



Psychology in Action

LAW IN PRACTICE

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**Applications of psychology to
legal decision making and
legal skills**

Sally M.A. Lloyd-Bostock

Centre for Socio-Legal Studies
University of Oxford

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Psychology in Action

PSYCHOLOGY IN ACTION

Psychology has a great deal to say about how we can make our working lives more effective and rewarding: the way we see other people, how they see us, and our ability to communicate with others and achieve what we want from a situation. Starting from actual practice in the classroom, the police station, the surgery or the interviewing room, PSYCHOLOGY IN ACTION looks at the everyday working methods and concerns of particular groups of people and asks: where and how can psychology help?

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LAW IN PRACTICE

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The style of a book such as this has meant keeping references to people's published work to a bare minimum. There are good reasons for this, but it has meant drawing on many studies and ideas without giving the reference. I would like to thank all those whose work has contributed to the substance of this book, but whose names do not appear.

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To Kit and Alex

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Introduction

Practising lawyers spend much of their time dealing with other people, whether they are interviewing clients, negotiating, preparing legal documents, or taking part in legal decisions and courtroom procedures. Research in psychology relates to all these aspects of law in practice. The psychology of communication, persuasion, and social interaction can help lawyers develop their legal skills. Psychological research on legal processes, both inside and outside the courtroom, can suggest ways of understanding what is going on from a psychological perspective: Why are eyewitness accounts often inaccurate? What makes a witness persuasive in court? How do judges and magistrates arrive at a sentencing decision? How do juries react to instructions?

In addition, psychologists are increasingly acting as experts in legal contexts. Most of the expert advice provided by psychologists relates to individual cases, involving psychological questions about such matters as the mental state of an accused person; or the likely effects of a custody decision on a child. Psychology has also been brought to bear on more general policy issues, for example through influencing judicial policy making or through advising Royal Commissions. Insights from psychology can shed light on practical legal problems and processes, without necessarily giving rise to specific advice in the individual case. The reliability of confessions, and the impact on children of testifying in abuse cases are examples.

A book on the applications of psychology to law in practice could range very widely indeed. I have simply not attempted to cover some areas. I omit psychology's contribution to substantive law, though psychologists have worked on policy questions about such matters as gambling and traffic law. Other topics can only be dealt with briefly: further reading is suggested throughout the book for those who wish to

follow something up in more depth. I focus on the courtroom and the ordinary non-court work of most practising lawyers. I begin in Chapters 1 and 2 with questions about the reliability of witnesses and techniques of interviewing suspects. Chapters 3 and 4 then turn to the courtroom itself – the impact of evidence, language in court, juries and sentencing by judges and magistrates. The special issues raised by cases concerning children are discussed in Chapter 5. Chapter 6 moves right away from court work, and shows how principles of psychology can be applied to the skills of interviewing, negotiating and making legal language comprehensible. Chapter 7, on psychologists as experts, describes how different kinds of professional and applied psychologists apply their expertise in individual cases.

The research I draw on has been carried out in various parts of the world, including the UK, the US, Canada and Australia. It therefore comes from a range of different jurisdictions. As well as broader differences between, say, the UK and the US, law and procedures can differ between states in the US, or between England, Scotland and Northern Ireland. Few of these differences matter for the purposes of this book. Unless there is a specific reason to do otherwise, I shall simply refer generally to the UK, the US and Canada (or North America), or Australia. Occasionally Northern Ireland and Scotland need to be excluded from the UK and these instances are specified in the text.

I deal with some controversial topics. In some fields (such as the skills of interviewing clients) well-established psychological theory and research can be applied in a clear and direct way. But in others, psychologists feel that they are not yet ready to make sufficiently definite statements for legal purposes. Both lawyers and psychologists continually debate where the line should be drawn. Should the courts allow psychologists to provide expert evidence on the reliability of a witness's evidence? Can psychologists provide the right answers to questions about the best interests of children? When should the psychological 'knowledge' offered by psychologists be preferred to legal decision makers' own common sense?

There are good reasons to tread carefully. Most psychological research is not designed to answer practical questions. I have more to say in Chapter 8 about the question of when research findings can safely be put to practical use in legal contexts. In Chapter 7, I discuss some of the scientific and ethical dilemmas raised for psychologists who take on the role of expert. But I would not be writing this book if I did not believe that psychology has a great many interesting and useful things to say to practising lawyers, and perhaps to those interested in reform.

Chapter 1

The Accuracy of Witnesses

Witnesses are often extremely unreliable, not just because they may be lying. As Lord Devlin wrote in 1976, 'The highly reputable, absolutely sincere, perfectly coherent and apparently convincing witness may, as experience has quite often shown, be mistaken'. Even the self-incriminating statements of a suspect undergoing questioning quite frequently turn out to be false.

The accuracy of an honest co-operative witness and the detection of deception in a dishonest witness raise two rather different sets of questions. The problems of reliability that arise from psychological processes of memory and recall when a witness is not deliberately deceiving are discussed in the present chapter. In Chapter 2 I move on to the issues that arise when questioning someone suspected of a crime or, at least, of concealing the truth.

THE HONEST WITNESS

Lord Devlin was referring particularly to the problem of mistaken identity, and it is through celebrated cases of mistaken identity leading to wrongful conviction that the spotlight has come to be turned on the unreliability of eyewitnesses. A series of *causes célèbres* has brought this home in a dramatic way: James Hanratty who was hanged, Patrick Meehan, Luke Dougherty, Laszlo Virag, George Davis who were convicted and sent to prison, and George Ince and Peter Hain who were brought to trial – all primarily on the basis of identification evidence that was later discredited. But the same observation applies to accounts of events and memory for scenes as well as the identification of people. Nor is the problem confined to wrongful conviction. Mistakes and

omissions in eyewitness accounts and identifications also create problems for the police and innocent suspects, and for civil cases concerned with compensation rather than conviction. One professor of law, William Twining, argues that both psychologists and lawyers interested in eyewitness identification have too readily focused attention on wrongful conviction resulting from mistaken identity. They have not really questioned whether this is the most frequent or important consequence of misidentification (Twining, 1983). Yet a suspect wrongly identified, brought into the police station, questioned and subjected to an identification parade may suffer greatly even if no prosecution is ever brought. Peter Hain was never convicted, but he surely suffered greatly from mistaken identification.

As long ago as the turn of the century criminologists and psychologists were staging experiments to test the reliability of witnesses and demonstrating that eyewitness accounts are often very inaccurate indeed. Our memories may serve us extremely well for the most part, but human memory was not designed for the benefit of the legal system. When a person is asked to describe events or identify someone after seeing them only briefly and possibly not having paid a lot of attention to them, he or she is being asked to do something that the memory is not adapted to do well.

To understand when and why eyewitnesses are likely to be unreliable it is necessary to break away from misleading ideas about how human memory works. Present-day psychology has developed ideas about the nature of memory that are fundamentally quite different from the kinds of model we would tend to use intuitively. We think of memory and perception as passive, copying processes, rather like a camera or tape recorder, or to be more modern, a video recorder. We expect tapes and recordings to deteriorate. Photographs may fade. But we would be very surprised if we put away a blurred photograph of a man with straight hair and when we later took it out found a clearly focused photograph of a man with curly hair. In the same way, we do not expect our memories to change apart from fading. We do not expect them to become clearer as time goes on, or to alter, and we expect them to be related to the original event in a very direct way.

Such passive models of memory have now given way to the idea that perception and memory are *active* and *constructive* processes. Perception does not produce a record but an interpretation. Nowadays there is emphasis on what the person contributes to the process of perception and memory – his or her expectations, past experiences, beliefs and prejudices, and what he or she is trying to do at the time.

THE PSYCHOLOGY OF PERCEPTION AND MEMORY

Only a fraction of the signals that reach us from the outside world can be registered by our senses and even fewer are converted into lasting memories. The process of perception is therefore of necessity highly selective. Attention is paid to the important or relevant, and much is ignored. Short cuts and rules of thumb are used. Because attention is selective, the attention-worthiness of an event can be of considerable importance in determining how well it is remembered. If someone knows in advance that they will be questioned about something afterwards they can provide far more complete and accurate information than someone who has not been forewarned. On the other hand, it is possible for a bystander to an event to be able to say very little about what went on right under his or her nose. The person may not be particularly dreamy or absent-minded – it is simply not possible to take everything in.

Meaning and expectations

As well as being selective, perception is also *constructive*, building a meaningful picture or sequence and filling gaps in information. We make sense of things, and come to perceive them in terms of the sense we have made of them. The general point that perception involves a contribution from the perceiver is illustrated by children's jokes based on an unlikely leap of recognition that a sketch is of, say, the 'south side of an elephant going north'. Quiz games sometimes show a photograph of a familiar object taken from an unusual angle and contestants struggle to identify the object. What these have in common is the absence of any clear hypothesis or expectation as to what the object is. It is not immediately obvious how the material is to be organized. Once given a clue (the answer to the riddle; more of the photograph) the perceiver is at once able to make sense of the information.

The part played by expectations in perception is strikingly illustrated in a tragic case described by Robert Sommer in 1959. Sommer acted as an expert witness in the trial. The incident occurred in Canada. A man mistook his friend for a deer whilst out hunting, and shot him dead. When the event was reconstructed, a Royal Canadian Mounted Police constable had no difficulty in identifying a man as a man in these circumstances, casting doubt on the likelihood that the hunter had genuinely taken his friend for a deer. What differed of course were the expectations of the constable and of the huntsman. On seeing something move, the huntsman, expecting to see a deer, did indeed 'see' a deer. An

additional contributing factor was that the huntsman wore red – a colour that is more difficult to see late in the day.

In his book *The Reliability of Evidence* (1972) Arne Trankell provides a good example of the way in which gaps may be filled to make a meaningful sequence. A lawyer was crossing town in a taxi during the rush hour. Suddenly, the car in front of the taxi stopped and a door swung open. The lawyer saw an old man pushed out, or fall out, and lie in the road. The lawyer later discovered to his surprise that his observations had been quite mistaken. The old man had been a pedestrian who was knocked down, not a passenger in the car. The lawyer had seen an open door and the old man in the road, and his perceptual processes had done the rest. This kind of mistake is particularly likely to occur when something dramatic seems to be happening: we quickly form an idea of what it is on the basis of rather fragmented information.

Memory for stressful events

If an event is extremely stressful or shocking, the effect can be to interfere very seriously with our ability to remember anything much at all about it. Memory for what happened before the shocking occurrence can be affected, as well as memory for what followed. Sometimes if a person cannot remember what happened, memory may gradually return or be recovered under hypnosis. But sometimes people never remember. In these cases it is possible that the process of creating a lasting memory was interfered with to such an extent that there is no memory to retrieve.

At less extreme levels of stress, there has been debate amongst psychologists as to whether the memory of a witness to something like a crime will be enhanced or worsened by the strong emotions that he or she may experience. The reason for this debate is that emotional arousal can work both ways, depending on the level of arousal and on the complexity of the task to be performed. A moderate degree of arousal generally increases cognitive efficiency. But at high levels of arousal the reverse is true, and performance on complex cognitive tasks drops off quickly. This is why moderate exam nerves can be a positive help, but too much nervousness is counter-productive. Working in the other direction, there are reasons why memory for stressful events might be improved. The chance that people paid close attention is increased. They may even anticipate the need to be able to describe events later and make an effort to commit detail to memory. It has also been found that the more deeply information is thought about or puzzled over at the time it is presented, the more likely it is to be recalled later.

Psychologists cannot study experimentally the effects of extreme arousal – it would not be ethical to frighten or otherwise arouse people that much. But experience of actual events such as hold-ups suggests that the high level of arousal is such as to produce poor recollection afterwards. But retrograde effects of shock are apparent even at quite low levels. In one experimental study by Elizabeth Loftus and Terence Burns (1982) subjects were shown a film of a hold-up, and later their memory for details of it was tested. In the film the robber is chased from the bank into a parking lot where two young boys are playing. In one violent version of the film the robber runs towards a getaway car, then turns and fires a shot towards two men in pursuit. The shot hits one of the boys in the face, and he falls to the ground, bleeding and clutching his face. A second, non-violent version is identical up until just before the shooting. Then the film cuts to inside the bank where the bank manager is informing employees and customers what has happened, asking them to remain calm.

Those who saw the boy shot in the face had poorer memory for that part of the film before the shooting than those who saw the non-arousing version. Just before the shooting a large number 17 is visible on one of the boys' jerseys. Only 4 per cent of those who saw the violent version got this right, compared with 28 per cent of those who saw the non-violent version. On 14 out of 16 items where recall was compared, those who saw the violent film did worse. Although the violence was shocking, this was just a film of a fictitious crime. Witnessing a real crime is even more likely to produce shock and arousal levels that interfere with, rather than enhance, the processing of information.

'Murder in the Corridor'

Experiments involving staged events such as mock shootings have in fact produced rather strong reactions of shock and enabled the investigator to study the reliability of witness accounts in these circumstances. One such study is described in detail by Trankell. He calls it 'Murder in the Corridor'. A student acted aggressively during a lecture, interrupting with questions challenging the relevance of the lecture. The incident was built up until the lecturer asked the student to leave and accompanied him from the room into the corridor. Further argument was overheard by the audience through the open door to the corridor, and finally shots and a scream. The audience was thrown into a state of shock and panic. The follow-up investigation revealed that many witnesses had experienced physiological reactions such as shaking, dryness in the mouth, cold sweat, and difficulty with breathing. It indicated also that