

## **The Validity of Repressed Memories as Evidence**

### **1. Introduction**

Is it possible for some life experiences to be so horrendous that our brain completely shuts them out, but then is able to recollect memories of them years later? Repressed memory, or dissociative amnesia, is a widely discussed topic that has caused disputation between psychiatrists. It is argued that sometimes when traumatizing events occur in our lives, our mind may choose to push this memory into an unreachable corner of the unconscious. It becomes an underlying basis on which psychoanalysis is built on. With the legislation changing throughout the years, the number of cases increased in which plaintiffs claim to have memories of childhood sexual abuse that have been repressed for many years. These plaintiffs sue their alleged perpetrators based on occurrences of twenty to forty years ago. Due to that, one may begin to ask questions in regards to how common such repressed memories of sexual abuse is, if jurors actually believe these claims, and if these memories can be even considered authentic. The 1990s were blooming with allegations of several repressed memory cases. In many instances, the plaintiffs claimed the recovery of such memories to be verifiable evidence of sexual abuse allegations. However, the history of repressed memory cases in accordance with the Daubert Standard and the Federal Rule of Evidence 702, demonstrate that repressed memories that were discovered with the help of a therapist cannot be considered valid in discovering the truth against the crime of sexual abuse.

### **2. Scope of this Paper**

This paper will discuss the validity of repressed memories as evidence in sexual abuse cases. Since many of these cases began when the plaintiffs went to therapy, it has become a question of scientific evidence of whether these memories should be admissible. The

admissibility of an expert's testimony as scientific evidence within the Daubert Standard and the Federal Rule of Evidence 702 sets out whether or not repressed memories will be admitted as verifiable evidence of sexual abuse. In addition, the discovery of methods used during therapy, such as hypnosis and sodium amytal, has made the authenticity of repressed memory cases very doubtful. The history of these rulings predicts that repressed memories do not serve as verifiable evidence. However, as there is much controversy over this topic, this paper will also discuss the possibility that a repressed memory case can be considered valid if corroborating evidence exists. Finally, indications will be made that it is not reasonable for repressed memories to be admissible. This paper will not discuss sexual abuse cases that did not arise out of recovered memories without therapeutic help.

### **3. Body of the Research Paper**

#### **3.1. The Daubert Standard and the Federal Rule of Evidence 702**

The admissibility of scientific evidence has always been questionable, but the Daubert Standard, which originates from Daubert v. Merrell Dow Pharmaceuticals, Inc.[FN1], contributed a rule of evidence that discusses the admissibility of a testimony of an expert witness. This standard gives a party the possibility to raise a Daubert motion. It is a motion in limine that can be raised either before or during a trial, which can lead to the exclusion of evidence to the jury because it was found unqualified. The Daubert Standard sets out that under the Federal Rule of Evidence 702, it is the trial judge's task to assure that the testimony of a scientific expert is based on actual scientific knowledge. This means that the trial judge is required to make certain "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." (Daubert v. Merrell Dow Pharmaceuticals, Inc.) The Daubert ruling has made requirements in the determination of what scientific knowledge is. This is important in

claims of recovered memories because of the manner these cases are handled in the courtroom. According to Rule 702, an expert witness's testimony becomes admissible if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (d) the expert has reliably applied the principles and methods to the facts of the case." [FN2]

### **3.2. Hypnosis and Sodium Amytal Considered as Inadmissible**

In 1992, the False Memory Syndrome Foundation (FMSF) was founded, which constructed a professional advisory board, provided information regarding the claims of recovered memories, the methods used to recuperate them, and set up scientific conferences. Of course, establishing such an organization was not going to sit well with recovered memory advocates. One main reason is because the foundation discovered that "nearly eighty percent of the complainants in both civil and criminal cases stated that their memories were recovered while they were in therapy." [FN3] Additionally, some of the repressed memories were developed with the help of hypnosis or sodium amytal. This is of significance because, according to People v. Shirley [FN4], memories that were enhanced through hypnosis are inadmissible in most jurisdictions since "hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable". (People v. Shirley) Furthermore, it has also been investigated that reality becomes distorted under the influence of sodium amytal. Due to this fact, the claims of plaintiffs who had taken this drug while in therapy "cannot be assumed to be literal and accurate representations of something that actually happened to those individuals". [FN5] The foundation's discovery received defensive responses that caught the media's attention. Not surprisingly, the debate about the facticity of recovered memory cases

often landed in the courtroom due to one party alleging to have recovered memories of childhood abuse and the other party denying that it committed it. So as one can see, the Federal Rule of Evidence 702 in regards to scientific evidence becomes relevant to such claims as it determines which party's claim has the strongest scientific knowledge, methodology, as well as technique according to the Daubert Standard.

### **3.3. Four Legal Postures**

An extensive amount of 200 cases with repressed memory cases have landed in appellate courts with rulings that were the cause for four legal posture. The first one is that “the discovery rules (i.e., the date a person discovers an injury) may not apply to recovered memory claims”.[FN6] Secondly, such claims don't extend the statute of limitations in the scope of a statutory disability. Thirdly, in order for the discovery rule to be applicable, independent corroboration is necessary. Lastly, before any extension of the statute of limitations can occur, a repressed memory theory has to be determined reliable. So, the Daubert Standard of scientific knowledge will often be applied to a recovered memory claim during a pretrial hearing on admissibility.

### **3.4. History of Rulings**

It can be reasonably foreseen which course such hearings will take due to past rulings. For example, in Tyson v. Tyson[FN7] the Washington Supreme Court did not find reason to extend the discovery rule to repressed memories. Reason for that is that the absence of “empirical, verifiable evidence exists of the occurrences and resulting harm”. (Tyson v. Tyson) The legal rationale behind that was that the when a victim's claim of repressed memories cannot be independently verified, then there is a great potential for false claims and the court's ability to determine the truth would become disproportionately low. Another case that rejected to extend

the discovery rule was Lemmerman v. Fealk[FN8]. Here, the Michigan Supreme Court found that it is rather challenging to resolve the matter fairly, “given the state of the art regarding repressed memory and the absence of objective verification.”(Lemmerman v. Fealk) It becomes obvious that many times claims of recovered memories are not successful due to the lack of scientific support. In Kelly v. Marcantonio[FN9], the Rhode Island Supreme Court found that the scientific reliability of repressed memory theories has to be determined before a trial or extension of discovery first. This means that “a trial justice, after hearing and considering expert medical and scientific evidence and opinion will, in the first instance, be in the best position to decide as a matter of law whether the alleged repressed recollection in a particular case is sufficiently relevant, reliable, and scientifically and/or medically established”. (Kelly v. Marcantonio) It is apparent that most courts will most likely want to have a judgment about the scientific status for a repressed memory case first. So, taking a look at all of the decisions made so far, it can be assumed that such testimonies are less likely viewed as reliable.

### **3.5. Mental Derangement to be Considered as Corroborated Evidence**

However, not every repressed memory case seems to be unsuccessful in finding the evidence as trustworthy. In Meiers-Post v. Schafer[FN10], the Michigan Court of Appeals held that in a case in which the survivor of sexual abuse has repressed memories, then he or she would be allowed to pursue their case in a civil suit up until one year after the memory revived. The court also found that this will only be provided if the alleged victim has corroborating evidence that would support their sexual abuse claim. If a plaintiff cannot provide corroborating evidence, then he or she is not able to seek restitution. In Meiers-Post v. Schafer, the plaintiff sued her former high school teacher for sexual abuse from 1970 to 1974. Here, the plaintiff’s memories of these events were provoked by a television show concerning sexual exploitation of

students by a teacher. Meiers-Post became conscious of what happened between her and her former high school teacher and then immediately sought psychotherapy which followed legal recourse. A letter of the plaintiff's therapist to the court stated that after viewing the television program the plaintiff became emotionally distressed and had symptoms that reinforced the diagnosis criteria for Post-traumatic Stress Disorder. This disorder often occurs to individuals who are not capable of processing trauma. As a consequence, it leads to the denial of the existence that the traumatic event ever took place. The victim learns how to avoid participating in activities or getting into situations that could possibly awaken memories of the event that causes the trauma. However, once the victim finds himself in a situation that is similar to the original trauma, the symptoms tend to arise, such as in this case when Meiers-Post watched the television show on sexual abuse. Having this disorder, gave the plaintiff the option to use the insanity exception to the statute of limitations which provides that "if a person is insane at the time her claim accrues, she has one year after the disability is removed to bring the action although the applicable period of limitation has run." (Meiers-Post v. Schafer) According to this clause, a person is considered insane if he suffers from a condition of mental derangement which hinders him from practicing rights that he is usually aware of. It is a decision for the trier-of fact to make of whether or not a person is insane for the purpose of the insanity clause. As a result, the judges found that Meiers-Post's Post-traumatic Stress Disorder was sufficient corroborating evidence that the sexual abuse did take place and, therefore, allowed Meiers-Post to proceed with the suit under the insanity clause.

### **3.6. Falsely Produced**

It has been argued that seeing a therapist, is the reason why the majority of these cases began in the first place and that that they produced false memories. If that is the case, then they

should not be considered as corroborating evidence. As mentioned earlier, the majority of these memories occurred when therapists either used hypnosis or a drug called sodium amytal. For instance, in Ramona v. Superior Court of Los Angeles County[FN11], the alleged victim, Holly Ramona, originally went to therapy for the treatment of bulimia nervosa. There were no suspicions of sexual abuse at all. Then, the therapist advised Holly's mother that in most cases of bulimics it was caused through sexual abuse. Holly was placed into group therapy in which sexual abuse was of discussion and began having flashbacks of her father abusing her. The therapist then referred to a psychiatrist who used sodium amytal, a drug considered to be a truth serum, in his interviews. Under the influence of the sodium amytal, Holly alleged to have been raped by her father. Both, the therapist and the psychiatrist, guaranteed her that under the influence of the drug her memories had to be real because the drug makes it impossible to lie. Holly Ramona then sued her father for childhood sexual abuse. However, "the record is undisputed she was uncertain in her belief before being interviewed while under the influence of sodium amytal and assured by her therapist she had not lied during the interview". (Ramona v. Superior Court of Los Angeles County) On appeal, the court found that the trial court couldn't have reasonably determined that Holly's memories were not produced during the sodium amytal interview. This concludes that a repressed memory, which had never been mentioned before therapy, may have never even existed in the first place and makes it also unreasonable to believe that a repressed memory should be solely used as evidence.

#### **4. Conclusion**

When considering the history of rulings on repressed memory cases of sexual abuse, the Daubert Standard, and the Federal Rule of Evidence 702, it becomes very evident that these cases have minimal veracity. Plaintiffs of the alleged sexual abuse are usually not able to provide

corroborating evidence that can prove such abuse has ever taken place, which also means that the discovery rule becomes inapplicable. Also, the alleged victims have not recovered memories until they were seen by a therapist and did so for reasons that were not in relation to childhood sexual abuse at all. The repressed memories were often enforced through hypnosis or sodium amytal, which can alter an individual's memories and makes a testimony in many jurisdictions inadmissible. Predominantly, this cannot be assessed as verifiable scientific evidence and, therefore, repressed memories are not valid evidence of sexual abuse.



**Footnotes**

FN1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

FN2. "Rule 702. Testimony by Expert Witnesses." LII / Legal Information Institute. Accessed December 10, 2015. [https://www.law.cornell.edu/rules/fre/rule\\_702](https://www.law.cornell.edu/rules/fre/rule_702).

FN3. "Recovered Memories in the Courts." False Memory Syndrome Foundation. Accessed December 20, 2015.  
<http://www.fmsfonline.org/?ginterest=RecoveredMemoriesInTheCourts>.

FN4. *People v. Shirley*, 723 P.2d 1354, 31 Cal. 3d 18, 181 Cal. Rptr. 243 (1982).

FN5. Piper Jr., August. "Amytal Interviews and 'Recovered Memories' of Sexual Abuse: A Note." IPT Journal. 1994. Accessed December 9, 2015. [http://www.ipt-forensics.com/journal/volume6/j6\\_1\\_3.htm](http://www.ipt-forensics.com/journal/volume6/j6_1_3.htm).

FN6. Underwager, Ralph, and Hollida Wakefield. "Recovered Memories in the Courtroom." IPT Journal. Accessed December 5, 2015. <http://www.ipt-forensics.com/library/memories.htm>.

FN7. *Tyson v. Tyson*, 727 P.2d 226, 107 Wash. 2d 72 (1986).

FN8. *Lemmerman v. Fealk*, 534 N.W.2d 695, 449 Mich. 56 (1995).

FN9. *Kelly v. Marcantonio*, 678 A.2d 873 (R.I. 1996).

FN10. Meiers-Post v. Schafer, 427 N.W.2d 606, 170 Mich. App. 174, 170 Mich. 174 (Ct. App. 1988).

FN11. Ramona v. Superior Court of Los Angeles County, 57 Cal. App. 4th 107, 66 Cal. Rptr. 2d 766 (Ct. App. 1997).