ADMISSIBILITY OF
HYPNOTICALLY-DEVELOPED
EVIDENCE

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I. INTRODUCTION

With the resurgence of scientific interest in hypnotism following the
Second World War and its subsequent recognition by the British,
American and Canadian Medical Associations as a legitimate and
valuable therapeutic technique to be employed by psychologists,
psychiatrists, and the medical and dental professions, renewed attention
has been focused upon the validity, utility and limitations of this
phenomenon within the judicial system.

Hypnosis has repeatedly established its potential value as an
extra-judicial investigative technique, employed by both law enforce-
ment personnel and defence counsel, with its most significant role being
the restoration of repressed or lost memories. It is acknowledged by

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1 During and following World War II hypnotism was employed on a wide scale in
treating psychogenic casualties.

2 In 1955, the British Medical Association recognized hypnotism as a valuable
therapeutic technique in treating certain psychiatric disabilities and as an analgesia for
Supplement 190.

In June 1958, the American Medical Association approved a report of the Council
of Mental Health which, following a two year study, recognized hypnosis as a legitimate
diagnostic and therapeutic technique: Plunkett, Medical Use of Hypnosis, 168 J.A.M.A.
186 (1958).

In March 1958, the Canadian Medical Association appears to have recognized
hypnosis as a valuable tool in medicine: Dufresne, Hypnotism and Medicine, 78 Can.

3 For a commentary on the widespread use of hypnotism as an investigative
procedure employed by law enforcement officials, see H. Aron, Hypnosis in Criminal
Investigations (1967); T. Barrow, Hypnosis: An Investigative Aid (unpublished paper
presented at the fifth annual seminar of the Western Canada Crown, Banff, Alta., Apr.
1982); W. Bryan, Legal Aspects of Hypnosis (1962); W. Hibbard & R. Worring,
Forensic Hypnosis: The Practical Application of Hypnosis in Criminal Investi-
gations (1981); F. Monaghan, Hypnosis in Criminal Investigation (1980); Reiser,
Hypnosis as an Aid in a Homicide Investigation, 17 Am. J. Clinical Hypnosis 84
(1974); Reiser, Hypnosis as a Tool in Criminal Investigation, 43 Police Chief 36
psychologists and psychiatrists that recollection of an incident may be repressed as the result of a physically or emotionally traumatic experience, shock, intoxication or simply by the lapse of time. Hypnotism has been recognized as a legitimate technique for removing the mental block and thereby retrieving the repressed or forgotten memory. 4

Proponents of the admissibility of hypnotically-developed testimony suggest that such evidence should be admissible in judicial proceedings but that the fact of previous hypnosis of the witness should go to the weight or credibility which the trier of fact would accord to it. Those who take an opposing viewpoint argue that the inherent dangers associated with hypnosis are such ‘‘that once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify’’. 5 It is the purpose of this discussion to attempt to reconcile these opposing views and to determine whether evidence obtained in such a manner should be admissible within the Canadian judicial system.

It is acknowledged that there are numerous problems inherent in hypnotically-developed evidence which the courts must be cognizant of in order to properly exercise their discretionary function in determining the admissibility of such testimony.

This article examines the nature of hypnotism, the memory process and the inherent problems associated with attempting to use hypnosis to refresh the memory of a witness. A number of suggested procedural safeguards designed to reduce the danger to an acceptable level are also discussed.

This discussion is limited to the admissibility of extra-judicial hypnotically-induced statements and hypnotically-refreshed testimony, the appropriateness of evidence adduced when the witness is in a hypnotic state and the expert’s opinion as to the reliability of the hypnotic induction procedure and the truthfulness of the results.

II. NATURE OF HYPNOTISM

First, it is necessary to determine the nature of hypnotism. The hypnotic, trance-like state which has been associated with the pheno-
Admissibility of Hypnotically-Developed Evidence

non of hypnotism has been described in ancient writings and observed in the religious ceremonies of many primitive cultures.\(^6\)

Modern interest in hypnotism was first aroused through the practice and theories of a Viennese physician, Franz Anton Mesmer, who promulgated a theory (which was subsequently disproved) that the hypnotic phenomenon was induced by a force emanating from his hands which he described as "animal magnetism".

The individual most responsible for reviving scientific interest in hypnosis following the rejection of Mesmer's theory, was the Scottish physician James Braid, who developed the hypothesis that suggestion played an important role in hypnotism. Such distinguished and respected professionals as Pierre Janet, Hippolyte Bernheim and the neurologist Jean Martin Charcot inquired into the phenomenon of hypnotism and theorized as to its nature.\(^7\)

Notwithstanding the long history of the scientific investigation of hypnosis, it is difficult to arrive at a specific theory which adequately explains its precise nature. Perhaps all that can be achieved is a description of the characteristics associated with the phenomenon. Professor Ernest Hilgard described it as follows:

(1) Subsidence of the planning factor. The hypnotized subject loses initiative and lacks the desire to make and carry out plans of his own. In an older vocabulary he lacks the desire to will action. . . . It should be noted that there is always a relative, rather than an absolute, change in state under hypnosis. Thus the hypnotic subject has the ability to initiate action . . . what is important is that he has little desire to do so.

(2) Redistribution of attention. To state that attention is redistributed is a loose way of saying, first, that attention is selective . . . and second, that under hypnosis selective attention and selective inattention go beyond the usual range . . .

(3) Availability of visual memories from the past, and heightened ability for fantasy-production. . . . [T]he hypnotist can in fact suggest the reality of memories for events that did not happen. Thus memories under hypnosis, like memories outside hypnosis, may be productive as well as reproductive.

(4) Reduction in reality testing and a tolerance for persistent distortion. . . . [T]his does not mean that all critical or logical abilities are suspended, but a certain uncritical literalness is often found.

(5) Increased suggestibility. The suggestibility theory of hypnosis is so widely accepted that hypnosis and suggestibility come to be equated by some writers on hypnosis.

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\(^6\) For a more detailed discussion of the history of hypnosis, see G. Cutten, Three Thousand Years of Mental Healing (1911); W. Kroger, Clinical and Experimental Hypnosis 1-6 (2d ed. 1977); Rosen, History of Medical Hypnosis: From Animal Magnetism to Medical Hypnosis, in Hypnosis in Modern Medicine (3d ed. J. Schneck ed. 1963).

(6) Role behavior. The suggestions that a subject in hypnosis will accept are not limited to specific acts or perceptions; he will, indeed, adopt a suggested role and carry on complex activities corresponding to that role.

(7) Amnesia for what transpired within the hypnotic state. . . . Posthypnotic amnesia has been found to be one of the most dependable concomitants of hypnosis; it has been used . . . as the mark of what is called the highly susceptible or "somnambulistic" subject. It is not an essential aspect of hypnosis; even a subject capable of spontaneous posthypnotic amnesia can be told that he will recall what went on in the trance and will then recall it. . . .

The term "hypnosis" itself, which is derived from the Greek hypnos meaning to sleep, is somewhat misleading "inasmuch as sleep, as ordinarily understood, is not necessarily present". The subcommittee of the British Medical Association proposed the following definition of the hypnotic state, which was subsequently adopted by the American Medical Association:

[A] temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. These phenomena include alterations in consciousness and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind. Further, phenomena such as anaesthesia, paralysis and rigidity of muscles, and vasomotor changes can be produced and removed in the hypnotic state.

There are basically three different levels of hypnotic trance: light, medium and somnambulistic, with each trance level distinguishable by particular physical and mental characteristics. The deeper the trance the more passive the subject's conscious mind and the more susceptible he becomes to suggestion. The somnambulistic trance is typified by the subject's ability to regress in age and to experience visual and auditory hallucinations.

The term "hypnotic susceptibility" refers to the subject's degree of responsiveness to hypnotic suggestion and is to be distinguished from "depth" which refers to the "momentary state of the subject in a hypothesized dimensional level". Individuals may obtain different depths of trance depending on the subject's susceptibility. A hypnotic

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8 Id. at 6-10.
9 Rodger, supra note 2, at 192.
10 Plunkett, supra note 2, at 187.
11 Rodger, supra note 2, at 191.
12 Davidson, Refreshing the Memory of a Witness Through Hypnosis, 5 U.C.L.A.-ALASKA L. REV. 266, at 270 (1976). See also Spector & Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?, 38 Ohio St. L.J. 567, at 571-72 (1977), in which they separate the hypnotic state into six depths or levels of trance characterized by specific physical and mental acts that the subject is capable of performing at that level.
13 Davidson, id. at 271.
14 Spector & Foster, supra note 12, at 575.
subject may react differently to a suggestion made while he is at one trance depth than he would to the same suggestion at another depth, and the depth of the hypnotic trance may fluctuate within a single examination, resulting in apparently contradictory results.\textsuperscript{16}

The two principal phenomena associated with hypnotically-enhanced memory are hyperamnesia, wherein the subject remembers by mentally observing the event in question, and age regression, wherein the subject recalls the event as a participant and may actually relive the incident.\textsuperscript{16} Hyperamnesia may not improve the subject's conscious memory since the suggestion implanted is that he remember while still in the hypnotic state. The entire process therefore occurs in that state. The technique may be successful but may leave the subject without his present recollection refreshed.\textsuperscript{17}

Complete age regression, also referred to as revivification, forces the subject to "relive" the experience for which further information is required.\textsuperscript{18} Age regression has the advantage of enabling the hypnotist to extract information without specific questioning, thus avoiding to a certain degree suggested responses; it is of special importance when the hypnotist does not know what information the subject will impart.\textsuperscript{19}

III. NATURE OF MEMORY

It is acknowledged that memory, unenhanced by hypnosis, is fraught with inaccuracy and distortion, and that even a witness who has not been subjected to hypnosis may "succumb" to suggestion and produce imaginary evidence.\textsuperscript{20} Such a witness may claim to see that which did not happen and may be so influenced by the suggestions of a skillful interrogator as to provide totally inaccurate evidence.\textsuperscript{21}

\textsuperscript{15} Baker, \textit{Hypnosis as an Evidentiary Tool}, 8 Utah L. Rev. 78, at 80 (1962); see also Le Cron, \textit{A Study of Age Regression Under Hypnosis}, in \textit{Experimental Hypnosis} 70 (L. Le Cron ed. 1974).

\textsuperscript{16} Davidson, \textit{supra} note 12, at 271-72. See also R. Reiff & M. Scheerer, \textit{Memory and Hypnotic Age Regression} 66 (1959); Comment, 1 U. Tol. L. Rev. 691, at 696 (1969).

\textsuperscript{17} Murray, \textit{Admissibility of Present Recollection Restored by Hypnosis — State v. McQueen}, 15 Wake Forest L. Rev. 357, at 361 (1979).


\textsuperscript{19} \textit{Id.} at 473.

\textsuperscript{20} Diamond, \textit{supra} note 5, at 341-42.

\textsuperscript{21} See Horvath v. The Queen, [1979] 2 S.C.R. 376, 7 C.R. (3d) 97 (1978), in which the Supreme Court of Canada held inadmissible a statement obtained by a skilled and proven interrogation specialist by the use of suggestive questions which resulted in the subject entering into an involuntary mild hypnotic state. See also Marshall, Marquis & Oskamp, \textit{Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony}, 84 Harv. L. Rev. 1620 (1971).
It has been stated that both "[p]erception and memory are the product of an intricate blend of neurological, psychological, and physiological processes" profoundly affected by the subject's behavioural and motivational characteristics which distort that which is to be perceived and remembered; this accounts for the vagaries attendant upon the exercise of these faculties.\textsuperscript{22}

Memory is only as accurate as the initial perception which, in turn, is influenced by attitude, preferences, biases, knowledge, expectations and the emotional processes. When an event is recalled it is "reconstructed with the aid of the initial perception of the event, knowledge acquired prior to the event, inferences drawn subsequent to the event, and the emotional impact of the event".\textsuperscript{23} Facts which the individual believes he recalls vividly and in detail under ordinary circumstances may have undergone such a degree of distortion between the initial perception and its eventual recollection that in some instances the testimony would be completely false.\textsuperscript{24}

Also involved in the perception and memory process is a "logical completion mechanism", which permits an individual perceiving an incident to fill in the gaps that occur as a result of his arbitrary selection of stimuli and to integrate the fragmentary impressions into a logical sequence.\textsuperscript{25} This process is not unlike that of confabulation, which will be discussed subsequently.

In the case of an ordinary witness who has not previously been subjected to hypnosis, it has been suggested that the type of questions and the atmosphere of interrogation play an important role in the accuracy of his testimony.\textsuperscript{26} As to the credibility of witnesses under ordinary courtroom interrogation, it has been discovered by investigators in legal psychology that erroneous suggestions to witnesses by attorneys will often induce erroneous testimony.\textsuperscript{27} It has been stated that:

\begin{quote}
[I]n the terrifying procedures which witnesses are frequently subjected to and in the manner in which they are turned and twisted by the barristers, they will certainly often be induced to make statements which depend on suggestion.\textsuperscript{28}
\end{quote}


\textsuperscript{23} Spector & Foster, \textit{id.} at 589.

\textsuperscript{24} Haward & Ashworth, \textit{supra} note 18, at 474.

\textsuperscript{25} Spector & Foster, \textit{supra} note 12, at 588.

\textsuperscript{26} Marshall, Marquis & Oskamp, \textit{supra} note 21.


A witness may forget a fact due to lapse of time or because he becomes flurried in the witness box; thus, it is well-established that a witness may refresh his memory by reference to an extrinsic item. The witness may testify on the basis of "past recollection recorded", by referring to an earlier record or memorandum to confirm a fact even though he has no present recollection of the fact contained therein, or on the basis of "present recollection revived", which involves a reference to a record or memorandum which actually reminds the witness of the fact or event. In the latter instance the witness is actually testifying from his present recollection of the past event as it has been refreshed by the memorandum; it is this principle which is relevant to the discussion of hypnotically-developed evidence.

The traditional basis for refreshing memory was stated in *Henry v. Lee* as follows:

> If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness.

Another important evidentiary principle relevant to this discussion is that a writing used to revive the witness' recollection does not form part of the evidence of the witness. The jury may examine the memorandum, not as evidence of the facts contained therein, but to determine whether it could properly refresh the witness' memory.

It has been suggested that in the adversarial system the adverse party can examine the memory aid and cross-examine to "test the credibility of the witness that his memory had indeed been revived as well as to test the accuracy of the memory aid and the witness' testimony" and that there "seems to be no reason why these same safeguards are not equally applicable when hypnosis is used rather than hard-copy memorabilia to refresh the memory of a witness". As will be indicated elsewhere in this discussion, the inherent dangers associated with the hypnotic procedure are not sufficiently safeguarded by such traditional methods. Additional precautions are necessary in order to minimize these dangers.

As one author has suggested:

> The hypnotic subject is a great deal more vulnerable to suggestion than is the normal person, and the hypnotic distortions persist into the posthypnotic period with much greater force. The accepted view, that the law cannot exclude the usual eyewitness testimony where there may have been some

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30 P. McWilliams, *id.* at 1003.
31 2 Chitty 124 (K.B. 1810).
33 Davidson, *supra* note 12, at 269.
unreliable distortions, should not justify the admission of testimony that is known to have been subject to the inevitable distortions of the hypnotic process.\textsuperscript{34}

I am unable to concur with this opinion. The accepted view of the law is that, while striving for perfection and reliability among witnesses, the courts are prepared to accept evidence which is known to be distorted by lapse of time, poor observation, personal prejudices or biases, emotions or any of the factors previously discussed which exert a distorting influence on the witness' memory. They should be equally prepared to accept testimony which is the result of hypnosis and which has been subjected to the inherent dangers in the hypnotic procedure, provided adequate safeguards have been applied. The goal is to have the evidence brought before the court with as little distortion as possible. If stringent safeguards are applied to hypnotically-developed testimony which are not applied to testimony derived from the ordinary memory process, in an attempt to reduce distortion to an acceptable level, is this any less desirable than admitting the testimony of a person who testifies after refreshing his memory by means of a document or memorandum? Distortion is known to exist no matter which method is used. It is for the courts to decide whether the hypnotic procedure produces a greater degree of distortion in a witness' refreshed memory and, if so, whether the suggested safeguards are sufficient to bring such testimony within the range of distortion acceptable for ordinary testimony.

It is contended that where the proper hypnotic induction procedure is employed and where safeguards are applied, "the testimony of the witness whose recollection has been so revived presents no more potential for inaccuracy due to the disabilities of perception, memory, and articulation than that of any witness".\textsuperscript{35} With this view in mind, I will now examine the various problems associated with the hypnotic phenomenon and the various safeguards which can be applied in order to prevent an intolerable degree of distortion.

IV. Admissibility of Hypnotically-Refreshed Memory

"The fundamental principle of admissibility is that all facts which are logically probative are admissible in evidence, unless excluded by some specific rule of exclusion."\textsuperscript{36} This rule has been interpreted as follows:

\begin{quote}
(A)ll facts and circumstances which afford a fair presumption or inference as to the question in dispute, and which may fairly and reasonably aid the jury in
\end{quote}

\textsuperscript{34} Diamond, \textit{supra} note 5, at 342.
\textsuperscript{35} Spector & Foster, \textit{supra} note 12, at 591.
\textsuperscript{36} 12 C.E.D. (West 3d) 58-129.
arriving at the true conclusion, are admissible, and the true principle is to extend rather than restrict the admissibility of evidence.\textsuperscript{37}

There is authority that although evidence is technically admissible, the court may be of the opinion that it is of little probative value, is prejudicial to the accused and consequently ought not to be admitted.\textsuperscript{38} This proposition has been limited in the following manner by the Supreme Court of Canada in \textit{R. v. Wray} as indicated by Martland J.:

\begin{quote}
[T]he exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.\textsuperscript{39}
\end{quote}

The majority of the Court held that there was no judicial authority to support the proposition that a trial judge has a discretion to exclude admissible evidence because, in his opinion, it would be calculated to bring the administration of justice into disrepute. The trial judge’s discretion to exclude admissible evidence does not extend beyond his duty to ensure that the minds of the jury will not be prejudiced by evidence of little probative value but of great prejudicial effect.

It may be contended that the testimony of a witness whose memory has been hypnotically-enhanced will provide evidence which, if believed, will be of a highly probative nature, and that it is for the trier of fact to determine the credibility and weight to be given to such evidence. Conversely, it can be argued that hypnotism is so inherently dangerous that any testimony obtained thereby would be so contaminated as to be of only trifling probative value and yet, because of the appearance of credibility with which such witnesses have been known to render their testimony, it would serve to operate unfairly towards the accused. With these two opposing views in mind, the Canadian and American authorities will be examined to determine how the courts have perceived the admissibility of such evidence.

In the first reported case involving hypnotically-developed evidence in the United States, \textit{People v. Ebanks}, the Supreme Court of California in 1897 ruled that “[t]he law of the United States does not recognize

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hypnotism". It was not until more than sixty years after that decision, that the Supreme Court of California, in Cornell v. Superior Court of California, accepted hypnotism as a medically recognized aid to enhance memory recall, by permitting defence counsel to examine his client with the assistance of a hypnotist in a pre-trial investigation.

The majority of recent American cases indicate a trend towards admitting testimony based on hypnotically-enhanced memory, on the theory that the witness is testifying from "present recollection refreshed". The courts have held that the fact of hypnosis does not go to the question of admissibility of the evidence, but rather to the weight and credibility afforded the testimony by the trier of fact, safeguarded by a cautionary instruction from the bench on the inherent problems associated with the hypnotic procedure.

One author contends that "reliability in general should not be the issue in determining the admissibility of hypnotically-adduced testimony of the defendant when this testimony is given in the presence of the court or jury". He suggests that since the question of credibility of a witness is left to the jury under ordinary circumstances, there is no reason why the reliability or credibility of hypnotically-developed testimony cannot also be left to it.

In Harding v. State the Court of Special Appeals of Maryland, upon hearing testimony in which a prosecuting witness gave different evidence after being hypnotized, held that the altered testimony and the fact of hypnotism affected the witness' credibility, but not the admissibility of the evidence. In People v. Smrekar, the Appellate Court of Illinois ruled that when "a witness is capable of giving testimony having some probative value, the witness is permitted to testify with evidence of impairment of the ability of the witness to accurately recall evidence or that suggestive material has been used to refresh the witness' recollection going only to the weight to be given to the testimony of the witness". The Court, therefore, admitted the identification evidence of the witness who had been previously hypnotized, thereby overruling its

40 49 P. 1049, at 1053 (Cal. S. Ct. 1897).
44 Supra note 42, at 306.
earlier decision in *People v. Harper*.\(^{46}\) In that case the Court had affirmed the trial court’s order to suppress evidence which may have been recalled solely by the use of hypnosis or truth drugs since neither had sufficient scientific reliability to satisfy the court.

The Supreme Court of North Carolina in *State v. McQueen* held that:

>[T]he fact that the memory of a witness concerning events, distant in time, has been refreshed, prior to trial, as by the reading of documents or by conversation with another, does not render the witness incompetent to testify concerning his or her present recollection. The credibility of such testimony, in view of prior uncertainty on the part of the witness, is a matter for the jury’s consideration. So it is when the witness has, in the meantime, undergone some psychiatric or other medical treatment by which memory is said to have been refreshed or restored. So it is when the intervening experience has been hypnosis.\(^{47}\)

After hearing expert testimony on the problems and dangers associated with hypnotism relative to the issue of whether the victim’s testimony was so tainted by pre-trial hypnosis as to be rendered inadmissible, the California Court of Appeal in *People v. Diggs*\(^{48}\) was of the opinion that, in view of the modification in memory and demeanour which generally follows treatment by hypnosis, the testimony may in many instances be termed a product of the technique. However, in this particular instance, notwithstanding Dr. Bernard Diamond’s opposing opinion, the Court of Appeal was convinced that the lower court had been presented with sufficient evidence of the reliability of the method used, the competence of the technician administering the treatment and the relative absence of post-hypnotic suggestion to allow the evidence to be admitted.

The principle of “present recollection refreshed” has been applied to admit into evidence the testimony of a witness whose memory has been previously hypnotically-enhanced. The determination of the admissibility of the hypnotically-refreshed recollection should involve an examination, by means of a *voir dire*, of the problems associated with the procedure and the safeguards applied to alleviate these dangers, in order to determine if the memory or recollection of the subject was irreparably altered by improper suggestion.

In *Wyller v. Fairchild-Hiller Corp.*,\(^{49}\) a civil action for damages resulting from a helicopter accident, the United States Court of Appeals accepted the witness’ assertion that he was testifying from his present recollection as refreshed by hypnotic treatments and held that such evidence was admissible with the issue of credibility and weight being left to the jury. The opposing party was entitled to challenge the reliability of both the recalled facts and the hypnotic procedure by extensive cross-examination of the witness and the hypnotist.


\(^{47}\) *Supra* note 42, at 427-28.

\(^{48}\) 169 Cal. Rptr. 386 (Ct. App. 1980).

\(^{49}\) *Supra* note 42.
In *Kline v. Ford Motor Co.*50 a civil action for damages arising out of a motor vehicle accident, the United States Court of Appeals, affirming its decision in *Wyller*, admitted testimony based on hypnotically-enhanced memory on the basis that the witness was testifying from present recollection refreshed. The Court went on to state that competence refers to the condition of the witness at the time of testifying and the fact of previous hypnosis goes only to credibility and not to the competence of the witness. The Court expressed the rationale for its decision as follows:

Competence refers to the condition of the witness at the time he or she is called to testify. Jacqueline was fully capable of expressing herself and understanding her duty as a witness to tell the truth. . . . She was present and personally saw and heard the occurrences at the time of the accident. She was testifying about her present recollection of events that she had witnessed. That her present memory depends upon refreshment claimed to have been induced under hypnosis goes to the credibility of her testimony not to her competence as a witness. Although the device by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document.51

The Superior Court of New Jersey in *State v. Hurd*, after hearing the evidence of several noted experts in the field of hypnotism, concluded that:

> [E]ven though hypnosis is a recognized phenomenon, the potential for the production of fantasy and confabulation during a hypnotic exercise militates against the automatic admissibility of hypnotically induced recall until an acceptable level of reliability of that recall is established.52

The Court stated that if there was sufficient compliance with specified safeguards and if it was satisfied that there was no impermissibly suggestive or coercive conduct by the hypnotist and law enforcement personnel connected with the hypnotic exercise, the witness would be permitted to testify on the basis of "present recollection refreshed".53

Not all American courts have taken the position that hypnotically-enhanced memory is admissible as evidence. In *Greenfield v. Commonwealth*,54 and in *State v. Mack*,55 the courts applied the test indicated in *Frye v. United States*,56 and held that no expert is capable of determining whether a memory retrieved by hypnosis, or any part of that memory, is truth, falsehood or confabulation and, consequently, testimony of a previously hypnotized witness concerning the subject matter of a pre-trial hypnotic interview is not admissible in a criminal proceeding. In *People

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50 Id.
51 Id. at 1069-70.
53 Id. at 307.
54 204 S.E.2d 414 (Va. 1974).
55 292 N.W.2d 764 (Minn. 1980).
56 293 F. 1013 (D.C. Cir. 1923).
v. Tait, the Michigan Court of Appeal held that hypnosis had not achieved that degree of scientific acceptance that would permit its introduction into evidence.

The Supreme Court of Arizona in State v. LaMountain, after indicating that there was no expert testimony regarding the effect of hypnosis on an individual's memory, held that it was not established that hypnosis was such as to be admitted into evidence. The same Court in the subsequent decision of State v. Mena held that until hypnosis gains general acceptance as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, hypnotically-enhanced testimony would be inadmissible. The Court went on to state that to accept the witness' declaration that he is testifying from his own present recollection requires an assumption that the witness is capable of making a determination that what he perceives as his recollection actually came from his prior observations as opposed to impressions planted in his memory through hypnosis. Such an assumption is contrary to the opinion held by many authorities that a witness will recall memories fabricated under hypnosis as his own recollection and will be unable to distinguish his true memories from pseudomemories implanted during hypnosis.

Turning to the Canadian cases, in R. v. Pitt the British Columbia Supreme Court considered an application by an accused, who was charged with the murder of her husband and who had been diagnosed as having functional amnesia, to be hypnotized in front of the jury in an attempt to revive a conscious recollection of those events which she was incapable of recalling as a result of her state of amnesia. Although the hypnotic induction was to be in the presence of the jury, the witness was to be given a post-hypnotic suggestion to recall the relevant incident in her waking state, and it was to be only in the waking state that she was to testify as to what she remembered. No evidence was to be received from the witness while in the hypnotic state.

The Court held that a recollection refreshed by such means was admissible, as the evidence indicated that hypnotism was a "recognized and efficacious medical means whereby recollection can be revived of those things which have been put down into the subconscious by the process of functional amnesia". The Court went on to state that "it would be unfair to deny to the accused the right to have the assistance of this particular medical procedure or psychiatric procedure which, on the evidence I have heard, would appear to be an accepted procedure, a proper procedure and one which is efficacious". The Court also

57 297 N.W.2d 853 (Mich. 1980).
58 611 P.2d 551, at 555 (Ariz. 1980).
60 Id.
62 Id. at 345, 68 D.L.R. (3d) 515.
63 Id. at 345-46, 68 D.L.R. (3d) at 516.
indicated that the fact of hypnotism was a matter for the jury to weigh and consider in assessing credibility.\(^{64}\) It drew an analogy between hypnotically refreshing a witness' memory and allowing the witness to take advantage of another accepted medical procedure, such as a surgical operation on the brain to remove a blood clot and thereby revive his memory.\(^{65}\)

The Manitoba Provincial Court (Family Division), in \textit{R. v. K.},\(^{66}\) was the next Canadian court to consider, by way of a \textit{voir dire}, the admissibility of testimony of a hypnotically-refreshed witness who, in this instance, was testifying in relation to a juvenile charged with causing death by criminal negligence as the result of a fatal motor vehicle accident. In arriving at his decision, Garfinkel J. interpreted the Supreme Court of Canada decision in \textit{R. v. Wray}\(^{67}\) as supporting the legal proposition that all evidence that is logically probative should be admitted "unless there is a reason to exclude it".\(^{68}\) The trial judge determined that the hypnosis had been performed according to a proper procedure which would obtain the best results, and indicated that his initial reaction was that the determination of whether the subject's memory was actually refreshed should go to weight and credibility and not to admissibility.\(^{69}\) However, after determining that hypnotism was not infallible and that there were difficulties in obtaining truth from a hypnotized subject,\(^{70}\) the Court concluded as follows:

It must be remembered that in this instance we are dealing with a juvenile, albeit one at the maximum age for being a juvenile, and the court, I think, must take that into consideration in considering what is fair and proper too.

I am of the opinion that the reliability of a memory recalled or refreshed by hypnosis or recalling events by hypnosis has not been satisfactorily established in this case. I am of the opinion that the evidence here indicates that hypnosis is not a reliable technique for recalling memory. It is subject to too many variables, and consequently my ruling is that the evidence is inadmissible because that evidence is unreliable and uncertain; that the technique of refreshing memory by hypnosis is not akin to the scientific procedures which would normally be allowable; consequently I am saying that the evidence is inadmissible.\(^{71}\)

It is my opinion that having determined that the hypnotist was competent and that the hypnotic induction procedure was properly applied, the Court's initial reaction was correct and the evidence was admissible, with its weight and credibility to be assessed by the trier of

\(^{64}\) \textit{Id.} at 346, 68 D.L.R. (3d) at 516.
\(^{67}\) \textit{Supra} note 39.
\(^{68}\) \textit{Supra} note 66, at 244, [1979] 5 W.W.R. 113.
\(^{69}\) \textit{Id.} at 239, [1979] 5 W.W.R. 108.
\(^{71}\) \textit{Id.} at 252, [1979] 5 W.W.R. 121.
fact. The Court obviously misinterpreted the Wray decision, previously discussed, and had no jurisdiction to exclude evidence of substantial probative value once it had made the finding of fact it did concerning the hypnotic procedure, simply on the basis that it would operate to the prejudice of the juvenile accused.

In order to be considered competent a witness must have first-hand knowledge of the facts relating to the issue. In R. v. Allen (No. 2), the Ontario High Court of Justice considered a situation where the witness apparently did not have first-hand recollection of the incident, as her suppressed memory had been revived only after the administration of sodium amytol, a "truth serum". The comments of the Court, particularly the following statement, are relevant to this discussion of hypnosis:

I think it is appropriate to point out that there is no suggestion in the evidence that the administration of sodium amytol gives any assurance that the statements elicited from a patient under the influence thereof are likely to be true by reason of that fact. The evidence is clear that the administration of the drug for that purpose is not recognized as a valid procedure in the field of forensic psychiatry. It is not recognized scientifically as being an assured method of obtaining truthful statements from a person. In fact, Dr. Coulthard said that a person to whom the drug is administered may wilfully make false statements even though under the effect of the drug.

It must be emphasized that the Crown on this voir dire is not trying to prove that the statements are true because they were made under the influence of the drug. We were and are concerned on this voir dire only with the question of the competency of the witness, not the question of the credibility of the witness. The fact that the evidence has been retrieved through the administration of the drug, if brought out on cross-examination at trial, is, of course, a factor which a jury can consider in determining the credibility of the witness and the weight to be given to such evidence.

It is suggested that this reasoning is equally applicable to hypnotically-retrieved memory when it is offered only as a "process which has gained acceptance as a technique capable of inducing previously unrevealed statements".

In the unreported decision of R. v. Zubot the Alberta Court of Queen's Bench considered the issue of the admissibility of testimony of a previously hypnotized witness. The witness, who lived in the house adjacent to that of the victim, observed certain activity outside the victim's residence on the night he was killed. When first questioned by the police she had no recollection of the incident. She was placed under hypnosis by Staff Sergeant Tom Barrow of the Calgary Police Service Hypnotic Investigative Bureau, and was then able to describe the incident in detail and identify two of the assailants, who were subsequently charged.

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72 46 C.C.C. (2d) 477 (Ont. H.C. 1979).
73 Id. at 480.
74 State v. Hurd, supra note 52, at 305.
After hearing expert opinion evidence regarding the dangers of hypnotically enhancing memory and an evaluation of the procedure applied in the instant case, Heatherington J. made a finding that the hypnotist was qualified and the procedures he employed were proper, and held that such evidence was admissible with the determination of its weight and credibility to be left to the jury.

In order to determine whether the courts were correct in admitting, or failing to admit, hypnotically-refreshed testimony it is necessary to examine the specific problems or dangers inherent in the hypnotic procedure as well as to evaluate the safeguards devised to alleviate the possibility of distorted recollection.

A. Inherent Problems Associated with Hypnotism

1. Heightened Susceptibility to Suggestion

Suggestibility is an essential element of hypnosis and cannot be prevented, just as it cannot be eliminated from ordinary interrogation. What the courts must be cognizant of is the implantation of impermissible suggestions, intentionally or unintentionally, either by the hypnotist or by the influence on the witness of the environment in which the procedure is conducted. It has been suggested that “absent any attempt by the operator, or anyone else present during the induction process, to construct the subject’s memory, suggestibility during hypnosis should bear on the weight, rather than the admissibility of the subject’s testimony”.  

As has been indicated previously, susceptibility to suggestion plays an important role in any interrogation process. However, the probability of subtle influences affecting the memory restoration process is increased by the heightened suggestibility of a hypnotic subject. The hypnotist’s success in applying suggestion derives from his ability to take advantage of the fact that when the conscious or critical part of the mind is at rest in the hypnotic state the deeper subconscious parts of the mind are highly susceptible to suggestion.

Among the mental phenomena which the British Medical Association attributed to the hypnotic state were a temporary limitation of will power and an “increased receptivity of suggestion from without, sometimes to the extent of producing passing delusions, illusions, and hallucinations”.

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76 Id.
77 Id.
80 Rodger, supra note 2, at 191.
The danger posed by hypersuggestibility in the hypnotic process is that the restored memory has been either intentionally or unintentionally distorted, resulting in a "reconstructed, rather than a revived, memory". As was stated by the Appellate Court of Illinois in *People v. Smrekar*:

Martin T. Orne, professor of psychiatry at the University of Pennsylvania, warns that the danger is very real. "The nature of hypnosis is such that you respond to suggestion," he says. "The same way I can help you refresh your memory, I also can help you construct memory where there isn’t any."

In an ordinary interrogation situation a danger exists that the witness will tailor his responses to conform to what he feels are the expectations of the interrogator; this depends upon his degree of susceptibility to suggestion, which is in turn dependent upon various other factors in the individual’s psychological profile. In the waking condition this susceptibility to suggestion is restrained to a large extent by reason, attention and judgment.

As hypnotism is a state of heightened suggestibility, it has been contended that the hypnotist’s suggestions control each step of the process. However, as will be discussed elsewhere, the subject is able to exert his will in circumstances where it is in his self interest to do so or where he feels threatened.

It is not only verbal instructions which "communicate suggestive messages to the subject", but the attitude, tone of voice, demeanour and perceived expectations of the hypnotist. As Dr. Martin Orne, a recognized authority in hypnotism, indicates:

> [It is necessary to take into account the hypnotized individual’s remarkable responsivity not only to explicit suggestions but also to very minute cues, often outside the observer’s awareness... The cues as to what is expected may be unwittingly communicated before or during the hypnotism procedure, either by the hypnotist or someone else... the nature of these cues may be quite obscure, both to the hypnotist, to the subject, and even to the trained observer.]

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81 Spector & Foster, *supra* note 78, at 699.  
82 *Supra* note 45, at 859.  
83 Spector & Foster, *supra* note 12, at 591: Perhaps most significant is the level of respect that the questioned person maintains for authority figures generally, and courts and police in particular. Also influential is the strength of one’s desire to conform to the viewpoints and perceptions of the majority, and to appear reliable in one’s own observations. The repetition and frequency of a suggestion, as well as bias or self-interest on the part of the interrogated person are often factors affecting the susceptibility to suggestion.  
84 Allen, *supra* note 79.  
85 Diamond, *supra* note 5, at 333.  
86 *Id.*  
As the subject's extreme suggestibility enables him to detect unintended meanings in the hypnotist's questions, unrecognized by the hypnotist himself, "a subject may mirror by overt behavior the attitudes of the expert towards hypnotism". A suggestion so implanted may be extended into the subsequent waking state, with the result that the memory which the subject believes to be his own has actually been implanted, either intentionally or unintentionally, by the hypnotist. If the hypnotist is not aware of the source of the response or its meaning to the subject, any opinion he forms may be inaccurate.

It would appear then that the danger discussed earlier of a witness' susceptibility to suggestion is aggravated by the pre-trial hypnotic enhancement of memory. It has been suggested that the hypnotic induction procedure should be such that no possibility of impermissible suggestion exists. A procedure has been advanced to minimize the dangers of suggestibility:

[T]he hypnosis should take place in neutral surroundings, such as a doctor's office, and the hypnotist (and the subject, obviously) should not be aware of any "desired" responses. The hypnotist should encourage the subject to discuss the events generally and he should leave it up to the subject to supply the details.

A voir dire should be held to determine if there was impermissible suggestion resulting in irreparable damage to the witness' recollection of the incident. The New York County Court in People v. Hughes, recognizing the extreme suggestibility of the hypnotic subject, held that pre-trial hypnosis was the proper subject of a hearing to determine whether the circumstances and the procedure employed were so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification".

In United States v. Adams, the United States Court of Appeals admitted hypnotically-refreshed testimony. However, the Court recognized the danger of the subject's susceptibility to suggestion in the hypnotic state and cautioned that great care must be exercised to ensure that statements following hypnosis are the product of the subject's own recollection and are not tainted by suggestions made while he is under hypnosis.

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90 Spector & Foster, supra note 78, at 702.
91 Dilloff, supra note 89, at 8.
92 Supra note 42, at 649.
93 Supra note 42.
94 Id. at 198-99. See also People v. McDowell, id.
Admissibility of Hypnotically-Developed Evidence

2. Fact vs. Fantasy and Confabulation

Any normal person can distinguish fantasy from reality; a hypnotic subject, however, in an "altered" state of reality, is dependent on the hypnotist to define reality and may base his response to the hypnotist's inquiries upon a fantasy which he perceives to be reality.\(^9\) Even when he is no longer in the hypnotic state, the subject may experience difficulty differentiating between his own actual memories and those which are implanted by hypnotic suggestion. There are those who consider that dangers exist which are more serious than deliberate fabrication by the subject: distortion, which occurs when actual memories are altered in the mind of the subject, and confabulation, which is the filling in of memory gaps with inaccurate memories or information\(^9\) in order to give the memory a logical appearance. This is not unlike the "logical completion mechanism", discussed earlier, which is associated with the ordinary memory process unenhanced by hypnotism.

It has been suggested that the distortion attributable to the intermingling of fact and fantasy during hypnotically-induced recall does not differ from perceptual or memory flaws associated with the ability to perceive, recall and articulate in an ordinary witness' testimony. It is further indicated that testimony based on hypnotically-restored memory "poses no more potential for inaccuracy due to disabilities associated with perception, memory, and articulation than the testimony of any other witness".\(^9\)

However, this view is not in accordance with accepted scientific opinion on the hypnotic state. Clearly there are inherent dangers associated with hypnotically-restored memory which are specific to or exaggerated in the hypnotic state, which are not encountered with an ordinary witness and thereby increase the potential for inaccuracy. It is for this very reason that it is necessary to establish the elaborate procedural safeguards upon which the admissibility of such testimony has been made conditional.

Dr. Bernard Diamond has suggested that a witness, once subjected to pre-trial hypnosis, "can rarely, if ever, recognize that a suggestion implanted intentionally or unintentionally by the hypnotist is not the product of his own mind",\(^9\) and further, that this misperception will withstand the most rigorous cross-examination. He contends that out of a desire to comply with the suggestions of the hypnotist, the subject will fill in missing details by fantasy or confabulation and will thereby create a hypnotically-reconstructed memory which is apt to be a mosaic of...

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\(^9\) Murray, supra note 17, at 365.
\(^9\) Spector & Foster, supra note 78, at 698.
\(^9\) Supra note 5, at 334.
appropriate actual events, entirely irrelevant actual events which may be portions of other real memories unrelated to the situation being probed, pure fantasy and details supplied by fantasy to create a logical whole.\textsuperscript{99}

In \textit{People v. Hughes}, Dr. Martin Orne, by affidavit evidence, expressed his concern about the tendency of a hypnotic subject to confabulate by filling in forgotten memories with fantasized facts in an effort to comply with the hypnotist’s suggestions:

The details of material that is confabulated depend upon the subject’s total past experience and all relevant cues that \textit{have} been made available to him in the past. Subjects will use cues previously provided in the wake \textit{sic} state in an inconsistent and unpredictable fashion; in some instances such cues are incorporated in the confabulated material, while in others the hypnotic recall may be virtually unaffected by them. \ldots I have found hypnosis dramatically useful in some instances where I have used it to bring back forgotten memories of witnesses to crimes, while in others a witness might, with the same conviction, produce data that is totally inaccurate. \ldots As long as this material is subject to independent verification its utility is considerable and the risk attached to the procedure minimal. \ldots Unfortunately, a witness who is uncertain about his recall of a particular set of events can, with hypnosis, be helped to have absolute subjective conviction about what had happened, though the certainty can as easily relate to a confabulation as to an actual memory. \ldots The crucial fact is that neither the subject nor the expert observer can distinguish between confabulation and accurate recall in any particular instance. The only way that can be done is on the basis of external corroborative data.\textsuperscript{100}

However, after having expressed concern over the dangers inherent in the hypnotic enhancement of memory, it is to be noted that Dr. Orne did not exclude the use of such testimony in criminal proceedings, provided that certain essential safeguards were complied with.\textsuperscript{101}

3. \textit{Deliberate Fabrication}

Most experts agree that a hypnotic subject is not incapable of deliberate fabrication under circumstances “when his vital interests are threatened or when telling the truth presents some emotional or

\textsuperscript{99} \textit{Id.} at 335.  
\textsuperscript{100} \textit{Supra} note 42, at 646-47.  
\textsuperscript{101} \textit{Id.} at 647. The safeguards specified by Dr. Orne are as follows: (1) Only a psychiatrist or psychologist with special training in hypnosis should carry it out and, to minimize bias and suggestiveness, the hypnotist should be given, in writing, only such facts as are reasonably necessary to conduct the session. (2) \textit{All} contact between the hypnotist and his subject should be videotaped. (3) No one other than the hypnotist and the subject should be present because of the danger that the observers will inadvertently communicate to the subject. (4) Prior interrogations should be taperecorded so that it is possible to document that the witness has not been cued, explicitly or implicitly, about information which is then reported for apparently the first time during hypnosis.
psychological danger to him". Experimentation has indicated that a subject's desire for self-preservation is unaffected by the hypnotic state and consequently he may intentionally fabricate a response. It has been suggested that:

[Subjects in deep trances apparently do not lose complete touch with reality and may employ a variety of personal defenses to avoid doing or saying anything that is fundamentally repugnant to them. Thus, sufficiently motivated persons may wilfully lie although instructed to tell the truth.

In circumstances where the subject believes his personal interests to be threatened and gives an evasive answer or deliberate fabrication, the hypnotist should attempt to remain alert as to how the subject responds to a particular inquiry or suggestion. Any indication of uneasiness or evasiveness should serve as a warning to the hypnotist.

In addition to deliberate fabrication and evasive responses, it is possible for a subject to feign induction into the hypnotic state. Dr. Bernard Diamond maintains that even the most skilled experts cannot consistently detect simulated hypnotism. An early leading article on the legal aspects of hypnosis stated that:

[As we have already seen, the loss of self-control is distinctive of this condition; and secrets, even when to divulge them would convict of punishable crime the person concerned, are very likely to be let slip when that person is in the hands of a skilled practitioner of hypnotism.

On the other hand, if there is a chance of getting truth, which he might otherwise be able and might very much wish to conceal, from the hypnotized as well as from the drunken man, there is also a very good chance of getting a large admixture of mistake and falsehood. For hypnotic subjects, like alcoholic subjects, can lie consciously: they even invent subtle webs of falsehood, as well as those who are in the normal state of waking. Indeed, in certain cases the disposition to prevaricate, and a certain low but effective form of animal cunning, are developed by the hypnosis itself; while an increased suggestibility for all kinds of illusions and hallucinations is as much an essential feature of the dream-life of hypnotic, as it is of normal sleep.

The ability to deliberately fabricate under hypnosis is illustrated in People v. Lopez in which the victim, the subject of a particularly brutal and traumatic rape, repeated a fabricated tale throughout her hypnotic sessions. The expert evidence was to the effect that the victim's memory was restored, not through hypnotic enhancement, but by the healing

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102 Dilloff, supra note 89, at 5; Davidson, supra note 12, at 594; Comment, Hypno-Induced Statements: Safeguards for Admissibility, 1970 LAW AND SOCIAL ORDER 99, at 102; Erickson, An Experimental Investigation of the Possible Anti-Social Use of Hypnosis, 2 PSYCHIATRIST 391 (1939).
103 Erickson, id. at 398-99.
104 Baker, supra note 15, at 80.
105 Murray, supra note 17, at 365.
106 Supra note 5, at 337; Spector & Foster, supra note 12, at 577.
effects of the passage of time. As the victim acquired the ability to cope psychologically with her experience she gave a statement which differed from the one she gave while under hypnosis; it was subsequently accepted by the courts as the true and accurate account of the incident. She testified that she had "lied under hypnosis because she was frightened of retaliation by the defendants if she told the truth; she was embarrassed and ashamed about the nature of the acts committed on her and was afraid that she would lose the respect of her parents".  

4. Desire to Conform to Expectations

It has been suggested that, during any interrogation process, there is a danger that the subject will "attempt to mold his information to assuage the interrogator" and the significance of the risk during hypnosis, as in ordinary interrogation procedures, is dependent upon various factors: the pliability or suggestibility of the subject, his desire to conform and the degree of authority exerted by the interrogator.  

The relationship between the hypnotist and his subject is of necessity close and personal, with the subject reposing an extraordinary degree of trust and dependence in the hypnotist. The subject's willingness to cooperate may often manifest itself as a desire to please the hypnotist, with the resultant danger that the subject may fabricate a response which conforms to what he perceives to be the expectation or desire of the hypnotist.

This desire to conform to the expectations of the hypnotist may cause the subject to reflect an attitude detected in the hypnotist's words and behaviour; the situation is further complicated by the "subject's own beliefs and expectations regarding the appropriate behaviour for hypnotized individuals". In order to conform to the perceived expectations of the hypnotist, a subject may confabulate a response which has been intentionally or unintentionally communicated to the subject by the hypnotist; consequently the hypnotist should be extremely conscious of his personal biases and expectations in order to minimize the possibility of fabrication, confabulation and distortion.  

5. Lingering Effect of Hypnosis

If the commonly accepted basis for the admissibility of hypnotically-enhanced memory is the principle of "present recollection refreshed", then the witness must be able to testify on the basis of a

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109 Id. at 382.
110 Spector & Foster, supra note 78, at 698.
111 Murray, supra note 17, at 363-64.
112 Spector & Foster, supra note 12, at 578.
113 Mutter, Critique of Videotape Presentation of Forensic Hypnotic Regression, the Case of Dora, 23 AM. J. CLINICAL HYPNOSIS 99, at 100 (1980).
conscious recollection as he perceives it at the time of giving the evidence. However, Dr. Bernard Diamond maintains that suggestion made under the effects of hypnosis has an enduring effect and "[o]ne can only conclude that hypnosis can induce subtle but highly significant distortions of memory that will persist indefinitely, distorting all subsequent related recall of the subject".114

6. Post-Hypnotic Suggestion

The memory of an amnesiac is commonly revived by means of post-hypnotic suggestion, wherein it has been suggested to the subject, while in the hypnotic state, that he will later remember clearly the forgotten event. Post-hypnotic suggestion is a "compulsive enactment, subsequent to awakening, of suggestions supplied by the hypnotist during the trance".115 It is contended that such suggestions implanted during the hypnotic state will take precedence over normal thoughts and feelings.116 The hypnotist must exercise extreme caution in the phrasing of the post-hypnotic suggestion, as the subject has a tendency to execute the suggestion literally and will generally rationalize an explanation for his behaviour.117

Another danger associated with post-hypnotic suggestion is that the subject may subconsciously and unintentionally fabricate a response in an effort to comply with the suggestion of the hypnotist.118

It is important to note that a subject may, during the hypnotic procedure of revivification or age regression, vividly and convincingly describe the incident in question. However, a post-hypnotic suggestion attempting to blunt the impact of the pre-existing amnesia may be unsuccessful; the subject may be incapable of recalling in the waking state the occurrence he has described in the hypnotic state.119

7. Appearance of Credibility

It has been suggested that one of the most remarkable features of hypnosis is its ability to resolve doubts and uncertainties in the mind of the subject. Therefore, the normal indicia of uncertainty such as hesitancy, expressions of doubt or lack of self-confidence which the trier of fact relies on to determine the credibility of and weight to be given to a witness' testimony are not present in a witness whose memory has been hypnotically enhanced. The nature of hypnosis "is such that the subject's

114 Supra note 5, at 336.
115 Spector & Foster, supra note 12, at 572.
116 Haward & Ashworth, supra note 18, at 471.
117 Spector & Foster, supra note 12, at 572-73.
118 Murray, supra note 17, at 361.
119 Spector & Foster, supra note 12, at 572-73.
critical judgement is suspended and he responds to the demand for exact, photographic recall even when his actual recall is vague and doubtful." As was stated in *State v. Mena*:

> [C]ooperative hypnotized subjects remember distorted versions of actual events and are themselves deceived. When recalled in hypnosis, such false memories are accompanied by strong subjective conviction and outward signs of conviction which are most compelling to any observer.121

As was previously indicated in a reference to the affidavit filed in *People v. Hughes*, Dr. Martin Orne is quoted as stating that:

> Unfortunately, a witness who is uncertain about his recall of a particular set of events can, with hypnosis, be helped to have absolute subjective conviction about what had happened, though the certainty can as easily relate to a confabulation as to an actual memory. . . .122

This problem is illustrated in *People v. Diggs*123 where the issue before the court was the admissibility of hypnotically-refreshed testimony of the victim during a second trial, following the failure of the jury to reach a verdict at the first trial. The Court, in ruling that such evidence was admissible, based its decision in part upon the fact that “when called to the stand, the victim was able to recount the circumstances of the attack with significantly more confidence than she had at trial”.124 This increased confidence or appearance of credibility may have been the result of hypnotically reinforcing the witness’ confidence in her own observations and recollection.

B. Safeguards

It is suggested that if the admissibility of evidence of hypnotically-enhanced memory is made conditional upon the development and fulfilment of certain concomitant procedural safeguards, some of the inherent dangers of hypnotism will be alleviated.

1. Qualifications of the Hypnotist

As inducing the hypnotic state is relatively simple and requires minimal training and technical skill, almost any person can hypnotize another individual. However, special skill, experience and professional training are necessary in order to be aware of the inherent dangers in attempting to hypnotically refresh a witness’ memory or to evaluate the subject’s response to a given suggestion.

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121 *Supra* note 59.
122 *Supra* note 42, at 647.
123 *Supra* note 48.
124 *Id.* at 390.
The myriad of methods by which the hypnotist may, either intentionally or unintentionally, suggest a response to the subject would seem to indicate that a high degree of training and experience is required for the task.\(^{125}\) The American Medical Association suggests that "a background of psychodynamic psychology and psychiatry is essential in order to understand the phenomenon of hypnosis".\(^{126}\) Others suggest that the hypnotist should be a psychiatrist, physician or psychologist, with either substantial experience or formal training in hypnosis, and preferably with both.\(^{127}\) Still others go so far as to suggest that the hypnotist should be qualified in both hypnosis and the law.\(^{128}\) Whatever the desired qualifications, it is obvious that a poorly trained or inexperienced hypnotist would be incapable of properly appreciating the dangers inherent in hypnotism or of properly assessing the subject's responses.

If the hypnotist is to offer an opinion, his qualifications, experience and skill must be established as a foundation for his professed expertise. It has been suggested that the standards governing the degree of experience or training necessary to qualify the hypnotist as an expert should be identical to those laid down by the courts in regard to other disciplines.\(^{129}\) In the early decision of *State v. Donovan*,\(^{130}\) it was held that hypnosis was a field in which qualification as an expert witness could be derived solely from theoretical training. This decision may, however, have been influenced by the scarcity at that time of persons familiar with the practical or technical aspects of hypnosis. In view of the many varied uses for hypnosis among present-day psychiatrists and medical practitioners, it would seem reasonable and necessary to re-evaluate the qualifications of an expert witness on hypnosis.\(^{131}\) Since the decision of the Supreme Court of Canada in *Phillion v. The Queen*,\(^{132}\) it would appear that the hypnotist must be highly qualified in terms of formal training if he is to express an opinion as an expert. In that decision the Court refused to accept as an expert an unqualified but experienced polygraph operator.

There are those who advocate training and employing persons such as law enforcement officers as hypnotists, though they may not have a professional standing in mental health or behavioural sciences.\(^{133}\) It has

\(^{125}\) Diamond, *supra* note 5, at 313.
\(^{126}\) Plunkett, *supra* note 2, at 187.
\(^{127}\) Dilloff, *supra* note 89, at 7.
\(^{128}\) Comment, *supra* note 102, at 117.
\(^{129}\) Spector & Foster, *supra* note 78, at 701.
\(^{130}\) 102 N.W. 791 (Iowa 1905).
\(^{133}\) See *People v. Tait*, *supra* note 61, in which the hypnotist was the prosecutor who had only an amateur's ability and in which the evidence was not admitted; *State v. LaMountain*, *supra* note 62, in which the hypnotist was the Deputy Sheriff and in which
been further suggested that if minimal competence is established in the hypnotist “further questions of qualification generally should bear on the weight to be accorded the operator’s testimony”.  

Proponents of this view would have a qualified expert, other than the hypnotist, express his opinion based on an examination of the transcripts, tape recordings or videotapes of the hypnotic induction. However, it is my opinion that it would be preferable to require the hypnotist to be a professional with formal training in mental health and behavioural sciences, who can properly appreciate the dangers of hypnotism, compensate for such dangers and properly evaluate the subject’s responses.

2. Induction Procedure

Great care must be exercised during the hypnotic induction procedure to ensure that the testimony resulting from the hypnotic session is the “product of the subject’s own recollection, rather than of recall tainted by suggestions received while under hypnosis”.  

The New York Supreme Court in People v. McDowell articulated a number of concomitant procedural safeguards necessary to ensure the acceptable quality of evidence derived from the hypnotic procedure:

1. The person conducting the hypnotic session should be a qualified professional, preferably a Psychiatrist or Psychologist, with training in the use of hypnosis.

2. The qualified professional should be independent, not acting in concert with or responsible to the prosecution, investigator or the defense.

3. The qualified professional should be given only such information as is essential for him to have, in order to conduct the hypnotic session. Such information should be communicated in the form of a written memorandum.

4. All contact between the qualified professional and subject should be videotaped.

5. No representative of the police, prosecutor or defendant should be present during the hypnotic session.

6. A lengthy pre-hypnotic interview should take place between the subject and the hypnotist. The entire medical history of the subject should be carefully explored. The present intake of all drugs should be discussed

the evidence was not admitted; State v. Clark, supra note 42, in which the hypnotist was an officer in the Sheriff’s office who had undergone special training and had considerable experience in hypnotism; R. v. Zubot, supra note 75, in which the hypnotist was a staff sergeant with the Calgary Police Service Hypnotic Investigation Bureau and in which the evidence was admitted.

134 Spector & Foster, supra note 78, at 701-02.
135 People v. McDowell, supra note 42, at 182.
with particular reference . . . to the symptoms of the patient and the
reason for the prescription. The subject’s judgment and intelligence
should be evaluated.

(7) The qualified professional should elicit from the subject, prior to
hypnosis, a detailed description of the facts surrounding the subject
matter of the hypnotic session, as the subject recalls them.

(8) The qualified professional should make every effort to avoid adding any
new elements to the subject’s memory, and should be extremely careful
to avoid giving implicit or explicit cues at any time during pre- and
post-hypnotic contact, as well as during the session itself.

(9) Due to the fact that all professionals agree that no examiner can be certain
the responses of the subject are free from confabulation, all facts given
during the session should be independently corroborated insofar as
possible.136

Dr. Bernard Diamond is properly in agreement that a stenographic
transcript of the hypnotic session is insufficient and can be misleading as
it may not adequately convey the communication of cues and suggestions
by the hypnotist through tone of voice and “body language” to his
subject. The only adequate record would be a videotape recording of
everything that transpired before, during and after the hypnotic
session.137

The cautious hypnotist will incorporate safeguards into his induction
technique to assist in detecting simulation of the hypnotic state. In the
medium trance, analgesia is experienced so that a person feigning a
trance would exhibit a reflex response to a pin prick which would be
indicative of simulation.138 Another technique which may be integrated
into the hypnotic induction in an attempt to detect deliberate fabrication
is what has been termed the “automatic lie-detection technique”.139 This
technique involves conditioning the subject through hypnotic suggestion
to react with an ideomotor response, such as a twitch of the finger, every
time his response to a question is not truthful. Although these techniques
may be of some use as additional safeguards it should be remembered
that neither is a consistently accurate determinant of simulation or
veracity.

3. Cautionary Instruction to Jury

As has been previously indicated, a danger exists that jurors may,
because of the hypnotic subject’s appearance of credibility and their own
misconceptions concerning the nature of hypnotism, accord a disproport-
ionate degree of weight, reliability and credibility to the evidence of a

136 Id. at 182-83.
137 Supra note 5, at 339.
138 W. HIBBARD & R. WORRING, supra note 3, at 240.
139 H. ARON, supra note 3, ch. 10.
witness whose memory has been hypnotically refreshed. It has been suggested that a forceful and clear instruction regarding the value of hypnotism as a means only of restoring or enhancing recollection rather than as an indicator of the reliability or veracity of the refreshed memory “should adequately safeguard the jury’s ability to gauge credibility”.\footnote{Spector & Foster, supra note 12, at 595.}

The triers of fact must be made aware, not only that the hypnotically-developed recollection is subject to the same frailties as ordinary testimony, but of the inherent dangers, associated specifically with the hypnotic state, which may affect the reliability of the evidence. This latter aspect can best be dealt with by calling experts who will express their opinions on the theoretical and practical aspects of hypnotism as it relates to the procedure employed in the instant case. However, the court, in its instructions to the jury, should emphasize these dangers.

In \textit{Wyller v. Fairchild-Hiller Corp.}\footnote{Supra note 42, at 510. See Harding v. State, supra note 42, at 310 for an example of the precautionary instruction given to the jury: You have heard, during this trial, that a portion of the evidence of the prosecuting witness, Mrs. Coley, was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this evidence carefully. Do not place any greater weight on this portion of Mrs. Coley’s testimony than on any other testimony that you have heard during this trial. Remember you are the judges of the weight and the believability of all the evidence in this case.} the United States Court of Appeals held that a cautionary instruction to the jury concerning the weight and reliability of hypnotically-refreshed testimony would have been appropriate. However, counsel had failed to object to the Court’s failure to include such an instruction, and it therefore could not now be raised as a ground of appeal.

\section*{V. Admissibility of Extra-Judicial Hypnotically-Developed Statements}

\subsection*{A. Exculpatory Statements}

The issue of whether extra-judicial hypnotically-developed statements should be admissible as evidence at trial has been considered by the courts in both Canada and the United States and was subsequently resolved by the exclusion of such evidence when tendered for the purpose of asserting the truth of the contents contained therein. The overwhelming majority of American cases have held that such evidence is inadmissible\footnote{See People v. Busch, 366 P.2d 314 (Cal. 1961) and People v. Modesto, 382 P.2d 33 (Cal. 1963).} and this approach has apparently been followed in the
Canadian decision of *R. v. Pitt*. Evidentiary rules excluding previous consistent self-serving statements and hearsay, as well as the inherent unreliability of such statements, would be the rationale for the exclusion of extra-judicial hypnotically-developed statements.

The statement of the rule against the admissibility of previously consistent statements is found in the following words of Neville J. in *Jones v. South-Eastern & Chatham Ry. Co.'s Managing Committee*:

>[S]tatements may be used against a witness as admissions, but . . . you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony.\(^{144}\)

Therefore, where the person making an extra-judicial hypnotically-induced statement gives evidence in court, the previous statement is not admissible if it falls within the exclusionary rule relating to previous consistent statements.

As has been indicated, hypnotism is an accepted method of reviving lost memories but offers no guarantee of the truthfulness of the refreshed recollection. Consequently, such extra-judicial statements are not properly admissible when offered as evidence of the truth contained therein. Because of the unreliability of hypnotically-induced statements, the authorities have "unanimously agreed that the reliability of hypnosis has not yet been sufficiently established to merit the admissibility of statements made while the subject is in the trance".\(^{145}\)

In *State v. Harris*,\(^ {146}\) the defendant's unsworn, extra-judicial self-serving statement was ruled inadmissible because the hypnotic technique did not guarantee truthfulness. In *People v. Hangsleben*,\(^ {147}\) a case in which the accused sought to introduce psychiatric testimony of pre-trial statements obtained during a hypnotic session in order to establish the truth of the statements made while under hypnosis and to bolster the credibility of the witness' testimony at trial, such a statement was held by the Michigan Court of Appeals to be inadmissible for either purpose.

An additional ground for excluding the extra-judicial hypnotically-developed statement arises in circumstances where the accused does not

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\(^{143}\) *Supra* note 61.


\(^{146}\) 405 P.2d 492 (Or. 1965). *See also* People v. Blair, 602 P.2d 738 (Cal. 1979) where statements made while under hypnosis that are introduced for the purpose of proving their truth were held inadmissible, and Creamer v. State, 205 S.E.2d 240 (Ga. 1974) where extra-judicial statements made while under hypnosis were inadmissible, since the reliability of the hypnotic technique as a truth determinant had not been established.

testify but attempts to have the statement entered into evidence by the hypnotist as truth of the contents. Such testimony would be inadmissible as "the evidence would be offered for the purpose of asserting the truth of the statements, and so would be pure hearsay". 148

The rule excluding hearsay evidence is found in the following statement in R. v. Christie:

[E]vidence is not admissible through the mouth of one witness to show what a third person said for the purpose of proving the truth of what the third person said, (a) because to admit such evidence would be to accept the statement of a person not on oath, and (b) because that person could not be cross-examined on his statement. But the evidence may be admitted upon some other principle. The maxim "Hearsay is no evidence" should be "Hearsay is no evidence of the truth of the thing heard". 149

It is contended that this definition implies that an extra-judicial statement which is offered, not in order to prove the truth of the contents of the statement but for some other purpose, is admissible as "original evidence and the hearsay rule does not apply". 150 This raises the issue of whether the hypnotist can communicate the extra-judicial statement obtained during hypnosis to the court in order to establish the basis for his expert opinion.

The rule of limited or alternative admissibility states that evidence which is inadmissible for one purpose may not be inadmissible for another. For example, evidence of a prior consistent statement, inadmissible for ordinary purposes, is admissible to rebut the suggestion of recent fabrication. 151 Where such evidence is offered for a limited purpose and satisfies all the applicable rules as to admissibility it must be admitted. The jury must be cautioned against misapplying the evidence, but the possibility that they might improperly consider it in another capacity, notwithstanding the caution, does not render it inadmissible. 152

It has been held that a doctor must rely to some extent on what his patient tells him and when he relates this to the court he may be stating hearsay, but such evidence is admissible for the limited or alternate purpose for which it has been tendered. It has been further held that an opinion based on such statements is subject to criticism if the patient does not testify, and is subject to rejection if the patient is not a credible

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148 Haward & Ashworth, supra note 18, at 478.
152 See R. v. Rosik, [1971] 2 O.R. 47, 2 C.C.C. (2d) 351 (C.A. 1970); aff'd [1971] 2 O.R. 89, 2 C.C.C. (2d) 393 (S.C.C. 1970). See also Modesto, supra note 142, at 231 in which a tape recording of the accused's extra-judicial statements made while in a hypnotic state was held to be inadmissible in the discretion of the trial judge in weighing its probative value as part of the basis for the expert's opinion against the risk that the jury might consider it an independent proof of the facts recited therein.
Admissibility of Hypnotically-Developed Evidence

It is contended that the same principle applies to extra-judicial hypnotically-induced statements upon which an expert relies in formulating his opinion; the statements are admissible for such a limited purpose.

B. Inculpatory Statements

It is my opinion that extra-judicial inculpatory statements obtained during hypnosis should be excluded from evidence because of the inherent unreliability of any statement obtained in the hypnotic state. A further reason for the exclusion of such statements is the difficulty of establishing that the statements were voluntarily made by the accused.154

When the Crown has attempted to introduce into evidence inculpatory statements made by the accused while in a hypnotic state, such statements have been excluded by the Canadian courts on the basis of a failure to satisfy the onus of establishing their voluntary nature. In R. v. Booner,155 the Alberta Supreme Court considered a situation in which a Dr. Langsner, claiming the ability to exercise hypnotic influence, visited an alleged murderer on several occasions in his cell for the express purpose of obtaining a confession. On the final visit an inculpatory statement was made by the accused. The Court held that the onus was clearly upon the Crown to establish the voluntariness of the statement having regard to Dr. Langsner’s several visits to the accused. Although the doctor claimed that he did not obtain the confession by hypnosis, the Court did not accept his testimony and ruled that “the Crown has failed to discharge the onus . . . placed upon it of establishing that the defendant was not under the influence of mental suggestion exercised by Dr. Langsner and therefore [the Court] will not admit the confession”.156

In Horvath v. The Queen,157 the Supreme Court of Canada considered a situation in which the evidence indicated that the skilful interrogation by the investigating R.C.M.P. officer of a juvenile charged with murder produced a state of involuntary hypnosis in which certain inculpatory statements were made. Following the hypnotic state the juvenile made a further inculpatory statement. The majority of the Court was of the opinion that the issue was whether the confession was tainted because the accused was under hypnosis immediately prior to, but not at the time of the confession, and while under hypnosis made a previous inculpatory statement which was held to be involuntary because he had

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156 Id. at 205, [1928] 4 D.L.R. at 797.
157 Supra note 21.
not consented to being hypnotized.\textsuperscript{158} The Court held that the second statement, although given while the accused was no longer under hypnosis, was contaminated by the factor of hypnosis, which remained determinative of the whole issue.\textsuperscript{159} The Court held that the rule in \textit{Ibrahim v. The King}\textsuperscript{160} should be extended to include involuntary hypnosis and consequently any confession so obtained was inadmissible.

\section*{VI. Admissibility of Testimony While Hypnotized}

Testimony presented by a witness while in a hypnotic state is no more reliable than testimony based on a memory refreshed by hypnosis out of court and subsequently given in court while in the waking state. Consequently, permitting testimony by a hypnotized witness would be unjustified, as the witness could have his memory refreshed hypnotically prior to court and could then testify from his present recollection. The exclusion of evidence given by a witness while in a hypnotic state has been urged on the basis that such evidence "borders on the theatrical and may well have a disproportionate impact on a jury",\textsuperscript{161} as well as being unnecessary.

The only circumstance in which testimony given by a witness in a hypnotic trance could conceivably be justified is on the rare occasion when the subject is capable of recalling an incident while in the hypnotic state, but is not amenable to a post-hypnotic suggestion to recall the incident in the waking state. As the statement made during hypnosis out of court could not be tendered by the hypnotist as direct evidence because of the hearsay rule, the only way the court could receive the evidence would be to have the subject placed under hypnosis in front of the jury and to have him testify in that state.

An additional difficulty associated with this form of testimony is that it presents an almost insurmountable problem for the opposing party who wishes to cross-examine the witness. Cross-examination has a tendency to confuse a witness in a hypnotic state.\textsuperscript{162} The only possible means of overcoming this difficulty is to present questions to the hypnotist, who in turn will communicate them to the subject in a proper fashion. Obviously such a procedure would seriously hamper the effectiveness of the cross-examination.

The only case in either Canada or the United States in which a witness was permitted to testify under hypnosis was the unreported decision of \textit{State v. Nebb},\textsuperscript{163} a decision of the Ohio trial court. Arthur

\textsuperscript{158} \textit{Id.} at 410, 7 C.R. (3d) at 118.
\textsuperscript{159} \textit{Id.} at 431, 7 C.R. (3d) at 137.
\textsuperscript{161} Comment, \textit{supra} note 102, at 114; see Spector & Foster, \textit{supra} note 12, at 596.
\textsuperscript{162} Spector & Foster, \textit{id.} at 588.
\textsuperscript{163} (Unreported, Ohio, 28 May 1962).
Nebb was indicted for first degree murder but maintained in his defence that at the time of the incident he was suffering from a delusion that he was shooting his wife, whom he had witnessed having sexual relations with another man. The jury was temporarily excluded and the accused was placed under hypnosis by a Dr. Huxtable, who had erroneously advised the Court that statements made by a person under hypnosis would with reasonable medical certainty be truthful and correct statements. The accused was examined by Dr. Huxtable and by both counsel and maintained his previously related account of the incident. The prosecutor was so impressed by the hypnotic interview and with the veracity of the accused that he accepted a plea to the reduced charge of manslaughter. There are some obvious difficulties with the procedure in this case, as both sides were permitted to examine the accused and the opinion stated by the hypnotist was clearly wrong. However, the primary concern is that such a procedure should never have been permitted, as its only purpose was to lend credibility to the evidence which the accused had already given. This was not a situation in which the accused could not remember the incident prior to hypnosis and required hypnosis to refresh his memory. It was employed for the sole purpose of bolstering the accused's evidence, which is improper and should be inadmissible.  

In R. v. Pitt, the British Columbia Supreme Court permitted the accused to be hypnotized in front of the jury for the express purpose of refreshing her recollection of the incident in question. However, the Court made it absolutely clear that it was not prepared to hear any testimony from the accused while in the hypnotic state. The accused was returned to the waking state with a post-hypnotic suggestion to recall the incident, gave her testimony in that condition, and was consequently capable of being cross-examined in the ordinary manner. The Court was not required to consider the admissibility of the testimony in the hypnotic state, which might have been the issue had the accused not responded to the post-hypnotic suggestion to recall the event in the waking state. However, it is contended that the accused could as conveniently have been hypnotized prior to trial for the purpose of refreshing her memory. The procedure of refreshing memory in court is unnecessarily theatrical.

VII. Admissibility of Expert Opinion

The opinions of witnesses possessing special skills are admissible when the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without such assistance. Expert opinion will be admitted when it is of assistance to

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164 For a further comment on State v. Nebb, see Teitelbaum, supra note 43.

165 Supra note 61.

the jury in its deliberations and will be excluded only where the jury could as readily draw the necessary inferences.\textsuperscript{167}

It has been suggested that although jurors, as triers of fact, are continually called upon to assess credibility based on their common experience, the ability to assess the reliability of a scientific process such as the hypnotic technique is not within their common experience and consequently psychological expertise is essential to assist in assessing the evidence of the hypnotic subject.\textsuperscript{168} As one writer contends:

Psychologists, who have been scrutinizing the various phenomena of testimony since the turn of the century, maintain that psychological expertise is necessary during the course of a trial to aid the trier of fact in assessing credibility of witnesses.\textsuperscript{169}

It is my opinion that such a view should not be applied to the determination of the reliability, credibility or weight afforded to the testimony of witnesses whose memory has been hypnotically refreshed. In R. v. Kyselka,\textsuperscript{170} a case in which a psychiatrist gave evidence which suggested that a sixteen-year-old mentally retarded rape victim, because of her mental classification, would likely be a truthful person, Porter C.J.O. indicated:

[T]here is no warrant or authority for such oath-helping as occurred in the circumstances of this case, reminiscent as it is of the method before the Norman Conquest by which a defendant in a civil suit or an accused person proved his case by calling witnesses to swear that the oath of the party was true. If this sort of evidence were admissible in the case of either party no limit could be placed on the number of witnesses who could be called to testify about the credibility of witnesses as to facts. It would tend to produce, regardless of the number of such character witnesses who were called, undue confusion in the minds of the jury. . . .\textsuperscript{171}

Dr. Bernard Diamond maintains that no one can verify the accuracy of the hypnotically-refreshed memory.\textsuperscript{172} In those instances where hypnotically-refreshed memory has been admitted as evidence, the expert is usually called upon to express an opinion on the validity of the testimony based on the hypnotic experience. He further indicates:

It would be wrong to claim that hypnotically enhanced memories are always false or distorted. I contend, rather, that there exists no means to determine with certainty whether or not such falsity or distortion has been introduced by hypnotism. Thus, in my view an expert can testify only as to the probabilities of the effect of the hypnosis. . . . Yet one often finds testimony by such persons in unequivocal terms that no undue suggestions have been given to

\textsuperscript{167} 12 C.E.D. (West 3d) 58-276.
\textsuperscript{168} Spector & Foster, supra note 12, at 583.
\textsuperscript{169} Id.
\textsuperscript{171} Id. at 107-08, [1962] O.W.N. at 163-64.
\textsuperscript{172} Supra note 5, at 337.
the subject and that his recall was extremely spontaneous and undistorted. Usually the hypnotist also expresses his conviction in the truth of the recall.173

In United States v. Awkward,174 a case in which the hypnotist gave expert opinion evidence that the subject’s memory had been accurately refreshed by hypnosis, the United States Court of Appeals ruled that such evidence was inadmissible, since opinion evidence relating to credibility was to be limited to "character for truthfulness or untruthfulness", and that the final issue of credibility was for the jury.175

An expert has no greater ability than a juror who has been properly apprised of the inherent dangers of hypnotically refreshing memory and of the purpose of the various safeguards available to determine the credibility of testimony of a hypnotic subject’s refreshed recollection. Thus, the expert’s opinion of the witness’ credibility must be rejected, since the jury can as readily draw the necessary inferences. The extent of the expert’s opinion should be limited to the probabilities of the effect of the hypnotic procedure employed in the particular instance.

VIII. Conclusions

The issue for the Canadian judiciary, drawing upon the American experience, is whether the benefits to be derived from hypnotically-developed testimony outweigh the inherent dangers associated with the procedure, when alleviated as much as possible by procedural safeguards.

Hypnotically-developed memory offers no guarantee that the testimony obtained thereby is accurate or truthful. The hypnotic subject is as susceptible to flaws in perception, retention, recall, articulation and to deliberate fabrication as is the ordinary witness. Additionally, there are inherent problems associated specifically with the hypnotic state which may increase the degree of distortion, fantasy and confabulation found in the hypnotic subject’s refreshed memory.

173 Id. at 340-41.
174 Supra note 42. See also Harding v. State, supra note 42, at 311 in which the Court of Special Appeals of Maryland found no difficulty in the fact that experienced psychologists expressed an opinion that in that particular case there was no reason to doubt the accuracy of the witness’ recollections; and State v. Hurd, supra note 52, in which the Superior Court of New Jersey held that the hypnotist or expert should not be permitted to give his opinion that a witness’ memory had been accurately refreshed by hypnosis.
175 United States v. Awkward, supra note 42, at 670. See also R. v. Baugh, 36 O.L.R. 436, at 443, 31 D.L.R. 66, at 72 (C.A. 1916) in which at a criminal trial, views expressed by the trial judge at a previous civil action as to the credibility of the accused are inadmissible, on the basis that it is opinion evidence on a point on which opinion evidence is not admissible.
Various safeguards have been proposed which are intended to minimize the specific dangers of hypnotism. It is contended that these safeguards, if rigidly adhered to, will alleviate the inherent dangers of hypnosis to such a degree that the evidence of the subject will be no less reliable than the imperfect memory of the ordinary witness. Determination of credibility must be left to the triers of fact, assisted by expert testimony as to whether the hypnotic procedure was impermissibly suggestive.