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Pitfalls in Testimony Involving Children's Memory

By

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The issue of children's memory is contentious. Some individuals assert that if a child says something, therefore it must be true. However, the research shows that this certainly is not the case. Human memory is not an exact recording of an event(s). For example, Kathryn Kuehnle's Child Sexual Abuse Evaluations in *Handbook of Forensic Psychology* (2007) notes that some research findings suggest a rate of false sexual abuse allegations ranging from 6-8% (Falor, 1991; Jones and McGraw, 1987). However, Ceci and Brook (1995) argue that these estimates are misleading and low, and that a more accurate estimate is 23-35% when other comprehensive criteria are included in the approximation (Poole and Lindsay, 1997). This writer proposes to evaluate children's testimony by objective guidelines established by the science.

The report from the research board of the British Psychological Society on guidelines on memory and the law (Recommendations from the Scientific Study of Human Memory, 2008), establishes guidelines derived from a review of the scientific study of human memory and a detailed consideration of the relevant legal issues, including the role of expert evidence. The guidelines are intended to be guidelines not absolute statements.

Key Points

Key points are:

1. Memories are records of people's experiences of events and not a record of the events themselves.
2. Remembering is a constructive process wherein there are mental reconstructions that bring together different types of knowledge and an active

remembering. Thus memory is prone to error and easily influenced by the recall environment, including police interviews and cross-examination in court.

3. Memories for experienced events are always incomplete. Memories are time compressed fragmentary records of experience. Any account of a memory will feature forgotten details and gaps, and this must not be taken as any sort of indicator of accuracy. Accounts of memories that do not feature forgetting and gaps are highly unusual.

4. Memories typically contain only a few highly specific details. Detailed recollection of the specific time and date of experience is normally poor as is highly specific information such as precise recall of spoken conversations. As a general rule, a high degree of very specific detail in long-term memory is unusual.

5. Recall of a single or several highly specific details does not guarantee that the memory is accurate even though it actually occurred. In general, the writers of the guidelines make the excellent point that the only way to establish truth of a memory is with independent, corroborating evidence. This is especially important in forensic assessments wherein third parties are interviewed.

6. People can remember events that they have not in reality experienced. This does not necessarily entail deliberate deception. For example, an event that was imagined with a blend of a number of different events or that makes personal sense for some other reason can come to be generally experienced as a memory, i.e., referred to as confabulations.

Memories for Traumatic Experiences, Childhood Events, Interviews, and Identification Practices

Memory in younger children, older adults, and other vulnerable groups all have special features. These features are unlikely to be commonly known by a non-expert but about which an appropriate memory expert will be able to advise the court.

Who Will the Guidelines Help?

Police: Interviewing vulnerable and intimidated witnesses requires particular care and skill. The problem for many interviewers is to extract a detailed, coherent, and succinct account from the witness for later use in court but at a point when the police may be at an early stage in their investigation or a need to explore what may later become peripheral issues.

The authors of the guidelines note that guidelines on questioning of children and vulnerable adults would be useful to help interviewers recognize what is a leading question and to ensure non-influence of a witness by a particular line of questioning.

Prosecutors: Usually the decision whether or not to prosecute lies with the prosecutor. This may require the district attorney to make an assessment as to the credibility of a witness or a complainant. The assessment process might involve reading statements, viewing a recorded interview, and considering other relevant information such as a Social Services' file or an opinion from a psychologist or a psychiatrist. Guidelines will be of assistance in this important decision-making process.

Defense Counsel: There is a duty when defending to explore all reasonable lines of defense. It is often the position that in cases of historic child sex abuse that the defense can do no more than say that the matters complained about simply did not occur. However, the guidelines offer an option in terms of further scrutiny of the complaints against the defendant.

The Court: The judiciary is understandably very supportive of the concept that in general jurors are able to make their own judgments upon factual issues based on their own collective experience. However, there are occasions when judges are required to warn juries about the need for caution; for instance, in relation to eyewitness ID. Expert witnesses can give expert evidence on the potential unreliability of evidence concerning childhood memory.

Child Care Proceedings

In this area of law, the courts in dependency hearings are more ready to admit memory evidence. In proceedings under the Children Act of 1989, there is frequently "finding of fact hearings" in which a judge has to determine whether a child has suffered or is likely to suffer significant harm. In such cases, the standard of proving such allegations is the civil standard, that is to say on a balance of probabilities. Memory evidence may be of assistance in the cases in which sexual abuse is alleged and where the court hearing would want to be able to draw on all available material in order to safeguard the welfare of the child. Memory evidence may help the court to understand how memories are laid down and what a child might or might not be expected to recall.

Adult Memory for Childhood

Adult recall of very early childhood experiences is subject to amnesia. Most adults can remember few memories for events experienced before about five years of age. When memories of events occur at an early point are recalled, individuals who recall typically describe their recollections as having to form a "knowing" in a general way rather than remembering specific details. What is interesting is that when adults recall their earliest memories, they frequently do not know whether what they have in mind is really a memory or something constructed from facts they have been told or based on photographs or mental representations based on family history. Children are more suggestible in this regard. Furthermore, most people remember little or nothing below the age of three, which is known as the period of childhood amnesia. A few memories can typically be recalled from when the individual was age three to five and more at age five to seven. However, it is not until the period of eight or older that many

memories can be recalled, and it is not until the age of about eight to ten that memories begin to feature the more typical structure content and organization of adult memories. Children's memories are less structured, less organized, and more fragmentary.

Characteristics of Childhood Memories

These memories are usually enigmatic in nature and feature only a few details. The information is isolated, not associated with other memories, and often perplexing to the individuals. Early childhood memories have been found to be much more open to suggestibility than later childhood memories.

Children below the age of five have many memories that cannot be recalled in adulthood.

The period from birth to five is characterized by rapid neurological development, especially the areas of the brain that in adulthood will control learning and memory. At the same time there is equally rapid acquisition of language and concepts. It is important to note that infants and young children have yet to acquire these concepts known to adults, including complex emotions such as guilt, embarrassment, and shame. Thus, it would not be possible for a child younger than five, for example, with the concept of embarrassment, to have an original memory that contained features labeled in those terms.

Guidelines and Rules of Thumb Suggested for Gauging Accuracy of Childhood Memories Recalled by Adults

1. Detailed and well-organized memories dating to events that occurred between five to seven years of age should be viewed with caution.
2. Detailed and well-organized memories dating to events that occurred between three to five years of age should be viewed with considerable caution.
3. All memories dating to the age of three and below should be viewed with great caution and should not be accepted as memories without independent corroboration evidence.

Children Recalling Autobiographical Memories

The writers of the guidelines note that recent studies of children remembering childhood memories found the following:

1. Older children aged eight and nine recalled about one-third of a set of events known to have been experienced and committed to memory at age three. Seven-year-olds recalled about 60% of these distinctive childhood events. This demonstrates considerable forgetting in the older group of children.

2. Older children recalled far more details of recent events than the younger children, indicating a more adult form of remembering from nine years onwards.
3. Six- to nine-year-olds recalled earlier memories than 10- to 19-year-olds, again showing forgetting in the older children.
4. Importantly, 10- to 19-year-olds recalled more negative events than the younger children. The implication being that younger children had difficulty in recalling negative experiences.

Authors of the guidelines note that the conclusion from this is that by approximately nine to ten children have autobiographical memories that are adult in nature.

The authors note that childhood memories recalled by children should not contain knowledge that the child would have had at the time. If they do, then this is knowledge that has been added in at a later date, although, of course, a child who has been sexually abused and is able to remember the abuse, may show knowledge of certain acts that few other children of their age would show.

Authors of the guidelines also note that recalling a memory of feeling guilty at say age three is almost certainly false, as children at this age have yet to develop this feeling or to learn the word guilty. Similarly, recalling duration of events, complex reasoning, thoughts, and details are most unlikely for events dating to below five to seven.

Retention Interval

The retention interval is the period of time elapsed between experience and recall. This highly affects durability of human memory. The main effect of retention interval is forgetting progressively. As the retention interval increases, progressively more information is lost until a memory is forgotten. Thus, to give an example, a person's recall of their breakfast this morning will be surprisingly good, tomorrow they will remember little, and next week almost certainly nothing at all. Factors such as stress and trauma accelerate memory decay.

Effect of Repeated Interviews

Rehearsal is one of the key mechanisms for retaining memories and knowledge. Talking and thinking about recalled experiences improves retention and confers resistance to forgetting. However, it should be noted that this is an especially important point or it should be noted that each instance of recall offers an opportunity for distortion and error to be assimilated to a memory and possibly incorporated in a long-term basis. The same can be said of repeated interviews and repeated questioning, which increases the possibility of error.

Vulnerable Groups: Children, Older Adults

- Errors in the memories of children:
- Memory illusions.
- Implanted (suggestions of memories).
- Memory and social factors underlie suggestibility.
- Deception, for example, three- and four-year-olds will lie to avoid punishment and get a reward or keep a secret in a game. Some lay persons, social workers, and legal professionals believe that children never lie, particularly about sexual abuse. Studies cited by the authors of the guidelines note that children can, in fact, lie about being touched.
- Repeated interviews and questions. Children are typically interviewed several times by numerous professionals and family members before a case gets to court. Repeated requests for information with an interview may signal to a child that their earlier answer was incorrect. Young children are especially prone to change their answers when questioned repeatedly and are often reluctant to say, "I don't know." This is particularly heightened when yes/no questions are asked.
- Detecting accuracy. Experts are unable to detect without additional evidence whether children's reporting of events is accurate or inaccurate and whether they are describing true or false events, yet one sees frequently that individuals take accounts of children complainants at face value. This writer argues that guidelines, such as outlined in this paper, and the science and research need to be considered before drawing such conclusions. Memory of complainants should be subjected to testing such as with any form of evidence, such as trace DNA.

Memory, Trauma, and Stress: Intrusive, Traumatic Memories from Posttraumatic Stress Disorder (PTSD)

Research suggests that in clinical cases the victim's memory for the trauma is likely to be fragmented into several key "hot spot" moments. Hot spots are defined by the writers of the guidelines as "the worst moments" for the person during the trauma and also those points that tend to come back as intrusive memories. While the hot spots are generally remembered as vivid and clear, they may be recalled in a jumbled order. Thus, while some parts of the trauma memory may be recalled consistently and detailed, the other parts will remain more vague, have some gaps, jumbled in order, and possibly contain inaccuracies. Some people incur head injuries during trauma, which can affect their memory but which may improve over time.

Some people dissociate during trauma, meaning that they spontaneously black out or switch off or dissociate from their bodies. Dissociation disrupts the trauma victim's ability to recall the entire event. This is particularly important in cases of aggravated

assault and sexual assault. The person with PTSD may have gaps in their memory for the traumatic event.

Interviewing Witnesses

Inappropriate questioning styles: These include frequently interrupting the witness, overalking on the part of the police, excessive use of closed yes/no questions, and inappropriate timing and sequencing of questions. These interrupt witness concentration, give little opportunity for the witness to give information not specifically requested, and encourage the witness to engage in ineffective and superficial searches of their memory.

Interrogative pressure: The interviewer may shift the witness's reporting of unwanted but perhaps accurate answers to untrue or distorted ones by the use of challenge (for example, "That's not right, is it?") and negative feedback, which can be explicit (for example, "We believe some of the information provided is incorrect.").

Assessment with the Gudjonsson Suggestibility Instrument

The Gudjonsson instrument provides an individual with a paragraph of information to retain. The examinee is then told that they have made errors and that they need to do better and that there will be a repeat presentation of the passage for memory. This writer's clinical experience as well as that of the research shows that suggestible individuals can be made to change their answers just as happens during police interviews with suggestive individuals.

External Sources of Information and Influence

There can be contamination through discussion when two people discuss their memories for an event. What one says can contaminate the other person's memory event.

Remembering as a Social Activity

Witness testimony is unusual as it emphasizes literal recall. People are more used to offering interpretations of past events when communicating and illustrating a set of values that are linked to activities such as blaming.

Susceptibility to External Information

Witnesses are likely to be more susceptible to incorporating external information into their memory increasing their uncertainty about the details in question. The longer the delay between witnessing an event and being interviewed, the more they trust the interviewer's motives and intentions and the more they believe they are expected to be able to recall what is asked of them.

Judgments About Witness Memory: Plausibility

Incomplete accounts are the norms in human memory and therefore do not indicate that memory is inaccurate. However, extremely coherent narratives, as noted by the writers of the guidelines, may also be indicative of prior preparation and rehearsal. This does not mean that description is intended to deceive or is inaccurate, but does suggest that memory may have been worked over and honed in retrospect. A comparative analysis of the accuser's initial statements versus later interviews can be helpful.

Witness confidence is not, by itself, a good indicator of memory accuracy. In particular, the writers of the guidelines note that providing witnesses with feedback confirming their statements leads to inflated witness confidence.

There are gold standards for investigative interviewing, such as the cognitive interview which emphasizes developing a rapport, witness participation, context reinstatement, reporting everything, varied recall, imagery, and social dynamics. This protocol has been extensively researched and found to significantly reduce error in questioning of witnesses (Lamb, 2008).

Conclusions

The goal of this paper is an exposition of objective guidelines on memory and the law from the scientific study of human memory by the research board of the British Psychological Society. These guidelines show that there are objective data to assess children's and witnesses' memories other than simply *prima facie* acceptance of them. The inaccuracies and vulnerabilities of special groups and of memories is an area deserving of greater attention.

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