



Dear Reader

When our first Director, Roger Scotford, founded the BFMS (initially known as ACAP), he could not have foreseen that we would continue to exist a quarter of a century later. That we do, represents a double-edged sword. On the one hand, this is a remarkable. Yet, on the other, the fact that the Society remains as relevant today as it was back then demonstrates that false memory-type allegations remain prevalent in the contemporary United Kingdom. That said, we should be proud of our achievements. To the best of my knowledge, we are the most active false memory society in the world. Our web site is a fantastic resource for those newly acquainted with the subject of false memory and it continues to be up-dated with relevant information on a regular basis.

We will continue, vigorously, to raise awareness about our work and the role and function of the BFMS. To that end, I have recently given successful talks at Warwick, Glasgow Caledonian, Goldsmiths and Portsmouth Universities. I was delighted to be the opening speaker at a recent TEDx conference at Newcastle University where I – and the work of the BFMS – received a very warm welcome. Moreover, on 12 February, the BBC World Service transmitted a programme in the documentary series, *The Why Factor*, entitled ‘Hypnosis: Why Would Anyone Allow a Stranger to Access Their Mind?’ The programme introduced and explained the subject of hypnosis, and how it can, in the wrong hands, produce false memories. These supposed ‘memories’ – which may include ‘flashbacks’ – can feel very real and completely believable, and yet be very false. Curing phobias, managing pain, entertainment: hypnotism has a number of tangible benefits. But it can also carry significant risks as the BFMS knows only too well.

At the time of writing this editorial, I received a telephone call from a member who had been supporting her accused son. The latter was put on police bail after being arrested by police for alleged historical child sexual abuse. His mother was telephoning to let me know that the police,

after investigating the allegations, had decided to take no further action. We are delighted at the outcome because the case had all of the hallmarks of a false memory-type allegation. However, the nature of our work inevitably means that sometimes when one door closes another one opens. And less than a week after that decision, we took two new cases. Both bare all the hallmarks of false memory-type allegations. Both involve criminal legal proceedings. I had barely recorded these cases when the telephone rang. It was an existing member who was arrested last year and placed on police bail. He was telephoning to say that, the previous day, charges had been laid. To misquote a former Prime Minister, a week is a long time in false memory.

I ought to stress at this point that the majority of our cases do not result in trial in Crown Court. Yet this is always a distinct possibility. Another member remains on police bail. Until recently, I never thought that this would result in prosecution, but because of recent legal developments there is a now a real possibility that this can be escalated. In these types of cases, the accused treads a fine line because complainants are classified as ‘victims’ who will be believed from the outset. It is now more difficult than ever to defend against these allegations. However sometimes it gets worse before it gets better, and there is a consensus among many social commentators and

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members of the legal profession that the criminal justice system has now plummeted to rock bottom. Yet in an unprecedented development, the head of the Metropolitan Police Service has stated on the record that the force is now abandoning the policy of automatically believing that an allegation is true. Cressida Dick, the Metropolitan Police Commissioner, said: "Our job in respect of investigations is to be fair, to be impartial and where appropriate to bring things to justice – and of course to support victims, but it isn't all about victims." While this is a welcome development, it will require a seismic shift in the culture of the Met to deliver on this statement – especially if they continue to use the term "victim" instead of 'complainant.' We may have hit a tipping point. In an even more remarkable development, Alison Saunders, the Director of Public Prosecutions has stated that she will step down when her contract is up for renewal in October. Ms Saunders has been the subject of considerable controversy following the recent collapse of a number of high profile rape trials involving none or late disclosure of key evidence which undermined the prosecution's case. Indeed, following an investigation by the BBC it is apparent that the number of cases involving non-disclosure failings has increased dramatically by 70% over the last year. In 2017, 900 cases collapsed because of breaches in the disclosure process. In spite of this data, Alison Saunders insists – astonishingly – that no innocent person has been wrongly convicted. In my opinion, this amounts to cognitive bias bordering on delusion.

Saunders faced widespread criticism that she "was more interested in convictions than she was in people being tried fairly." According to Daniel Janner QC (whose father Lord Janner was falsely accused of sexual allegations), under her watch "the essential principles of British Law, such as the presumption of innocence and the need to weigh evidence, were crushed in her doctrinaire crusade, where she urged that anyone alleging sexual assault should be believed automatically". Janner is correct. It is not an exaggeration to state that Alison's Saunders' tenure has been utterly disastrous. She is responsible for comprehensively undermining the central ethos of our criminal justice system: the presumption of innocence has been replaced with a presumption of guilt. In the interests of justice, the DPP should resign with immediate effect.

The nature and function of memory recall remains a perennial problem which continues to bedevil the criminal justice system in the investigation and prosecution of sex cases. The widespread myth that memory works like a video

recorder is prevalent time and time again in the courtroom. I have witnessed this first hand. The accused is expected to recall verbatim specific details of events which took place 10, 20, 30 even 40 years ago. Inability to recall minute detail is pounced on by prosecutors to build their case in the adversarial setting of the Crown Court. When these cases involve false memory claims, locked into a glass box, the accused is unduly disadvantaged. Make no mistake – miscarriages of justice do occur. And with horrendous life-changing consequences which include incarceration, reputational loss, family breakdown and isolation. This is a truly catastrophic state of affairs. Over the last 18 months, there has been a marked increase in the number of callers to the helpline (usually female) whose partner (usually a husband) has recently been convicted of contested historical sexual abuse allegations. I have met with a number of these women and read through their files. The contents of which are disturbing in the extreme. The majority of these cases appear to be false-memory type allegations. There is no corroborative evidence whatsoever. Conversely the prosecutions were based on the word of the accusers – many of whom appear to suffer from severe mental health impairment.

Elsewhere in this special legal edition, two leading criminal barristers provide telling critiques about non-disclosure and the staggering failings of our criminal justice system. Also, an independent training consultant specialising in raising awareness of parental alienation analyses its crossover with false memory. This edition is longer than usual. It is our 25th anniversary and, in legal terms, we are operating in shark-infested waters.

In the courtroom, the lack of knowledge about false memory-type allegations is truly frightening. The BFMS will continue to raise awareness about the topic and we will continue to support our members to the best of our capabilities.

The impact of wrongful allegations is immense. Connor Fitzgerald was remanded in custody following rape allegations. He was eventually acquitted. In interview with the *Sunday Times*, he said: "the whole episode has been the worst example of toxic feminism." Samuel Armstrong was falsely accused of raping a woman in Parliament. The accusation devastated his life: "It was the most profound sense of shame I have ever felt."

I am aware of seven cases which are in various stages of the appeal process. I am sure that you will join me in wishing these wrongly accused families the very best of luck.

Kevin Felstead

Disclosure in cases of non-recent sexual complaints: Promoting best practice and fair justice outcomes

Pamela Radcliffe, Barrister,
Visiting Research Fellow
Portsmouth University

'The legislation that governs this process... [disclosure] has been in place for a number of years, but the criminal justice system has struggled to get it right. Disclosure issues are systemic and deep-rooted.' The National Police Chiefs' Council, (NPCC) National Disclosure Plan, January 2018.

'Disclosure problems have blighted our criminal justice system for too long and although disclosure guidelines, manuals and policy documents are necessary, it is the mindset and experience of those who do disclosure work that is paramount.' Richard Horwell, QC, Mouncher Investigation Report, 2017.

'...The real problem is that the police don't seek the truth, they construct cases. Starting with a rock-solid assumption that the victim is indeed a victim and the victim's story is correct, the temptation is strong to fit the facts to the story rather than test the story with the facts...' Lord Finkelstein, The Times, May 18, 2016.

Introduction

Fact. Serious prosecution disclosure errors are endemic within the criminal justice system of England and Wales. Despite the recommendations of the Gross Review (2011), The Henriques Review (2016), The Mouncher Investigation Report (2017) and the 'Making it fair' HMCPSI HMIC Inspection (2017), to improve police investigator understanding and disclosure performance, a series of recent rape trials exposed egregious police and prosecution errors. The recent cases concerned contemporary sexual com-

plaints¹: where forensic and investigative pathways were obvious and available, such as CCTV, mobile phone records, social media accounts and email activity. The impact of these errors was catastrophic; trials were discontinued and cases collapsed. Miscarriages of justice generated by patently false complaints or manifestly unreliable witness testimony, were narrowly avoided. Police and Crown Prosecution Service (CPS) failures to investigate and provide relevant material or timely disclosure to the Defence are now recognised as a widespread problem. Criminal lawyers and Crown Court judges have grappled with disclosure issues on a daily basis for years. The current system is not working. The head of the criminal bar described the recent case failings as 'a sign of the 'dystopian disaster' engulfing the criminal justice system.'² Official explanations for disclosure failures have focused on resource and time constraints. However, whilst public spending cuts and reduced police numbers have undoubtedly played their part, two other themes of concern unrelated to operational limitations emerge, namely: (i) training issues, incomplete and /or inaccurate police investigator understanding of the underlying rationale for disclosure and core duties and (ii) police investigators' failure to maintain the correct objective professional mindset.

The National Police Chiefs' Council (NPCC) and CPS have responded swiftly to quell public concern. The CPS issued updated disclosure guidance³ and a Joint National Disclosure Improvement Plan (JNDIP) has been forged.⁴ In addition, a joint protocol to streamline third party disclosure⁵ and procedure is also under development. However, whether yet more guidance and training will reform embedded poor practice remains to be seen. Gross (2011), considered the plethora of guidance and protocols was concerning and recommended it be consolidated and simplified⁶. Finally, even if funding and manpower are increased and new training implemented, flawed charging and poor disclosure decisions are arguably likely to persist unless policy objectives concerning the prosecution of serious sexual offences are also revised.

NRC cases pose many challenges to our adversarial system most importantly, to achieving due process. Disclosure and due process go hand-in-hand. Securing disclosure in NRC cases is inherently problematic. Disclosure is the 'beating heart' of the adversarial system. Without a fair investigation and fair disclosure the integrity of the English and Welsh criminal justice system is at risk. This article briefly examines: (i) the gen-

eral justice challenges posed by non-recent complaints (NRCs)⁷, (ii) the nexus between the police investigation and prosecution disclosure, (iii) how disclosure operates, and (iv) identifies ways in which investigators and legal professionals may improve best practice, ensure just legal outcomes and minimize miscarriages of justice in non-recent cases within the current framework. Discussion of other important issues, such as whether a mandatory corroboration warning or time bar should be imposed in NRC cases or whether the CACD's approach to abuse of process applications is too restrictive, are not addressed.

An overview of the justice challenges posed by non-recent sexual complaints

(i) The nature and prevalence of non-recent complaints

Currently, there is no statutory definition of 'non-recent' in the context of the investigation of delayed sexual complaints made by adults⁸ relating to childhood sexual abuse⁹. 'Non-recent' may encompass any official complaint made more than one year after the alleged crime. Formerly termed 'historic', NRC cases refer to events that may or may not, have occurred five, ten, or twenty years previously. Delays in excess of 60 years are now being seen¹⁰. Since the Savile enquiry and Operation Yewtree in October 2012 they have become a distinct category of sexual crime. The current prevalence of NRC as a proportion of all sexual offences is unknown. There is a paucity of research or statistical data on delayed complaints however they clearly comprise an important sub-set of sexual crime figures. Office of National Statistics data for the year ending June 2013 revealed 24% of sexual crime reports related to alleged events of between 1 – 20 years previously and 11% of complaints related to events more than 20 years previously. The JNDIP (2018) observes NRC cases have '*increased dramatically over recent years.*'

(ii) Increased risk of poor investigations in 'ordinary' NRC cases

'Ordinary' members of the public of previous good character form the typical cohort of accused/defendants in NRC cases. Recent government inspections and reviews, CACD judgments and anecdotal professional report, indicate NRCs may be especially vulnerable to miscarriages of justice caused by flawed or incomplete police investigations. Unlike celebrities and persons of public prominence who are often in a position to rely upon official documents, witnesses of repute, or privately hired investigators to expose an unre-

liable complaint, the ordinary accused person is often a humble teacher, care worker, or parent, with scant resources. Independent documentary records that may have undermined the complaint are often lost or destroyed and non-partisan witnesses a rarity. In ordinary cases, the intense media and public scrutiny that accompanies VIP investigations and probably exerts a strong incentive on police to 'get it right' (even if it does take time), is absent. Other factors militating against a fair investigation and charging decision in ordinary NRC cases are: CPS and public pressure to prosecute every serious sexual complaint, police operational overload, reduced investigator resources, time pressures associated with the Better Case Management process and an accused who is unlikely to have a proactive top-flight legal team engaging with investigators from an early stage.

(iii) Characteristics of NRC cases

The hallmark of NRC cases is the absence of independent evidence that a crime has occurred and central reliance upon, (a) the complainant's oral testimony to prove the crime and (b) witnesses, (most likely biased) such as a spouse, relative or friend, to whom the witness maintains she/he complained earlier,¹² or who purport to recall material factual evidence for instance, the complainant's or defendant's behaviour at the relevant time or for a specific event. The complainant's Achieving Best Evidence interview answers¹³ become the prospective witness testimony if a prosecution and trial ensue. Conducting these interviews requires enhanced interviewing skills and interdisciplinary knowledge. Little other investigative material is ordinarily gathered prior to charge. The complaints fall into two types, (i) institutional or professional mistreatment by former care home workers, social workers, teachers, sports coaches, youth leaders or medical professionals, and (ii) familial and friend abuse. Type 1 cases present disclosure opportunities via a variety of official records, although these may have been lost or destroyed. Type 2 cases also present disclosure opportunities although these are less obvious. The complainant is typically able to identify and name their alleged abuser. Non-recent complaints against strangers are rare. The defence is typically, either no sexual contact occurred, or any sexual contact was consensual and lawful.

(iv) The inherent unreliability of all NRC witness testimony - memory decay, cognitive errors and contamination

All delayed complaint accounts whether of Type 1 or 2 are vulnerable to long-term memory decay.

Individual personality and cognitive features combined with external factors unconsciously distort and reshape the memory¹⁴. A constellation of cognitive factors such as, imagination inflation, individual suggestibility, source misattribution, innocent confabulation, negative bias, and post event information arising from discussions of shared memories with trusted family members or therapeutic intervention all compromise genuine fragmentary recall *prior to* the police interview¹⁵. In some cases, complainants develop sincerely held but objectively false memory beliefs or pseudo-memories for entire events.¹⁶ These memories are vividly and compellingly ‘recalled’¹⁷.

The golden rule is that human memory is not reproductive but reconstructive. It does not faithfully record every aspect of an experience or even most of it. Like grains of sand on a beach, a memory never stays the same even if it is encoded and stored at the outset. Memory is constantly moving and being transformed by the ‘tide’ of internal cognitive mechanisms and external events and/or information. Traditional UK police interview models are not designed to detect, evaluate or assess the impact of long-term memory error or contamination. ABE interview guidance highlights the necessity of allowing complainants uninterrupted free narrative and avoiding leading questions. Worryingly, a recent government inspection found investigator compliance with the guidance to be ‘poor’¹⁸. However, even if guidance is properly followed, this will not eliminate the risk of further memory contamination by the mere act of retelling.

(v) Flawed investigator interview methods that compound memory errors and fail to identify potential avenues of inquiry and future disclosure

The complainant’s interview

All too often, police interview methods compound the inherent testimonial weakness of NRCs. Interviewers commonly ask questions that risk generating superficially compelling detail to the lay fact finder’s eye, but which psychologists would consider problematic and unreliable. Complainants are commonly asked to describe clothing worn at the time of the alleged incident, or whether a right or left hand was used. Answers given may be firmly believed-in and sound persuasive but relate to inherently unreliable detail, unlikely to be encoded into long-term memory, unless there was something particularly memorable about it. For instance, if the hand had a frightening tattoo on it or there was other detail of high emotional valence. Complainants are often asked to recall precise words spoken or a specific conversation that occurred many years previously;

this is alarming from a memory scientist’s perspective. Even if the fact of a conversation is recalled, only a ‘gist’ memory, or general ‘drift’ of the conversation will be retained that may or may not be accurate. Hindsight or interpretative bias, attentional bias, or implicit or explicit memory bias, such as negative stereotyping by family members towards the accused, are all known to subtly transform individual perspective for an actual or believed-in event. This may result in unconscious reconstruction of the experience from the originally encoded memory¹⁹. Police interviewers commonly fail to explore surrounding contextual information that might generate avenues of investigation and potential disclosure. In practice, a typical police cognitive interview of a NRC focuses on obtaining a highly detailed account of the alleged criminal event and nothing more. Anecdotal professional report indicates, no matter how unlikely or bizarre the complaint, investigators frequently suspend critical judgment and accept the complaint without testing or exploring it²⁰. This approach is unlikely to generate material that may assist evaluate memory accuracy or the integrity and reliability of the complaint. For instance, interviewers often fail to identify or explore what triggered the complaint, yet this is an important issue that should be objectively examined. Moreover, the complainant’s memory recall is not normally tested against facts capable of being verified. Diverse contextual evidence referred to in the complaint narrative may be capable of verification. Whilst not bearing directly on the reliability of the sexual complaint, it may do so indirectly. Investigation of the alleged fact or scenario may reveal pseudo or unreliable memory beliefs. Examples of contextual facts capable of verification might be, whether or not a specific Bingo Hall was in business at the relevant time, whether or not the accused worked at a particular location at all or at a specific time, locating the relevant care worker’s report of an event when a complaint was allegedly made.

In familial allegations, memories for family events and complaint narratives may also be confabulations or reconstructions of multiple fragments of actual or believed-in memories. For instance, in one known case, the complainant referred to her recall of the defendant lifting her baby brother from his cot. Investigators and lawyers failed to detect this could not be true, accepting it at face value; the accused had been in prison during the baby’s birth, infancy and cot-stage. This ‘pseudo-memory’ and other evidence (overlooked at trial) indicated the complainant had reconstructed her childhood memories, eliding memory fragments to form an unreliable but meaningful personal narrative after hearing of her

sister's belief that she had been abused. The difficulty with NRCs is that an accused person cannot show them to be demonstrably false, unlike in a recent case. Further, the notion that someone can unconsciously construct an objectively false but genuinely believed-in, richly detailed, personal narrative about sexual abuse, conflicts with (is cognitively dissonant to) commonsense.

Nor do investigators explore the continuity of memory recall to assess when the abuse memory was first accessed or known of, or how frequently and in what circumstances this memory has been re-visited; this is another important area for investigator consideration, when, why and what was discussed with third parties. Exploring earlier opportunities to complain and why the complainant did not is another important area of investigation. For instance, if the complainant was a witness in family proceedings and made affidavits concerning conduct by the defendant, was sexual abuse mentioned? If not, why not? Another important area is the nature and quality of contact and communication between complainant and the accused since the alleged incident. The above areas are all reasonable lines of enquiry that may generate relevant investigative material for the charging decision or potential defence disclosure, but are often overlooked by investigators.

The defendant's police interview

Investigators too frequently approach a defendant's police interview with an adversarial mindset and presumption of guilt. Advocate experience indicates investigators fail to obtain a free narrative from the outset of the defendant's background and relationship to the complainant and fail to act on information tendered in the defence interview that might generate relevant investigative material helpful to the defence.

Moreover, accused persons in NRC cases are often older or retired males who are mentally and physically fragile. No special concessions or allowances are made prior to interview. Typically, these accused have no experience of contact with the police. 'Dawn raids' are the norm, followed by incarceration in a police cell pre-interview. Scant pre-interview disclosure is offered about the allegation. This approach is likely to induce high stress and anxiety and further compromise an accused person's ability to give an accurate, full or fair account of themselves. In addition, stress may hamper recall of potential strands of further inquiry/disclosure favorable to their defence.

(vi) The complainant's oral testimony, individual characteristics, false and unreliable complaints

and an elevated risk of miscarriages of justice in NRC cases

The 'elephant in the room' is that despite the absence of objective forensic disclosure and grounds for real concern about the unreliability of delayed memory recall, NRC complaints frequently proceed to trial relying solely on the complainant's witness testimony namely, their incomplete memory belief and perception a crime occurred in the distant past. Whilst complaints may be truthful and mostly accurate, they may also be flagrant lies or predicated on sincerely held but unreliable memory beliefs ('unreliable beliefs'). This latter category is different in character from the traditional binary adversarial model of true versus false allegations and is not necessarily understandable via ordinary commonsense. Existing data on the prevalence of manifestly false (recent) complaints is fraught with controversy, but they are not rare. Police participants in the Elish Review (2015)²¹, reported a '*high level of false allegations seemingly made by individuals for their own ends*' and a '*reluctance at senior level to discuss the true level of false or 'delusional' reporting*'^{22...} Haven staff²³ also drew attention to deliberate and obvious instances of false allegations and identified another distinct category of unreliable complaints featuring 'troubled people' rather than a deliberately untruthful cohort. 25% of all Haven clients presented with mental health needs. The Elish Review observed that the issue of false reporting was '*an enormously complex area*'²⁴.

There is no UK socio-legal empirical research on the prevalence of either false allegations or unreliable beliefs *within* NRC cases. There is no evidence to suggest NRC cases are immune from false/unreliable complaints; to the contrary, it is suggested they are more likely. A constellation of factors suggest demonstrably false NRCs are easier to make, and unlikely to be detected, these are: police and prosecutor guidance to 'believe the victim', the absence of objective forensic evidence, compelling complainant demeanor and confirmation bias. In these circumstances, it is easy for an unscrupulous person's complaint to be 'waved through' to trial without detailed scrutiny. Further, as observed earlier, NRCs are inherently susceptible to the vagaries of unreliable long-term memory recall. Lastly, there is cause for concern that complainants with genuinely held but unreliable beliefs or pseudo-memories of abuse may comprise a significant new cohort of witnesses. This latter group presents significant challenges to the adversarial model, justice professionals and fact finders.

In addition to the general memory problems associated with long-term recall listed in (iv) above, NRC complainants may have learning difficulties or complex mental health impairments including depression, anxiety, psychotic or personality disorders that may further confound memory accuracy and cognition. There are also complainants who although not diagnosed with formal mental illness, may have received therapeutic (NHS or private, psychological or psychiatric) counseling or psychotherapeutic intervention for stress or anxiety. Treatment quality, modality and efficacy of therapeutic interventions vary widely as do the scientific integrity of professional qualifications and ‘treater’ beliefs²⁵. Treatment may involve extensive self-rumination on distant memory fragments, intensive group work, reinterpretation of pre-adolescent emotions and vague feelings, hypnotic regression and even dream interpretation. Complainants with complex mental health conditions or prior depression may also have a history of or be at risk of significant self-harm or suicidal thoughts. These complainants require careful, sensitive handling from investigators and all justice professionals throughout the justice process. Severe adult mental health problems are not diagnostic or indicative of childhood sexual abuse and neither do they predict false or unreliable allegations, however they should serve as ‘red flags’ to investigators, to proceed with care. The Henriques Review of Operation Midland highlights the justice dilemma and risks posed by witnesses of this type and the need for caution.

Obtaining a full understanding (and preferably disclosure) of any pre-existing organic cognitive or non-organic psychological disorder and therapeutic treatment *before interview* will optimise ABE interview preparation and enable investigators to assess the impact (if any) on memory accuracy and reliability during post-interview evaluation. Some private and NHS ‘treaters’ continue to apply controversial treatment modalities that may generate false or unreliable memory beliefs. In these circumstances, complaint narratives for entire events may undoubtedly be sincerely and honestly held, but be internally generated and inherently unreliable. Early location of relevant third-party material, including therapeutic records and obtaining an expert opinion to assist pre-charge evaluation of testimonial and memory *reliability* (as distinct from credibility) is vital in these cases; currently neither is the norm²⁷. NRCs are inherently complex and require specialist interdisciplinary knowledge. Miscarriages of justice are a real risk in these cases and challenge the conventional adversarial model.

(vii) *CPS policy objectives and police guidance undermine professional objective mindsets and may lead to flawed investigations and an increased risk of wrongful convictions*

In some of the recently reported rape cases where catastrophic disclosure omissions occurred, there was a wholesale failure by both police and the CPS to obtain or analyse *any* of the CCTV or media conversations. Whether this was indeed due to financial or operational constraints as claimed, is questionable. Confirmation bias is more likely the root cause of these failures. Confirmation or ‘myside’ bias in the context of police investigations and prosecutions is the tendency to investigate or interpret information in a way that confirms or supports a pre-existing belief or hypothesis and unconsciously disregard or fail to give sufficient weight to information conflicting or inconsistent with the hypothesis. One particular victim-focused recommendation (often referred to as the ‘*believe the victim*’ policy or doctrine) substantially increases the potential for investigator confirmation bias; it states, ‘*the presumption that the victim should always be believed should be institutionalized.*’²⁸. The adverse consequences likely to flow from confirmation bias are well known, yet no counter-measure exists to assist police investigators resist bias and maintain the correct objective mindset. The above HMIC recommendation is now embedded within CPS and police guidance.

A key CPS objective is to correct past mistreatment of genuine victims of sexual abuse. This target is commendable, however measures devised to achieve this namely: exhortations to increase charging and conviction rates, assessing ‘successful’ outcomes by achieving a conviction, and describing all complainants as ‘victims’ from the outset, risk causing injustice by eroding the presumption of innocence. Moreover, they compound the risk of confirmation bias and increase the risk of unjust legal outcomes. The investigator in the case below probably succumbed to confirmation bias.

In May 2017, three days before trial, the Crown offered ‘No evidence’ against Elgan Varney. This concerned a contemporary rape complaint, following the breakdown of a consensual relationship; both parties were students. The accuser had a prior history of mental ill-health and shortly after making the allegations took her own life. Despite 10,000 Facebook and WhatsApp messages between the parties which undermined the prosecution case and information on *the complainant’s* computer indicating her allegations were false (including multiple searches on false

allegations and how to withdraw a prosecution), the Crown appears to have doggedly pursued the case after the complainant's death until 'the eleventh hour' two years later²⁹. Whilst some might argue that the justice system's 'checks and balances' worked, because the case was eventually discontinued, this decision came far too late and caused mental distress to the accused. Any investigator examining the facts objectively should have concluded the complaint was unreliable and most likely false, at an early stage. Investigators didn't need to inspect all the electronic data to reach this conclusion. Was there unconscious cognitive bias in this case? Did the officer become too emotionally involved after the complainant took her own life, thereby preventing an objective, fair review of the evidence?

In another high-profile case, the judge concluded an officer had indeed got 'too close'. This case was also discontinued prior to trial. Defence lawyers accused the police of '*airbrushing out of the picture*' anything that could have assisted the defence³⁰.

Conclusion

NRC cases present unique and complex challenges to our adversarial system; these challenges are significant and concern four key areas namely, (i) witness testimony (un)reliability, (ii) reduced disclosure opportunities, (iii) the implicit adversarial 'cultural trust'³¹ vested in the investigator to perform a fair investigation and fair disclosure and (iv) the difficulties faced by an accused person to counter a false complaint beyond a bare denial. It is virtually impossible for a defendant to objectively expose a delayed complaint of sexual abuse as false given the absence of independent evidence. These cases are literally word against word. Determining where the truth lies is inherently problematic for fact-finders. Ensuring unreliable complaints are identified and filtered out early on in the justice process is essential. The stakes are high. Persons convicted of serious child sexual assault are liable to receive prison sentences of ten years and upwards.

Detecting fresh evidence to correct miscarriages of justice in these cases is often down to chance. In David Bryant's case, the complaints concerned events during the 1970s. His application for leave to appeal against his conviction was initially refused and his prison sentence increased. Fresh evidence was obtained by mere chance when his accuser Mr. Day pursued a civil claim for damages. Mr. Day's medical files revealed a history of chronic lying and suspected underlying personali-

ty disorder. These records were not sought or inspected by the prosecution during the criminal investigation or at any stage during the criminal justice process. Police investigators failed to conduct an open-minded investigation in this case, most probably underpinned by a 'believe the victim' mindset.

The final justice conundrum posed by NRC cases is that wrongful or unsafe convictions are notoriously difficult to quash. The exact prevalence of unsafe convictions arising from NRCs is unknown but evidence suggests they are not insignificant. The criminal justice system is poised on the brink of a 'perfect storm' that will generate a tsunami of miscarriages of justice. Financial cutbacks for all justice professionals, judicial pressure to bring cases to trial more speedily, reductions in face-to-face conferences with defendants, prosecution policies aimed at increasing charging and conviction rates and lastly egregious investigator disclosure failures, are all in danger of eroding due process and public trust.

Small steps have the potential to reap large rewards. Changing investigator mindsets, correcting poor police practice, improving investigator awareness and forensic diligence and lastly encouraging fair treatment towards both accuser and accused will all help correct, although not resolve, current risks to justice.

This is an abbreviated version of a comprehensive and detailed, article about the disclosure process. The author is grateful for the critical feedback and encouragement from Dr Kevin Felstead, Madeline Greenhalgh, Professor Chris French, Dr Martin Spillane and Bibi Ihuomah .

Footnotes:

1. Save for one non-recent complaint at Newport Crown Court; the complainant alleged serious sexual abuse from a young age by five men, including a retired doctor and social worker. The case was aborted two weeks before trial due to extreme disclosure failings. www.thetimes.co.uk/article/cps-failings-paedophile-trial-collapses-over-lurid-claims-of-serial-fantast-dv7dzd5r2
2. <https://www.theguardian.com/law/2018/jan/29/underfunded-justice-system-crumbling-top-criminal-barrister-says>
3. www.cps.gov.uk/sites/default/files/documents/legal_guidance/Disclosure%20Manual_0.pdf CPS Disclosure Manual (26/2/2018)

4. <http://www.npcc.police.uk/Publication/National%20Disclosure%20Improvement%20Plan%20January%202018.pdf> National Disclosure Improvement Plan January 2018. NPCC
5. Third party disclosure is the generic term referring to information held by persons/institutions e.g. GP records, social services, care home records etc.
6. This has not occurred.
7. This article relates exclusively to delayed complaints by persons over aged 18years.
8. A person under the age of 18years may also make delayed sexual complaints.
9. Non-recent complaints of childhood sexual abuse will be abbreviated to (NRC).
10. R v R.D. [2013] EWCA Crim 1592 63-year delay. The appellant was aged 78 at sentence and of former good character. The Court of Criminal Appeal (CACD) rejected his appeal. Psychotherapeutic records. The CACD said the relevance of the content was 'entirely speculative'. Paragraph 26.
11. Namely non-famous persons.
12. Originally termed 'recent complaint' evidence, oral testimony from a third party of a complainant's prior report of the alleged misconduct even though the 'report' was not proximate to the incident complained of is now admissible. S.120 of the Sexual Offences Act 2003 (as amended by the Coroner's and Justice Act 2009) now governs admissibility. Admissibility is via legal argument or the parties' agreement. When admitted, the complaint becomes evidence of the truth of the complaint itself. Relevance is not therefore confined to consistency of the complaint. This is a major departure from the former common law position.
13. The 'Achieving Best Evidence in Criminal Proceedings: guidance on interviewing victims and witnesses, and guidance on using special measures' (ABE), governs the preparation and conduct of video recorded interviews with vulnerable or intimidated witnesses. The interview becomes the evidence in chief at trial. Sexual complainants automatically qualify as intimidated witnesses (Youth Justice and Criminal Evidence Act 1999, s17(4)) for special measures and ABE interviews. https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf
14. See Oxburgh, G., & Hynes, I. (2016) *Investigative Practice*. In Radcliffe et al, (Eds.), *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives*. (pp 221-233) Oxford, OUP.
15. See n14 paragraph 14.07.
16. Pseudo or false memory beliefs may emerge without therapeutic intervention.
17. For a review of current research see Nash, R., & Ost, J. (Eds.) (2017) *False and Distorted Memories*. Abingdon, Routledge.
18. *Achieving Best Evidence in Child Sexual Abuse Cases – A Joint Inspection*. December 2014. HMCPSP & HMIC www.justiceinspectrates.gov.uk/hmic/ para 2.19.
19. Howe, M., and Knott, L. (2015) The fallibility of memory in judicial processes: Lessons from the past and their modern consequences. *Memory*, Vol.23, Nos 5-6. 633-656
20. See n 1. The most recent reported example is the Newport case. Extreme allegations of child sexual abuse evolved during therapy were 'believed' without critical scrutiny until late disclosure forced a prosecution volte-face.
21. Elish Angiolini, QC Rt Hon Dame. (2015) *Report of the Independent Review into The Investigation and Prosecution of Rape in London*. 30 April 2015 The Elish Review paragraphs 410 – 446 www.cps.gov.uk/publications/.../dame_elish_angiolini_rape_review_2015,
22. Ibid, paragraphs 147 - 154
23. 'Havens' are the Sexual Assault Referral Centres (SARCS) specific to London. They provide forensic services, and pastoral and psychological support to victims of sexual crime.
24. See n21 paragraph 154.
25. Empirical research shows many psychologists, psychiatrists and self-styled therapists, hold beliefs about memory science that are contrary to scientific consensus, for instance believing that memories for traumatic events may be 'repressed' and later 'recovered' or 'retrieved' intact from the unconscious mind via 'memory work'. See Patihis, L., Ho, L. Y., Tingen, I.W., Lilienfeld, S.O., & Loftus, E. (2013) Are the Memory Wars Over? A Scientist-Practitioner Gap in Beliefs About Repressed Memory. *Psychological Science*, 2014, Vol 25(2), 519-530
26. An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence. Sir Richard Henriques, 31st October 2016 paragraph 1.32. news.met.police.uk/.../report-independent-review-of-metropolitan-police-services-han...
27. See Barden, R.C. *Memory and Reliability: Developments and Controversial Issues*. (2016) In Radcliffe et al, (Eds.) *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives*. Oxford, Oxford University Press. (pp 343-359) See also, Alison, L., Kebbell, M., Lewis, P. Considerations for experts in assessing the credibility of recovered memories of child sexual abuse the importance of Maintaining a Case-Specific Focus *Psychology, Public Policy and Law* 2006, Vol. 12. No. 4, 409-441.

28. Crime-Recording, making the Victim Count (November 2014) HMIC paragraph 1.31. <https://www.justiceinspectrates.gov.uk/hmicfrs/.../crime-recording-making-the-victim...>

29. <http://www.dailymail.co.uk/news/article-4480756/Man-reveals-devastating-effect-rape-accusation.html>

30. <http://www.theguardian.com/uk-news/2016/may/09/detective-criticised-for-getting-too-close-in-alleged-rape-case> *'Judge J Tabor QC said DC Ben Lewis of Gloucestershire police had got too close to the complainant and did not understand his job properly. Tabor said the officers and the CPS had to bear responsibility for not disclosing 'game-changing' material to the defence teams...'*

Brants, C., & Field, S. Truth-finding, procedural traditions and cultural trust in the Netherlands and England and Wales Int. J. E & P October 05, 2016.

Liam Allen – The Harsh Reality of Non-Disclosure

The case against criminology student, Liam Allen, collapsed in Croyden Crown Court in December after the prosecution discovered that police had withheld thousands of text messages which proved pivotal to the case of the defence. Allen was accused of raping a former girlfriend and was advised that he could face a lengthy prison sentence, if convicted. The prosecuting barrister, Jerry Hayes issued a telling assessment about the case against Allen: "I told the judge that this was the most appalling failure of disclosure that I have ever encountered." Allen, who was subjected to a 2-year investigation, would have been placed on the sex offender's register indefinitely. His life and reputation in tatters. This was a shambolic waste of the public purse and the tip of a very large iceberg. Allen escaped conviction by the skin of his teeth. Following his acquittal, a relieved Mr Allen told the *Times* newspaper: "I can't explain the mental torture of the past two years. I feel betrayed by the system which I had believed would do the right thing – the system I want to work in."

Wrongful convictions are a terrible risk in our frighteningly imperfect judicial system

Matthew Scott, Barrister

There is a somewhat distasteful expression that prosecuting barristers occasionally use after a jury has convicted: "I potted him," they will say to anyone who happens to be listening, usually with a faintly repellent smugness.

There is more to prosecuting than potting a defendant as though he were a celluloid ball, important public service though that can often be. Prosecutors have a critical role in protecting the innocent. A good prosecutor should never take an unfair point, should never try to adduce clearly inadmissible evidence and above all should always disclose evidence that undermines their own case or supports that of the defence. The police too are under a duty to follow all reasonable lines of inquiry and to reveal what they discover to the prosecutor even if it undermines a case they thought they were building against a guilty man. It is the failure to investigate important lines of inquiry at all, and the failure to disclose "undermining" evidence discovered when such investigations have been carried out that has led to a series of highly publicised cases collapsing in the last few weeks. Most of these have been rape cases in which vital evidence from phones and social media was either not properly investigated or not properly disclosed to the defence until practically the start, or even after the start of the trial.

As a result, the Director of Public Prosecutions, Alison Saunders, has come in for widespread criticism and there is a real question over whether she will hang on to her job. She was not helped by the Attorney General's stinging comments about the CPS's handling of the prosecutions over the weekend. Ms Saunders herself may not bear any personal responsibility for the disclosure failures that led to the various debacles but she must take personal responsibility for a Prosecution Service which seems to be careering from one crisis to another.

Last week she announced a package of measures designed to allay growing fears that the criminal justice system is simply not coping.

Innocent people with months to wait for their cases to come to court will have been reassured to

learn that the CPS, at least, has not been idle while they have been staring at the cell ceilings in their rat-infested gaols. Sleep does not always come easily in such places, but knowing that *Area Casework Quality Committees (ACQCs)* have already been set up, and that “legal managers” are to carry out a number of *Individual Quality Assessments* will certainly help. Who, after all, could fail to be reassured by news that “*themes identified by the ACQCs*” are now to be “*escalated to the National Casework Committee*”? Plans are now well afoot for still more dramatic developments in March, when a series of “*regional awareness workshops*” will be held, and by June any remaining problems will be cleared up with the appointment of a “*cadre*” of “*disclosure champions*” and the complete development of a “*suite of national standard forms ...*” It is easy to mock the Crown Prosecution Service’s long-standing love affair with bureaucratic tinkering, and its neo-Leninist acronyms, committees, cadres, and what-not. In fairness, the plans, drawn up jointly with senior police representatives, do include some sensible and long overdue proposals for improving police training. All too many police officers seem to have only the vaguest grasp of the concept that their job should be to help the defence, just as much as the prosecution, to ensure a fair trial.

It is also welcome that the CPS is now to review disclosure in all ongoing rape and serious sexual offence prosecutions.

Yet many questions remain. Why should the review limit itself to ongoing cases, when, (it might be thought) there is even more urgency in freeing the innocent from wrongful imprisonment?

Ms Saunders has answered that, albeit with alarming complacency: she does not believe that there are any innocent people in prison as a result of disclosure failures.

Less clear is why the review should be limited to sex cases. Problems with disclosure, after all, are endemic throughout the criminal justice system, as last July’s joint report by the Crown Prosecution and Constabulary Inspectorates found.

But although disclosure failures can, and have been, catastrophic in other types of case, it may be no coincidence that all recent problems have involved either rape allegations or, in one case, a people-trafficking case which, unusually, turned largely on the evidence of a single complainant.

For many years now there has been remorseless pressure on the police and prosecutors to convict more rapists and sex criminals. Statistics, often of dubious quality, are quoted to demonstrate that not enough rapists are prosecuted, or that when they are prosecuted they are too often acquitted.

The college of Policing still retains its notorious policy that investigators should “believe the victim” and not “focus” on investigating their credibility; and the Crown Prosecution Service legal guidance on “building cases” of rape and serious sexual offences continually refers to complainants as “victims.” It is almost as if an accusation is enough to assume guilt and trial a tiresome and somewhat archaic obstacle on the way to locking up the accused.

Even when material is uncovered which demonstrates the innocence of a slew of hapless defendants (of both sexes) who, had it not been for the fortuitous appearance of crucial evidence at the eleventh hour would probably have been convicted, there is a widespread reluctance to draw the obvious conclusion that prosecutions based on the uncorroborated word of a single witness are liable to lead to wrongful convictions. And sex cases, more than other types of case, tend to depend on such evidence.

The DPP is not alone in pushing worries about the wrongly convicted to the back of her mind. The former Lord Chief Justice, Lord Judge, seemed less concerned about the risks to innocent defendants than with the risk that:

“these events may reduce the prospects of conviction even when the allegation is genuine.”

This is no doubt possible, although it is dangerously narrow thinking. These cases should alarm us primarily not because they may indirectly increase the potential risk of the guilty going free but because they demonstrate the actual high risk that the innocent run of being wrongly convicted. Had the phone and social media records of the accusers of Liam Allen, Isaac Itiary, Samuel Armstrong, Cristina Bosoanca and others not been uncovered their accusers would have been free to lie, to misremember or to fantasise without any independent evidence to contradict them, and juries would have been free to convict on their evidence. Any trial would have been a lottery, and one in which the CPS (without the benefit of the undisclosed material) had assessed that the defendants held losing tickets. The blithe assumption that there have been no cases in which defendants have been convicted while evidence of innocence lay undiscovered or undisclosed in a complainant’s phone or Facebook account requires a good deal of wishful thinking that is certainly complacent and, frankly, borders on the ridiculous: Ms Saunders herself has been at pains to explain that it is not the practice of the police to examine electronic media in every rape or sexual assault case. It is overwhelmingly likely that innocent people must now be in prison as a result of convictions in cases where no such examinations have taken place.

Until 1994 English and Welsh prosecutors were often inhibited from bringing prosecutions in uncorroborated sex cases because judges were required to warn juries of the danger of convicting on uncorroborated evidence. There was a good deal to dislike about the actual wording of the warning, not least its implied message that any complainant in a sex case was pretty likely to be lying, and there were many arcane rules about what could and could not constitute corroboration. Yet crucially the rule encouraged police and prosecutors to search for corroboration rather than simply present the evidence of the complainant.

We need only look to Scotland for an example of a judicial system which still encourages, in fact requires, at least some corroboration before anyone can be convicted of almost *any* offence. As with the old English corroboration law the rules are somewhat complex – multiple complainants to similar offences can, for example, constitute corroboration – and it is a rule that has its critics: there is little doubt that some people in Scotland have not been prosecuted who, had they been accused in England, would have been convicted of sex offences. Partly for this reason recent years saw a concerted attempt to abolish the rule, and so bring Scotland’s law more into line with that in England. Fortunately for the integrity of the Scottish justice system the attempt failed. The main justification for the rule is that it reduces the likelihood of wrongful convictions, something about which English and Welsh judges and prosecutors are, I am afraid, unduly sanguine.

Although the Scottish Government was keen to abolish the corroboration rule, most of those who responded to an earlier consultation were in favour of keeping it. Nor could the retentionists be characterised as old-fashioned fuddy-duddies, temperamentally inclined to minimise the seriousness of rape. Rape Crisis Scotland, Edinburgh Women’s Rape and Sexual Abuse Centre, Sexual Abuse Survivors Support in Edinburgh and Scottish Women’s Aid all opposed its abolition, arguing, perceptively, that:

“the risk that this development would lead to a general perception that convictions obtained on this basis were unsafe may put complainants at more of a disadvantage than any resulting benefits would advance their interests.”

In other words, they foresaw a similar problem to that identified by Lord Judge earlier this month: that rape prosecutions brought on weak and unreliable evidence may undermine “genuine” complainants.

The evidence is anecdotal but the contrast with England and Wales seems striking. Although the Scottish rules about prosecution disclosure are broadly similar to those south of the border, and

although Scottish police and prosecutors are subject to similar (if slightly less stringent) financial constraints, there has been no similar outcry there over disclosure failures. In a rape allegation, which might depend largely on one person’s word against another, a hard-pressed English police officer or prosecutor can ignore the need to gather any evidence beyond that of the complainant; a Scottish police officer knows, simply, that with only the complainant’s evidence the case must fail. The result is that prosecutions are likely to be better prepared in Scotland, and important evidence – whether it favours the defence or prosecution – is less likely to be missed.

Sadly, although Westminster legislators have in the past successfully incorporated parts of Scots law into English and Welsh law (the concept of diminished responsibility in murder cases being a good example) it seems very unlikely at the moment that MPs south of the border will be tempted to introduce something similar to the Scottish corroboration law into our law.

There are, of course, plenty of other things that can be done to reduce the risk of wrongful convictions. Better training for police officers would certainly help, and there are encouraging signs that many sensible senior police figures accept that this is essential. More resources for police, prosecutors and the defence are, I am afraid, necessary. But above all there needs to be an acceptance amongst police and prosecutors that false allegations and wrongful convictions are not vanishingly rare anomalies. They are real risks in a frighteningly imperfect system.

Matthew Scott, Barrister.

This article has been published with kind permission of the author. It was originally published in the Daily Telegraph on 31 January 2018. A copy is also available on *Barrister Blogger*.

The Anne Craig Controversy

In 2016, *The Mail on Sunday* published three articles on the therapeutic practises of self-styled life-coach, Anne Craig. The articles focused on the experiences of the Victoria Cayzer and Laura Hue-Williams’ families whose daughters were treated by Craig. In addition, the newspaper published a further three case studies from individuals who had undergone similar treatment with Craig. These people were prepared to share their

stories providing that they remained anonymous. According to the Mail on Sunday, 32 year-old solicitor revealed she had seen Craig for around 18 months in order to deal with ‘anxiety issues,’ before ending the sessions in late 2012: ‘At first I was quite reassured because she appeared so conventional but she lures you in because of all the issues you are dealing with. She tells you that she too has suffered with them. The sessions usually lasted between three and four hours, which was long and exhausting. She is very clever and manipulative and once she knows your weaknesses she exploits them. I told her that my parents had divorced when I was 16, (and) that it was my mother’s decision and that she had then moved abroad. Also I told her that my mother had had a child before me who had died young. Anne told me that my mother had abandoned me and that she could never love me like the child she had lost. It was terrible stuff – but that is her through and through.’

Her method is that you need to break free of a particular person. It is subtle and framed in a way that breaking free is actually quite positive. My mum took the hit and it affected my relationship with her. She seems benign, but that is what traps you. For all these girls that was the trap. It is extremely difficult to break away from her because she says “the journey” is the most important thing in your life, and only once you have completed the work with her can you be truly happy and live a fulfilled life. Anne would say that if you leave, who knows what may happen. There was a lot of negativity.’

The article provided a compelling insight regarding what goes on in the consultancy rooms of so-called recovery and regression therapists. It described with a clarity that is thought-provoking what it is like to be the recipient of this – quite frankly – bizarre therapy. The inordinate emphasis on breaking away from family and friends leads to fractured families and destroyed relationships. Tellingly the blaming of parents for current problems – even when they are unambiguously linked to psychological illness – is particularly noticeable with horrific consequences.

I pondered whether this case would inevitably fade away, but journalist Mick Brown has recently written a brilliant and illuminating article about the Anne Craig controversy in the *Daily Telegraph Magazine*. Anne Craig has been accused of separating women from their families and implanting false memories of abuse. An outline of the unsuccessful civil case made against her by the family of one of her clients is available to

view on the BFMS website. After he began researching the topic, Brown wrote: ‘What I had not expected was to become embroiled in a story of considerable complexity, calling into question the nature of memory, its fallibility, and its propensity to be manipulated. It’s the story of a woman who was able to set herself up as a life coach, with no training, no qualifications and no supervision – with calamitous consequences; a story of the struggle between two mothers and the woman they believe has stolen their daughters from them. Above all, it is a story that raises urgent questions about the role of therapy in treating emotional problems, and the need for stricter regulation of those who practice it.’

According to Anne Craig: “A certain group of people would say, “I can’t take my mother’s anger anymore” and I want to know why. I look at a pattern, and then take it back and back until you actually get to the root of that. And then you take it out of the root, and that is the only way it is ever going to dissipate.” ‘... Fearing for her daughter’s well-being, Lady Caledon employed a private investigator, who interviewed other young women who had been Craig’s clients. The Caledons discovered that Laura Hue-Williams had also broken with her family after seeing Craig, and made contact with her parents. Laura’s father, Timothy, is a retired stockbroker; her mother is now married to businessman, Henry Strutt.’

‘In February 2014, lawyers acting for the Caledons wrote to Craig, accusing her of manipulating Victoria, Laura and others by implanting false memories, leading the women to believe that their parents had been guilty of “the most heinous of crimes,” and encouraging them to cut themselves off from their families and friends. “It would appear”, the letter alleged, “that not only are you using this as an opportunity to extract money from the targets, but you are also seeking to use them for your own emotional needs.”

The article examines the type of therapy (if that is the way to describe it) Anne Craig gave to clients and assesses its validity. It addresses how a predisposition on the part of a therapist to see sexual abuse as the root cause of psychological problems presented by patients can lead directly to an accusation of sexual abuse. A number of the young women treated by Craig rejected the diagnosis she gave them and considered themselves better off immediately.

Brown interviewed distinguished professor of

psychology, Elizabeth Loftus. "Many therapists," Professor Loftus told me, "will never admit that they have acted as a spur to false memory and most are probably not even aware they are doing something terribly wrong."

'... In April 2015, the Crown Prosecution Service decided not to prosecute Anne Craig, and the charge of fraud was dropped. Freed from her bail conditions, she started to see both Victoria and Laura again, without charging for her services. No longer their 'personal development coach, she had now become their friend. Both Victoria and Laura told me that Craig was the person they trusted most in the world.'

This article gives a remarkable insight into one type of regressive therapy, and how patients gradually turn from clients into 'friends.' Professional boundaries appear to be non-existent. A dependent relationship seems to be created that lasts for many years. The fortunes of some of the patients treated by Craig do not appear to have improved, and their separation from their families has continued.

The Role Of Memory In Parental Alienation

Sarah Squires

Independent trainer who specialises in raising awareness of parental alienation in the UK

One of the hardest elements of parental alienation is when allegations are made by both children and parents. Professionals have a duty of care to investigate and gather evidence. But how reliable are the memories being recalled?

It has long been accepted that false memories exist and there are countless studies which confirm how easy it is to "implant" a memory (which we will look into later) but for a practitioner involved in a parental alienation case, it can be hard to identify real from false memories and therefore recall confabulation can result in prosecution for the "abuser", possibly jail and definitely the loss of the relationship with their child.

It is therefore important that we understand what memory is and how it is stored in order to be able to analyse the role memory plays in parental alienation.

What is memory?

Bartlett (1932) describes memory as "imaginative reconstruction" meaning that memories consist of numerous elements, pieced together and replayed in a format familiar to the teller.

The first two elements are:

Declarative

Nondeclarative

Declarative can be further broken down into facts (semantic) and events (episodic) memory.

Craik and Lockhart (1972) found that complex semantic processing produced better recall than simple semantic processing. Meaning it's the details which help with the recall.

However, Rogers et al. (1977) found that episodic memory was more reliable than semantic in recall situations. Meaning we remember things better which have a personal and emotional connection to us. A study by Hayne and Imuta (2011) found that by the age of 3, children exhibit rudimentary episodic memory skills, and that strict reliance on verbal recall may underestimate their episodic memory ability.

Interestingly, more recent findings have suggested that it is the ability to retain, as opposed to form, episodic memories that may be the source of the advantage inferred through age in older children, with 3-year-old children demonstrating good retention of episodic recollection across short but not long delays, Scarf et al. (2013).

Nondeclarative memory, also known as procedural memory, is the repository of information about basic skills, motor (muscular) movement, verbal qualities, visual images, and emotions. It is our unconscious memory based on what we have been taught and experienced in the world around us.

As we go through the role of memory in parental alienation we will look at the different elements of memory in more detail.

How memory is stored

Information comes flooding into the brain and is processed through our senses (visual, audio, kinesthetic, olfactory, and gustatory). Information selected from this process is then stored in our short term memory, where it stays for approximately 15 and 30 seconds, Peterson and Peterson (1959). However this can be lengthened through rehearsal. Long term memories can be stored for a lifetime and are encoded as a semantic memory.

The main parts of the brain involved in memory are the medial temporal lobe (specifically the hippocampus) and portions of the parietal and pre-frontal cortices (AR Preston and Eichenbaum 2013). Studies of human brain development have shown that the hippocampus and surrounding cortices are formed relatively early in gestation (Seress & Abraham, 2008) meaning young children have the capacity to form memories. However natural maturation means their functions grow and refine as the child ages.

Children develop memory very early on in life.

"Late in the first year of life, the medial temporal lobe structures are functionally mature, and there are increases in the density of synapses in the prefrontal cortex. This corresponds to the improved recall abilities of infants near the end of the first year of life. Further improvements in the reliability of recall occur throughout the second year of life, corresponding to the continued increases in synapse formation in both the prefrontal cortex and dentate gyrus."

(<http://www.child-encyclopedia.com/brain/according-experts/memory-and-early-brain-development>)

How false memories can be created

Freud (1923) first identified the likelihood of false memory, naming it confabulation and reconstruction. Confabulation is the unintentional manufacturing of information to fill in the missing details during recall. Its usual purpose is to make the story more coherent and can occur under conditions of high motivation or emotion. In 1997 Coan found that "our recollection of memories can be manipulated and even entire sets of events can be confabulated". He proved this by "implanting" a memory into Chris (14 year old boy) about getting lost in a mall when he was five. He was given 4 other real memories to recall and was re-interviewed about them a few weeks later. He gave the implanted memory a score of 8 out of 10 for quality of recollection. Higher than 3 of the real memories. This demonstrates the power of rehearsal and authority. The child absolutely believed in the validity of the experiment. It is therefore easy to see how a parent, with enormous authority over the child, could successfully implant a memory which the child would absolutely believe.

Reconstruction involves the distortion of the original memory through a series of filters including our past experiences, beliefs, schemas and stereotypes. This is why eye witness statements

can differ so much. Brewer and Treyens (1981) tested memory in an office environment, asking 30 subjects to recall objects in the room where they had been waiting individually for 35 seconds. They falsely recalled many "expected" objects which were not actually there such as books and pens. This is because they had previous experience and schema of what an office looks like. For a child, they could recall an "incident" which happened in a place which was familiar to them and fill in the gaps with their own schema for that environment. For example, a child may "recall" one parent hitting the other in the bedroom and be able to describe the room in great detail because it is familiar to them, not necessarily because they witnessed anything in the room and therefore may falsely recall certain objects. The memory will sound convincing due to the detail but may be based on their schema rather than fact.

Elizabeth Loftus and Cara Laney (2013) found that the verbiage used to frame a question when trying to illicit a memory recall can impact false memory recollection. For example, asking, "Did you see THE dog?" was more likely to get a false memory recollection than asking, "Did you see A dog?" In the one experiment, Loftus and Palmer (1974) showed different videos of a car collision to different participants. Some saw a video of the car crashing at 20mph, others a video of a collision at 30mph and the rest a video of a crash at 40mph. Participants were then asked to estimate the speed of the car. The experiment results showed that the verb used to describe the crash (collision, crash, incident) had more effect on the speed estimated than the actual speed of the car that the participants witnessed in the video. Therefore as professionals it is important we consider how we frame our questions and the language we use to illicit information, paying particular attention to not asking leading questions.

Nicholas Spanos (1996) explored the idea of "impossible memories" in children just after birth. They implanted the memory of a colour mobile over their crib and found that almost 50% of participants were led to construct complex, vivid and detailed false memories using a process called "guided mnemonic restructuring" which involves active encouragement. This demonstrates that even though the child did not have the cognitive ability to remember this event, active encouragement to recall such an image can lead to high numbers of false memories being recalled. Even though common sense and knowledge would suggest that participants knew that it was impos-

sible for them to remember the mobile, encouragement and authority was able to over ride this in a large majority of participants. Therefore suggesting that a parent who regularly encourages their child to recall a particular memory, can create this "impossible memory" of an event which they couldn't possibly remember. Loftus and Laney also found that imagination inflation can occur as the more a subject visualises/images the event, the more "real" it becomes. Participants in one experiment were told to imagine playing inside at home after school, hearing a strange noise outside, running toward the window, tripping, falling, reaching out and breaking the window with their hand. In addition, participants were asked questions such as "What did you trip on? How did you feel?" In one study 24 percent of the participants who imagined the broken-window scenario later reported an increase in confidence that the event had occurred. This shows the power of imagination and how a parent could manipulate a child into recalling an event which didn't occur simply by retelling the story over and over again.

In the same paper three key elements which impact the forming of false memory were identified as:

- social pressure
- encouragement
- individual encouraged not to consider if the memory is true or not

In parental alienation cases, all three of these elements exist from the alienating parent.

Implications for parental alienation

In studies adults have been shown to be very susceptible to suggestion and manipulation to create false memories if they are encouraged to by someone they have an interpersonal relationship with meaning children, who are much more susceptible to their parent's influence, could easily "create" memories which they retain through rehearsal, Bartlett & Memon, (2007); Ceci & Bruck, (1995).

If we go through the 8 manifestations of parental alienation syndrome as identified by Richard Gardner (1998), we can start to see the important role that memory has in these cases.

A campaign of denigration

A child who previously had a positive and secure attachment to the alienated parent, suddenly hates them and vilifies them for everything they do and have done.

They have no good memories of the alienated parent. The age of the child is important as is how long the child has been separated from the parent. However, we know that children are capable of storing and recalling memories from a very young age and so for there to be a complete absence of any good memories, may suggest manipulation or conditioning.

Conditioning plays an important role in procedural memory and two main conditioning elements have been identified: classic and operant.

Classic conditioning theory was developed by Pavlov (1902) following experiments with dogs. He found that you could associate a behaviour to a previously non-associated action through classic conditioning. He rang a bell and the dogs did not respond. He showed them food, they salivated (required response). He then gave the food and rang the bell at the same time, dogs salivated (required response). Finally he rang the bell on it's own and the dogs salivated (required response). The dogs had been conditioned to associate the bell and food.

Operant conditioning was developed by Skinner (1948) and Thorndike (1905). They both found that animals would repeat the same action if the outcome was pleasant (positive reinforcement) and would stop an action if the outcome was negative (negative reinforcement). The animals learnt this through trial and error. This became known as the "law of effect"

In a parental alienation case a child could say they love the alienated parent and get shouted at (negative reinforcement) so they stop saying it and instead say "I hate them" and get rewarded (positive reinforcement). Following the law of effect, the child would make more negative statements towards the alienated parent in order to receive more rewards.

Further studies have been done on reinforcement and additional techniques identified.

Avoidance learning acts similarly to negative reinforcement, except "the desired behaviour serves to prevent the onset of a noxious stimulus, or in a variant, terminates such a stimulus that already exists", Miner, (2007). In parental alienation a child may go along with a lie in order to avoid being shouted out. Extinction involves withholding the pleasing stimulus that is maintaining the unwanted behav-

our each time the behaviour occurs. This happens until the behaviour gradually decreases to zero or the desired level, M. Sundel & S. Sundel, (2005). So in a parental alienation case the parent may withhold affection until the child stops asking to go and see the alienated parent.

Negative punishment involves removing a pleasing stimulus other than the one maintaining the behaviour in order to decrease the frequency of the behaviour. Normally, the behaviour decreases immediately, M. Sundel & S. Sundel, (2005). In parental alienation the parent may stop access to a sport or after school activity for as long as they keep seeing the alienated parent.

There is also the added dimension here of the attachment style of the parent. If they were previously rejecting-neglecting the child, there is even more motivation for the child to say negative things as they will get their primary needs met as well.

Weak, Frivolous and Absurd Rationalisations

In some instances there may be a genuine reason the child feels angry towards the alienated parent. But the reaction is still disproportionate to the incident which has made them angry. As an ex-child protection social worker I have witnessed contact between abusive parents and their children and in almost all cases, the child will interact with the parent and the relationship will return to it's previous state. Obviously here the age of the child is important though. An adolescent child may demonstrate more anger due to their increased understanding and their own interrupted emotional state as they go through puberty. A younger child however, whose memory is still developing, would struggle to recall memories from over two months ago. Therefore it is important for practitioners to remember that a child will have both good and bad memories of the alienated parent. Bad events do not delete good ones. If a child is unable (or unwilling) to recall positive memories, this could indicate manipulation or conditioning. It may also be possible that false memories have been implanted and cemented through rehearsal, ensuring that the child thoroughly believes their accusations. This could indicate confabulation, reconstruction, impossible memory or imagination inflation.

Lack of Ambivalence For the Alienated Parent

The child has a very "black and white" view of their parents. One is all good, the other all bad. No positive qualities can be recalled for the alienated parent and no negative ones for the alienator.

Memory is very rarely erased (except in amnesia cases) and instead fades over time. So for a child to be unable (or unwilling) to recall any positive qualities in their parent, suggests that conditioning has taken place. For example, the alienating parent could classically condition the child into believing the alienated parent is all bad by associating all bad memories with that parent, "We can't go on holiday this year because of your mother/father". If this process is repeated often enough, the child will be conditioned to believe the alienated parent is all bad. Diversely, the alienating parent will be telling the child that they are the only one who loves them and understands them, conditioning the child to see them as all good.

The Independent Thinker Phenomenon

The child will adamantly deny that anyone has influenced their decision.

Again, age will be an important factor here. In order for memory to be developed, we also need the cognitive abilities to piece it all together. Jean Piaget (1932) developed 4 cognitive stages of childhood development:

Sensorimotor Stage: Birth through about 2 years. During this stage, children learn about the world through their senses and the manipulation of objects.

Preoperational Stage: Ages 2 through 7. During this stage, children develop memory and imagination. They are also able to understand things symbolically, and to understand the ideas of past and future.

Concrete Operational Stage: Ages 7 through 11. During this stage, children become more aware of external events, as well as feelings other than their own. They become less egocentric, and begin to understand that not everyone shares their thoughts, beliefs, or feelings.

Formal Operational Stage: Ages 11 and older. During this stage, children are able to use logic to solve problems, view the world around them, and plan for the future.

"Six-month-olds have a memory span of no more than about 24 hours, which gradually expands to up to a month by 9 months. In the new study, 13-month-old babies could not remember events they had witnessed and mimicked four months earlier - a task that came easily to their elders, ages 21 months and 28 months."
(<https://www.upi.com/Older-children-remember-longer/47801036004400/>)

It is therefore important the practitioner explores the child's understanding of what the statements mean and uses memory recall exercises to confirm this. Does the child have the cognitive ability to make these statements? Do they understand the consequences? For example, a child who states that they have decided they never want to see their parent again could be asked "what about at Christmas? Do you not want a present from them?" and explore "what did you get from them last year?". Future and past tense exercises can help bypass the possibility of false memories because it is unlikely (and impossible) for someone to have rewritten their entire history or talked about the future with the child.

Absence of guilt about the alienated parent

The child will feel justified in their actions and cold towards the alienated parent.

According to Erikson's Psychosocial (1950, 1963) stage theory, around age three and continuing to age five, children assert themselves more frequently. They will play independently, make up games and initiate activities with others. This is the Initiative v's Guilt stage. Therefore it is important when a child is expressing that they are using their own initiative, that this behaviour is observed in other settings as well. Does the demonstrate the ability to think independently about other subjects? Any inconsistency may suggest manipulation, particularly reconstruction where real memories have been distorted.

Reflexive Support for the Alienating Parent in Parental Conflict

The child will always side with the alienating parent. The child does not want to hear the alienated parent's point of view.

This demonstrates elements of concrete thinking. i.e. seeing something as fixed and certain. It is evident in very young children but as children age they begin to develop logical and eventually abstract thinking as well (see Piaget's development stages above). The absence of logical thinking, which would be developmentally appropriate for their age, suggests either developmental delay or manipulation. Language may also play an important role here. For example, the alienating parent may have repeatedly told the child "remember when?" which is a powerful suggestive question as it implies a real memory exists. The child may then confabulate a memory as part of the conditioning process.

Presence of Borrowed Scenarios

The child may make accusations against the alienated parent which phrases and scenarios which are inappropriate for their age. For example, a child might say "I hate mum/dad because they made up homeless" but when you ask them what homeless means they have no understanding of it.

Whilst not all allegations are false, those which use language which isn't congruent with the child's natural speech, would suggest that false memories have been implanted. As outlined in the above section on "how false memories are implanted", this is relatively easy to do and children will be highly sensitive to this kind of manipulation from a caregiver. Especially if it is coupled with condition behaviours. Again language will play a part in the manipulation of the memory of the child. A memory of a telling off can be later recalled as violent through the retelling by the alienating parent, "He screamed at you. You remember don't you?". The child is conditioned to agree with the parent so imagination inflation may take place.

Rejection of Extended Family

Anyone associated with the alienated parent will be rejected by the child for little or no reason.

Using Erikson's psychosocial development model again, the crisis of trust vs mistrust occurs during the first year or so of life. During this stage, the infant is uncertain about the world in which they live. To resolve these feelings of uncertainty, the infant looks towards their caregivers for stability and consistency of care. This forms the attachment.

Initially Bowlby (1969) believed that a child formed one primary attachment which superseded all others. However later research has shown that children form multiple quality attachments to a range of caregivers, including grandparents, aunts and uncles (Furnivall 2011). Therefore it is important when a child is rejecting whole families or those associated with alienated parent, that a practitioner explores early attachment and experiences with the wider family through taking family history. The child is unlikely to have forgotten those experiences and, unless severe abuse has taken place, it is unlikely the memories have been repressed. Therefore the child may have been conditioned and manipulated into "forgetting". Confabulation, reconstruction, impossible memories and imagination inflation can all play a role but it is most likely to be some form of conditioning, with reinforcement being given to the child for rejecting others.

Conclusion

Both memory and parental alienation are complex theories and we have to draw upon many additional theories in order to give a comprehensive picture of what is going on. However I hope that this paper has demonstrated the important role that memory and memory manipulation plays in parental alienation syndrome and provided some practical advice on what to look for.

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Overseas False Memory Societies

Please feel free to write or phone if you have relatives in these countries who would like to receive local information. The American and Australian groups produce newsletters.

AUSTRALIA

Australian False Memory Association Inc., AFMA, PO Box
74, Campbelltown, South Australia 5074, Australia
Tel: 00 61 300 88 88 77 · Email: false.memory@bigpond.com
· www.afma.asn.au

CANADA

Paula – Tel: 00 1 705 534 0318 · Email: pmt@csolve.net
Adriaan Mak – Tel: 00 1 519 471 6338 · Email: adriaanjw-
mak@rogers.com

FRANCE

Alerte Faux Souvenirs Induits, Maison des Associations, 11
rue Caillaux, 75013 Paris, France
Tel: 00 33 6 81 67 10 55 · Email:
afsi.fauxsouvenirs@wanadoo.fr · www.psyfmfrance.fr

GERMANY

Schulterschluss bei Sektenbetroffenheit e.V.
Email: kontakt@schulterschluss.info.
Www.schulterschluss.info

NETHERLANDS

Email: info@werkgroepwfh.nl · www.werkgroepwfh.nl

NEW ZEALAND

Casualties of False Sexual Allegations (COSA)
New Zealand
<http://menz.org.nz/cosa/>

NORDIC COUNTRIES

Åke Möller – Fax: 00 46 431 21096 · Email:
jim351d@tninet.se

USA

False Memory Syndrome Foundation, 1955 Locust Street,
Philadelphia, PA 19103-5766, USA
Tel: 00 1 215 940-1040 · www.fmsfonline.org

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BFMS · PO Box 172, Stockport SK6 9BP, UK
Tel: 0161 285 2583
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