‘MUMMY SAID I DON’T REMEMBER ANYTHING’:
TRUE MEMORIES, FALSE MEMORIES AND CONSEQUENCES

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I dedicate all 8,876 words to an inspiring professor and even better friend.

I am a better me because of you.
CONTENTS PAGE

INTRODUCTION 4
EYEWITNESS TESTIMONY AND MEMORY RECALL 5
TYPES OF MEMORIES 7
  REPRESSED MEMORIES 7
  SUPPRESSED MEMORIES 9
  ALTERED MEMORIES 10
  FALSE MEMORIES 12
OBSTACLES TO THE TRUTH 13
  INTERVIEWER TONE 15
  POSITION OF AUTHORITY 16
  REPEATED QUESTIONING 17
  TIME AND TYPE OF INTERVIEWER 19
  National Institute of Child Health and Human Development Protocol 22
EASTWOOD AND PATTON REPORT 23
INNOCENCE PROJECT 26
  RONALD COTTON OR BOBBY POOLE? 27
CONCLUSION 28
REFERENCE LIST 30
I INTRODUCTION

Since the 1990’s a ‘memory war’ has waged between scholars, physicians and scientists alike over the validity and reliability of different forms of memory. The issue has come into the fore of the legal arena because of its implications in the testimony of witnesses, namely the legitimacy of child witnesses. Children are being called as witnesses and are asked to recount certain events with as much accuracy as possible. There is the underlying belief or expectation that these memories have not been tampered with.

This paper will start by demonstrating that eyewitness testimony accounts are not conclusive, and that memory is vulnerable to distortions; a problem that is further aggravated in the case of children. An evaluation of the different forms of memory, namely, repressed, suppressed, altered and false memories will demonstrate the degree of variations in the processing of memory. This paper will then evaluate how suggestibility and interviewer bias (through mechanisms such as: the tone of the interviewer; the interviewer’s relative position of authority; repeated questioning; and the timing of the interview) manipulate a child into changing, whether consciously or unconsciously, the recall of their memory.

This paper will then consider the report titled ‘The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System’ (Eastwood and Patton Report) that outlines some of the cross-jurisdictional concerns of children as witnesses. The Eastwood and Patton Report establishes trial processes can re-victimise children to such an extent where the trauma has a strong negative impact on their ability to recall a memory.


with the requisite degree of accuracy. This paper will conclude with an assessment of the United States initiative; the Innocence Project, a organisation dedicated to the exoneration of wrongfully convicted individuals due to inaccurate eyewitness testimonies. A brief look into the case study of Ronald Cotton will demonstrate the tragic consequences of misidentification, and how it serves as a stern reminder that memory recall is not as infallible as once perceived.

II EYEWITNESS TESTIMONY AND MEMORY RECALL

For centuries, eyewitness testimony has been used as a primary means for establishing the elements of a crime and determining the guilt of offenders. It is one of the most persuasive forms of evidence that can be presented to the court. It is assumed that humans can recollect most memories with a high degree of accuracy and detail and that recounting a memory is analogous to a video recorder – it is this assumption that poses real concerns for the courtroom. In light of recent developments in the study and understanding of memory, the tenacity of eyewitness testimony has been drawn into question. For decades, research and analysis was predominantly focused on quantity based memory assessments concentrating primarily on traditional memory recognition and input-bound measures. In recent years, the studies have moved from this quantitative approach to that of a qualitative one; namely, the various ways in which memories can become distorted and erroneous.

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Eyewitness testimony can be unreliable given its dependence on the interaction between human senses and the brain’s processes in remembering these interactions. Memory is suggestible to many different sources of distortions that can affect the integrity of the original memory. These problems are further exacerbated in the case of child witnesses. Historically, the judicial system has been cautious when relying on children’s evidence, attributable to the perceived inferiority of the accuracy of children’s memory and studies that revealed the high degree of suggestibility that children are vulnerable to. In general, the studies show that overall, children remember less than adults. Some of the explanations posited for this are; children have not developed cogent storage, encoding and retrieval faculties, they do not have established processes of semantic organisation and their metacognitive skills and knowledge structures are under matured, particularly at a young age.

Since these early reports, studies have found that children’s ability for memory recall is not as weak and suggestible as originally thought – particularly when open-ended questions are used. Generally, studies have found that children will tend to remember

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10 Ibid.


16 W Schneider and M Pressley, Memory development between 2 and 20 (Springer New York, 2nd ed, 1989).

distressing or stressful events better than mundane every day events. Further, memories of events of a more personal nature are remembered with greater accuracy than if the child did not have a personal connection to the event. Additionally in younger children, the lack of preformed schemas makes them resistant to erroneous suggestions. A schema is an encapsulated network structure of multiple sensory episodes that can be altered by either assimilation or accommodation; essentially, where there are ‘missing pieces’ to a memory, children may fill these with pieces that are consistent with preformed schemas of a similar event.

From the studies suggested above, it seems that the debate is not centred on one of quantity, the issue lies in that of the quality and whether or not children’s memories of events are as substantively accurate as they can be.

III TYPES OF MEMORIES

A Repressed Memories

A repressed memory is one where an individual can recall, although it has been blocked from their conscious mind or they have been previously unable to recall it.

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18 Kelly McWilliams, Rachel Narr, Gail S. Goodman, Sandra Ruiz and Macaria Mendoza, ‘Children’s memory of their mother’s murder: Accuracy, suggestibility, and resistance to suggestion’ (2013) 21(5) Memory 592.


Simply put, a repressed memory is where;

something happens that is so shocking that the mind grabs hold of the memory and pushes it underground, into some unaccessible corner of unconscious. There it sleeps for years, or even decades or even forever – isolated from the rest of mental life. Then one day it may rise up and emerge into consciousness.22

A debate has occurred between clinicians and academics over the veracity of repressed memories and what implications this debate will yield in future studies of memory. One side argues for the validity of repressed memories and their importance particularly in child sexual abuse cases, while the other side questions the probative value of a repressed memory and the method of its ‘re-discovery’.23 Advocates for the former side argue that skeptics of repressed memories misunderstand the true meaning of what constitutes a repressed memory.24 Freud originally stated that ‘the essence of repression lies simply in turning something away, and keeping it at a distance from the conscious’.25 Further, Freud proposed two types of repression: the first being a fully unconscious defence, where the mind subconsciously deletes the memory;26 while the second type concerns the conscious and active avoidance of the memory, namely suppression.27 While there is


little evidence to support the existence of the first type of repressed memory,\(^{28}\) advocates argue that the second form of repression is not repression in the truest sense, but rather the suppression of memory.\(^{29}\)

**B Suppressed Memories**

Suppression is defined as an ‘active, deliberate conscious attempt to forget acutely painful or unacceptable thoughts and wishes by diverting attention to other matters’.\(^{30}\) This is a process where an individual can consciously shut down the retrieval of a particular memory.\(^{31}\) This process is voluntary and concerns conscious avoidance of the memory and any associated stimuli.\(^{32}\) Anderson and Green\(^{33}\) conducted the renowned ‘think/no think’ study with word pairs to determine if preventing awareness to an undesirable memory would inhibit its later retrieval. The study concluded that it is possible to actively suppress a memory both in the short and long term.\(^{34}\) Further the study also found that in the long term, the active avoidance of the memory inhibited its later recall and increased the number of times details in the memory were forgotten.\(^{35}\)


\(^{29}\) This principle will be discussed later in the paper.


\(^{33}\) Anderson and Green, above n 27, 368.

\(^{34}\) Ibid, 367.

\(^{35}\) Ibid.
While these studies are show promise in relation to memory suppression, the dependent variable were words, not a traumatic autobiographical memory.36

Conversely, some scholars have also found that individuals who have experienced more traumatic events in their lives had a greater degree of suppression than individuals who did not.37 While the studies do not paint a consistent picture as to the nature of suppressed memories, one cannot ignore the findings above. Mechanisms do exist that can push unwanted memories out of an individual’s conscious and this can have permanent effects on the accessibility of these suppressed memories.38

Some advocates suggest that it is very unlikely that an individual can completely forget or repress a traumatic experience.39 Additionally, studies suggest that traumatic experiences are in fact remembered clearly by victims as opposed to being repressed.40 Further, there is little scientific evidence to suggest that repeat traumatic events can be repressed, for years and then be made recoverable through therapeutic intervention.41

C Altered Memories

Research demonstrates that individuals can unintentionally assimilate misinformation in an original memory from the recollections of others, which is known as the ‘misinformation effect’. The misinformation effect refers to the process when misleading information is presented to an individual in relation to a particular memory and that


37 Anderson and Huddleston, above n 27, 82.


40 Ibid.

41 Holmes, above n 28, 85; Loftus, above n 22, 530.
misinformation is adopted as part of the original memory.\textsuperscript{42} The misinformation that is presented is generally given unintentionally either through the types of questions asked,\textsuperscript{43} feedback provided post interviews,\textsuperscript{44} and body language and the like during the investigation process.\textsuperscript{45}

Further, Fuzzy Trace Theory can be used to explain the misinformation effect. According to Fuzzy Trace Theory:

Memories are duly recorded as verbatim representations of the exact and surface form of details, and in parallel as gist representations containing the general sense of what happened. Verbatim and gist traces are stored independently, and verbatim traces decay at a faster rate than do gist traces. Younger children rely more on verbatim than gist processing compared to older children…\textsuperscript{46}

Fuzzy Trace Theory adopts a degree of the misinformation effect, namely that over time the original memory will fade due to the decay of the verbatim representations, and be replaced with a modified, tampered version. From a legal perspective, this can cause severe issues with the reliability of memories as their integrity can be compromised by their very source.


\textsuperscript{43} Elizabeth F Loftus, Eyewitness Testimony (Harvard University Press, 2\textsuperscript{nd} ed, 1996) 55.


\textsuperscript{46} Kim P Roberts and Martine B Powell, ‘The roles of prior experience and the timing of misinformation presentations on young children’s event memories’ (2007) 78(4) Child Development 1140.
D False Memories

A false memory is one where an individual can remember with vivid accuracy an event that never happened.47 False memories are described as errors of commission, unlike forgetting which is described as errors of omission.48 False memories are a result of losing the particular source of the original memory.49 Studies have demonstrated that children and adults will remember a plausible false event, suggesting that the cognitive processes involved in memory are similar.50 Fuzzy trace theory assumes that individuals store real memories, yet over time misinformation is moulded into the original memory, and this can result in the true memory being lost.51 The main elements necessary for the construction of a false memory are; that the event be a plausible one, that the individual believes in the event and constructs a memory from that, and that the individual has mistakenly attributed the constructed memory to actual memory.52

One of the main issues facing the judicial system is that, given the suggestibility of child witnesses, there is the potential for their evidence to be tainted by either other evidence or through juries and judges discounting part or whole of their testimony as they consider it unreliable.53


IV OBSTACLES TO THE TRUTH

The issue with legal practitioners eliciting information out of children is the manner in which that information is obtained and whether or not there have been suggestive influences on that.\textsuperscript{54} Scholars posit that inadequate and inefficient interviewing techniques can increase the degree of suggestibility and contamination of memories in children.\textsuperscript{55} Suggestibility has both a broad and narrow definition. The broad definition concerns ‘the degree of which children’s encoding, storage, retrieval and reporting of events can be influenced by a range of social and psychological factors’.\textsuperscript{56} The narrower definition is ‘the extent to which individuals come to accept and subsequently incorporate post-event information into their memory recollections.’\textsuperscript{57}

Studies have also pointed to the impact that interviewer bias and confirmation bias have on memory retrieval in children.\textsuperscript{58} Personal beliefs and expectations influence the way individuals think, encode and remember the world around them.\textsuperscript{59} People tend to interpret information presented to them in line with these held beliefs and expectations.\textsuperscript{60} Because of this, people actively seek information that confirms these beliefs and expectations rather than disconfirm it.\textsuperscript{61}

\begin{itemize}
  \item \textsuperscript{54} Ibid.
  \item \textsuperscript{55} Maggie Bruck and Stephen J. Ceci, ‘The Suggestibility of Children’s Memory’ (1990) 50 Annual Review of Psychology 420.
  \item \textsuperscript{56} Ibid.
  \item \textsuperscript{57} Ibid, 421.
  \item \textsuperscript{59} N J Rose and J W Sherman, ‘Expectancy’ in A W Kruglanski and E T Higgins (eds), Social Psychology: Handbook of basic principles (Guilford Press, 2007) 94.
  \item \textsuperscript{60} Bradley D McAuliff and Brian H Bornstein, ‘Beliefs and expectancies in legal decision making: an introduction to the Special Issue’ (2012) 18(1) Psychology, Law and Crime 2.
  \item \textsuperscript{61} C G Lord, L Ross and M R Lepper, ‘Biased assimilation and attitude polarization: the effects of prior theories on subsequently considered evidence’ (1979) 37(11) Journal of Personality and Social Psychology 2099.
\end{itemize}
Interviewer bias is characterised by interviewers holding a set of preconceived beliefs about an event, and how (at times) interviews are moulded to reflect these beliefs.\(^6^2\) Similarly, confirmation bias is defined as ‘the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations or a hypothesis in hand’.\(^6^3\) In relation to eyewitness testimony, during the interview and investigation phase, the interviewer seeks to confirm presumed particulars that the interviewee may have not disclosed.\(^6^4\) This bias causes interviewers to seek confirmatory information and disregard information that they believe to be inconsistent.\(^6^5\)

This bias can affect the entire structure of the interview.\(^6^6\) Scholars point out that it is challenging to have an unbiased interviewer as they rarely conduct interviews, for example; on abuse, without prior background information that is indicative of the abuse.\(^6^7\) Even when trying to be neutral, interviewers can bias the questions asked in their interviews.\(^6^8\) One of the main factors that affect confirmation and interviewer bias is the preliminary information that the interviewer has before the interview, which can affect the style of the interview and can result in the increase in the rate of false witness

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\(^6^2\) Ceci and Bruck, above n 55, 425.


\(^6^6\) Ceci and Bruck, above n 55, 430.


\(^6^8\) Thompson, Clarke-Stuart and Lapore, above n 20, 408.
testimonies. Further, biased interviewers tend to ask more misleading questions with the presumed aim of obtaining ‘withheld’ information.

Other factors, when coupled with interviewer and confirmation bias can increase the degree of suggestibility that a child is vulnerable to from an interviewer. These factors include; the interviewer’s tone, the relative position of authority, utilisation of repeated questioning and the timing and type of interview conducted.

A Interviewer Tone

The tone that an interviewer uses when interviewing a child can influence a child’s suggestibility. Children can be influenced by the tone and urgency of an interviewer that can lead to the child making false claims. The emotional tone moulds the linguistic interaction between interviewer and interviewee and influences the amount of false reports that are recorded.

In one study, Thompson, Clarke-Stewart and Lapore assessed the degree of suggestibility of young children in relation to the activities of a janitor. When a neutral interviewer questioned the children, their recollections of the event were consistent and correct. In interviews where the interviewer was overly supportive, the children provided as many accurate as inaccurate statements. Finally, in interviews where the interviewer was cold and authoritative, the rate of false statements was greater than accurate statements. The beliefs that children held about the janitor prior to the interview were altered and stored in their long-term memory.

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71 Thompson, Clarke-Stuart and Lapore, above n 20, 405.

72 Ibid, 421.
B Position of Authority

The Social Demands/Response Biases Hypothesis predicts

… that children are seen to make a deliberate, conscious decision to report the suggested item based on the social context and/or pragmatic cues presented to them at the time of testing.\(^{73}\)

This hypothesis is used as an alternate model to explain suggestibility as children will report false evidence because of the social demands of the interview process.\(^{74}\) One of these social demands relates to the perceived credible and authoritative position of the interviewer to the child.\(^{75}\)

Studies have found that children have a tendency to adopt statements made by adults as credible, given their position of authority.\(^{76}\) Additionally, due to the socialisation process, it is presumed that children have a willingness to try and please adults by providing information they believe is being asked of them.\(^{77}\) Young children rely on the questions asked from the interviewer to provide a framework and guide them through their memory recall.\(^{78}\)

Young children are sensitive to the differences in credibility of the source of misleading information.\(^{79}\) Studies find that children are more resistant to suggestibility of


\(^{74}\) Ibid.

\(^{75}\) Ibid, 61.


misinformation when presented post event from a young child compared to that of an adult.  

Academics have also concluded that the types of adults that provide misinformation can influence the degree of suggestibility and misinformation that is adopted into a child’s memory. As children get older, their understanding of social roles tends to change and they can resist misleading suggestions that are presented by adults. While the Social Demand/Response Biases Hypothesis does provide some insight into the factors behind suggestibility, it is only tenable in some situations and is seldom the only cause behind a child adopting misleading suggestions.

C Repeated Questioning

The literature suggests that when questioned repeatedly on a particular point, children change their answer in an attempt to be more compatible with that of the interviewer. In the event of repeated questioning, the errors that are made in one interview can be carried through to subsequent interviews. In these subsequent interviews, when children try and recall information, the information is erroneous, as the original memory has now been altered. When children are asked repeatedly about false events, the assent rate rises for each event; a child will more likely agree to a false claim in the third interview rather than the second.

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82 Sutherland and Hayne, above n 79, 390.


84 Karen Salmon and Margret-Ellen Pipe, ‘Recalling an event one year later: The effects of props, drawing and prior interviews’ (2000) 14 Applied Cognitive Psychology 100.

85 Bruck, Ceci and Melnyk, above n 49, 193.

86 Ibid.
While the negative effects of repeated questioning is indisputable, some studies on repeated questioning have revealed that they can help promote further recall and make memories resistant to decay.\textsuperscript{87} Repeated questioning can enhance the strength of a memory of an event as the child is made to continuously rehearse the event – stopping the memory from fading.\textsuperscript{88} Some scholars have elaborated on this and suggest that repeated questioning can lead to hypermnesia.\textsuperscript{89} Hypermnesia refers ‘to increased recall levels associated with longer retention intervals’\textsuperscript{90} and ‘occurs when the recall of previously unreported information exceeds the forgetting of previously recalled information.’\textsuperscript{91} One of the main concerns with relying on ‘recalled’ information is the problem of whether or not this new information is genuine or created through suggestion.

In relation to violent events, scholars suggest that witnesses can experience temporary retrograde and anterograde amnesia, which affects their ability to provide accurate and complete testimony directly after an event.\textsuperscript{92} What this suggests is that if in an initial interview, a child’s memory is not complete, it does not mean that the missing pieces of that memory have been permanently lost or decayed.\textsuperscript{93}

\textsuperscript{87} Ibid, 190.


\textsuperscript{91} Ellen Scrivner and Martin A Safer, ‘Eyewitnesses show hypermnesia for details about a violent event’ (1988) 73(3) Journal of Applied Psychology 371.


\textsuperscript{93} Scrivner and Safer, above n 91, 372.
Scholars have not reached a conclusive finding on the issue of repeated questioning. While there is evidence in support, there is also a considerable body of evidence that rejects these findings. There is some discussion that the effectiveness of repeated questioning should be assessed in conjunction with the form of questioning that interviewers utilise.

D Time and Type of Interviewer

The timing of an interview with child witnesses is crucial for eliciting untainted, fresh memories and also as a means of protecting these memories from the effects of subsequent suggestibility. A higher degree of accurate information is elicited when investigative interviews occur as soon after the event as possible. Interviews immediately preceding an event can restore and reinforce the strength of the original memory and inoculate it against the threat of misinformation and suggestibility. Memory trace-strength theory supports this hypothesis. A memory strength trace is strong if ‘the original information is retained in an elaborate form in which many of the semantic and formal features are preserved in a richly associated network representation’ and ‘that weaker memories are more suggestible to suggestion than strong memories.’ Academics suggest that the earlier an interview with a child witness takes place, the more likely that the original memory will have a strong memory trace and will be less suggestible to misleading information.

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97 Ibid, 117.

98 Ibid, 120.

Other studies have suggested that it is the delay between the event and the interview that helps in memory recall as an individual has had time to consider both the original memory and misinformation which in-turn allow the misinformation to be forgotten.\textsuperscript{100} The rationale is that the interview acts as a reminder and the original memory is re-activated during the interview.\textsuperscript{101} The only pre-condition is that the interview does not occur so far outside the ‘time-window’ that it is forgotten.\textsuperscript{102} While there is evidence to suggest that delay or non-delay can have an effect on the accuracy of memory retrieval, there is no agreement among scholars that the effect of misinformation on original memories is either mitigated or exacerbated by early or late investigative interviews.\textsuperscript{103}

Studies have found that the form of questions asked of child witnesses can have considerable effect on the answers given in interviews.\textsuperscript{104} As stated above, children rely on the questioning technique of the interviewer to provide a framework which helps guide them through the interview process.\textsuperscript{105} Studies suggest that children provide more accurate reports of events when asked open-ended questions as it gives a child the autonomy to recollect a specific set of events as they remember them to be,\textsuperscript{106} without suspecting that there is a predetermined answer that the interviewer is looking for.\textsuperscript{107}

\textsuperscript{100} R A Schmidt and R A Bjork, ‘New conceptualization of practise: Common principles in three paradigms suggest new concepts for training’ (1992) 3 Psychological Science 212.


\textsuperscript{103} For evidence on delay leading to adoption of misinformation see, T A Marche, ‘Memory strength affects reporting of misinformation’ (1999) 73 Journal of Experimental Child Psychology 67; and for evidence that misinformation is adopted in interviews very soon after the event see, D S Lindsay, ‘Misleading suggestions can impair eyewitnesses’ ability to remember event details’ (1990) 16 Psychology: Learning, Memory and Cognition 1080.

\textsuperscript{104} H R Dent, ‘The effects of interviewing strategies on the results of interviews with child witnesses’ in A Trankell (ed), Reconstructing the past (Kluwer 1982) 283.

\textsuperscript{105} Ceci and Bruck, above n 55, 430.


addition, open-ended questions require the child to contemplate all possible alternatives when answering the questions, \(^{108}\) while specific questions only provide a child with a pre-determined set of options to choose from.\(^ {109}\) Open-ended questions allow children to retrieve and attribute experience details to the memory, which, also assists in making children’s memories resistant to suggestibility.\(^ {110}\)

While open-ended questions have been proven to educe better memory recall, children lack the capacity to provide coherent, rich and detailed accounts of their memories purely using only open-ended questioning.\(^ {111}\) Compared to adults, children employ fewer memory strategies in memory retrieval and will need cues from the interviewer for their memory systems to be activated.\(^ {112}\) It is here that academics agree that the cues provided from the interviewer can very easily become suggestive.\(^ {113}\) One of the main problems with the use of open-ended questions is that interviewers find it difficult to implement them in the course of the interview, \(^ {114}\) as children can sometimes provide limited information and the specific probing is necessary to extract the requisite information.\(^ {115}\) Specific questioning techniques can be disruptive in an interview as the child is

\(^{108}\) Lamb, Orbach, Hershkowitz, Esplin and Horowitz, above n 106, 1214.

\(^{109}\) Ibid.


\(^{113}\) Ibid.


\(^{115}\) Peterson and Biggs, above n 107, 281.
redirected from focusing on their own memories to focusing externally to the questions posed by the interviewer.\textsuperscript{116}

1 \textit{The National Institute of Child Health and Human Development Protocol}

Some academics have theorised that the coordinated use of both open-ended and specific questions is the preferable option when interviewing children.

The National Institute of Child Health and Human Development Protocol (\textit{NICHD Protocol}) is a program developed in the United States that assesses all stages of an investigative interview and the role of all the actors in the interview.\textsuperscript{117} Interviews start with introductions and rapport building in an attempt to establish a relationship with the child, and also to explain the investigative interview process.\textsuperscript{118} Open-ended prompts about the event follow in order for the child to familiarise themselves with the substantive elements of the targeted event.\textsuperscript{119} When the interviewer is confident what the child has sufficiently familiarised themselves with the target event, the interviewer will continue with open-ended questions concerning parts of the memory, followed with direct questions where necessary.\textsuperscript{120}

While the NICHD Protocol has been found to promote more accurate memory recall than other interviewing techniques, it cannot address the motivational factors behind a child’s reluctance to disclose information about an event.\textsuperscript{121} Further, the literature is slim on how the NICHD Protocol is tailored for those with mental and intellectual difficulties.\textsuperscript{122}

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\textsuperscript{117} Lamb, Orbach, Hershkowitz, Esplin and Horowitz, above n 106, 1204.
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\textsuperscript{118} Ibid.
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\textsuperscript{119} Ibid, 1205.
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\textsuperscript{120} Ibid.
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\textsuperscript{121} M E Pipe, M E Lamb, Y Orbach and A Cederborg, \textit{Child Sexual Abuse: Disclosure, delay and denial} (Routledge, 2007) 52.
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Therefore, while there is promise in the research on the effective interviewing techniques of children, there is still more work that needs to be done with relation to all the competing variables and how they work together to elicit the most accurate information out of child witnesses.

V THE EASTWOOD AND PATTON REPORT

The issues discussed above are further aggravated when children move into the court proceedings themselves. Not only is the misleading, deceptive and suggestive nature of the trial damaging for children, it can have a devastating effect on their memories. The Eastwood and Patton Report was produced by Dr Christine Eastwood and Professor Wendy Patton, which assessed the criminal justice system’s response to child complainants of sexual abuse. One of the significant issues faced by child witnesses is the lack of protection offered by actors of the court system before, during or after the court process.123 One defence lawyer stated;

The Crown don't care about the child. The police don't care about the child. And I don't care about the child. You see the trial is not about the child. It simply makes the child a witness… You've got to get around this idea that the criminal justice system is about the child, it shouldn't be about the child, and hopefully will never be about the child.124

The Eastwood and Patton Report conducts a cross-jurisdictional analysis of Queensland (Qld), New South Wales (NSW) and Western Australia (WA) to determine how the states manage child witnesses and facilitate a process where the child can provide their evidence in a safe and neutral environment. Out of the three states evaluated, it was found that WA ranked the best, with Qld ranked the lowest.125 One of the key differentials that separated WA from the other states was the commitment to the

124 Eastwood and Patton, above n 4, 2.
125 Ibid, 11-32.
protection of children during the court process both in terms of legislation\textsuperscript{126} and legal reform.\textsuperscript{127} The Attorney-General, in the Second Reading Speech of the Criminal Law (Procedure) Amendment Bill\textsuperscript{128} was aware of the harm that the trial process have for children and the authenticity of their memories, ‘the delays caused by preliminary hearings also have severe repercussions as they can impact upon the ability of witnesses to recall facts as clearly as they once might have.’\textsuperscript{129}

Throughout their research, Eastwood and Patton with a host of other scholars have found that the criminal justice system itself is responsible for causing further trauma and abuse to child witnesses.\textsuperscript{130} The traditional criminal justice system was developed for adult use and leaves children painfully vulnerable to its effects. The Eastwood and Patton Report evaluated, from the child’s perspective, the various stages of the trial process from committal hearings all the way to the final verdict and sentence.\textsuperscript{131} One of the most detrimental effects of the court process is through cross-examination. Lawyers use cross-examination as a means of discrediting the witness through misleading, suggestive and deceptive means.\textsuperscript{132} This is particularly more problematic in the case of children taking the stand. The following extract of a court transcript demonstrates the degree of forced suggestibility in children:

\begin{quote}
Mr X: Did he ever threaten you?

Child: I don't think so.
\end{quote}

\begin{footnotes}
\textsuperscript{126} Evidence Act 1906 (WA) s 106.

\textsuperscript{127} Law Reform Commission of Western Australia, Evidence of Children and Other Vulnerable Witnesses, Project No 87 (1991).

\textsuperscript{128} Criminal Law (Procedure) Amendment Bill 2002 (WA).

\textsuperscript{129} Western Australia, Parliamentary Debates, Legislative Assembly, 27 March 2002, 9026-9030 (James Andrew McGinty, Attorney-General).


\textsuperscript{131} Eastwood and Patton, above n 4, 49-62.

\textsuperscript{132} Henderson, above n 130, 200.
\end{footnotes}
Mr X: What do you mean you don't think so?

Child: I can’t remember.

Mr X: So the answer is that he never threatened you. Is that right?

Child: Yes.133

Comments made by children in the Eastwood and Patton Report about being cross-examined, highlight the judicially sanctioned contamination of children’s memories by lawyers and actors of the court. Children from Qld stated how the defence council would badger and ask compound questions in the hope of confusing them; ‘he asked lots of difficult questions and tried to mess me up.’134 A child from NSW expressed how, ‘He [defence council] was trying to get me to say all this stuff [that] wasn't true.’135 Another child documented how the stress of the trial forced them to answer questions as quickly as possible just so they could leave.136 In WA, even with the facilities available, one child reported:

I think he [defence council] was trying to confuse me – and that’s awful because in my mind I’m just trying to have my story out there and just to get it out. And then I’ve got some guy twisting my words and saying no, no, no.137

Aside from the suggestibility that a child may be subject to during the investigative interview stage prior to the trial, the above extract and comments is a clear and example of the sanctioned contamination of a child’s memory at a highly stressful and critical time. While the Eastwood and Patton Report did not focus on the suggestibility of child witnesses exclusively, it does indicate that the issue of suggestibility is never far from any evaluation of children and their participation in the judicial system.

133 Eastwood and Patton, above n 4,

134 Eastwood and Patton, above n 4, 59

135 Eastwood and Patton, above n 4, 60

136 Ibid

137 Eastwood and Patton, above n 4, 4.
VI THE INNOCENCE PROJECT

While this paper has evaluated the problems with child witnesses and their evidence, this section will go one step further and demonstrate the devastating effect of not having adequate interviewing techniques in place during the investigation period and how that can result in innocent people being sent to prison for crimes they did not commit.

The Innocence Project is a not-for-profit legal organisation in the United States, dedicated to the exoneration of wrongfully convicted individuals. The use of DNA testing has given those who are wrongfully accused a second chance for release and those who are truly guilty to be bought to justice. The Innocence Project also works with law enforcement, law and journalism schools, and lobbies for criminal law reform to prevent further injustices in the future.

One of the main features of the Innocence Project is the research and training that is offered for law enforcement officials about the suggestibility of human memory, and techniques that can be utilised to ensure the most accurate recall. Studies conducted have found that close to 75% of wrongful convictions are due to eyewitness misidentification – contributable to ineffective interviewing techniques, problematic line-ups and other identification procedures. Some of the techniques identified to assist in more accurate recall are the utilisation of double blind administration, proper line-up composition, recording the procedure, adequate instructions for the witness, control of confidence statements and sequential representation. While these techniques are being used now in the facilitation of witness investigation, one case in particular bought to the fore the impact of inadequate interviewing techniques and insufficient investigative procedures.

138 Benjamin N Cardozo School of Law, Yeshiva University, the Faces of Exoneration, <http://www.innocenceproject.org>

139 Ibid.

140 Ibid

141 Benjamin N Cardozo School of Law, Yeshiva University, Understand the Causes Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>
This particular case tells the story of Ronald Cotton, a man wrongfully convicted of a crime he did not commit.

A Ronald Cotton or Bobby Poole?

In 1984, an assailant entered Jennifer Thompson’s home where he robbed and raped her. During the assault, Ms Thompson made every effort to familiarise herself with her assailant; how tall he was, if he had any tattoos and whether or not he had any unusual jewellery. Later on that same night, another woman was also assaulted in the same manner as Ms Thompson. Authorities were provided with leads from different people of the public, claiming to know whom the offender was, namely one, Ronald Cotton (Cotton). Cotton heard of some of the claims being made against him and went to the police station in an attempt to make sense of the allegations. The police then arranged a photo array for Ms Thompson, with a photo of Cotton included, in which she positively identified Cotton as her assailant. The authorities organised for a line-up, in which Ms Thompson positively identified Cotton once again. Cotton was charged and in 1985 was convicted of one count of burglary and one count of rape and was sentenced to life imprisonment.

While in prison, Cotton had heard another inmate, Bobby Poole, bragging how it was he who had raped Jennifer Thompson and the other victim. Cotton was subsequently

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145 Ibid, 440.
148 Wise, Fishman and Safer, above n 1144, 438.
149 Ibid.
granted a re-trial given the second victim had failed to identify Cotton in a line-up.150 During the trial, the second victim decided that Cotton was in fact the man who had raped her, even though she had never identified him in a line-up.151 Ms Thompson and the second victim both confirmed that Cotton was the man who had raped them.152 Further, the court excluded evidence that Bobby Poole had confessed to the crimes.153 Cotton was found guilty of both offences and was sentenced by the Alamance County Superior Court to prison for life plus fifty-four years.154 It was not until 1995, that through the use of DNA analysis, Cotton was exonerated from prison and all charges against him were dropped.155

While this story does have a happy ending with an innocent man being released, and the true offender being brought to justice, the fact cannot be dismissed that the same innocent man was made to spend more then a decade in prison for a crime he did not commit. What this story demonstrates is the tragic consequences of the inadequate handling of eyewitness testimony. Even though Ms Thompson was sure that the person she identified was her assailant, Cotton and Bobby Poole were still two different men. This story shows the fallibility of human memory and highlights how more effective measures need to be implemented in order to stop this from happening again.

VII CONCLUSION

In conclusion, this paper has looked at some of the issues that impact the accurate recall of memories in child witnesses. Studies, as exhibited above, demonstrate that memories are incredibly malleable and subject to many forms of distortions. Types of memories

151 Wise, Fishman and Safer, above n 144, 439.
153 Wise, Fishman and Safer, above n 144, 439.
such as repressed, suppressed, altered and false memories, while still the subject of some academic debate, warrant concern. Their existence impacts the veracity of children’s evidence and the probative value of that evidence in the eyes of judges and juries. A child’s level of suggestibility and the damaging effects of confirmation and interviewer bias is a devastating combination that has the potential to exacerbate damage to the integrity of a child’s memory. The NICHD protocol provides guidelines for law enforcement officials and clinicians alike for more effective interviewing techniques with relation to children, in order to elicit the most information-rich and uncontaminated memories. While this is a positive step in the right direction, further studies need to be conducted in order to develop a conclusive and effective interviewing strategy for children.

This paper also evaluated the Eastwood and Patton Report for its insight into the inadequate and often ineffective treatment of children as witnesses in sexual abuse cases. The findings suggest the treatment of children as witnesses is not only inappropriate but can have negative implications on a child’s ability to categorically recount their testimony. Finally this paper assessed what would happen if the worst came to fruition – namely that somebody’s eyewitness testimony would result in an innocent person being sent to prison. While the evaluation of the Innocence Project did not exclusively focus on child witnesses, it demonstrates the issues with eyewitness testimony and its reliability irrespective of age. The issues and concerns about child witnesses will not go away as children are getting more involved in legal processes than ever before. There is no denying the positive steps that scholars and clinicians have taken in an attempt to understand the complexity of children’s memory. More work needs to be undertaken to ensure that the memories of children are not subsequently tampered with through voluntary or involuntary adult influence and are as reliable as they can be when in a court.
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