

RECOMMENDATIONS FOR THE FORENSIC EVALUATION OF THE TESTIMONY IN CASES OF FALSE MEMORIES

RECOMENDACIONES PARA LA EVALUACIÓN FORENSE DEL TESTIMONIO EN CASOS DE FALSAS MEMORIAS

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Abstract

Different court cases from the 1980s known as the 'daycare abuse cases' are reviewed. In these cases, the alleged victims were interviewed with suggestive questioning, resulting in likely false memories and wrongful convictions. In addition, an Italian case in which a therapist has recently been convicted related to false memory controversy is discussed. Specifically, the therapist was convicted for implanting false memories of sexual abuse in an adolescent by using suggestive techniques to 'recover' memories that he considered repressed in the unconscious. To contribute to the

prevention of such cases, a revision of recommendations for the improvement of the forensic evaluation are presented. These recommendations constitute a compilation of those that are being proposed in European countries when assessing court cases in which false memories may have been potentially implanted. Thus, we recommend using an alternative scenario building approach, in-depth analysis of the disclosure context and involvement of an additional expert to act as a reviewer of the report. In addition, a review of recommendations designed to improve the drafting of expert reports is included. All of these recommendations would contribute to the reduction of cognitive biases that may affect judgements both before and during the assessment. The

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implications that adopting these recommendations could have for both the justice system and the individuals are included, such as the reduction of wrongful convictions. Finally, it is highlighted the need for the creation of spaces in which to assist victims of false memories. Additionally, it is highly recommended the foundation of expert committees which could assist courts in equivocal cases, in which possible suggestive influences are detected.

Keywords: false memory; expert witness; memory; legal decision-making.

Resumen

Se presenta una revisión de casos judiciales surgidos a partir de 1980 conocidos como ‘Casos de abuso en guarderías’. En estos casos, las presuntas víctimas fueron entrevistadas con un interrogatorio altamente sugestivo, lo que dio lugar a probables falsas memorias y a condenas erróneas. Además, se discute un caso italiano en el que un terapeuta ha sido recientemente condenado en relación con las falsas memorias. En concreto, el terapeuta fue condenado por implantar falsas memorias de abusos sexuales en una adolescente mediante técnicas sugestivas con el fin de ‘recobrar recuerdos que consideraba reprimidos en el inconsciente. Con estos casos en mente, se presenta una revisión de las recomendaciones para la evaluación forense que se están proponiendo en otros países europeos para la evaluación de casos judiciales en los que pudieran estar implicadas falsas memorias o entrevistas sugestivas. Así, se recomienda utilizar un enfoque de construcción de escenarios alternativos, un análisis en profundidad del contexto de la revelación del abuso y la participación de un experto adicional que actúe como revisor del informe. Además, se incluye una revisión de una serie de recomendaciones destinadas a la mejora de la redacción de los informes periciales. Todas estas recomendaciones contribuirían a reducir los sesgos cognitivos que pueden afectar a la evaluación, tanto antes como durante la misma. Se incluyen las implicaciones que la adopción de estas recomendaciones podría tener, tanto para el sistema judicial como para los individuos que sufren este tipo de situaciones, como la reducción de las condenas erróneas. Por último, se destaca la necesi-

dad de crear espacios de asistencia a las víctimas de falsas memorias. Además, se recomienda encarecidamente la creación de comités de expertos que puedan asistir a los tribunales en casos equívocos, en los que se hayan detectado posibles influencias sugestivas.

Palabras clave: falsa memoria; testigo experto; memoria; toma de decisiones judiciales.

Introduction

The testimony given by witnesses, victims and suspects is often the only or the main evidence for reaching judicial sentences, especially when the crime has been committed in the private sphere, as is often the case in child sexual abuse (Arce, 2017; Novo & Seijo, 2010; van Koppen, 2007). A particularly relevant issue in this type of case is to assess the reliability of the victim's testimony and whether it has been influenced by suggestive interview techniques. This assessment is crucial, as it is known that these influences can produce false memories (Arce et al., 2023; Loftus, 2005; Otgaar et al., 2017, 2018), which could lead to testimonies that, although they would be honest, are fabricated. Such testimonies may result in false accusations or confessions and thus lead to wrongful convictions (Gudjonsson, 2021; Otgaar et al., 2021).

Although this issue has been discussed (Volbert & Steller, 2014) no specific recommendations have been offered on how to approach a case in which false memories might be involved; a series of general questions have been proposed that practitioners should ask themselves when a new case is initiated. In this study, we will briefly introduce False Memories in the applied setting and present different court cases in which false memories were most likely involved to illustrate the common elements underlying them and the legal and social relevance that these cases might entail. Primarily, we will offer several specific recommendations for expert witnesses in evaluating possibly fabricated but honest testimony. In addition, we will include some recommendations that have recently been proposed in other European countries to draft better expert reports.

False Memories in court

False memories are generally defined as memories of events that were never experienced, which are recalled as if they took place (Loftus, 1995). Furthermore, it has been argued that true and false memories are difficult to differentiate without independent corroboration, as they would produce the same consequences both legally and socially (Bernstein & Loftus, 2009). Moreover, false memories of a traumatic event produce the same psychological injury as experienced ones, so that this injury is not valid evidence for prosecution if the external origin of the memory cannot be demonstrated (Gancedo et al., 2021; Vilariño et al., 2009).

The scientific study of False Memories gained special interest in the 1980s and 1990s, after the emergence of numerous court cases in which high suggestibility occurred, which lead to false or erroneous testimonies. For example, so-called 'Daycare Abuse Cases' arose, in which children were interviewed with suggestive questions after which they declared -falsely- to have been abused by a particular group of people (e.g., teachers). At the same time, there were cases in which some individuals claimed to have recovered memories of childhood sexual abuse (Loftus & Davis, 2006; McNally, 2005; Otgaar et al., 2019). Such statements sometimes arose after suggestive therapies in which the therapist guided the person to recover alleged sexual abuse histories that had been repressed in the unconscious, which might explain some current psychopathology of the person and thus needed to be recalled to heal these current problems (Laney & Loftus, 2005). Several scholars, experts in memory, raised concerns about these types of therapies, as there is a plethora of studies showing that traumatic memories are often well remembered, and that there is no empirical support for the concept of unconscious repression (McNally, 2003; Patihis et al., 2022). These two circumstances led these scientists, sceptical of these recovered memories and the use of suggestive techniques, to design methods to study whether it was possible to implant false memories in the laboratory. A considerable number of studies have shown that false memories can be implanted using suggestive techniques (Arce et al., 2023; Otgaar et al., 2018; Scoboria et al., 2017; Selaya et al., 2020, 2021).

Some relevant court cases are presented here in which the testimony was most likely based on false memories. The purpose of including these cases is to show the social, judicial, and personal relevance involved in this phenomenon, as both the person who developed the false memory and the person wrongfully accused would be being victimized, potentially developing severe trauma (Hoyle et al., 2016; Laney & Loftus, 2013; Loftus & Bernstein, 2005).

United States

McMartin

In 1983, seven preschool teachers were accused of abusing more than a hundred children in the most horrific and bizarre ways, including drinking blood, engaging in animal torture and ritual sexual abuse. After all the investigation and the corresponding trials, which lasted 7 years, the teachers were acquitted of the crimes charged. This was because it was shown that extremely suggestive techniques and targeted interviews with the children were used to reveal the alleged abuses, which probably led to false allegations of abuse (Schreiber et al., 2007).

Kelly Michaels

Similarly, to the McMartin case, in 1987 Kelly Michaels, a preschool teacher, was accused of molesting 20 children - including penetrating them with knives or Lego blocks, forcing them to drink her urine or lie naked on a satanic pentagram, all during school hours. After the investigation, and despite finding no physical evidence of such acts, she was sentenced to 47 years in prison. During her imprisonment, various investigators, forensic psychologists, and journalists sent numerous letters to the court explaining their concerns about the way the investigation had been conducted with the children. After 5 years in prison, she was released, as the court ruled that the interviews had been so suggestive that the children's statements after the interviews could not be considered reliable (Schreiber et al., 2007).

Netherlands

Oude Pekela

In 1987, in the village of Oude Pekela, 98 children of different ages claimed to have been brutally punished and sexually abused and to have been part of extremely violent situations, including participation in beatings and ritual killings. In this case, no evidence or suspects were found (Rossen, 1992) and the idea was that these claims emerged after very suggestive interviews.

Galileo Elementary School

In 2009, two teachers were accused of sexually abusing 20 children in the Netherlands. The testimonies included bizarre situations, such as having a piece of their genitals cut off and seeing crocodiles in the teachers' homes. Expert reports concluding that suggestive interviews were conducted and the lack of evidence to support the statements led the court not to prosecute the teachers (Otgaar et al., 2017).

Indonesia

In 2016, at an elementary school in Jakarta, eight school staff members were accused of abusing three children and were sentenced to between 7 and 11 years in prison. However, it has been shown that the children were exposed to highly suggestive interviews by their parents and the police and participated in therapies that used suggestive techniques, such as imaginary play and anatomical drawings, to "disclose" the abuse. After analysis of the case reports and documentation, it was concluded that the statements did not present markers of validity of experienced events (Vrij et al., 2021), such as the absence of suggestive questions, that the disclosures are spontaneous or that the statements are made in the children's own words (and without a motivation to lie), which are usually seen in these types of cases, while they do include several fac-

tors that may impair the reliability of the children's statements (Calado, 2022).

Italy 2019

Otgaar, Curci et al. (2022) describe a different case from those mentioned above, since it was demonstrated how an adolescent girl had developed a whole a false memory of an abuse. This is described in more depth as it was a unique case in which the danger of using pressure and suggestive techniques in a therapeutic context was clearly demonstrated.

In this case, a therapist was sentenced to four years in prison and suspended from employment for implanting a false memory of sexual abuse in a 17-year-old girl. In 2016, the therapist guided the girl to recall an abuse perpetrated by a friend of her father, events she did not initially remember. The therapist used Eye Movement Desensitization and Reprocessing (EMDR)¹ to 'alter her traumatic memories' as well as other highly suggestive interventions to recover the unconsciously repressed memories of the abuse. During the recordings they analysed of the therapy sessions, they appreciated how the girl became increasingly confused, eventually 'remembering' that she had been sexually abused not only by her father's friend, but also by her own father. Following this therapy, the teenager developed externalizing problems and lost contact with her father. In 2019, the therapist was charged with implanting false memories using 'unethical and manipulative techniques', with emphasis being placed on the use of highly suggestive interviews and altering traumatic memories through EMDR techniques. The therapist was convicted of causing serious harm to the girl under his therapeutic intervention, an abuse of functions and procedural fraud. This case has highlighted the potential relevance of some techniques being used in therapy, such as EMDR (Otgaar et al., 2021).

To investigate whether a statement might be based on experienced or 'false' facts, several recommendations have

¹ EMDR is "a popular therapeutic intervention in which patients are asked to recall their most traumatic memory while simultaneously following the therapist's index finger horizontally with their vision.

This eye movement procedure has been shown not only to reduce the vividness and emotionality of autobiographical memories, but also has the potential to facilitate the creation of false memories" (Otgaar, Curci et al., 2022, p. 2124)

been proposed for forensic evaluation when dealing with a new case in which false memories might be involved. It should also be noted that these recommendations were also designed to reduce possible cognitive biases that may occur in expert reports, as well as to emphasize the need for technical reports to include evidence-based knowledge.

Recommendations for Forensic Psychologists

The recommendations included here are a compilation of those recently introduced in other European countries. They have been proposed to help forensic psychologists assess whether testimonies are based on experienced or fabricated but honest facts (i.e., false memories).

The first recommendation is that experts work with different scenarios when assessing the validity of testimony. Although mentioned somewhat in testimony evaluation techniques (e.g., SVA includes postulation of alternative hypotheses) attempts to widely introduce this approach have not been very successful (Otgaar et al., 2017), among other reasons because the task of forensic evaluation is not investigation (i.e., study of hypothesis), but rather providing validity to the complainant's testimony (Arce, 2017). Therefore, the testimony evaluation technique must be able to classify all false memories as fabricated to comply with the principle of presumption of innocence.

The main reason for working with scenarios is that they may help to avoid the inclusion of certain biases that may occur in the assessment. Some of these biases may occur before the assessment or during the assessment (Vredeveldt et al., 2022). The former would be 'possible offender stereotypes', 'case familiarity' or 'loyalty bias'. Offender stereotypes refer to the association between some crimes and certain stereotypes of those who commit them (e.g., child sexual abuse). Familiarity refers to conclusions that could be made erroneously only because they were concluded in a previous similar case. Loyalty bias refers to bias that could arise in favour of the party appointing the expert for various reasons (e.g., spending more time with that party, being exposed to the party's views, etc.; Murrie et al., 2013). In addition, those that

could occur during the evaluation are confirmation bias, perseverance in belief, or bias snowball effect. The first two are the two sides of a coin: the first refers to the tendency to seek information that confirms prior beliefs, while the second is the tendency to disregard information that contradicts prior beliefs. The bias snowball effect would be the consequence of the sum of the above: the confirmation of a prior belief with the discrediting of non-beliefs implies a positive feedback loop that would have a negative effect on the final decision (Vredeveldt et al., 2022).

A second recommendation is to deeply analyse the context of the disclosure of the alleged crime (e.g., in the context of false memories, child sexual abuse is often discussed). While spontaneous statements are believed to be more accurate, allegations that arise after suspicions of third parties-and their interviews-may involve the contamination of testimony or even the implantation of false memories. It is worth mentioning that this analysis of the circumstances involves not only the analysis of the context (when, where, and with whom; Korkman et al., 2014), but also the techniques that have been used to elicit the statement (e.g., determining whether it was made during therapy) and why the questions that have been asked with parents or teachers were used. It is known that anatomical dolls, human figure drawings, or body diagrams can elicit errors (Bruck, 2009; Poole & Bruck, 2012). It is not that these techniques are not useful when used with abused children, but that they are not valid for diagnosing or detecting abuse. Therefore, it is necessary for all such analyses to be evidence-based. Thus, when statement analysis or interview techniques are not supported by the scientific community and/or contradict evidenced scientific knowledge, one should be cautious with the information obtained. Thus, other possible alternative scenarios could be constructed (e.g., that the testimony is fabricated but honest; that part of the statement is based on a genuine recollection, but another part is fabricated, etc.).

Along these lines, several characteristics of interviews that include suggestive information have been proposed, which should be considered when evaluating previous interventions and avoided in the intervention itself. Based on the classification used by Schreiber et al. (2007), these characteristics would refer to the duration of the interview,

the nature of the questions and the suggestive techniques that may or may not have been used. Regarding the length of the interview, they specify that it should not be measured in time, but in number of utterances, number of words and interventions made by the interviewer, the interviewee and the ratio between them; when the ratio is high in favour of the interviewer's interventions, it has been suggested that, possibly, the interviewer is unskilled or is more likely to have introduced suggestive information (Underwager & Wakefield, 1990). Regarding the nature of questions, Schreiber et al. attended to a) open-ended questions, b) yes/no questions, c) choice questions, and d) specific questions; it is recommended that interviews should be based on open-ended questions, especially at the beginning of the interview, and that all other types of questions should be used sparingly and only if they are posed in a non-suggestive manner. Finally, they specified the suggestive techniques that may appear in an interview, such as a) reinforcement, b) repetition of questions, c) use of information from other witnesses, d) invitation to speculation, and e) introduction of new information. Although the authors refer to interviews with children, because they aim to reduce the contamination of testimony, they are also applicable to cases involving adults.

It is also relevant to analyse previous statements to determine whether there is an escalation in the severity or intensity of the alleged abuse as different statements occur.

In this sense, if it has been possible to detect that the person had no memory of the event prior to any therapy or interview, it is crucial to establish a chronology of the evolution of memories and the techniques that have been used in each intervention (Otgaar, Curci et al., 2022).

Finally, it is highly recommended that another expert in the field, who is not knowledgeable about the case, review the report to make critical comments on it. In this way, it would help to further minimize any biases that may be present in the report. In addition, this reviewer would also check whether the information about the case and the scientific literature included in the report support the scenarios that have been put forward in the case. Tangentially, this approach would help the expert witness to be more scrupulous in avoiding possible subjective com-

ments that could be included in the report, knowing that another expert witness will read the report before it is issued (Otgaar et al., 2017; Vredeveldt et al., 2022). This recommendation could be understood as a peer review process like that which scientific articles undergo (Vredeveldt et al., 2022).

Other recommendations

To promote better professional practice, it is worth mentioning other recommendations that have been proposed by Vredeveldt et al. (2022) on how to improve expert reports.

The authors recommend that a brief description of the expert's experience or a short CV be included. It should also indicate the specific code of conduct to which he or she subscribes and, if there is more than one expert signing the report, the specific contributions of each expert to the report.

In addition, the experts should make the relevant elements of the case explicit before analysing them by drafting a summary of the context (e.g., what the case is about, relevant dates of the events and the court proceedings). This will serve as an introduction but will also help the experts if they are called to court even years after the analysis.

During the analysis, any choice should be made according to scientific standards. This would include making explicit why the chosen tool (e.g., psychometric measures) is useful in that case, the scope and limitations of the tool, and the psychometric properties or characteristics of the assessment that may affect the interpretation. In addition, the cultural background of the person being assessed needs to be considered, as there may be cross-cultural differences that could affect the testimony. Vredeveldt et al. (2022) exemplify that 'statements of African asylum seekers and atrocity witnesses may be less detailed and coherent than what is considered the norm in Western societies (Anders, 2011; Combs, 2017; Herlihy et al., 2012, p. 17)'. This is especially relevant in a country like Spain, due to its constant migratory flow and the fact that it is the first EU country to receive non-European migrants (Eurostat, 2022).

As for the conclusion section of the report, it is recommended to summarize the analysis and what and how the evidence fits into the proposed scenarios. Not only should the expert be transparent about the process, but also about the irrelevant information he/she may have been exposed to and the possible biases he/she may have generated. In other words, make the limitations of the report explicit, as if it were a scientific article.

Finally, it is highly recommended to include an obiter dictum section at the end of the report. It means that, if during the evaluation, the expert detects some situation that may be important or relevant to the case and is related to his field of expertise, he should include it at the end of the report, even if it is not included in the court order. This would serve the judge, the defence, or the prosecution as a guide for further investigation.

Implications

The recommendations included in this paper could improve expert reports, as well as help experts to prevent making erroneous inferences or unintentionally focusing on a specific scenario rather than others (Otgaar et al., 2017). Despite having been initially developed in other countries, such as the Netherlands, they can also be applied in Spain, as both countries share a similar judicial system (van Koppen, 2007). In both countries, statements are repeated on several occasions: initial statement, police interrogation, judicial and expert testimony, without considering those conversations during therapy or with family members, which could lead to the reinforcement of the errors or biases initially produced. However, it is worth mentioning that this repetition of statements does not necessarily imply that these are more biased, but it is more important to know how and when these interviews were conducted (Goodman & Quas, 2008).

In addition to these specific recommendations, it is pertinent to state that it would be relevant to create platforms that protect and assist these victims. For example, the British False Memories Society provides information and support on false memories, especially those related to child sexual abuse (Shaw, 2017). In addition, it would lead to an improvement of the legal system if expert committees

were implemented at the national level to assess those equivocal cases (e.g., sexual abuse), especially at the beginning of the judicial process. Although this may sound somewhat utopian, it is not unfeasible: they have existed since 1999 in the Netherlands. The Dutch Expert Committee for Equivocal Allegations of Sexual Abuse is a multidisciplinary committee that is contacted, for example, when it is detected that a case might be related to false memories, to advise the court or give recommendations on how to conduct the investigation (Nierop et al., 2021).

Conclusion

In conclusion, these recommendations could help forensic psychologists reduce potential biases in their reports and facilitate the detection of possible false memories that could lead to wrongful convictions. To reduce these biases, and other potential biases, the construction of alternative scenarios is highly recommended. In addition, the study of the context of the disclosure, as well as the evaluation of the evolution of the statements is crucial. In addition, the involvement of another expert to review the report is highly recommended. The implementation of these recommendations would not only protect forensic psychologists from malpractice allegations, but would also benefit the *primum non nocere* principle, i.e., prevent practitioners from using potentially iatrogenic techniques (Lilienfeld, 2007). Not to mention that they will help victims of false memories to access fairer practices and trials and make it easier to seek professional help when they need it.

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