HYPNOTICALLY REFRESHED TESTIMONY
AND ITS ADMISSIBILITY AND PROPOSED
BENEFITS THEREOF FOR NAMIBIAN TRIALS

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DECLARATION

I, the undersigned author do hereby declare that the work, forming the substance of this dissertation, is the original work of the author. It has not been laid down for dissertation purposes at the University of Namibia – Faculty of Law nor to the best of my knowledge, laid down for dissertation purposes at any other University.

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M. FRINDT DATE
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To God all the glory and honor.

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CHAPTER ONE

INTRODUCTION, STATEMENT OF PROBLEM, SIGNIFICANCE OF STUDY, CLARIFICATION OF KEY WORDS AND OUTLINE OF SUBSEQUENT CHAPTERS

1.1 INTRODUCTION AND PROBLEM STATEMENT

Edmund Burk, in the House of Commons in 1794, once exclaimed that the rules of "… the Law of Evidence .... [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes."\(^1\) Unfortunately, for the majority of us, the Law of Evidence poses some great difficulties. Definitions vary from one author to the next, and the various topics within the framework of the law of Evidence, require different applications and 'systems' of the law.\(^2\)

Further, with the changes occurring in society - whether, due to technological and scientific advancements or due to changes of government, from non-democracy to democracy - the Laws of Evidence, must still be applied - subject to adaptation - to that particular changing society. This is sometimes done - not so much with reluctance - but rather with difficulty.

This interesting dissertation topic: "Hypnotically refreshed testimony: it's admissibility and proposed benefits thereof for Criminal Trials" will surely prove the above said - and hopefully face the challenges.

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2. Hoffmann and Zefferit, The South African law of Evidence (Butterworths: Durban, 1988 (Fourth Ed: Chapter one)
It must be stated from the onset that the author, for reasons to be found throughout this dissertation, does not propose for hypnosis to be used blindly and devoid of any rules of evidence. Rather the author wishes to bring to the attention of the reader, that despite these problems, such as confabulation, hypnosis should be introduced into the court in certain manners and instances so as to cause the least possible reformation to the rules of evidence and to benefit the defendant.

The author urges our courts not to rule out hypnosis as a means of elicitation of evidence in the court totally, but rather advocates the use thereof as a means of facilitated communication. Of necessity, certain safeguards will have to be employed so as to ensure that every party to a dispute is able to employ the latest medical and scientific methods to his/her benefit as well as being able to testify on his or her own behalf, thus giving effect to the right to a fair trial.

Unfortunately, reference will be made to relatively new concepts and terminology. Further, various topics within the field of the Law of Evidence will necessarily be discussed. As there is a lack of debate on the said topic in Namibia and South Africa, this dissertation will rely heavily upon foreign case law, Constitutions and legislation all of which will be discussed and tested against Namibia’s legal and constitutional framework.

1.2 SIGNIFICANCE OF STUDY

In an attempt to develop debate on a legal level with regard to the admissibility of hypnotically refreshed testimony in Namibian criminal trials, this study will examine the possibility of using hypnosis as a means to facilitate the elicitation of evidence by a witness. It will also serve to indicate the shortcomings and
unconstitutionality of rendering such method inadmissible by our rules of Evidence.

This study will hopefully drive home the constitutional guarantee given in Chapter Three of the Namibian Constitution Article 12 (d), that ‘all persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them’. Article 12 (e) further states that ‘All persons shall be afforded adequate time and facilities for the preparation and presentation of their defense, before the commencement of and during their trial’. Such facilities include the right to consult with and be defended by a legal practitioner whether state appointed or not. It further includes the right to call or cross-examine any witnesses as well as the right to be called as a witness in his/her own defense. Further facilities necessarily also include the facilitation of conveying such evidence to the court, if it can not be conveyed in an ordinary manner. Such facilitation, as will be discussed in chapter three, includes the use of translators, keyboards and such other methods of facilitation, of which hypnosis forms part of such method. Thus the accused or defendant must be allowed to make use of the latest techniques to facilitate in placing his/her evidence before the court.

Thus, a person can only be afforded a proper trial, if such person can use, or has the choice to utilise available techniques, including hypnosis for the proper relating of evidence to the court, which will be to his benefit in accordance with our law.

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3 The Namibian Constitution No 1 of 1990
4 R v Pitt (1968) 68 D.L.R (2d)513
This paper will thus also necessarily, indicate the relations between accepted facilitation of communication in courts for purposes of conveying information to the court and hypnosis as a further method of facilitated communication.\(^5\)

This paper will argue that as with other scientific methods accepted in trials, such as fingerprinting, blood, DNA samples and neurophysiology and so forth, hypnosis is also gaining uniform and positive scientific acceptance, and should thus not be excluded on the basis of lack of scientific certainty. Furthermore, it will also be shown, that hypnosis is a useful means of eliciting information and will relate information with regard to the reliability thereof.

This study will thus hopefully indicate the shortcomings of our legal system in so far as it provides for the exclusion of hypnotic evidence in criminal trials, due to the exclusionary rules, governing evidence in our courts. It will be made clear that hypnosis has gained sufficient scientific acceptance, and is a useful means of facilitating the adducing of evidence in our courts

Again, it is not the intention of the author to advocate for the indiscriminate use of hypnosis in courts. Rather the intention is to show that the Namibian legal system differs from its Commonwealth and USA counterparts in that it does not entertain a jury system. Thus the reasons listed in the USA and elsewhere for the inadmissibility of hypnotic evidence based upon the undue weight, which may be attached to such evidence, should thus not be merely accepted into the Namibian legal system. Furthermore, it will be shown that criticisms based upon lack of corroboration and exclusion based upon hearsay rules have been relaxed and will thus not be entertained in South Africa and hence should also not be entertained in Namibian courts.

\(^5\) Rock v Arkansas, 483 U.S. 44, 51 (1987)
1.3 METHODOLOGY

This study relies mainly upon literature review, foreign case studies and constitutional guarantees.

1.4 CLARIFICATION OF KEY WORDS

Since this study is primarily about, hypnosis and rules of evidence, this section sets out the definitions and or overview of the various concepts this paper will discuss. Some of the concepts are relatively new medical concepts and will thus be unfamiliar to the average legal practitioner.

1.4.1 “Adjectival Law” denotes the procedure, pleading and proof by which substantive law is applied in practice or that ‘branch’ of law governing litigation.

1.4.2 “Admissibility” denotes whether evidence (as the means of proof) will be received by a court i.e., it is not inadmissible because of a rule of the law of evidence. It will also only be admissible if it is relevant – considered as the primary rule of admissibility.

1.4.3 “Adversarial legal system” denotes a legal system, which places emphasis upon the orality of the court process through the calling and cross-examining of witnesses.

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7 ibid. p 10
8 ibid.
1.4.4 “Confabulation” denotes where the subject whilst under hypnosis, unconsciously fills in or adds something inaccurately to the actual recollection of the event

1.4.5 “Hardening” denotes where the subject’s confidence about the accuracy of Recollections increases without justification due to hypnosis

1.4.6 “Facilitated communication” denotes the assistance in communicating in a comprehensive manner, by use of a trained guide or therapist to relate the true words or actions to another e.g. the court.  

1.4.7 “Hypermnesia” denotes enhancement of memory produced by hypnosis or other means

1.4.8 “Hypnosis” denotes the trance state produced by an induction procedure

1.4.9 “Refreshment” denotes where, a witness – failing to remember certain events or information, is allowed to revive such previously known information or events by extraneous means for purposes of relating such information thereafter, orally and without continued reference to such extraneous matter.

1.4.10 “Relevance” denotes the relation between one fact and another, where, according to the rules of logic and common experience, the existence of the first makes the existence or non-existence of the other more likely or probable

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9 Luxton, MS: Facilitated Communication Digest, Vol 4 No 1 at pp 12 - 13
11 ibid. at cit
12 Elliot an Phipson (Supra) pp 10
1.4.11 “Reliability” denotes the consistency of a psychological test. The ability for a test to yield consistent results when given to the same subjects repeatedly.\(^\text{13}\)

### 1.5 LAYOUT OF SUBSEQUENT CHAPTERS

This dissertation consists of 5 chapters. This first chapter has introduced the study and outlined its focus.

**CHAPTER TWO**

This chapter will highlight the salient features of Namibian Evidence law. It will give an exposition of the history and development of our law of evidence, showing that the Law of Evidence has and is capable of development in accordance and in concert with changing times. The adjectival legal system based on English common law, adopted in both Criminal and Civil Proceedings will also be discussed. Further, it will necessarily have to deal with the position of Namibia’s adjectival system upon independence from South Africa on 21 March 1990.

**CHAPTER THREE**

This chapter, will deal with the concept of Hypnosis, its level of accuracy if any and potential benefit to a witness in a criminal trial. It will also deal with the concept of confabulation and why such at the most is insufficient to dispel this method of elicitation of evidence as unwarranted in our courts on the basis of inadmissibility. Further, it will also be shown that hypnosis has gained uniformity and certainty and demands scientific respect and acceptance, thus making it sufficiently scientific to be ‘sufficiently trustworthy’ to be used in trials.

\(^{13}\) Roy Udolf (Supra) pp 361

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Facilitated Communication will be briefly introduced at the end of this chapter and will be further dealt with in chapter four.

CHAPTER FOUR
Chapter four will essentially be a review of foreign case law dealing with both facilitated communication and hypnosis being used in courts of law, indicating the extent of success in both arenas. Chapter four will also tie together the previous two chapters and the relationship between the rules of English laws of evidence and their application in particular in American and Canadian Jurisprudence, who’s adjectival system is similarly based on English common law. The author will also indicate developments made in these foreign countries with regard to rules of evidence and how Namibia can benefit from such undertakings.

CHAPTER FIVE
The author will in this Chapter, give a synopsis of the previous Chapters, indicating the position regarding hypnosis and facilitated communication in foreign jurisdictions. Concluding arguments as to why Namibia should amend its position on admissibility of hypnotically induced evidence in its courts will also be made. The author will also necessarily indicate the various benefits which such hypnosis may bring to our legal system with regard to witnesses, especially traumatised victims who have – as a means of ‘healing’ - ‘blocked – out’ the events of past and now wish to testify against their perpetrators. The author will also warn the courts of the possible infringement of constitutional rights guaranteed in the Namibian Constitution, if such witnesses are not allowed to testify on their own behalf or on behalf of another using the method of hypnosis as a means.
CHAPTER TWO

HISTORY AND DEVELOPMENT OF NAMIBIA’S EVIDENCE
LAW AND POSITION AFTER INDEPENDENCE

2.1 INTRODUCTION – THE ABILITY TO REFORM

This dissertation would be lacking without briefly and I hope concisely, making reference to the history and development of Namibia’s law of evidence - showing that the Law of Evidence has and is capable of development in accordance and in concert with changing times. This exposition, will also necessarily point out the origin of our law's emphasis on 'Orality', the 'Exclusionary Rules' and the various rights, such as the 'right to avoid self -incrimination' and the 'right to call and cross-examine witnesses' as well as the 'right of an accused to be called as a competent witness'. These are all important for purposes of this dissertation.

Cross on Evidence,¹ gives some background history of the rules of evidence. He writes that the rules of evidence can be traced back to the seventeenth and eighteenth century. Cross states that the decisions given by judges during those periods were responsible for the complex and almost defunct body of law concerning the competency of witnesses and the exclusion of all but the most useful evidence. Cross writes further² that other rules such as the rule against hearsay with its other numerous exceptions and the rule excluding evidence of opinion and the rudiments of the modern law of character evidence are perhaps the only rules not defunct in modern jurisprudence. Cross³ further states that the nineteenth and twentieth century has witnessed numerous statutory reformation.

¹ Cross on Evidence – 7th Ed, Butterworths London 1990 at pp 1
² Cross on Evidence op cit pp1
³ ibid pp1

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Already as far back as 1914, Lord Reading in the case of R v Christie\(^4\) held that: “it is desirable in certain circumstances to relax the strict application of the law of evidence.”

Numerous reforms and relaxations of the rules of Evidence were made in England by the Law Reform Committee, resulting in the Civil Evidence Acts of 1968 and 1972.\(^5\) The Criminal Reform Committee made further numerous recommendations, some controversial, and far reaching (such as the recommendation for total reform of the law relating to the admissibility of documentary hearsay). Some of these reforms were incorporated into the Police and Criminal Evidence Act 1984, which provided for changes to the law relating to the admissibility of confessions in evidence in criminal proceedings. Further relaxation of the rules applicable to criminal cases were implemented by the Criminal Justice Act of 1988 – principally with regard to documentary hearsay, the presentation of evidence, expert reports, securing evidence from abroad and the evidence of children.\(^6\)

It is not only England which has effected the reform of its laws of evidence. America has effected numerous reforms of its rules of evidence beginning with the Model Code of Evidence published by the American Law Institute in 1942. America then published the Uniform Rules of Evidence first published by the American Commissioners on Uniform Laws in 1953, which also formed complete codes. Congress then in 1975 further approved the Federal Rules of Evidence.\(^7\)

Similarly the code of evidence published by the Law Reform Commission of Canada in 1976 has been followed by the Uniform Rules of Evidence of 1982, and

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\(^4\) R v Christie [1914] AC 545 at 564  
\(^5\) Cross on Evidence (Supra) pp 3  
\(^6\) ibid pp 3  
\(^7\) ibid pp 4
extensive reforms of the rules of evidence in both Canada and Australia have been undertaken by the respective Law Reform Commissions. (Federal/Provincial Task Force on the Uniform Rules of Evidence (1982) and the Law Reform Commission of Australia report No 38 ‘Evidence’ (1987))

Similarly, South Africa has made an amendment to its evidence rules by way of the South African **Evidence Amendment Act 45 of 1988**.

Cross states that there is an increasing tendency, especially with regard to civil cases, to develop guidelines relating to the weight to be attached to certain evidence

Cross further states that the common law rules of evidence were evolved for jury trial, and in the absence of the jury, are heard by lay magistrates. He writes further that it is for this justification that a greater restriction of the area of admissible evidence is required than if the trial was to be conducted before a legally qualified judge sitting alone. The position in Namibia will be dealt with at a later stage. It would however, suffice to state that in Namibia and similarly in South Africa judicial officers, including magistrates are legally qualified persons. It should also be stated that in Namibia, no jury exists, thus the fear of undue weight being attached by jury members or lay magistrates is unfounded. The greater restriction of the area of admissible evidence is thus not required in Namibia.

Three factors have contributed to the largely exclusionary character of the law of evidence, namely the jury, the oath and the common law adversary system of

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8 ibid pp 4
9 ibid pp 1
10 Civil Evidence Act of 1968, S 6(3)
11 Cross on Evidence (Supra) pp 3

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procedure.\textsuperscript{12} The fear that evidence may be manufactured by or on behalf of the parties also played its role and the extent thereof can be seen in what C P Harvey wrote, in ‘The Advocate’s Devil’\textsuperscript{13} that “…all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries…”

No doubt, it was this fear, which gave rise to the extraordinary common law rule that the parties to litigation were unable to give evidence. The unfairness and absurdity of this common law rule was thankfully noted but it however took two centuries for it to be abolished in 1851 for civil cases (by way of the Evidence Act 1851). It took a further, forty-seven years before the same common law rule was abolished in all criminal trials by way of the Criminal Evidence Act of 1898. \textsuperscript{14}

It should be clear from the above that the rules of evidence as passed down through judgements during the seventeenth and eighteenth centuries in England, are inadequate in facing the needs of a changing society, and changing norms. For this reason South Africa and Namibia must also reform their rules of evidence to make them more user friendly and to ensure that they are in compliance with both countries’ new constitutional dispensations.

One of the more important reforms made to South Africa’s and thus Namibia’s inherited rules on evidence, was with regard to Section 227 (1) of the Criminal Procedure Act 51 of 1977 – regarding the character evidence of sexual offence complainants. Odgens was correct in stating that the admissibility of such unreformed character evidence fails to meet the need to protect witnesses from

\textsuperscript{12} Langbein ‘The Criminal Trial before the Lawyers’ (1978) 45 U Chi LR 263
\textsuperscript{13} The Advocates Devil – C. P. Harvey 1958 at pp 79
\textsuperscript{14} Cross on Evidence (Supra) pp 2

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undue “hurtful, harassing and humiliating attacks. The right to privacy in the highly sensitive area of sexuality and the realisation that the exposure of their sexual history may deter many victims from testifying.” It is clear that the archaic nature of this section is contrary to the rights guaranteed under both the Namibian and South African Constitutions and defiles the needs of society for a fair trial and equality before the law (Article 12 and Article 10(1) of Namibian Constitution 1 of 1990).

Another important reform to the laws of evidence in South Africa is the South African Evidence Amendment Act 45 of 1988. This Act 45 of 1988 amended the position of admissibility of hearsay evidence. Hearsay evidence is now admissible in terms of Section 3 of the amended Act if such admission is in the interests of justice.

2.2 ADVERSARIAL LEGAL SYSTEM


Namibia’s substantive legal system is based on the Roman/Dutch law, and an adjectival legal system, based on the English common law. The adversarial procedure applies in both Criminal and Civil proceedings. Unlike in Continental legal systems, where evidence may commonly be given in writing, our legal system has as a result of the adversarial approach (but also because of the past jury

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15 Phipson on Evidence: Howard et al 14th Ed. pp 85
16 see also A Sachs and J. Hoff Wilson’s ‘Sexism and the Law: A Male Belief and Legal Biasm’ 1978 (Martin Robertson & Co Ltd) indicating that the law has and to a lesser extent is being moulded according to the beliefs and needs of male judges – this is another reason for the reformation of our laws of evidence in a democratic and non gender society as seen above by Section 227 (1) CPA 51 of 1977
system) emphasised orality with the development of the 'Compurgators' (oath helpers) through to the system of 'Judicium Dei' up until our modern day legal system. The need for orality in early English law systems, due to the great illiteracy of jurors - transformed the courtroom into a type of stage - the parties to the dispute 'acting out' verbally - through the calling and cross-examining of witnesses.\textsuperscript{18}

Van der Merwe, further states that because in the past - jurors who were lay persons - attached undue weight to certain kinds of evidence which were sometimes untrustworthy, the exclusion of hearsay and previous consistent statements helped to reinforce the non-documentary nature of trials.\textsuperscript{19} The introduction of the Exclusionary Rules of the modern Law of Evidence was claimed by Judge Ryder, who was Chief Justice of the Kings Bench between 1754 –1756, to essentially have a prophylactic purpose, "... designed to prevent error from infecting adjudication. Prophylaxis substitutes for cure."\textsuperscript{20}

Langbein further writes that by the early nineteenth century a French observer reported that the Judge "... remains almost a stranger to what is going on..." while counsel for prosecution and defence examine and cross-examine the witnesses.\textsuperscript{21}

The nineteenth century showed further developments, including among others - the 'privilege against self-incrimination' and the 'beyond- a - reasonable - doubt' standard of proof.\textsuperscript{22}

\textsuperscript{18} Van der Merwe ‘Die evolusie van die mondelinge karakter en uitsluitingsreels van die Engelse gemene bewysreg, Stellenbosch Law Review 1991 Vol. 3, pp 281 at 283 - 284
\textsuperscript{19} ibid. pp 283 - 284
\textsuperscript{21} ibid pp 1168
\textsuperscript{22} LH Hoffmann and DT Zeffertt, The South African Law of Evidence (Butterworths: Durban, 1988 4th Ed

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Until 1843, persons who had a vested interest in the outcome of the litigation were excluded as competent witnesses. Until 1851, parties in civil cases could not themselves give evidence. The corresponding dates in the Cape Colony are the 'Evidence Ordinance of 1846' and the 'Evidence Act of 1861' respectively. Whereas in England until 1898, an accused could not give evidence at all, the accused was made a competent witness in the Cape Colony, by way of the 'Administration of Justice Act' in 1886.  

2.3 NAMIBIA’S LAW OF EVIDENCE

After the final colonisation of the Cape Colony, by Great Britain, in 1806, it was decided by the Colonial Authorities that the administration of justice in the courts of 'Landdrosts and Heemraden' were inadequate. The authorities thus imposed the English Rules of Procedure on the Cape Colony, however leaving much of the substantive Roman/ Dutch law unaltered. Enactment of the 'Cape Evidence Ordinance, Ord. no. 72 of 1830' thereby introduced the English Law of Evidence into South Africa. Further Ordinances and Proclamations were made - further developing the position of the Law of Evidence.

On the 30th day of May 1961, South Africa became a Republic and the law of England, which was binding on South Africa's legal system, was virtually frozen. This accounts for the position as stated by Judge of Appeal Rumph that "... the law of England, as it existed at that stage (30th May, 1961) is the law to be applied..." in South Africa.

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23 Wigmore, Evidence ( Little, Brown and Co.: Boston, 1940 (3rd Ed)
24 Hoffmann and Zeffertt (Supra) at pp 6 - 7
25 ibid. 6 - 7
26 Van der Linde v Calitz 1967 (2) SA 239 (A)
27 Ex parte Minister van Justisie: in re S v Wagner 1965 (4) SA 507 (A)

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As stated above - trials rely much upon orality, and therefore much upon one's ability to relate, recollect and express the knowledge of the facts in issue. However, when memory is limited, the courts may allow 'refreshment' to take place and similarly if expression of such knowledge of the facts is restricted, the use of facilitators is allowed.\textsuperscript{28}

Refreshing of memory is basically an aid, which the witness has in order to 'refresh' or familiarise him or herself with any writings or statements made by him or herself at the time of the transaction concerned. Such refreshing may also be done from documents or writings made soon after the said transaction if, in the court's opinion, these were written at a time when the events were still fresh in the witness' memory.\textsuperscript{29}

According to the case of \textbf{R v Pitt 1968} \textsuperscript{30} it was held that eliciting information by means of hypnosis is analogous to refreshment of testimony.

Chapter three will take a look at hypnosis as a means of ‘hypermnesia’.

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\textsuperscript{28} In re Luz P.595 N.Y.S.2d 541 (N.Y. App. Div. 1993)
\textsuperscript{29} Impending the Credit of a Witness: Taking of Oral Evidence and the Examination of Witnesses at p 315. See also the cases of S v Wagner 1965 (4) SA 507 (A) and S v Joubert 1971 (3) SA924 (E)
\textsuperscript{30} R v Pitt (1968) 68 D.L.R. (2d) 513
CHAPTER THREE

3.1 INTRODUCTION AND BACKGROUND – HYPNOSIS AND FACILLITATED COMMUNICATION

James Braid (1785 – 1860), first coined the word hypnosis, which is derived from the Greek hypnos (sleep).¹

Hypnosis is a form of attentive, receptive focal concentration with a sense of parallel awareness and a constriction in peripheral awareness. The hypnotic – like experience most common in everyday life is that of becoming so engrossed in a particular activity, such as reading, driving, or watching television, that one loses the customary spatiotemporal orientation and enters the imagined world, or loses track of time and distance covered. The relationship between hypnotic concentration and ordinary awareness is analogous to the relationship between macular and peripheral vision. Macular vision in hypnotic states, being intensely colour filled and detailed, but allows inspection of only a limited vision field, while peripheral vision sacrifices, detail and colour for the broadest possible examination of the ambient environment.²

Other sensory, motor and psychological alterations are associated with the hypnotic trance experience, including the ability to alter perceptions, the capacity to dissociate, amnesia for part or all of the hypnotic experience and a tendency to compulsively comply with instructions given during the hypnotic state, commonly termed suggestibility. Suggestibility, can thus be used to the benefit of the


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hypnotist, in demanding that the subject be open and truthful, since the subject tends to suspend critical thinking and judgement. Any hypnotised person may experience any or all of these hypnotic phenomena. It must however be understood that although critical thought is suspended – confabulation or ‘hardening’ may still occur, it must also be noted that a person while under hypnosis will seldom be susceptible to suggestions which are contrary to his or her notions of morals.³

For psychotherapeutic and legal purposes, it is occasionally helpful to use the hypnotizable person’s capacity to intensify memories or even to relive aspects of the past. In general, only persons who are highly hypnotizable are capable of such regression. The crucial distinction between a true hypnotic regression and mere intensifying of memories that can occur in a less hypnotizable person is that, in regression, the person relives previous events as though they were happening in the present, often with much of the original affective intensity. The person who is less hypnotizable however, relates the events as spectator, or distances him or herself from the intensity of the events.⁴

There is further growth in interest in utilizing hypnotic regression for the purpose of intensifying the memories of witnesses and victims of crime, despite the increasing controversy about the dangers of confabulation or giving the witness a false sense of conviction about the veracity of their memory.⁵

Information retrieved during hypnotic regression is not necessarily more accurate than any other belief or perception; however, new information may be uncovered, in part because of the intense affect that can be re-elicited in hypnotic regression.

³ ibid pp 1389 - 1403
⁴ ibid pp 1389 - 1403
⁵ Orne, M. ‘The use and misuse of hypnosis in court’ – International Journal of Clinical and Experimental Hypnosis (1979) (October)

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This is consistent with the theory of state-dependent memory, which holds that people remember more accurately the content of experiences when they are in a congruent emotional state. The best manner to use information elicited under regressive hypnosis is to use such information as a starting point for obtaining additional objective evidence. The subjects should give a full account of their memories prior to such regression, and the entire account should be recorded, preferably on videotape.6

Since World War II the intellectual climate concerning hypnosis has radically improved. The Society for Clinical and Experimental Hypnosis was established in 1949 in the United States, and in 1959, was expanded into an international society. The well deserved stature, of hypnosis as a science was given to the study of hypnosis in 1958, by a policy statement from the American Medical Association recognising hypnosis as a legitimate treatment method. In 1955, the British Medical Association passed a similar resolution.7

Brody8 writes, with regard to hypnosis, that the popular press is fond of touting the use of hypnosis to aid retrieval of information in criminal investigations. Stalkner and Riddle (1932)9 write that the effectiveness of hypnosis is rather mixed, demonstrating modest increases in recall, but also finding that subjects may confabulate or invent details they could not remember – thus filling in any lacunae.

6 Crasilneck, H.B ‘Clinical Hypnosis: Principles and Applications pp 440
7 Crasilneck, H.B ‘Clinical Hypnosis: Principles and Applications pp13
8 Brody, JE ‘Hypnotism is a powerful but vulnerable weapon in fight against crime. New York Times, October 14, 1980, pp 15, 17
Wigmore\textsuperscript{10} (Para 924a) once stated that “if ever there is devised a psychological test for the valuation of witnesses, the law will run to meet it.” Three such scientific means have been considered namely the ‘lie-detector’, ‘truth drugs (narco-analysis)’ and ‘hypnosis’. However, contrary to Wigmore’s statement\textsuperscript{11} none of these have been embraced with much enthusiasm.

In the same line of thought, Kroger and Douce, 1979 and Reiser and Nielsen, 1980\textsuperscript{12} - have suggested that forensic applications of hypnosis have purpose in its use as “ a lie detector, obtaining confessions, the lifting of amnesia, aiding witnesses in recall of details…”\textsuperscript{13}

The abundant use of hypnosis in those contexts however, are overtly optimistic and reflect some misunderstandings of both the “nature of our [U.S] legal system and the constitutional rights of the accused in criminal trials” to quote Roy Udolf.\textsuperscript{14}

According to Dr. Martin Orne, in his paper ‘ The Use and Misuse of Hypnosis in Court'\textsuperscript{15} there has been a sharp increase in the use of hypnosis by prosecutors and defendants, plaintiffs and respondents alike. Such use of hypnosis is to enhance memory for events associated with a crime or civil suit - if appropriate safeguards are employed.

\textsuperscript{10} Cross on Evidence pp 294
\textsuperscript{11} ibid
\textsuperscript{12} Reiser, M and Nielson, M (1980) Investigative Hypnosis: A developing speciality – American Journal of Clinical Hypnosis 23 (2): 75 - 84
\textsuperscript{14} Handbook of Hypnosis for Professionals – 2nd Ed. 1987 VNR – New York pp 275
\textsuperscript{15} International Journal of Clinical and Experimental Hypnosis (1979) October

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Although courts have rejected the use of hypnosis as a truth telling device (as was narco-analysis or truth serum), recognition of hypnosis as a valid therapeutic modality by the American Medical Association and the American Psychological Association has contributed to a new trend in the use of hypnosis in legal cases. This stems from the fact that hypnosis is widely used in therapeutic contexts to help individuals remember events for which they have had amnesia.

Since defendants claim to lack memory of the events for which they are being tried – the use of hypnosis in courts for the purpose of ‘refreshing’ memory in order to better assist in their own defense seems reasonable, logical and in keeping with the concept of fairness.

Further, it was contended that hypnosis could be useful in determining the defendant’s state of mind at the time of committing the offence. It was by way of this ‘backdoor’ that hypnosis was reintroduced into the courtroom. The case of State v Papp, 1978 is an excellent example of the reintroduction of hypnosis into the courtroom – the court exonerating the defendant from such crime in the light of evidence brought forward under such hypnosis. Similarly, in the case of Crockett et al. V Haithwaite et al., 1978, hypnosis was used successfully to help plaintiffs in accident cases to remember the details of the accident.

16 People V McNichol, 100 Cal. App. 2d 544, 244 P.2d 21 (1950)
17 William C. Wester II ‘Clinical Hypnosis – a multidisciplinary approach 1991 – BSCI Publications Cincinnati, Ohio
18 ibid pp 500

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Evidence obtained by lie detectors and narco-analysis were rejected by the Supreme Courts of Canada.\(^{21}\) In the case of *Phillion v R* [1978] 1 SCR 18, the Evidence derived by method of narco-analysis was admitted at the trial. However, the admissibility of such evidence was not in issue before the said Supreme Court.

Admissibility of evidence derived by narco-analysis was however, in issue in the New Zealand case of *R v McKay* [1967] NZLR 139, and was rejected, because it infringed upon the rules of hearsay and because it would distort the process of trial.

Despite arguments in favor of admitting statements made under hypnosis and other means already put forward\(^{22}\) it is submitted that the unreliability of such techniques, together with the danger of the jury’s attributing more weight to such unfamiliar scientific evidence than it deserves would justify courts in excluding such statements. Although Namibia is a common law state, the jury system was eradicated. Thus, the argument that a jury will attribute too much weight to such scientific evidence is unjustified in Namibia, and likewise in South Africa. What must then be done, is to properly familiarise the judicial officer in matters of hypnosis letting such judicial officer decide the weight to be attributed upon each, as is his duty with all evidence put forward.

In the British Columbian case of *R v Pitt* (1968) 68 DLR (2d) 513 a woman who was accused of attempting to murder her husband, and was suffering from functional amnesia, could not relate to the court the events in question. Her


\(^{22}\) Haward and Ashworth ‘Some problems of Evidence obtained by hypnosis’ [1980] Crim LR 469, and Harnon ‘Evidence obtained by Polygraph: An Israeli Perspective’ [1982 Crim LR 340
counsel applied to the court for leave to have her hypnotised in court. An expert hypnotist gave evidence that her memory might be refreshed by such hypnotic trance. The application was granted and the woman gave her evidence after emerging from the trance like state. The court granted such leave to give evidence by means of hypnosis, on the basis that such was analogous to refreshment of memory and also because not to do so would be unfair not to allow the accused the benefit of the latest medical techniques. The position in Namibia, should be even stronger, since such right is guaranteed in its Constitution.23

Based on the assumption that every memory is somehow recorded, hypnosis is purported to be simply a means of ‘refreshing memory’.24 Hypnosis, has been traditionally used as a means to treat spontaneous amnesia, or ‘blocking of memories’, previous amnesic material would suddenly become accessible to consciousness, usually accompanied by profound affect as the patient relives the experience.25

William C. Wester II writes that it is characteristic of repressed memories to suddenly come to consciousness as an entire experience rather than emerging detail by detail. Rather, Wester II writes that such events are related in the narrative. He further states that while there is no certainty about the accuracy of these memories, such memories are more likely to contain important and accurate information, if such occurs spontaneously and without undue pressure from the therapist.26

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23 The Namibian Constitution No1 of 1990: Articles 10 and 12
24 William C Wester II pp 510
25 ibid pp 510
26 ibid pp 511

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There is a global phenomenon amongst our courts that some delayed prosecutions for childhood sexual abuse involve recovered memories.\textsuperscript{27}

In the recent writings of Lewis and Mullis\textsuperscript{28}, the approach taken by courts in England and Wales with regard to evidence of sexual abuse based on recovered memories, raises the issue of corroboration. They further note the controversy over phenomena of repression and recovery and the truthfulness of recovered memories, whether by means of hypnosis or not.

Lewis and Mullis\textsuperscript{29} however, arrive in their conclusion that such recovered memory evidence should be admissible in trial, subject to the requirement that some other evidence support such recovered memory evidence. This is in effect what they call the ‘corroboration approach’. Their arguments are based on the fact that the rules of evidence support the presumption of innocence and thus such revived memory should be admitted in the interest of attaining the truth.

However, Mike Redmayne in his article “A corroboration approach to recovered memories of sexual abuse: a note of caution”\textsuperscript{30} criticises their notion of innocence. Redmayne argues that if Lewis and Mullis take the presumption of innocence seriously, they should be rather more cautious about advocating a corroboration approach to recovered memories.

Corroboration is confirmatory evidentiary material derived from a source independent of the evidence to be corroborated.\textsuperscript{31}

\begin{flushright}
ibid
Schmidt p 108
\end{flushright}

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Lewis and Mullis, (supra) offer three options with regard to recovered memories, its admissibility and the corroboration thereof.

First, they argue that any and all such recovered memories be excluded on the grounds that the lack of convincing evidence for repression means that all recovered memories fail to satisfy a reliable threshold for admissibility. This argument is according to Redmayne, overly cautious and should thus not be supported. Further, Redmayne argues that, the Judge will necessarily be assisted in its evaluation of the recovered testimony by means of supporting evidence.

Second option is for a more flexible application of a reliability threshold, namely that such recovered memory evidence be considered at a pre-trial hearing or *voir dire*. This option is rejected however on the basis that there is no clear rule requiring supporting evidence. Further, such option may be more time consuming.

Option three, is analogous to the treatment of eyewitness identification evidence. This option is the more acceptable one, since it requires supporting evidence in order for such revived memory to be admitted in trial. The court must be warned of its potential unreliability. Eyewitness evidence is treated in Namibia under the cautionary rules of practice due to the fact that the strict requirement of corroboration evidence was done away with - aside from section 209 of the Criminal Procedure Act 51 of 1977. This was evident in the Namibian case of *S v Ndikwetepo and Others* 1992 NR 232 (HC) at 251C – I.32

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32 See also *S v Pretorius en ’n Ander* 1991 (2) SACR 601 (A) at 608b
Namibia’s criminal law previously required corroboration in a number of areas. These have been reduced however so that corroboration is now only required under section 209 of the Criminal Procedure Act 51 of 1977 in the case of confessions. It is submitted that the reason for such reduction in corroboration is due to the fact that Namibia does not entertain a jury system, as well as the reduced formalism in the legal system. Instead of corroboration required by statute, Namibia now has rules of practice that require caution when approaching certain kinds of evidence, known as the ‘cautionary rules’.

Thus, where memory is revived by means of hypnosis, such revived memory, aside from the criticism that such form of facilitation is untrustworthy, will necessarily face a further challenge of corroboration. In Namibia, corroboration of such revived memory will only be required with regard to confessions made and thus will not be required with regard to such revived memory. However, the courts must still exercise due regard to the probative value of such revived memory under the cautionary rules, which are based on common sense and are not formalistic in nature.33

Chapter four will look at expert opinion evidence, which must be delivered with regard to such hypnosis as a means of extracting such memory. The requirements for expert opinion to be admissible in court will also necessarily be discussed.

33 S v Itewa 1990 NR 220
Furthermore, criticism that such revived or refreshed memory or prior statements to that effect are to be excluded due to hearsay exclusionary rules will also not be entertained. Such statements, as will be seen in chapter four, will be admissible in South African courts based upon Section 3 of the South African Evidence Amendment Act 45 of 1988 which allows for the court to exercise discretion in admitting hearsay evidence in the interests of justice.
CHAPTER FOUR

FACILITATED COMMUNICATION: HYPNOSIS AS A MEANS

4.1 INTRODUCTION

The aim of this chapter is to give the reader an understanding of what ‘facilitated communication’ is, and how it is successfully used in foreign courts. This chapter will also show that hypnosis should be and has successfully been included as a means of communication facilitation. This chapter will make use of case materials, derived from the United States, Canada and New Zealand to support the author’s view and to show that in certain instances, the courts have laid various standards to be met before hypnosis can enjoy operation in the courts.

As stated above, if the witness is unable to recall certain events or information the courts will allow for ‘refreshment’ to take place.

Refreshment in its basic form occurs where a witness – failing to remember certain events or information, is allowed to revive such previously known information or events by extraneous means for purposes of relating such information thereafter, orally and without continued reference to such extraneous materials.
Documents and or Statements written down or recorded by third parties may also be admissible,¹ for purposes of refreshment of testimony - especially since many of the documents and or statements are not written down by the witness him or herself - as is the case with affidavits and statements made upon or soon after arrest.² However, for such documentation to be admissible for purposes of refreshment, such statement must be read by such witness, who must state that he knew it to be correct at the time of making such statement, and still holds it to be correct at the time of reading it.

Thus, by way of analogy, statements taken by persons acting as 'Communication Facilitators'' may also be used with regard to refreshing of testimony, if such method of facilitated communication has gained general acceptability in the relevant scientific field.³

4.2 FACILITATED COMMUNICATION AND HYPNOSIS

Facilitated Communication - generally means the aiding of communication through external means - where such person in need of such facilitation is unable to express him or herself, due to some impairment, whether due to memory loss, mental, psychological or physiological reasons.⁴

Although facilitated communication has mainly been utilised in instances of autism, the list of impairments resulting in the need for such facilitation and the methods utilised in such facilitation is by no means a numerus clausus.⁵

¹ Burrough v Martin (1809), 2 Camp. 112 and the Indian Evidence Act of 1872, Sect 159 - which also bears English influence.
² Criminal Procedure Act 51 of 1977 Sect 213
³ Frye v United States, 293 F.1013 (D.C.Cir. 1923)
⁴ Luxton, MS: Facilitated Communication Digest, Vol 4 No 1 at pp 12
Key-boards are used in instances where persons have difficulty in performing motor acts - by way of physical reinforcement of a lifting pressure, from the facilitator under the witness' wrists, the use of signers in respect of deaf and dumb persons - making provision for no less than eight separate forms of communication systems with regard to deaf and dumb witnesses. The allowance of speech therapists' assistance in instances where witnesses suffer from Cerebral Palsy.

The use of a language translator is similarly seem as a facilitator of communication, and similarly the use of a hypnotist in retrieving memory by way of hypnosis should be considered as a further form of such facilitated communication, and in some instances has so been declared.

However, as with all new forms of facilitated communication and similarly with new scientific evidence (such as lie detector tests, narco-analysis etc), hypnosis is surrounded by uncertainty and controversy, especially with regard to the accuracy of this method in terms of ascertaining the truth from the witnesses.

The introduction of hypnosis in the context of law and its use in Criminal trials is still in a stage of infancy. There is thus as a result great discrepancy between the Rules of Evidence and modern scientific evidence.

The primary problem of its admissibility, both in substantive use of statements made during such hypnosis and in the use of expert opinion as to the credibility

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6 People v Webb 597 N.Y.S 2d 565 (N.Y.Co. Ct.1993)
7 People v Rodriguez, 145 Misc. 2d 105, 108 - 109, 546 N.Y.S. 2d 769
8 People v Miller, 140 Misc. 2d 247, 530 N.Y.S. 2d 490
11 GL Wells: The Psychology of Evidence and Rock v Arkansas (supra)
12 Rock v Arkansas (supra)
thereon, has been the recurrent one of reliability and sufficiency of scientific acceptance.\textsuperscript{13} 

This has led to the fact that statements made under hypnosis in criminal trials have been uniformly rejected on the basis of the hearsay rule, lack of scientific acceptance of the underlying premise, or absence of necessary scientific foundation in the particular case.\textsuperscript{14} Such rejection has resulted in its exclusion from trials in many United States jurisdictions.\textsuperscript{15}

Such exclusion occurring, because of the tendency of the witness under hypnosis to be in a state of 'ultra sensitivity' and resulting in hypnotically refreshed testimony to suffer from 'confabulation' (a term whereby the witness fills in or adds, something inaccurately, to the actual recollection of the event) or 'hardening' (in which the witness's confidence about the accuracy of recollection increase without justification).\textsuperscript{16}

South Africa, in 1988 amended its Evidence rules by means of the \textbf{Evidence Amendment Act 45 of 1988}. The effected amendment was with regard to the 'hearsay rule'. P. Murphy, ‘On Evidence’ at 172 asserts that the rule against hearsay is “\textit{one of the most commonly applied rules of the law of evidence, and yet at the same time, the least understood...}” He defines ‘hearsay’ in terms of English law as “\textit{Evidence from any witness which consists of what another person stated (whether verbal, written, or by any other means) on any prior occasion, is inadmissible, if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true. Such a statement may, however be admitted for any relevant purpose other than proving the facts stated in it.”}

\textsuperscript{13} Experimental and Scientific Evidence at p 509 Chapter 20 
\textsuperscript{14} People v McNichol, 100 Cal.App. 2d 554, 224 p 2d 21 (1950) 
\textsuperscript{15} Chapter VIII: The Competency of Witnesses [Fed. Rules of Evidence 601] 

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Similarly, the American Federal Rule of Evidence 801(C) provides that “hearsay” is “…a statement, other than one by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

In South Africa, hearsay evidence was defined prior to the commencement of the Evidence Amendment Act 45 of 1988 as “… evidence of statements made by persons not called as witnesses and which are tendered for purpose of proving the truth of the allegations contained in such statements.”

In principle, one can say that ‘hearsay evidence’ is inadmissible because it is unreliable. The credibility of the source of such evidence cannot be tested during a trial by way of cross-examination, by an opponent or through observation by the court. The first danger is that the repetition of any statement involves inherent danger of error. Secondly, it is virtually impossible to engage in effective cross-examination of a witness who is testifying about a hearsay statement, since the witness did not observe the events in question.

The common law rule in Estate De Wet v De Wet 1924 CPD 341 was that hearsay evidence is inadmissible and could only be admitted once it was an exception to the hearsay rule.

Such exceptions were initially derived from case law. In the case of Vulcan Rubber Works (Pty) Ltd v SAR & H 1958 (3) SA 285, the appellate court confirmed the position that the courts did not have a discretion to admit hearsay evidence, save if it formed part of the existing exceptions. The court held that the

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17 Estate De Wet v De Wet 1924 CPD 341
18 Wigmore on Evidence 3rd Ed, vol 5, para 1362
19 Wigmore on Evidence ibid
exceptions were a *numerous clausus*, which could not be extended. Such exceptions were; *Res gestae; declarations by persons who die; evidence concerning physical or mental condition and admissions.*

The common-law rules on hearsay evidence have however, now been replaced by statutory provisions. With the repeal of section 216 of the Criminal Procedure Act 51 of 1977, the common law arrangement pertaining to hearsay evidence is abolished. The most important of these appear in the Evidence Amendment Act 45 of 1988. Hearsay is now defined in section 3(4) of Act 45 of 1988.

**Section 3** provides as follows:

“3. **Hearsay evidence** – (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless–

a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

c) the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail;
(vii) and any other factor which should in the opinion of the court be taken into account

is of the opinion that such evidence should be admitted in the interests of justice.”

Thus it is submitted that after inception of the Act 45 of 1988, hearsay will become admissible if:

(a) parties consent to the admissibility of a hearsay statement or document
(b) by adducing the statement of the person whose credibility determines the probative value of the statement or document
(c) the court, in the interests of justice, exercises its discretion in favour thereof.

Various cases have since utilised such discretion, of which the following are of notice: Holongwane v Rector St Francis College 1989 (3) 318 (D) in which such discretion arose and was admitted, similarly discretion was used for the admissibility of hearsay evidence in, Mnyama v Gxalaba and Another 1989 (1) CPD 650, S v Cekiso and Another 1990 (1) SA 20, Ndani v Allianz Insurance Ltd 1991 (1) SA 184 and Metedad v National Employer’s General Insurance Co Ltd 1992 (1) 494. The above cases all share in common the acknowledgement that after the inception of the Act 45 of 1988, the courts are vested with the discretion to permit hearsay evidence in the interests of justice, where the rigid and archaic principles of hearsay may frustrate the interests of justice.

Van Schalkwyk J in Metedad v National Employer’s General Insurance Co Ltd (supra) however, held that because of the presumption of innocence and the court’s intuitive reluctance to permit untested evidence to be used against the
accused in criminal cases, **section 3(1) of Act 45 of 1988** may only rarely find application in criminal law. He further states however, that the fact that the hearsay statement is untested in cross-examination, is a factor to be taken into account in assessing its probative value, but is no basis for non-admittance into trial.

Thus in the interest of justice, it is submitted that hearsay evidence, must be allowed as admissible in trials. **Section 3(1)(c) of the Act 45 of 1988** lists seven factors, which must first be taken into account before the courts decide whether it will be in the interests of justice to allow such hearsay evidence. It must be noted that for such admittance, of hearsay evidence, all seven factors need not be met as seen in *Hlongwane v Rector St Francis College*20 (Supra), where hearsay evidence was admitted despite the first three factors not being met.

Once such evidence has been admitted, it is the court’s function to determine the probative value if any of such admitted hearsay evidence.

Thus the criticism that statements offered by a witness whilst under hypnosis and thereafter relayed to the court is inadmissible due to the hearsay rule, is unfounded in terms of the South African **Evidence Amendment Act 45 of 1988**. As stated above, such statement if in the interest of justice, will be admitted at the discretion of the court and the presiding judge must ascertain any probative value thereof.

The claim that hypnotically refreshed memory should be excluded due to the hearsay rule thus does not hold much conviction. The premise of the hearsay rule, according to Schmidt 21 is that the witness who made the statement is not before the court - he or she is not under oath and most importantly that the evidence

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20  1989 (3) 318 (D)  
21  Schmidt Law of Evidence, Chapter 18 p444
cannot be tested by cross-examination. Thus the hearsay evidence is not included because it is not logically probative.\(^{22}\)

However, with regard to hypnosis as a means of refreshing of memory, the facilitators are sworn in under oath to aid in the outcome of justice, to assist the witness and not to interfere or manipulate the effects and outcome of such facilitation.\(^{23}\)

Unlike most hearsay evidence however, cross-examination of the witnesses is possible, but because of the effect of hypnosis, as stated above, such as confabulation and or hardening, cross-examination is merely more difficult, the trier of facts having to discriminate between fact and fiction.

With regard to hypnosis, it was written in the Council Report, 253 JAMA at p 1921\(^{24}\) that "[W] hen hypnosis is used to refresh recollections, one of the following outcomes occur: (1) hypnosis produces recollections that are not substantially different from non hypnotic recollections; (2) it yields recollections that are more inaccurate than non hypnotic memory; or most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details.... There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information."

Despite the general exclusion of hypnotically refreshed testimony in the United States under the **Federal Rules of Evidence 601** - there are certain exceptions to this practice. Some jurisdictions allow hypnotically refreshed testimony into

\(^{22}\) R v Blastland [1985] LRC (Crim) 234 (HL) at p 239 f, 1985 2 ALL ER 1095 (HL)
\(^{23}\) People v Web 597 N.Y.S 2d 565 (N.Y.Co.Ct. 1993)
evidence, if it can be shown to be 'sufficiently trustworthy'\textsuperscript{25} - the term being one subject to interpretation. Further, if it can be shown that a witness' testimony is independent from the hypnotic inducement - such witness may testify\textsuperscript{26} - weight being accorded to the accuracy of the testimony by the trier of fact.

A further, and in my opinion a more founded exception to the exclusionary practice is that of Constitutionality - limiting such exclusion.

In the case of \textit{Rock v Arkansas(1987)}\textsuperscript{27} - a defendant in a murder case was originally barred from giving testimony about details remembered under hypnosis that were relevant to her defence.

In the United States, defendants have a clearly established right to testify on their own behalf and to call witnesses favourable to their defence. In terms of the Due Process Clause of the 14th Amendment, the Compulsory Process Clause of the 6th Amendment and the 5th Amendment's privilege against self-incrimination. Any limitations on such right - such as the exclusion of hypnotically refreshed testimony, must not be overly broad and or arbitrary.\textsuperscript{28}

In California, the courts adopted a far stricter general rule which bars entire testimony by any witness, who has been hypnotised whilst it explicitly excepted testimony by an accused. "\textit{When it is the defendant himself - not merely a defence witness - who submits to pre trial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt}\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item Frye v United States, 293 F.1013 (D.C.Cir.1923) and Experimental and Scientific Evidence
\item Chapter VIII: The Competency of Witnesses [Fed. Rules of Evidence 601]
\item Rock v Arkansas, 483 U.S. 44,51 (1987)
\item ibid
\end{itemize}
\end{footnotesize}
herein is subject to a necessary exception to avoiding impairing the fundamental right of an accused to testify in his own behalf.”

In Namibian law, it is the right of each party to testify and to call witnesses. Convictions have been set aside in criminal cases, because the accused was not given sufficient assistance to call witnesses. As stated above, the Administration of Justice Act 1886 made provision for the allowance of an accused to be considered a competent witness. This right to give testimony and call witnesses is enshrined in the Constitution of the Republic of South Africa 108 of 1996, Chapter II, dealing with the fundamental rights and freedoms, section 9 (1) and section 32 (1) and section 34 dealing with access to courts. In the Constitution of the Republic of Namibia Article 12 (d) states 'All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them. Article 12 (e) further states 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial...' Article 12(f) states ' no person shall be compelled to give testimony against themselves. Non compliance therewith, results in the conviction being set aside.'

Frye v U.S.293 F 1013,1014 (D.C.Cir, 1923), set forth a standard for admissibility of expert scientific testimony in the federal courts of the United States of America. Just when exactly a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Initially, challenges

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29 People v Shirely, 31 Cal 3d 18, 723 P2d 1354, cert denied, 459 US 860, 74 L Ed 2d 114, 103 S Ct 133 (1982)
30 S v Haita 1993 NR 368 HC
31 S v Haita 1993 NR 368 HC

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to testimony and evidence derived from facilitated communication was challenged under this standard. The standard set was that scientific evidence would be admissible if it were sufficiently recognised by the relevant scientific community. Recently, however, the Supreme Court overruled the Frye case. In the case of *Daubert v Merrill Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 3793 (1993)* the court held that the case of Frye was in conflict with the Federal Rules of evidence and offered the following guidelines regarding admissibility of scientific evidence.

In applying this standard, however, a number of threshold questions are presented to the trial court: What must be accepted, who must accept it, how exclusive must such acceptance be, and what evidence is acceptable to reflect the extent of acceptance. Attempts at or ability of a method or theory to be tested, submission of theory or technique to peer review, potential rate of error for same and acceptance in the scientific community are all offered as guidelines.

It should be remembered that although the courts discuss reliability in general terms, the test as in the case of polygraph results, should be not whether the expert could achieve perfect success or no success at all. Rather, the test should be whether he could achieve such success as to make his opinion helpful to the court without being outweighed by countervailing considerations.33

In general, most case law related to facilitated communication has been built upon some application of the Frye standard of "general acceptance in that scientific field".

In the case of *In re M.Z. (1992)* (supra) - the courts denied evidence relating to a young Down syndrome person, finding that facilitated communication failed to meet the criterion of general acceptance by the scientific community.

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It was held that what constitutes "general acceptance" is apparently a matter of discretion for the trial court. This is due to the fact that no standard more specific than that enunciated in Frye has been found in statute or case law - with a focus on the reliability in the context of the particular type of evidence under consideration. Experience and determination on case-by-case basis will be required before procedural standards can be properly enunciated with any degree of definiteness.

In the case of *People v Webb (1993)* (supra) the court had to decide how live testimony via facilitated communication would be treated in a grand jury proceeding. Following the judges’ rulings, the person facilitating the witness took an oath promising to assist the witness in communicating without changing any testimony. Additionally, the facilitator wore headphones, which generated noise sufficient to prevent her hearing the questions being asked of the witness.

In *In re Luz P. (1993)* (supra) an appeal was heard by the New York Supreme Court, Appellate Division. The higher court overturned the previous ruling. In doing so, the court rejected the applicability of the Frye case and the standard of scientific acceptance. Instead, they likened the situation to that of the facilitator acting as an interpreter. The court approved a method of testing the reliability and validity of the interpretation.

In the British Columbia case of *R. v Pitt*[^34], a woman charged of attempting to murder her husband could remember little of what had happened, her counsel then applied for leave to have her hypnotised in court, a hypnotist having given evidence that her memory might be refreshed by a hypnotic trance.

[^34]: R v Pitt (1968) 68 D.L.R. (2d) 513

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The application was granted, the wife giving her evidence after she had emerged from the trance. The decision was partly based on the analogy of refreshment of memory, but reference was also made to the unfairness of not allowing the accused the benefit of the latest medical techniques.

In keeping with the Federal Rules of evidence, it would appear that the Luz pragmatic test would still be applicable in addressing the issues surrounding testimony via facilitated communication.

There are also some inherent problems with the test set out in the Luz case (supra). First, the decision provides no guidelines for judging what specific criteria should be met that would allow a judge to rule on the testimony's permissibility. Second, and more seriously, there is no way that any test can guarantee that all communication will be free of influence on the part of the facilitator. Thus, the Luz test may actually lead to a per se bar as well.

Unfortunately, this would still leave us with a per se bar on testimony and evidence through the use of facilitated communication. The intrusive methods used in the Webb case (supra) may thus interfere with the elements necessary for optimal facilitation.

As stated above, this bar would violate the rights of people using the method to communicate and revive memory or who become defendants or people without disabilities who want to call someone who uses such as a defence witness.

Referring back to the Rock v Arkansas case (supra), one needs to take cognisance of the fact that the right to testify and call witnesses does carry some limitations. Courts may however, only unqualifiedly prohibit such testimony in the courtroom if the method is conclusively and totally unreliable and invalid, however, such
testimony, by way of refreshed memory through hypnosis and other forms of facilitated communication, has clearly not been shown to be totally unreliable and invalid.

An expert witness' opinion of the accuracy and validity of hypnosis and it's effects, and similarly the accuracy and validity of all facilitations used in court is relevant. This is in order to be able to assist the court in making its determinations with regard to the weight to be placed upon such admissible testimony, since he/she has a greater knowledge of this field than the court. The expert witness, thus needs to be adequately qualified in the specific field of facilitation further, the grounds for the opinion must be stated, otherwise, according to Schmidt, the evidence does not have much value if the evidence is not connected to the facts of the case. The court is also not in the position to determine whether the opinion is correct or not. As stated in the Coopers case (Supra): "As I see it, an expert's opinion represents his reasoned conclusion based on certain facts and data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an experts' bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

However, in the case of S v Williams 1985 (1) SA 750 (C), Aron AJ held that a failure to give reasons affects the weight of the evidence and not the admissibility of the testimony.

35 Van Heerden v SA Pulp and Paper Industries Ltd 1945 2 PH J14 (W)
36 Schmidt and Zeffer, Evidence in LAWSA (2nd Ed) Vol. 9 pp 439
37 Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung Mbh 1976 (3) SA 352 (A) at p371 F-G

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The court should not subject itself to the witness' opinion. In other words, the court should not give up its role of judging, by uncritically accepting the opinion evidence. It should always determine if the opinion is justified in the light of the facts.

The general rule is that opinion evidence is insufficiently relevant and should therefore be excluded. It is the witness’ role just to state the facts and not to give his opinion, since his opinion is insufficiently relevant. Further, it is for the court to decide the matter not the witness.

There are however two exceptions to the above general rule. First, an ordinary person may give an opinion in respect of a fact, which is difficult to describe in any other manner. Secondly, opinion with regard to an expert witness within his/her field of expertise may be admissible.

The issue of admissibility of expert opinion was dealt with in the case of *Holtzhausen v Roodt (1997 (4) SA 766*. This case dealt with the admissibility of expert testimony of two experts, Ms Breslin and Mr Wilkinson, in the field of psychology and more particularly in the field of hypnosis.

Sachwell J stated that various relevant principles must be adhered to in determining the admissibility of expert opinion. Sachwell J set about listing six such principles, which will be briefly dealt with.

First, he states that the expert witness must give evidence requiring a specialised skill or knowledge. It was held in the case of *R v Turner [1975] QB 834 (CA)* at
that ‘If on the proven facts a judge or jury can form their own conclusion without help [from the expert witness] then the opinion of the expert is unnecessary.’ Thus evidence of opinion on matters, which do not require expert knowledge, is excluded since it does not aid the court in its determinations. It is unnecessary and may cause confusion.\textsuperscript{39}

Second, Satchwell J states that the courts are accustomed to the receiving of evidence from psychologists and psychiatrists, particularly in criminal courts. Satchwell J however reminded the court that it must not ‘elevate the expertise of the witness to such heights that we lose sight of the Court’s own capabilities and responsibilities.’ He then refers to the case of \textit{S v Kalogoropoulos 1993 (1) SACR 12 A at 22d-e} with regard to the court being able to draw its own inferences ‘from the objective facts relating to the [issues at hand].’

Third, the witness must be a qualified expert. It is not necessary according to Satchwell J, that the expert acquires such skill or expertise professionally. Rather it is up to the presiding officer to determine whether or not the witness has undergone special study, or whether such witness has sufficient skill or expertise to be called an expert.

Fourth, the facts upon which the expert opinion is based must further be proved by admissible evidence. It was held in the case of \textit{Davey v Edinburgh Magistrates 1953 SC 34 at 40} that ‘[t]he duty of the expert is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the expert’s conclusions so as to enable the Judge… to form [his/her] own independent judgement by the application of these criteria to the facts proved in evidence.’

\begin{footnotes}
\footnotetext{38}{[1975] 1 ALL ER 70 at 74d-e}
\footnotetext{39}{Holtzhauzen v Hoodt (1997 (4) 766 at 762 c}
\end{footnotes}
Fifth, the guidance offered by the expert must be sufficiently relevant to the matter in issue. It was held in R v Vilbro 1957 (3) SA 233 (A) that the expert opinion is accepted if relevant, rejected if not.

Finally, opinion evidence must not usurp the function of the Court, thus the expert must not be asked nor answer questions, which the Court has to decide.

Sachwell J, in conclusion held that the expert opinion of Ms Breslin, a psychologist from the University of St Lawrence be admissible. The court held that it remains the duty of the Court to determine the probative value of her evidence and in what manner and to what extent it is of use in the understanding of the facts before the Court.\(^4\)

The same court however, held that the expert opinion of Mr Wilkinson, a clinical psychologist from the University of South Africa and member of the South African Society of Clinical Hypnosis was inadmissible. The court was of the opinion that Mr Wilkinson had indeed established himself as an expert by reason of his professional qualifications, training and experience in clinical hypnosis. However, his opinion usurped the function of the court and was thus inadmissible.

It is thus clear that if hypnosis is to be utilised by the courts of Namibia, as an aid to refresh memory, the principles as set out by Satchwell J (supra) must be fulfilled, in order for expert opinion to be admissible.

\(^4\) ibid Pp779d-e
CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS

In conclusion, it is evident that hypnotically refreshed testimony, must 'earn' its admissibility in the court of law, although it is recognised as a means of facilitation - however still in its stage of infancy. Although it has not shown itself to be totally invalid and or untrustworthy, the courts do not have much precedent on the matter, at least not in South African or Namibian case law. The courts are thus trying to find 'neutral ground' or rather to balance the principles of opinion evidence (expert opinion), hearsay and the principles dealing with refreshment, and admissibility with the need to recognise and grant the applicant's right of access to the latest medical and other advancements and aids. Furthermore the courts are trying to balance this against the rights to call and cross – examine one’s own witnesses and to testify on ones own behalf in the constitutional interest of equality and fair judicial procedure.

Much of the decision that hypnotically refreshed testimony be declared as unconstitutional, stems from the fear that undue weight will be attached by jury members to testimony derived from hypnosis – whether due to pre-conceived ideas that hypnosis guarantees truthfulness or for some other reason. It has been pointed out in previous chapters that hypnosis can not guarantee 100% accuracy and truthfulness, and that ‘confabulation’ or ‘hardening’ might occur – fear that jury men and women might attach undue weight to such testimony is thus well founded.

However, Namibia although having an adjectival and adversarial legal system, moulded upon the English system – of which the United States, Canada and New
Zealand are also based – does not rely upon a jury system for the proper and smooth operation of its judiciary. Further, all trials in the higher courts of Namibia are conducted before properly trained and legally educated judges. Even the lower courts are presided over by judicial officers who have attained at least the degree in law of B.Juris or equivalent with many years experience in the administration of the laws of Namibia and thus necessarily the laws of evidence.

The fear, surrounding undue weight being attached to hypnotic evidence, by a jury or lay person acting as magistrate or judge is thus in its entirety unfounded. In the Namibian situation and as with all evidence presented before the court, it is the duty of the presiding legal officer to weigh such evidence placed before it.

Further criticisms, which have been raised throughout this paper, have been the question of corroboration, admissibility of expert opinion evidence and the criticism that such refreshment of memory by means of hypnosis should be inadmissible due to the hearsay rules.

However, it has been pointed out that, in Namibian rules of evidence, corroboration requirements have been done away with. Only Section 209 of the Criminal Procedure Act 51 of 1977 remains with regard to requiring corroboration where confessions are made.

Within the Namibian context, the corroboration rules have been replaced by the ‘cautionary rules’ as discussed in chapter three. Thus with regard to the criticism that refreshment of memory by way of hypnosis should fail to be admitted in courts should not be entertained in the Namibian context. Such evidence, must however, as was pointed out in Chapter three be left to the discretion of the judicial officer, with regard to exercising due regard to the probative value of such
revived memory under the cautionary rules, which are based on common sense and are not formalistic in nature.

With regard to opinion evidence, it was held that such opinion evidence may be admissible in courts under two circumstances, namely, where such ordinary person may give an opinion in respect of a fact, which is difficult to describe in any other manner. Secondly, opinion with regard to an expert witness within his/her field of expertise may be admissible.

It was pointed out in chapter four, that certain requirements must however be met, before such opinion evidence will be deemed admissible in the Namibian courts. The main thrust behind the admissibility of such expert opinion evidence, is the recognition that such witness is in a better position than the court to draw an opinion upon the facts placed before it. Thus the opinion must assist the court in making its decision and must not usurp the functions of the court. If these requirements are met, as set out in chapter four, then such expert opinion must be admissible in the interests of justice, and in aiding the courts to derive at a decision.

South Africa is in a better position than Namibia in dealing with the cumbersome rules of hearsay evidence. The position in South Africa, after the adoption of the Evidence Amendment Act 45 of 1988, is that hearsay evidence will be admissible in court if, the court feels that such evidence will be to the furtherance and in the interests of justice.

Namibia’s position with regard to hearsay evidence is unfortunately not in keeping with the South African position. In Namibia, hearsay evidence is still inadmissible, in terms of the hearsay rules of evidence.

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Thus the criticism that refreshment of memory by means of hypnosis, will constitute a violation of the hearsay evidence rules, will not be entertained in the South African context. However, such refreshment may still be barred in Namibian courts based upon such rule of evidence. South Africa is thus in a better position than Namibia in dealing with refreshment of memory by means of hypnosis as a means of facilitation of testimony.

If Namibia thus, wishes to give substance to its Chapter three Constitutional provisions, that all persons ‘charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them’ and ‘all persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial’; then it is recommended that Namibia follow the example of South Africa in amending its rules of evidence, to allow for the admissibility of hearsay evidence if in the interests of justice.

It has been shown in chapter two, that the rules of evidence can change, usually in keeping with changes in society and politics. The rules of evidence which were enforced upon Namibia through South Africa’s mandate over Namibia, have continued to be in existence upon Namibia’s independence. Such inherited rules of evidence can thus not be in keeping with the changes and spirit of society and politics. Namibia has however undertaken some reforms, as was pointed out in chapter two, however such reforms may be argued as being insufficient, in the face of Namibia’s ever evolving society and needs.

There has been great increase in violence against women and children in recent years, both in Namibia and South Africa, unfortunately, as was pointed out in Chapter Three, many victims due to trauma, especially sexual abuse trauma, have
‘blocked out’ such memory. Another disturbing factor is that most psychiatrists, in an attempt to ‘heal’ the victim encourage the repression of such memories. The result is that there is thus a delay in prosecution of the perpetrator, due to the surfacing of such memories at a latter stage, when ‘hard’ evidence has through time been destroyed. Further, where such memories have been repressed, the witness, due to the lack of memory is incapable of relating the events of the abuse to the court.

It is in these scenarios, where memory is suppressed that the author wishes to advocate the use of hypnosis as a means to facilitate the witness in order to relate the events to the court.

Even so, it is the opinion and recommendation of the author, that certain guidelines be initiated so as to support the use of hypnosis in the courts as a means of communication facilitation and to ensure uniformity and certainty in it’s application.

The author recommends that in keeping with accepted practices in foreign states with regard to such facilitated communication and hypnosis, the following principles should be observed:

First, any attempt to induce a state of hypnosis upon a witness – whether defendant or not, must be performed by an expert, i.e. a professional psychiatrist or psychologist, properly trained in the induction of hypnosis.

Second, nothing precludes the opposing council from entering evidence to the discredit of hypnosis or manner in which such induction was performed. The trial judge must decide upon its credibility.
Third, as with all facilitators of communication, the psychiatrist or psychologist must be properly sworn in to assist the court in its process of justice, and to ensure the court that such facilitator, will in no way attempt to influence the outcome of such hypnosis and subsequent revival of memory.

One might even require the facilitator to ensure that no leading questions be asked without the leave of the court if such leading questions are of necessity.

It must be reiterated that the proposed hypnosis does not form part of the testimony, but that such hypnosis is merely for the benefit of refreshment of events and information suppressed by the witness or defendant for a variety of reasons. The testimony comes into existence, only once the witness or defendant has come out of such state of trance, in keeping with the rules of evidence on ‘refreshment of testimony’.

It must further not be thought that such hypnotic testimony or such refreshment does away with or makes cross-examination impossible.

Since the witness’s memory is now refreshed, cross-examination can continue in its normal manner. Nothing prevents the uncovering of any inconsistencies or untruths in such refreshed testimony from being detected by means of cross-examination, just as it would be detected had testimony been given devoid of hypnosis. Further, opposing council must be given the right to call expert witnesses to educate presiding judicial officers in the reliability and validity of issues related to the method used. The trial judge, deliberating on the weight and truth to be attached to such testimony.

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It must be reiterated, that hypnosis is not advocated by the author, as a means to truth in trials, untruths may exist regardless of the means of refreshment and testimony given even under oath. What the author however, does wish to relate to the reader, is that, a witness or defendant can not be said to be given a proper and or fair trial, if the events or information, relevant to the trial, are suppressed in the mind of such witness or defendant.

Hypnosis allows for the revival of such suppressed information and the witness or defendant must be allowed to utilise such method of facilitated communication so as to conduct a proper defence. Not to allow such hypnosis, would be a violation of such witness or defendant’s fundamental rights guaranteed in chapter three of the Namibian Constitution.

Thus, there must be a manner to balance the court's need for reliable testimony with the constitutional rights of those who require such facilitation. Hopefully, this paper has cast some light upon the topic and indicated why our laws of evidence as they now stand - in placing a *per se* bar upon testimony received under hypnosis by way of the rules of admissibility - are archaic and not *in par* with scientific and medical advancements as well as the rights and freedoms guaranteed by Namibia’s Constitution, to all citizens, including the accused.

The question however remains. Does Namibia, even in the light of reformation of the Namibian rules of evidence, so as to admit hypnotically refreshed memory in court, have the resources in terms of skilled psychiatrists and psychologists, trained in hypnosis to assist such witnesses in relating their testimony to the court?
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