

Supreme Court of Canada Addresses Admissibility of Posthypnosis Witness Evidence: *R. v. Trochym* (2007)

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In February of 2007, the Supreme Court of Canada issued its ruling in *R. v. Trochym*, a case in which the Court addressed the admissibility of posthypnosis witness testimony. The holding by a majority of five Justices establishes a presumption of inadmissibility for posthypnosis evidence that is very unlikely to be overcome. Although not a clear bar against this form of testimony, this ruling makes it extraordinarily difficult for such testimony to be admitted in the future. The authors discuss the case, the relevant empirical literature, and implications for the Canadian psychology community, including some general recommendations for improved integration of psychology and law.

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In February of 2007, the Supreme Court of Canada issued its ruling in *R. v. Trochym*, a case in which the Court addressed the admissibility of hypnotically enhanced witness testimony. The holding by a majority of five Justices establishes a presumption of inadmissibility for posthypnosis evidence that is very unlikely to be overcome. Although not a clear bar against this form of testimony, this ruling makes it extraordinarily difficult for such testimony to be admitted in future court cases. However, this ruling needs to be considered in the context of the empirical research on hypnosis and memory to understand how that evidence coheres with the Court's decision in *Trochym*. We will begin with a summary of the psychological literature on hypnosis and eyewitness memory, followed by a description of the case facts, lower court decisions, the Supreme Court decision, implications of the ruling, and general comments about integrating psychology and law.

Hypnosis and Eyewitness Memory

Hypnosis was traditionally a component or form of psychotherapy, but some practitioners and law enforcement officers proposed that hypnosis could facilitate memory recall. Indeed, several well-known cases seem to provide anecdotal evidence of its effectiveness (see Reiser, 1989). Although the first empirical studies did not support this notion, the idea that memory could be enhanced or refreshed through hypnosis persisted, and police departments began relying on this technique increasingly in the 1970s (Spanos, 1996). Concerns regarding the putative enhancing effects of hyp-

nosis and the possibility that hypnosis might actually compromise memory accuracy were raised (Orne, Soskis, Dinges, & Orne, 1984).

Numerous experiments have shed light on this question (e.g., Dinges et al., 1992; Dywan & Bowers, 1983; Neuschatz, Lynn, & Benoit, 2003; Whitehouse, Orne, Orne, & Dinges, 1991; Yuille & McEwan, 1985; for reviews, see Knight & Meyer, 2007; Laurence & Perry, 1988; Orne et al., 1984; Perry & Laurence, 1983; Reiser, 1989; Sheehan, 1988; Wagstaff, Brunas-Wagstaff, Cole, & Wheatcroft, 2004; see Steblay & Bothwell, 1994 for a meta-analysis), with some studies showing that hypnosis is associated with more information recalled, whereas others show no effects or even deleterious effects. Nonetheless, the sum of the research clearly indicates that hypnosis tends to produce memory errors.

There are a number of factors associated with understanding the relationship between hypnosis and memory. First, there are individual differences in hypnotizability/suggestibility (Silva, Bridges & Metzger, 2005), including proneness to fantasize. Suggestible people are more easily hypnotized, and they are more likely to make memory errors in the first place (Drivdahl & Zaragoza, 2001; Farvolden & Woody, 2004). Hypnosis induces a heightened state of suggestibility and lowers people's ability to scrutinize cognitively postevent information, making them more vulnerable to suggestion (Orne et al., 1984; Sheehan, Grigg, & McCann, 1984). Scoboria, Mazzoni, Kirsch, and Milling (2002) examined the influence of leading questions and hypnosis on memory recall and found that both contributed to memory errors, but that these two factors have an additive effect on memory performance such that in combination, they produce significantly more memory errors than when either of these is used alone.

Hypnosis can produce false memories (Laurence & Perry, 1983); of course, many studies have examined false memories in nonhypnotized eyewitnesses (e.g., Wade, Garry, Read, & Lindsay, 2002; see Loftus & Bernstein, 2005 for a review). False or distorted memories can be identified or reduced when individuals who have been previously hypnotized are offered a financial incentive for distinguishing between veridical and suggested in-

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formation (Murrey, Cross, & Whipple, 1992) and when the rapport between the hypnosis interviewer and the witness is minimised (Sheehan, Green, & Truesdale, 1992). Another factor that can help witnesses distinguish between veridical and suggested reports is cross-examination (Spanos, Quigley, Gwynn, Glatt, & Perlini, 1991). However, there are also a number of studies that demonstrate the difficulties of reversing pseudomemories once they are produced (e.g., Green, Lynn, & Malinoski, 1998), so the mechanisms above are certainly not fail-safe. Indeed, in one study, even when witnesses were warned about the possibility of false memories emerging during the hypnosis session, most witnesses confidently reported these pseudomemories (Green et al., 1998; see also Weekes, Lynn, Green, & Brentar, 1992).

Contextual factors are important considerations in the creation of false memories (Porter, Birt, & Yuille, 2000) and in the context of hypnosis (Orne et al., 1984). Witnesses who expect that hypnosis should enhance their memory anticipate remembering more and feel compelled to report more. Moreover, hypnotists typically adopt an uncritical, open-minded, accepting approach with witnesses, making it easier for witnesses to report more information (Spanos, 1996). Thus, the expectations of the interviewer play a role in reporting pseudomemories, including those that emerge after hypnosis (Spanos, Burgess, Cross, & MacLeod, 1992).

An additional complicating factor is that it is difficult for observers, hypnosis experts, witnesses themselves, or anyone else to distinguish original reports from those generated at a hypnosis session. As Whitehouse and colleagues (1991) pointed out, "beliefs about one's own hypnotic skills and the nature of expectations concerning the efficacy of hypnosis for memory enhancement may coalesce to further degrade a person's ability to distinguish between hypnotic and non-hypnotic recall" (p. 58). Witnesses subjected to hypnosis are more confident in their memory performance than witnesses who have not been subjected to hypnosis; perhaps unsurprisingly, these confidence judgements are unrelated to accuracy (Laurence & Perry, 1983; Sheehan & Tilden, 1983; Whitehouse, Dinges, Orne, & Orne, 1988; Zelig & Beidleman, 1981).

Pseudomemories are not limited to those who have been hypnotized; they are generally products of a situational context involving suggestions (Weekes, Lynn, Green, & Brentar, 1992). Spanos and McLean (1986) maintained that these false memories are far more a function of reporting biases than memory distortions. Postevent information in the form of suggestions will impair memory performance both within and outside hypnosis. Several studies have shown that false information provided before hypnosis is incorporated comparably by both individuals who undergo hypnosis and those who do not (Sheehan, 1988; Sheehan & Tilden, 1983).

Wagstaff, Brunas-Wagstaff, Cole, and Wheatcroft (2004) pointed out that hypnosis may also be a face-saving mechanism. There are a whole host of reasons why witnesses may not disclose (or fully disclose) the events they witnessed or experienced, including embarrassment or perceived responsibility for the incident, fear of reprisal for reporting to police, or unwillingness to disclose frightening or distasteful acts. Thus, hypnosis or other techniques characterised as memory-enhancing may provide "permission" to witnesses to provide more detailed, complete accounts. Of course, as detailed below, the *Trochym* decision would make it difficult to allow this subsequent testimony as trial evidence, but it may assist

in the investigation of the crime, particularly if the additional information can be corroborated by forensic evidence.

A final piece deals with how the memory reports are used. Juries tend to overestimate the effectiveness of hypnosis as a memory-enhancing tool and do not appreciate its limitations (Knight, 2005). Jurors also tend to overestimate eyewitness accuracy, even when reports have been produced in part through hypnosis (Coleman, Stevens, & Reeder, 2001). In fact, one study showed that mock jurors found testimony from an eyewitness who was previously hypnotized to be more believable than jurors who were told that the witness had undergone a guided memory procedure (or none; Wagstaff, Vella, & Perfect, 1992). Although there are some indications that objective evaluators can have some success at identifying pseudomemories at a rate better than chance (see, e.g., Campbell & Porter, 2002), the findings in this area are generally not promising.

Summary of Case Facts

The victim, Donna Hunter, was found dead around 11 p.m. on Friday, October 16, 1992. Forensic analysis determined that Hunter had been killed by multiple stab wounds to her throat in the early hours of Wednesday morning (between 1 a.m. and 5:20 a.m.) and that her body had been repositioned about 8 to 12 hours later, presumably so that the murder would appear to have been sexually motivated. The investigators concluded that only the killer would have repositioned the body. Aside from the body having been moved, there was no evidence of sexual assault. Given the repositioning of the body, that there were no signs of a break-in and that nothing valuable was missing, police concluded that it was not likely that a stranger had committed the murder.

At trial, witness City Haghnegahdar testified that she had been up studying and had heard someone pounding on Hunter's door between 1 a.m. and 2 a.m. on Wednesday, October 14. After hearing Hunter yell and refuse entry, followed by additional banging, she heard the door open, followed by a conversation. Both people then entered the apartment and closed the door behind them. The forensic evidence strongly suggested that the person pounding on the door was Hunter's killer.

The investigation yielded no potential suspects with a motive to murder Ms. Hunter other than Steven John Trochym. The two had dated for about 10 months. Multiple witnesses testified that Trochym was very possessive, and several testified that he was both verbally and physically abusive toward Hunter. Evidence suggested that Hunter had been trying to break up with Trochym on Tuesday, October 13. The two were seen at several different bars on that evening, and witnesses testified to having seen Hunter attempting to ignore Trochym, and he unsuccessfully trying to vie for her attention, for example by trying to put his arm around her, and she pulling away from him. Trochym testified that Hunter was upset that evening because of money and family problems, an assertion that was contradicted by the testimony of a number of witnesses presented by the Crown. The Crown's evidence also illustrated that Trochym had the opportunity to commit the crime; he had been seen returning to one bar without Hunter, and was refused service at that bar at about 12:30 a.m. If he had travelled back to Hunter's apartment after that, the half-hour drive would have placed him there at the time of the banging and argument incident at 1 a.m.

Ms. Haghnegahdar testified at trial that she had seen Trochym leaving the apartment at about 3 p.m. on Wednesday, October 14, the afternoon after the murder (but before Hunter's body was discovered on Friday). When the police first interviewed her, she said she had seen him at about 3 p.m. on Thursday, October 15 (also before Hunter's body was discovered). Police requested that Ms. Haghnegahdar undergo hypnosis to improve her memory, and it was only after being hypnotized that she reported seeing him on Wednesday (not Thursday), which would have placed him at the scene of the crime at a time that would have been consistent with the forensic conclusion that the body had been repositioned 8 to 12 hours after the murder. Thus, despite her initial claim, Ms. Haghnegahdar testified that she saw the defendant leaving the victim's apartment on Wednesday, October 14, rather than Thursday, October 15. Trochym said that he had been back to the building (but not the victim's apartment) on Wednesday, October 14, to retrieve his car, and the building superintendent confirmed that he let Trochym into the underground parking garage on Wednesday, October 14.

There was also evidence on record as to Trochym's behaviour shortly after the murder. Co-workers noted that he had behaved very strangely on the days after the murder, and Trochym also had a number of arguably suspicious interactions with police investigators, including his refusal to attend a second meeting with investigators because of prior commitments of a haircut appointment and a darts game.

Lower Court Proceedings

In Trochym's trial for second degree murder, the Ontario trial judge held a lengthy *voir dire* involving testimony by three experts before determining that the posthypnosis evidence was admissible and that it would be a jury determination as to the weight that would be attributed to that evidence. The judge's admissibility analysis was based on a (formerly) leading case on the issue from Alberta, *R. v. Clark* (1984), which laid out guidelines for evaluating the admissibility of posthypnosis witness evidence: (a) the hypnosis interview should be conducted by a qualified individual with training in both hypnosis and psychiatry or psychology, (b) the hypnosis interview should be conducted by an independent hypnotist (i.e., generally, police hypnotists should be avoided), (c) that the hypnotist be given only the most basic, minimal necessary information, (d) the hypnosis interview should be recorded, (e) only the subject and the hypnotist should be present, (f) there should be a prehypnosis interview, (g) there should be a prehypnosis description of fact and anything new uncovered after hypnosis must be corroborated, and (h) the hypnotist should carefully attend to interview questions so as to avoid leading questions, suggestive body language, and other potentially biasing interview techniques.

After the admissibility decision, Trochym and the Crown agreed that there would be no cross-examination of the witness regarding her previous statements to police if the Crown did not mention that she had been hypnotized. The trial judge accepted the agreement. Therefore, the witness Haghnegahdar testified and the jurors were not informed: (a) that she had been hypnotized, (b) that her memory had changed after hypnosis, or (c) that experts had disagreed about the reliability of posthypnotic memory. The jury did

not hear any expert testimony about the reliability of posthypnosis memory. Trochym was found guilty of second-degree murder.

The Ontario Court of Appeal denied Trochym's appeal and declined to make a categorical bar against all posthypnotic testimony. In the opinion, written by Judge MacPherson, the court determined that posthypnosis evidence should be analysed on a case-by-case basis for its admissibility and that the trial judge had properly exercised discretion in making the original admissibility decision. The appeal court also held that the decision of the trial judge had been proper when he allowed the agreement between the parties about the absence of cross-examination on the issue of hypnotically enhanced memories.

The Supreme Court of Canada Decision

The Supreme Court allowed Trochym's appeal and ordered a new trial. The majority opinion was written by Justice Dechamps who was joined by Justices McLachlin, Binnie, LeBel, and Fish. Justice Charron issued a concurring opinion (i.e., she agreed with the majority decision, but for different reasons which she set out in her opinion), and Justice Bastarache issued a dissenting opinion that was joined by Justices Abella and Rothstein.

The majority noted problems with the *Clark* analysis and essentially concluded that those criteria are inadequate for making a proper admissibility decision with regard to posthypnosis witness evidence, because that evidence suffers from reliability problems and the *Clark* criteria assume that posthypnosis evidence is legally reliable. Bear in mind that the legal meaning of the concept of "reliability" in this context is broader than the meaning of this concept in psychology (i.e., consistency, replicability). The legal meaning of reliability is similar to the psychological concept of validity. Below, where we have used the term 'reliability,' we are referring to the more general meaning of its usage in law. "While [the *Clark* criteria] play an important role in limiting possible exertion of influence during a hypnosis session, the guidelines are problematic in that they are based on an assumption that the underlying science of hypnosis is itself reliable in the context of judicial proceedings. Reliability is an essential component of admissibility." (p. 26). On this point, the majority relied in part on another leading case, *R. v. Taillefer* (1995). In that case, the Quebec Court of Appeal ruled that the trial judge had erred in not allowing the defence to challenge the reliability of hypnosis as a memory aid.

The majority opinion discussed specific problems with the reliability of posthypnotic testimony in their analysis of the admissibility of that testimony. Regarding the admissibility analysis, the majority relied on two key cases, *R. v. Mohan* (1994) and *R. v. J.-L. J.* (2000), both of which are explained below. The majority acknowledged the importance of the *R. v. Mohan* (1994) analysis, but also performed an *R. v. J.-L. J.* (2000) analysis on posthypnosis evidence. The use of a *J.-L. J.* analysis in this context was of major concern to the dissent for reasons we summarise below. *J.-L. J.* is essentially an extension of *Mohan* that elaborates more specific criteria for evaluation of novel scientific evidence in an admissibility decision.

A *Mohan* admissibility analysis involves four basic factors: (a) relevance (is the evidence related to fact determination?); (b) necessity (will the evidence assist in the factual determination?); (c) absence of an exclusionary rule; and (d) qualification of the expert. *J.-L. J.* was an extension of *Mohan* based on the U.S. case

Daubert v. Merrell Dow Pharmaceuticals (1993) and its progeny. “In *J.-L. J.* the Court went a step further, establishing a framework for assessing the reliability of novel science and, consequently, its admissibility in court . . . *J.-L. J.* is particularly helpful for the purpose of drawing a distinction between the efficacy of hypnosis as a therapeutic tool and its utility as a forensic tool” (*R. v. Trochym*, p. 30–31). There are four elements to a *J.-L. J.* admissibility analysis: (a) whether the technique can be tested, (b) whether the technique has been subjected to peer review and publication, (c) the known or potential error rate of the technique, and (d) whether the technique/theory has attained general acceptance.

The *Trochym* majority concluded in its analysis that it is difficult to determine whether the technique can be tested since laboratory research is difficult to apply to a specific instance of hypnosis. However, they did note that there was some agreement among the experts in this case as to the outcomes from hypnosis. “The findings of laboratory studies may not, therefore, be particularly applicable to the area of forensic hypnosis. However, it is significant that, despite their disagreement on other issues, all the experts in this case testified that while hypnosis can result in the subject’s remembering a larger number of details, these will include both accurate and inaccurate information” (p. 32).

As to whether the technique has been subjected to peer-review and publication, the majority found that “even the most superficial examination of these commentaries reveals that much of the substance of the testimonies of the experts heard at trial is supported by the abundant discussions found in the legal literature. The question whether the technique has been subjected to peer review and publication can thus be answered in the affirmative . . . In sum, while it is not generally accepted that hypnosis *always* produces unreliable memories, neither is it clear when hypnosis results in *pseudomemories* or how a witness, scientist, or trier of fact might distinguish between fabricated and accurate memories” (p. 32–33, emphasis in original).

With regard to the known/potential error rate, the majority’s analysis was that the potential error rate for hypnosis is high, noting that the error rate is related to three key factors: risk of confabulation, that critical faculties for evaluating the veracity of information are absent under hypnosis, and that “memory hardening” or overconfidence is known to occur after hypnosis. This last factor was noted to be particularly problematic in light of the first point about confabulation; the majority noted that it is troublesome that hypnotized individuals may produce some inaccurate information after hypnosis, especially so given that their confidence in such faulty information is likely to be high (because of the memory hardening effect), and that experts and laypersons alike are not able to reliably distinguish between accurate and inaccurate posthypnotic memories. “Hypnosis introduces more sources of concern and a likelihood that existing fragilities of human memory will increase, tainting the reliability of the evidence. Furthermore, the frailties of human memory when unaffected by hypnosis are only just starting to become known; indeed, the fallibility or eyewitness identification has been a central concern in a number of inquiries into wrongful convictions.” (pp. 35–36).

To evaluate general acceptance, the majority used an analysis of legal precedent on the admissibility of posthypnosis evidence. The majority looked to jurisdictions outside of Canada for its determination, including the United Kingdom, but referred primarily to legal decisions from the United States. Two main trends in U.S.

legal decisions were identified: (a) presence of hypnosis goes to weight of the evidence, not its admissibility; and (b) posthypnosis evidence is unreliable and should be excluded. “In sum, it appears that the use of hypnosis in the judicial context has both its supporters and opponents, but that the general tendency is to be extremely cautious in dealing with posthypnosis evidence. This debate may continue until significant advances are made in the science of hypnosis, or until our understanding of human memory improves significantly” (p. 39).

The majority made a legal analysis of the ‘gap between *Clark* and *J.-L. J.*:’

When the factors set out in *J.-L. J.* are applied to hypnosis, it becomes evident that this technique and its impact on human memory are not understood well enough for posthypnosis testimony to be sufficiently reliable to be used in a court of law. Although hypnosis has been the subject of numerous studies, these studies are either inconclusive or draw attention to the fact that hypnosis can, in certain circumstances, result in the distortion of memory. Perhaps most troubling is the potential rate of error in the additional information obtained through hypnosis when it is used for forensic purposes. At the present time, there is no way of knowing whether such information will be accurate or inaccurate. Such uncertainty is unacceptable in a court of law . . . the *Clark* guidelines do not address the problems of confabulation and memory hardening, or the reality that hypnosis may compromise the right of cross-examination, thereby prejudicing an important instrument in the trial process. Experts appear to agree that neither the experts nor the individuals who have undergone hypnosis can distinguish confabulated memories from true memories. This is problematic for counsel cross-examining the witness at trial, because it will be impossible to challenge the witness on the veracity of his or her memory, except insofar as a posthypnosis memory is inconsistent with a prehypnosis statement (pp. 40–42).

So, the majority holding established a presumption of inadmissibility for posthypnosis witness evidence in Canada. “In sum, it is evident, based on the scientific evidence on record, that posthypnosis testimony does not satisfy the test for admissibility set out in *J.-L. J.* While hypnosis has been the subject of extensive study and peer review, much of the literature is inconclusive or highly contradictory regarding the reliability of the science in the judicial context. Unless a litigant reverses the presumption on the basis of the factors set out in *J.-L. J.*, posthypnosis testimony should not be admitted in evidence.” (p. 43). This presumption does not preclude admissibility of posthypnosis evidence, but the presumption must be overcome to have this form of testimony admitted. This is less than a clear bar against posthypnotic testimony. However, posthypnosis evidence is not likely to be admitted in the future unless there are major strides in research supporting its use, which seems very unlikely given the state of knowledge about hypnosis that we summarised above.

The majority did conclude that evidence not covered during a hypnosis session may be admitted, and they defined specific guidelines and restrictions for the use of such evidence. The trial judge must weigh the probative value of such testimony against the potential detriment of hypnosis, and the judge must mention the potentially problematic nature of such testimony and instruct the jury regarding the weighting of that testimony given its limitations.

In her concurring opinion, Justice Charron agreed with the majority that parts of testimony that were not subject of hypnosis should be admitted, but did not agree with the holding about

requiring special instructions (she would have left that to the discretion of the trial judge). She also argued that the trial judge should have discretion to admit posthypnosis testimony that is based entirely on prehypnosis memory, evidence that the majority holding now presumes inadmissible. Her view was that whereas hypnosis can cause problems with all posthypnosis recall, establishing the prehypnosis basis of evidence is ‘sufficient rehabilitation’ for the purpose of admissibility. According to Justice Charron, when posthypnosis evidence is admitted, the trial judge should have discretion as to whether expert evidence and/or special instructions to the jury are required.

In the dissenting opinion, Justice Bastarache (joined by Justices Abella and Rothstein), argued that posthypnosis evidence should not be excluded. His view was that the present case does not warrant change to the long-standing common law rule regarding admissibility of hypnotically enhanced witness testimony, in part because *Trochym* raised this issue only on appeal but also because there was no direct evidence to challenge the rule. In the dissent’s view, the sole evidence for challenging the rule was a handful of cases from the U.S. in jurisdictions that have opted for a categorical bar against such evidence, and that evidence is insufficient to warrant a change in the admissibility rule for posthypnosis evidence. He argued that complete exclusion of this type of evidence can deprive the trier of fact of probative evidence, resulting in miscarriages of justice. Bastarache asserted that a case-by-case analysis should be the rule regarding admissibility of posthypnosis evidence, and concluded that the trial judge made a proper analysis of the evidence and did not make an error in deciding to admit it.

The dissent also took issue with the majority’s use of *J.-L. J.* for evaluation of posthypnosis evidence. According to the dissent, making a novel science analysis of hypnotically enhanced evidence creates problems. Bastarache noted that this form of evidence has been used in Canada for almost 30 years and is therefore not novel science; therefore, with this *Trochym* precedent, in the future, other forms of established evidence may be subjected erroneously to a novel science analysis. He argued that the *J.-L. J.* novel science test was not intended as new law upon which all previously established forms of evidence must now be re-evaluated, it was intended as a framework for analysis of new techniques for their admissibility.

The dissent also had a problem with the form of the majority’s *J.-L. J.* analysis. Bastarache asserted that the general acceptance standard is not meant to be a “total unanimity” standard, and that reliance on experts from American cases is not proper, in part because this does not allow for proper cross-examination of experts. In the dissent’s view, judges should not take judicial notice of expert evidence from other cases. The dissent argued that human memory is problematic, and this is the case with both regular memory and hypnotically enhanced memory; therefore, posthypnosis evidence should not be excluded since nonhypnosis memory evidence is admitted and it is also less-than-perfect. The dissent asserted that judges and juries are able to weigh the risks associated with memory evidence, whether posthypnosis or otherwise.

The dissent also took issue with the majority’s characterisation of the trial judge’s admissibility decision. Rather than relying solely on the *Clark* guidelines, the dissent highlighted aspects of the trial judge’s decision that illustrated that it had not been dogmatic adherence to *Clark*, but that it had also included consideration of the general reliability of the posthypnosis evidence.

With regard to the specific case facts in *Trochym*, the dissent noted that the only discrepancy between the witness Haghnegahdar’s pre- and posthypnosis memory was the day of the event; this point does not change the significance of her testimony. The dissent noted that two other witnesses placed *Trochym* at Hunter’s apartment building on Wednesday, evidence which (the dissent argued) corroborated Haghnegahdar’s posthypnosis recall of having seen *Trochym* on Wednesday (and not Thursday, as she had originally told police). Justice Bastarache argued that excluding Haghnegahdar’s testimony entirely based on that one specific point that was “clarified” through hypnosis is contrary to the truth-seeking objective of the court:

This means that she will be unable to testify at retrial about seeing the accused coming out of Ms. Hunter’s apartment at a time when forensics determined Ms. Hunter would have already been dead, but before her body was discovered by authorities. This is highly probative evidence for the Crown’s case as it supports the “staging” argument, contradicts the appellant’s testimony that he never went back to the apartment and, at the very least, signifies that he knew she had been brutally murdered and yet took no action. The only aspect of this testimony that was refreshed through hypnosis was the day the sighting occurred. However, as noted by the trial judge, whether the sighting occurred on the Wednesday or Thursday does not change the significance of the evidence. Therefore, to exclude all of the evidence when only this point was clarified through hypnosis, strikes me as an inflexible and disproportionate solution. The goal of the court process is truth seeking, and a just result is best achieved when all relevant and probative evidence is put before the jury (p. 86).

The dissent also concluded that the evidence against *Trochym* was overwhelming and therefore there was no reasonable possibility that the verdict would have been different if the similar fact evidence had been excluded. In other words, the dissent concluded that, even if the posthypnosis evidence was erroneously admitted, that it was a harmless error.

The normative conclusions reached by the members of the Court are, strictly speaking, independent of the empirical evidence related to hypnosis and memory. The different views espoused by the majority, the concurrence, and the dissent were all based on different analyses of common, well-founded understanding regarding the scientific findings with regard to hypnosis. Generally, the Court’s reasoning was based on an accurate characterisation of the scientific findings with regard to hypnosis as a memory aid. As the majority noted, hypnosis can lead to confabulated memories and memory hardening, and neither laypersons nor experts can distinguish reliably between bona fide and problematic content in posthypnosis memories.

Implications of the *Trochym* Ruling

The *Trochym* ruling essentially means any evidence that is covered during a hypnosis session will be considered tainted. The presumption of inadmissibility is very unlikely to be overcome given the state of knowledge about hypnosis and memory and the bleak prospects for future research supporting hypnosis as a tool for eliciting new, bona fide memories. While topics not covered during a hypnosis session may still be admitted, the trial judge has discretion as to whether such evidence should be admitted, and must warn the jury about the potentially biasing effects of hypnosis. In other words, hypnosis will trigger heightened scrutiny of

evidence not covered during the hypnosis session. There is also a possibility that witnesses who are motivated to avoid testifying might seek out hypnotherapy as means of trial avoidance. We recommend that police, and the psychologists who work with police, should avoid using hypnosis with any witness who they believe may provide evidence that would be useful at trial.

Police interviews with eyewitnesses should, of course, be conducted with great care. The data support the often-repeated recommendation that eyewitnesses should be interviewed first using free recall techniques and in a nonleading manner. The subject matter of subsequent interviews should be directly linked to the original report and the interview should be conducted with the same care to avoid contamination that a forensic investigator would use when gathering physical evidence (see Wells & Luus, 1990).

The state of the science indicates that hypnosis is a problematic memory-enhancing technique. Consistent with the social scientific literature, the *Trochym* decision should compel law enforcement departments to rely on other techniques. One approach is the Cognitive Interview (Fisher & Geiselman, 1992), which is essentially a “tool box” of interviewing strategies that is grounded in principles of memory, cognition, and communication. Although the Cognitive Interview may produce more memory errors (Memon, Wark, & Holley, 1997), most studies demonstrate that the Cognitive Interview enhances memory recall and produces accuracy rates that are comparable to, or better than, typical police interviews (Fisher, Brennan, & McCauley, 2002; Granhag, Jonsson, & Allwood, 2004; for a meta-analysis, see Köhnken, Milne, Memon, & Bull, 1999). Moreover, the use of the Cognitive Interview has been challenged in court in both the U.S. and the U.K., but none of these challenges have been successful (R. Fisher, personal communication, March 18, 2008).

In a general sense, it is important for clinical psychologists and other mental health service providers to be aware of the potential legal implications of their work. Those who use hypnosis as an aspect of therapy might consider different techniques. It is difficult to predict future involvement in legal proceedings, so it makes sense for therapists to use hypnosis cautiously since those who have been hypnotized will subsequently be tainted in terms of the Canadian legal system. Of course, it is also generally important for practitioners to stay abreast of recent research developments to help inform their practice. The research on hypnosis and memory clearly indicates the distortions that may arise as a function of hypnosis. Considering that memory hardening is also likely after hypnosis, hypnosis should be used sparingly and with caution.

Integrating Psychology and Law

The *Trochym* decision is a clear illustration of how psychology may be applied in legal contexts. The case involved psychological research on hypnosis and memory, as well as clinical hypnosis used with a specific eyewitness, and therefore gives examples of how the legal system utilised both empirical research findings as well as case-specific clinical practice. The decision brings into relief some of the distinctions between law and psychology in terms of objectives, methods of inquiry, and language. Psychologists whose work brings them in contact with the law must be careful and specific regarding the meaning of language. This point is highlighted in the *Trochym* decision, where the difference be-

tween the legal meaning of the term “reliability” and the common usage of that term in psychology is abundantly clear. This is a case-in-point example of the important differences between psychology and law that could easily be overlooked by a psychologist who does not have much experience with the legal system.

Another aspect of the *Trochym* decision that raises important, general issues for psychologists is the admissibility analysis. The 1993 ruling by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* ushered in a new era of admissibility analyses for scientific evidence (see, e.g., Dixon & Gill, 2002; Faigman, 1995; Groskopf et al., 2002). Seven years later, the Supreme Court of Canada followed suit by adopting a close parallel to the *Daubert* criteria in *J.-L. J.* (2000). A general analysis of the implications of the *J.-L. J.* and *Daubert* decisions is beyond the scope of this paper, but it is worth noting that psychological evidence is likely to be more often subjected to this type of analysis after *Trochym*.

Looking specifically at the evaluation of psychological research in the *Trochym* decision, it is clear that the law approaches research in a different way than psychology. For one, the law relies on expert witnesses to present research findings. Psychologists would typically search out and digest original research findings, meta-analyses, and the like to develop an understanding of research evidence on a particular topic. The Canadian courts, however, look to experts to summarise the state of knowledge with regard to a particular content area. Therefore, the methods of inquiry used by the legal system and by psychology differ with regards to developing an understanding of the state of scientific knowledge.

Furthermore, as evidenced by the majority’s *J.-L. J.* analysis with regards to the “general acceptance” of hypnosis evidence, it is clear that the legal inquiry differs from what most psychologists would expect. Rather than looking to the research literature to determine what the scientific community has concluded about hypnosis, the majority examined prior *legal precedent* with regards to admissibility decisions regarding hypnosis evidence, and made reference to the *legal literature* on the topic. In addition to highlighting clear differences between psychology and law in terms of language and method of inquiry with regards to general acceptance, this decision raises a more general consideration for psychologists: if psychology is to be accurately and appropriately applied in legal contexts, it behoves psychologists to disseminate research directly to legal practitioners and scholars. Legal professionals are not likely to search psychology literature for primary-source research findings, and even if they did, it is likely that the technical aspects of psychological science would be largely inaccessible to them because they normally lack the training and background in psychological research methodology. Some forward-thinking on the part of psychologists can help pave the way for scientifically supported legal decisions in the future. Psychologists should occasionally publish their work in outlets whose readership consists of legal practitioners and scholars (e.g., The Advocates Quarterly, Judicature, Court Review), and present findings at conferences attended by lawyers and judges, looking beyond the more traditional outlets that are oriented primarily toward other psychologists.

Psychology has much to offer the legal system. Clinical forensic psychologists work in settings such as prisons and jails, and testify regularly in legal proceedings on a host of issues including risk assessment and competence. Psychological research can inform

legal decision making, as is evidenced indirectly in the *Trochym* decision (see also *R. v. Oickle*, 2000, for an example of psychological research cited in a Supreme Court of Canada decision). Psychology can also be used as a basis for research and reporting by legal institutions that may then be used to drive legal decision making and policy reform. One notable example is the influential Thomas Sophonow Inquiry (Cory, 2001), which has formed the basis for changes in police practices and has been cited in a number of Supreme Court of Canada decisions, including *Trochym* (e.g., *R. v. Hibbert*, 2002). In addition, psycho-legal research has the potential to inform specific legal issues if the legal standards are fully articulated and addressed in a careful and systematic manner through empirical research (Schopp & Patry, 2003). Of course, for psychological research to be taken seriously by the legal system or any other public policy institution, it is critical that research be programmatic and high in external validity. Courts have been sceptical of social science findings that rely primarily on laboratory research, expressing concerns regarding mundane realism and generalizability (e.g., early criticisms of the eyewitness identification literature applied to the legal context). Indeed, the *Trochym* majority opinion referred to the questionable applicability of laboratory findings with regards to hypnosis.

The *Trochym* decision is an excellent example of the ways in which psychology and law differ, and how psychology is applied in law. In addition to the specific implications from this case with regards to witness hypnosis, an analysis of the case offers some guidance for psychological researchers and practitioners for future interactions between psychology and law, and hopefully better-integrated application of psychology in the law.

Résumé

En février 2007, la cour suprême du Canada a livré sa décision dans le dossier *R.v. Trochym*, où la Cour a dû se questionner sur l'admissibilité du témoignage d'un individu en état post-hypnotique. La décision d'une majorité de cinq juges établit une présomption d'inadmissibilité des témoignages post-hypnotiques dont le renversement est peu probable. Même s'il ne s'agit pas d'une barrière nette contre cette forme de témoignage, cette décision rendra l'admission de ce type de témoignage très difficile dans le futur. Nous discutons du dossier, de la littérature empirique pertinente et des implications pour la communauté psychologique canadienne, en incluant quelques recommandations générales pour une meilleure intégration de la psychologie et la loi.

Mots-clés : hypnose, preuves, loi, psychologie et loi, psychologie médico-légale

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