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"REFRESHING A WITNESS'S MEMORY"

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Rethinking the Rules of Civil Evidence:

In need of a refresh? The doctrines of past recollection recorded and present memory refreshed

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The need to refresh or supplement a witness's evidence arises in nearly every trial. Yet the rules governing how witnesses can refresh their memory, and the use to be made of whatever documents they use to do so, are complicated and often misunderstood. Counsel's attempts to refresh or supplement a witness's recollection with documents are frequently met with objections (some well founded, others perhaps less so), and confusion and arguments about the evidentiary value of such documents often occur only at the end of trial.

This article – the first in *The Advocates' Journal* series on evidence – provides a practical refresher on the evidentiary principles that govern the use and admissibility of documents to refresh a witness's memory: specifically, the doctrines of past recollection recorded and present memory refreshed. To that end, our article begins with a summary of the law in this area. We then present a typical fact pattern to highlight some issues that relate to how these doctrines work in practice. Finally, we make the case for modest reform to the doctrines of past recollection recorded and present memory refreshed. In particular, we propose removing the distinction between the two doctrines and adopting a unified set of criteria for the use and admissibility of documents in circumstances where a witness may have an imperfect or incomplete recollection.

More than one hundred years ago, the concepts underlying these two doctrines emerged to address issues of limited or fading memories.[1] Since then, significant developments have taken place in the way we record events in our daily lives, and important scientific advances have been made in our understanding of how memory actually works. While recognizing that these doctrines are well established and that there may be little motivation to modify the law in this area, we propose reform in the hopes of simplifying the process for the use and admissibility of documents used to refresh or supplement a witness's memory at trial.

We approach the issues and make our proposals for reform from the perspective of civil litigators. In our cases, documents are often voluminous,[2] the events at issue often span several months (if not years), and, in the absence of constitutionally imposed time limits found in the criminal context,[3] trials often do not occur until five to 10 years after the events in question. It is a practical reality that witnesses require documents (e.g., their emails, text messages, minutes of meetings) to refresh their memory in preparing for and testifying at a trial.

In our view, where a document is reliable and created contemporaneously, and where a witness can vouch for its accuracy, the document should be able to be used to refresh the witness's recollection and be admissible for the truth of its contents, subject to the court's discretion to exclude any evidence where its probative value is outweighed by its prejudicial effect.

A refresher on the doctrines

The law of evidence contemplates two different circumstances that may arise which permit counsel to use a document to refresh or supplement a witness's memory: (1) where the witness has an independent recollection of an event but nevertheless suffers a memory lapse while testifying; and (2) where the witness has no independent recollection of the event or has "gaps" in recalling it.

In the first scenario, a document (or any other stimulus[4]) can be put to the witness to help refresh a memory. In this scenario, it must be established that the witness has some memory of the incident or events in question, but it would assist the witness to "refresh" their memory with one or more documents. The use of documents in this scenario is known as *present memory refreshed* or *revived*. The record is *not* admitted into evidence as an exhibit to be considered for the truth of its contents because it is hearsay. The only admissible evidence is the testimony of the witness, who testifies on the basis of a refreshed memory.[5] In the case of present memory refreshed, contemporaneity or timeliness of the record is not a requirement for the use of the document. The lack of contemporaneity of the record affects the weight of the testimonial evidence, but not the propriety of the use of the record to refresh the witness's memory.[6]

In the second scenario, where a witness has no independent recollection, the witness may use a document to testify and the document may be admitted into evidence, provided it meets certain criteria:[7]

1. Reliable record. The past recollection must have been recorded in a reliable way. This requirement can be broken down into two separate considerations: First, it requires the witness to have prepared the record personally, or to have reviewed it for accuracy if someone else prepared it. Second, the original record must be used if it is available.
2. Contemporaneity. The record must have been made or reviewed within a reasonable time, while the event was sufficiently fresh in the witness's mind, to be vivid and likely accurate.
3. Absence of memory. At the time of testifying, the witness must have no memory of the recorded events. This absence of memory must be genuine.[8] However, the witness does not necessarily need to have a *total* lack of memory. The witness may have some memory of an event, but it may contain gaps or otherwise be imperfect. In such situations, the parts of the document that fill in the gaps in the witness's memory are admissible.[9] The other aspects are not.
4. Present voucher as to accuracy. The witness, although having no memory of the recorded events, must vouch for the accuracy of the assertions in the record. In other words, the witness must be able to say they were being truthful at the time the assertions were recorded.

In addition to these criteria, most courts also measure a past recollection recorded against the overarching necessity and threshold reliability analysis of the principled approach to hearsay.[10] Finally, as with all evidence, its prejudicial effect cannot outweigh its probative value. Provided the document meets all these criteria, it is admitted into evidence as a *past recollection recorded*. Once admitted, the fact-finder is still required to assess and weigh the reliability of the evidence as against other evidence, including any oral testimony.

The effect of these two doctrines is that if a witness has a total lack of memory of an event, but there is a contemporaneous record of that event which was created in circumstances that vouch for the accuracy of the record, the record of the event may be marked as an exhibit. If the witness has a memory of the same event, but requires the document to refresh their memory, then the document may be used only for that purpose, but the document itself may not be marked as an exhibit.

In our view, the distinction between these two scenarios does not reflect what we now understand about how memory works, nor is it a practical or useful distinction in civil cases. The issues with these two doctrines can be best understood by considering the following scenario at trial.

The doctrines in practice

Imagine you are leading a witness's evidence in an oppression remedy proceeding involving a family company. Your client is the aggrieved shareholder plaintiff and the son of the defendant. You plan to lead your client's evidence on a meeting that occurred between the son and his father regarding the future of the company. Although you have prepared for his trial evidence, your client remembers several aspects of the meeting, but not all of them. The record includes an email that your client sent to his father the day after the meeting which generally summarizes what they discussed.

Counsel will be familiar with the script or series of questions one is required to ask to get the document into the witness's hands (once the witness is in the witness box) using the doctrine of present memory refreshed.

First, counsel will ask if the witness has an independent recollection of the meeting. If the witness says yes, the next step is to establish where the deficiencies or gaps in that recollection lie. In this case, that question might be, "What topics were discussed at the meeting?" The witness may provide some of the topics, and then state that he cannot recall the rest. Counsel will then ask if there is anything that would help refresh the witness's memory. Provided the witness is aware of and recalls the existence of the follow-up email, he will advise counsel that referring to it might help his memory. Counsel will then ask the court for permission for the witness to refer to the document to refresh his recollection.

What happens next can vary, based on the witness's answers and counsel's desire to have the document admitted into evidence. Often, counsel will simply ask if the document has refreshed the witness's memory. Provided the answer is yes, counsel will then continue with the questioning, guided by the document. In that case, there is nothing further to do. The witness's testimony will be the evidence, and the document will not be marked as an exhibit.

However, if counsel seeks to admit the document for the truth of its contents, counsel must also establish the document's reliability by meeting the criteria necessary for the admission of a past recollection recorded. Establishing reliability requires counsel to ask questions about when the document was created and by whom, and the circumstances surrounding its creation. Counsel must also ask the witness, recognizing that their present memory may be imperfect, if they can attest that the document was accurate at the time it was made.

If counsel seeks to admit the evidence under the doctrine of past recollection recorded, it requires a genuine absence of memory. Only the parts of the document that fill in the gaps of memory are admissible. For example, if the email above records three issues that were discussed at the meeting, and the witness forgot only the third, then only the part of the email dealing with the third topic would be admissible.

Issues

We understand that although well worn, the above script is somewhat cumbersome and artificial. First, the traditional script for refreshing a witness's memory typically requires the witness to volunteer a deficiency in memory to be provided with a document to supplement or refresh it. This can be particularly problematic where the witness may not even know that the deficiency exists. For example, when asked, "What topics were discussed at the meeting?" the witness may simply reply by stating the general topics that he remembers, without volunteering that he cannot recall all of them. The witness may in fact have

forgotten that additional topics were even discussed.

In such circumstances, counsel is required to point out the deficiencies in their own witness's memory to ensure that relevant and reliable evidence makes its way into the hands of the fact-finder. To complicate matters, the manner in which these deficiencies are pointed out can often invite objections about leading the witness. For example, in response to the above question, "What topics were discussed at the meeting?" the witness may recount three out of the five topics reflected in the subsequent email exchange. After counsel asks an open-ended question such as, "Was there anything else discussed?" and no further memory is prompted, counsel may then be required to ask a more pointed question, such as, "Do you recall speaking about the plans to acquire another company?" thereby prompting an objection to leading the witness. While reasonable people may disagree about whether this is in fact a leading question,[11] the fact is that these exchanges can be arduous and time-consuming while doing little to advance the fact-finder's understanding of the relevant evidence.

A further practical difficulty with the script is that it can appear designed to test the witness's knowledge of the record, as opposed to knowledge of the underlying events. Once a deficiency in the witness's memory has been established, the script (in its ideal form) then requires the witness to recall the existence of the precise document needed to help refresh his memory. Again, counsel are taught to ask the open-ended question, "Is there anything that would refresh your memory?" and hope that the witness is able to point to the correct document. The witness may recall he reviewed *something* in the record that would help refresh his memory about the topics discussed at the meeting but cannot recall if it was an agenda, an email, handwritten notes, or something else entirely.

Counsel and courts often state that an examination is "not a memory test."[12] Of course, in many respects, that is precisely what an examination is. However, the expression reflects the generally held view that while the purpose of an examination may, in part, be to test the witness's memory about the underlying events, an examination should not be a test of how well the witness knows the record.

In scientific terms, the memory that courts seek to test while a witness is testifying is not their short-term working memory – the ability to recall the documents in the record – but rather the witness's long-term memory of the actual underlying events.[13] Particularly in civil trials, witnesses are prepared by counsel in advance of their testimony, often through an extensive review of the records. Witnesses who have better short-term working memories and have been better prepared by using records to refresh their memories may not actually require the assistance of the document to testify, giving them a falsely enhanced aura of credibility and reliability. Others, who simply have weaker short-term working memories, may appear less reliable.

Once the witness is given the document in question, the traditional script then typically requires counsel to ask whether the document has refreshed the witness's memory. Many witnesses are entirely unaware of the legal distinction between *refreshing* or *reviving* an existing independent memory and *supplementing* memory gaps based on information that has been recently reviewed. Witnesses may simply agree that the document assists them or refreshes their memory, without further explanation about what that precisely means.

Psychologists and neurologists have long posited that the process of remembering is reconstructive or constructive[14] – meaning each time we remember an event, we are not actually recalling a wholly intact experience as if it were a video-recording. Instead, we are actively

creating connections based on the particular details that have been stored in the mind and assembling them to fit a narrative of the experience. This act of remembering or reconstructing an experience can be influenced by several factors, including our perception at the time of the experience, as well as subsequently acquired information.[15]

Lawyers encounter this phenomenon all the time when preparing witnesses for trial. A witness initially recalls that a meeting began at or around 4 p.m. However, in the course of discussing the meeting, the witness is presented with a document that diverges from their perceived recollection, suggesting the meeting actually started at 5 p.m. Suddenly, the memory changes. The witness now recalls that the meeting did in fact begin at 5 p.m. The witness may go further still, not only agreeing that the meeting began at a different time but developing a narrative account that helps to make sense of any discrepancy. (For example, "I now remember that the meeting started at 5 p.m., not 4 p.m., because I had to stop for a coffee first.")

Lawyers have understood these issues for almost a century. In a 1927 article in the *Harvard Law Review* entitled "The Relation Between Hearsay and Preserved Memory," Professor Edmund Morgan wrote:

> Every trial lawyer will realize that it is an unusual case in which the memory of a friendly witness is actually refreshed upon the stand ... Both before and at the trial even the most honest witnesses frequently deceive themselves in thinking that their narratives represent memory only, rather than part memory and part reconstruction. It is not uncommon to hear a witness testify that a memorandum actually refreshes his recollection ... when it is apparent that he is merely accepting the contents of the writing, and would be entirely helpless without it, even after having consulted it."[16]

This does not necessarily mean the witness is tailoring a recollection to fit the documentary evidence. It simply reflects the scientifically understood fact that a witness's memory can genuinely be distorted through the constructive and reconstructive process of remembering. It is therefore not surprising that courts have expressed concerns about the risk that a witness who genuinely believes their memory has been refreshed may nevertheless be influenced by the record they have reviewed.[17]

A final issue with the traditional approach to past recollection recorded and present memory refreshed is that these two doctrines can often apply simultaneously to the same document – parts of which are admissible and parts of which are inadmissible. Practically speaking, it is puzzling why only *some* aspects of an otherwise admissible, reliable, contemporaneously created, and vouched-for document may not be admissible simply because, at trial, the witness has an independent recollection of *those particular aspects* of the events as they are recorded. Take the above scenario involving the follow-up email sent subsequent to a meeting as an example. In that situation, where the witness recalls discussing topics one and two as recorded in the follow-up email but not topic three, the parts of the email dealing with topics one and two are not admissible, while the part dealing with topic three is. This distinction appears artificial in a situation where there is no reason to doubt the reliability of the email as a whole.[18] In reality, courts often disregard this distinction.[19]

Practically speaking, where the document in question is prepared reliably and contemporaneously and a witness is able to vouch for its accuracy, a fact-finder will want to consider it. This is true whether or not the witness's recollection overlaps with some aspects of the document.

Suggestions for reform

Overall, the issues outlined above lead us to propose that the doctrine of past recollection recorded be reformed to remove the distinction between witnesses who have *no* memory of an event and those who have *some* memory of an event. In other words, whether a document is used to fill in gaps *or* to refresh a witness's memory, the entire document should be admissible as a past recollection recorded regardless of whether the witness's memory overlaps with some aspects of the document, provided the document meets the other criteria of reliability, contemporaneity, and voucher as to accuracy.

The benefit of the new approach is to avoid and remove the arguable fiction that occurs at trial when the current rules of evidence dealing with refreshed memory are applied. As a practical matter, it is virtually impossible for a witness at trial to have an independent recollection of every detail that may be relevant to a case. Yet, as Peter Sankoff describes in *The Law of Witnesses and Evidence*, "counsel calling the witness will normally phrase the questions to make it appear that the witness has a vivid recollection of the events and is recalling them correctly."[20] The only reason counsel can do so is because it is a normal and accepted part of witness preparation to review documents with the witness to refresh their memory of the chronology and what occurred at a particular meeting or other event.

Instead of engaging in this fiction (that the witness has a vivid recollection of a meeting from years ago), counsel can simply go directly to laying the foundation for the admissibility of the document, place the document before the witness and the fact-finder, and then say, "Tell me what happened at the meeting."

Provided the proper foundation is laid – meaning the criteria of reliability, contemporaneity, and voucher as to accuracy are met – the traditional hearsay dangers are largely addressed. The witness remains available for cross-examination, and the extent to which a memory is based exclusively on the document in question remains a fruitful area for exploration.[21] The admissibility of the entire document increases transparency in the trial process, in that it empowers the fact-finder to consider fully the extent to which the witness's memory is actually independent as opposed to being based on the document and allows the fact-finder to make findings based on what may ultimately prove to be a more reliable form of evidence: the contemporaneous document.[22] In the case of jury trials, courts have held that past recollection recorded documents should be accompanied by a warning to the jury that they are a lesser form of evidence.[23] Given our knowledge of how memory works, however, it is difficult to understand why this warning should continue.

The efficacy of a new approach is of course dependent on establishing that the record is reliable. Where there is reason to doubt a document's reliability or where its probative value may otherwise be outweighed by its prejudicial effect, judges retain the discretion to exclude the document.

While we recognize that this proposal runs counter to some of the more established principles of the law of evidence, we believe, for several reasons, that those concerns can be addressed.

First, in many cases, the "lack of memory" criterion of the past recollection recorded test has been seen to bring this traditional exception to the hearsay rule in compliance with the "necessity" prong of the principled approach to hearsay.[24] The proposed new approach assumes that it will *always* assist a witness to refer to a contemporaneous reliable record to refresh their memory when giving evidence. It is, practically speaking, necessary for witnesses to review and rely upon many documents when testifying at trial.

Second, some may argue that removing the distinction between *some* memory and *no* memory risks the admission of self-serving evidence. Although it may be that the documents admitted under this new approach include prior consistent statements, Sharpe JA held in *R v Edgar* that a blanket exclusionary rule is not justified for such statements.[25] In the criminal context, he found the "hearsay rationale for exclusion of a prior consistent statement evaporates where the accused takes the stand and exposes himself or herself to cross-examination."[26] By definition, our proposal applies only in circumstances where the witness is testifying in chief, which means in all cases the witness will be exposed to cross-examination. The new approach does not interfere with the rule that, where self-serving evidence is being used only to support a witness's credibility by the fact of consistency, it is an impermissible use.[27]

Third, one of the reasons courts have insisted that a genuine lack of memory be a precondition to admissibility of past recollection recorded is so that witnesses cannot simply avoid giving evidence by falsely claiming they do not recall an event and relying solely on contemporaneous statements, for which they cannot be challenged under cross-examination.[28] This concern ignores that it remains open to cross-examining counsel to challenge the reliability of the record itself as well as the reliability of the perception of the witness at the time the record was made.

Overall, the line between a witness having no recollection and having some recollection of an event is often arbitrary and difficult to draw. As noted by Sopinka, Lederman, and Bryant, these two doctrines "are best understood at their extremes and often in practice they are converging rather than parallel lines."[29] In the case of contemporaneous reliable records, the doctrines should in fact converge. The witness should establish the foundation for the document, it should be marked as an exhibit, and the witness should be permitted to testify with the benefit of the document.

Notes

1. For one of the earlier Canadian articulations of these concepts, see *Fleming v Toronto Railway Co* (1911), 25 OLR 317, [1911] OJ No 40 (CA).
2. We note that for this reason, many of the issues outlined in this article can and should be avoided by counsel through agreement on a Joint Book of Documents, in accordance with the Court of Appeal for Ontario's directions in *Girao v Cunningham*, 2020 ONCA 260. However, the practical reality is that in many cases, for different reasons, agreement among counsel cannot always be reached, requiring counsel to consider the use and admissibility of each document. We note also at the outset that there are, of course, many paths to admissibility through both the traditional exceptions to hearsay and the principled approach. The purpose of this article is to focus specifically on one of those traditional exceptions: the doctrine of past recollection recorded.
3. As established in *R v Jordan*, 2016 SCC 27.
4. *R v Fliss*, 2002 SCC 16 at para 45.
5. There is one qualification to this general principle. Where the document in question is the witness's own prior statement, it can be admissible for the truth of its contents provided the witness "adopts" it, meaning (1) the witness acknowledges that he or she made the prior statement; and (2) the witness agrees that his or her memory while testifying accords with the contents of the prior statement: *R v McCarroll*, 2008 ONCA 715 at paras 39–40. However, as a practical matter, adoption typically occurs only in limited circumstances. First, it applies only where the document in question is the witness's own previous statement. Second, owing to the general prohibition on the admission of self-serving evidence or previous consistent statements, it occurs only when the witness has been confronted with an inconsistency in that statement through cross-examination.
6. *R v Silvini*, 1991 CanLII 2703 (ON CA).
7. See *R v Louangrath*, 2016 ONCA 550 at para 43, citing *R v Richardson*, 2003 CanLII 3896 (ON CA) at para 24.
8. *R v Francis-Simms*, 2020 ONCJ 632 (CanLII) at para 69, citing *R v McCarroll*, 2008 ONCA 715 (CanLII) at paras 53–54. In *McCarroll*, the evidence was not admitted as a past recollection recorded because the trial judge found that the witness was "obviously lying when she said she could not recall events that would be etched in anyone's memory for life."
9. *R v Robinson*, 2003 CanLII 3896 (ON CA) at para 30.
10. *R v Baksh*, 2005 CanLII 46740 (ON SC) at para 83; *R v Francis-Simms*, 2020 ONCJ 632 (CanLII) at para 71.
11. We leave that debate for another article in this series.
12. *R v TOH*, 2016 BCPC 438 (CanLII), at para 51; online: <https://canlii.ca/t/gx2fz#par51>, retrieved 2021-12-09; *R v NJBM*, 2020 BCPC 260 (CanLII) at para 48, online: <https://canlii.ca/t/jclp2#par48>, retrieved 2021-12-09.
13. For a helpful discussion of the evolution in scientific thinking about the differences between long-term memory, short-term memory, and working memory, see Nelson Cowan, *What Are the Differences Between Long-Term, Short-Term, and Working Memory?* Prog Brain Res 2008; 169: 323–33.
14. The origin of the concept of reconstructive memory dates to British psychologist Sir Fredric Bartlett's 1932 book, *Remembering: A Study in Experimental and Social Psychology*, in which he presented the findings of his experiment testing the ability of participants to recall a folk story. Bartlett found that over time, participants who had learned the folk story in question became unsurprisingly less accurate in recalling its details. More importantly, however, he also found that participants tended to either omit or transform elements of the story that they did not understand in order to accord with their own cultural narratives or "schema." Today, this work has been built on significantly, as scientists have come to learn that several factors – from initial perception, to subsequent information, to the individual's emotional state when perceiving and when remembering – can affect the content of an individual's memory.
15. The majority of the research performed in this area has focused on the significance for eyewitness testimony and child testimony, though the findings are more widely applicable. See, for example, Elizabeth Loftus's work on the "misinformation effect paradigm," which posits that exposure to post-event misinformation can cause a person to misremember the original event.
16. EM Morgan, *The Relation Between Hearsay and Preserved Memory* (1927) 40 Harv L Rev, 712.
17. Such concerns are evident in cases where courts restrict a witness from using what is perceived to be an unreliable document to refresh their recollection (see, eg, *R v Gwozdowski* (1973), 10 CCC (2d) 434, [1972] OJ No 2055 (CA) and *R v Shergill* (1997) 13 CR (5th) 160, [1997] OJ No 361), even though the law is clear that there are no admissibility requirements on documents used *only* to refresh memory (see *R v B (KG)*, 1998 CanLII 7125 (ON CA) at paras 21–22).
18. Setting aside the question of whether the entire document could be admitted under another traditional exception to the hearsay rule or otherwise under the principled approach.
19. See, eg, *Urbacon Building Groups Corp v The Corporation of The City of Guelph*, 2012 ONSC 81 at paras 38–44, but especially para 41.
20. Peter Sankoff, *The Law of Witnesses and Evidence* (Toronto: Thomson Reuters, 2019), ch 11.3 (a), "General Approach."
21. *R v Louangrath*, *supra* note 7 at paras 44–45; *R v Richardson*, *supra* note 7 at para 34.
22. See, eg, *R v B (KG)*, *supra* note 17 at para 23.
23. See, eg, *R v Louangrath*, *supra* note 7 at para 44.
24. *Ibid* at para 44; *R v Richardson*, *supra* note 7 at para 34.
25. *R v Edgar*, 2010 ONCA 529 (CanLII) at para 66.
26. *Ibid* at para 68.
27. See Doherty JA (concurring) in *R v Khan*, 2017 ONCA 114 (CanLII) at para 64.
28. See, eg, *R v Wigle*, 2018 ONCJ 201 (CanLII) at para 25, where the court noted, in admitting a document as a past recollection recorded, that "the witness's lack of memory was bona fide and not an attempt to avoid giving evidence."
29. Sidney N Lederman, Alan W Bryant, and Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (5th ed), LexisNexis Canada (online) at §16.103.