

Evaluating Witness Evidence

Recent Psychological Research and
New Perspectives

Edited by Sally Lloyd-Bostock and
Brian R. Clifford



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Preface

Evaluating witness evidence would seem to be an especially appropriate area for collaboration between psychologists and lawyers. It clearly involves understanding of a variety of psychological processes, including in particular, perception, memory, recognition, and recall. Belief in this potential for collaboration has given rise to a considerable body of psychological research which aims specifically to apply psychology in the area. In this book the most recent developments in research and thinking are presented through the work of leading figures in the field on both sides of the Atlantic. Contributions from psychologists cover work on factors influencing the quality of memory for events, faces, and voices; techniques of maximizing and evaluating the reliability of information provided by witnesses, including lie detection; and the newer topic of juror responses to witness testimony. In addition, a totally new perspective on the field as a whole is provided by an academic lawyer, who discusses the influence of certain trends in legal thought on the definitions of 'the problem' of identification and misidentification which have, perhaps uncritically, been adopted by psychologists.

Although apparently direct and obvious, the relationship between psychology and law in the area of witness evidence has turned out to be exceedingly complex, and the goal of making a practical contribution somewhat elusive. The tenor of the book is therefore critical and cautious. As well as reporting recent empirical findings, contributors devote their attention to analysis of conceptual, theoretical, and methodological issues and to reassessment of conclusions previously drawn from earlier work. There are also cross-currents in the book which reflect differences of approach and opinion among researchers. Thus the book captures current debates within the field, and indicates new directions which research is taking and could take in the future. The book will interest psychologists with theoretical interests in cognition generally as well as those working in the particular area of witness reliability; criminologists; academic lawyers with interests in evidence and procedure; and practising lawyers, the police, and others actively concerned in legal processes surrounding the evaluation of witness evidence. In addition, both the methodological and the substantive content should develop the experimental sophistication of undergraduate and postgraduate students in many fields.

Most of the chapters originated as papers presented at a conference on Law and Psychology held in Oxford, England, under the auspices of the Centre for

Socio-Legal Studies, Oxford, and funded by the Social Science Research Council. We wish to acknowledge the support of these institutions, which made it possible to bring together this group of major researchers in the area and hear papers on their recent work presented and discussed in the lively and stimulating atmosphere which such a meeting of common interests creates. We would also particularly like to thank John Boal and Jennifer Dix for their help in organizing the conference, Jennifer Dix for her painstaking work in the preparation of the manuscript, and Chris Clifford who compiled the index. Last but not least, we would like to thank our contributors for their patience when we kept them waiting and their prompt and good humoured cooperation whenever we asked for it.

February 1982

S.L-B.
B.R.C.

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Chapter 1

Introduction

Sally M.A. Lloyd-Bostock and Brian R. Clifford

Research on the reliability of evidence, or ‘witness psychology’ is by far the longest established area of law and psychology, having a history dating back to the beginning of the twentieth century. Almost as soon as experimental psychologists began making new discoveries about perception and memory, and about the relationship of physiological measures to various emotional states, the potential relevance of this work to questions of the reliability of witnesses and the detection of deception was realized. Hopes were quickly — and, it turned out, prematurely — raised that psychology could be as useful to law as the other forensic sciences. The psychology of the time could not by a long stretch fulfil this sort of promise. In particular, the development of theory about memory, as distinct from the accumulation of intriguing but puzzling findings, had a long way to go.

While stemming from the same basic view of the potential applicability of psychology in this area, work in the field today as represented in this book has altered radically in character since that early flurry of interest. Theory and methodology have obviously advanced greatly in the intervening years and continue to be refined and modified; and the questions tackled in research have been reformulated. As reviews of more recent work in the field show (e.g. Clifford and Bull, 1978) there has been a fundamental reorientation within psychology in the past 15 years or so, which has profound implications for the way psychological questions about the reliability of witnesses are approached. In particular, earlier, mistaken notions of memory and perception as passive copying processes analogous to those of the camera or tape recorder have given way to a recognition that these are active and constructive processes, shaped and reshaped by a very wide range of factors in the individual, the nature of the stimulus, and subsequent attempts to recall and describe. At the same time psychologists have become aware of the pitfalls in attempts to isolate sub-processes and study them experimentally — that is, that it is impossible to study memory in and of itself, divorced from, for example, social processes. The approach of narrowing down the processes under investigation dominated the study of memory for many years and led to the development of theory applicable only to a narrow range of human functioning specific to the tasks set.

Attempts to generalize from this work to practical applications are now seen to be problematic, or frankly misleading. Recognition of these dangers has led psychologists researching in this area to call for research specifically designed to be applicable to legal questions about witness reliability, and in particular to emphasize the importance of using as near as possible 'real life' methods whenever the line of enquiry permits. To a certain extent this represents a return from the laboratory to the earlier 'staged event' methods of Stern and others (see, e.g. Stern, 1910), but equipped with a much more fully developed theoretical structure. Most would feel that the proportion of laboratory studies in the literature on the topic of witness evidence is still unsatisfactorily high when it comes to practical application. Perhaps equally important, psychologists have developed a much clearer idea of what they may be able to offer of practical value and what they cannot. While those who work in the area obviously believe in the value of what they do, this book shows that they are also anxious to retain a proper perspective and restraint and avoid exaggerated claims for the applicability of psychology research.

In addition to theoretical and methodological developments within psychology, the chapters in this book reflect a broadening of focus. The early work concentrated on the courtroom, and the evaluation of evidence presented to the courts — as reflected in the title to Munsterberg's (1908) book *On the Witness Stand*. The emphasis today is far more on the process of gathering and evaluating information from witnesses prior to any court appearance, and indeed without the implication that the information will ever become courtroom evidence. Thus topics discussed in this book include aspects of the process of eliciting and evaluating information from witnesses in the course of an investigation, such as the use of identity parades, Photofit and other techniques, regardless of whether the end result is a prosecution. Attention is now given not only to factors in the event witnessed, but also to factors *subsequent* to it which may relate to the accuracy of memory. Other newer topics in the book include the possibility of improving the ability to recognize through training; and 'earwitnessing'. Twining in Chapter 14 shows that the perspective could be broadened still further and also more systematically and deliberately.

Where court processes are the focus, as in the first three chapters, it is from the new angle of asking how jurors or other court participants will evaluate the testimony of an eyewitness on the basis of common-sense psychology, and how far a psychologists' expert testimony would differ from this common-sense evaluation. The immediate relevance of this question arises from the fact that expert evidence is generally speaking only regarded as admissible in law if it concerns matters which cannot equally well be dealt with on the basis of ordinary common sense. Yarmey and Jones take this as their starting point in Chapter 2. Saunders, Vidmar, and Hewitt in Chapter 4 argue that there is a more fundamental relevance in that, from the practical legal point of view the crucial question about eyewitness evidence in the court is not 'How reliable, in

an objective sense, is the evidence?' but rather 'How does it actually influence decisions?' If the (un)reliability of such evidence is accurately assessed and accounted for by participants in making their decisions, then quite aside from the legal rules one can question whether there is any need for *psychologists* to contribute at all.

This is indeed a fundamental question which goes well beyond the issue of admissibility of expert evidence from psychologists or the credulity of jurors, and gets to the heart of the relationship between psychology and law. The idea that psychology may have a contribution to make in the area of witness evidence implies a notion which underlies most psychology and law research, namely that 'scientific' psychology can add to, clarify, or improve on the 'common sense' or 'naive' psychology on which law proceeds. As Wells and Lindsay indicate in their discussion of metamemory, the study of 'naive psychology' in the area of evaluation of witness testimony is related to research within attribution theory in social psychology, which concerns the ways in which people attribute causes of behaviour. Jones *et al.* have described the scope of attribution theory as being a part of 'psychological epistemology' or the processes whereby man knows his world. Attribution theory concentrates on that part which deals with knowledge about people — 'not "naive physics", or "naive cosmology" but a naive version of psychology itself' (Jones *et al.*, 1967, p. x).

It is into this area that the first three chapters of the book move, in asking whether and in what ways 'scientific' psychology in such areas as memory and recognition differs from common-sense psychology; or conversely in what ways common-sense psychology might yield mistaken or biased decisions. The question at this level is not 'Is memory likely to be fallible in such and such circumstances?' but rather 'What is the common-sense answer to this question, and in what ways and why does it differ from the "scientific" answer?' The authors of these chapters phrase their particular questions in more specific terms than this: Saunders *et al.*, for instance are primarily interested in a particular hypothesis about the jury, namely that jurors tend to place too much faith in eyewitness testimony; while Yarmey and Jones are concerned with the legal rules about admissibility of expert evidence from psychologists in this area. Wells and Lindsay's concern (Chapter 3) also arises from the question of whether jurors can accurately assess eyewitness evidence, and hence the proper role of psychologists as experts on this assessment. All, however, have moved to a different level in the general type of questions they raise, as Wells and Lindsay's discussion makes explicit. Loftus and Ketcham in Chapter 9 return implicitly to the same theme in their discussion of the malleability of memory: the very surprisingness of this malleability stems from its divergence from our common-sense beliefs about the nature of memory.

If the experience of attribution research is any guide this type of question is going to turn out to be immensely complex. To begin with, as Yarmey and

Jones's study shows (Chapter 2), there is neither a consensus 'scientific' (or 'expert') view, nor a consensus 'common-sense' view on matters concerning the likely reliability of different sorts of witness evidence under different circumstances. Yarmey and Jones's study seems to tap the process of interplay between psychology as a research discipline on the one hand, and practical beliefs on the other. The extent of contact individuals have with the psychological research literature is clearly reflected in the extent to which the influence of experimental findings and developments in theory is seen in their replies to the survey questions. The importance of this perhaps obvious observation goes beyond the immediate interests of Yarmey and Jones in the question of how far psychology has a special 'scientific' or 'expert' view, and how far ordinary people are informed about advances within psychology. It reflects the filtering through and assimilation of psychological findings to become part of our common-sense understandings — a process which has been rather little studied. Psychology this century has provided us with models, concepts, and findings which have radically changed the way we think about people, frequently with implications for law, since laws, legal procedures, and discussion of law in jurisprudence all involve assumptions about the nature of human beings, their capacities, and their behaviour. This process is not without its dangers. There is, for example, a real danger that theories long since rejected, refined or superseded within psychology itself may survive for much longer in received common-sense wisdom and influence legal decisions. This provides an added reason for caution in applying psychological research in this area. Lindsay and Wells suggest in Chapter 12 for example that psychologists are not yet in a position to offer clear advice to the courts on the issue of cross-race identification. If such advice as has already been given turns out to have been mistaken or to require elaboration or qualification, it may be difficult to undo its influence.

The idea that scientific psychology offers an improvement on the common-sense psychology on which law operates — through jurors or otherwise — is an inextricable part of almost all psychology and law work, but it is clearly not without contention. The implication that psychology can usefully be regarded as a science, on a par with the physical sciences has been widely questioned and the various arguments and discussion surrounding it need not be rehearsed here. None the less this kind of view is still often accepted too uncritically, and it is too often assumed that 'scientific' equals 'better' in this context. It is not uncommon to find psychologists implying that their suggestions ought immediately to be incorporated into the law if only they could persuade lawyers to discard some of their outdated ideas. The range of difficulties which arise from the nature of psychological 'knowledge' of course include all the problems of generalizing from laboratory experiments to other contexts; of operationalizing concepts; of interpreting results; and many more. Ironically the more scientific the approach in psychology in the sense of proceeding through tightly

controlled, narrowly focused experiments, the greater the problems often are in applying the research to practical questions concerning the reliability of witnesses. As Rabbitt (1981) clearly shows, such research is simply not designed to answer applied questions.

Contributors to this book are well aware of the provisional and partial nature of psychological knowledge; and much emphasis is now placed on the use of appropriate methodology if research is to be applied. It is characteristic of the field that little is accepted as finally established. Findings are constantly reassessed and alternative interpretations considered, resolution of conflicting findings is sought, experimental procedures are carefully examined, and alternative methodologies proposed. Indeed, two of the chapters in this book, those by Saunders, Vidmar, and Hewitt, and by Lindsay and Wells, are primarily concerned to question the conclusions of earlier studies and to emphasize that the psychological literature does not yet provide a clear basis for claiming that its conclusions ought to be incorporated into legal processes. Deffenbacher, in Chapter 13 seeks to resolve apparent contradictions in research on the effects of arousal on testimony. And Gudjonsson is largely concerned to emphasize the limitations on the practical application of lie detection techniques.

Psychologists naturally concentrate on the difficulties within their own discipline, and see these as the source of any problems in applying their work to law. Twining, as an academic lawyer, is less concerned in his chapter with the nature of psychological research and its findings, but raises some questions of a different type not previously discussed among psychologists, since they are questions which arise from law rather than psychology. Psychologists have tended to proceed on the assumption that the practical legal problems surrounding witness evidence, to which they have directed their attention, are reasonably clearly defined and that there would be broad agreement on this among lawyers. Twining shows us the dangers in such an assumption. There are differing traditions within legal scholarship which involve quite different approaches to and perspectives on legal phenomena, and hence on the nature of such 'problems' as identification and misidentification in legal processes. Contrasting two general approaches to the study of law — the Expository Tradition and the Contextual Approach — he examines how far biases associated with the former, much narrower approach are to be found in the literature (legal and psychological) on identification, and suggests that adopting something closer to the Contextual Approach opens up a very much broader perspective. The full implications of this approach for psychological research in the area of witness evidence have yet to be worked out, but it is apparent that at least some of the questions psychologists have been investigating would be cast in a radically different form, while other quite new questions would be raised. Twining is addressing lawyers as much as psychologists, and it may seem to be more for lawyers to clarify the nature of practical

legal problems; but these are none the less issues which psychologists working in the area cannot afford to ignore. If psychologists are implicitly buying into a particular view of legal processes which is widely and increasingly questioned within law, then it is surely essential that they should at least be aware of this.

The complexities of the area are also reflected in the interlocking of issues across chapters in the book. It is clear that no part of the problem of evidence reliability can be isolated from the rest. For instance, Shepherd in discussing recognition performance over delays, makes use of mock identity parades; Malpass and Devine in Chapter 5 raise a range of fundamental questions about the identity parade which might seem to throw some confusion into Shepherd's findings. Yarmey and Jones, for the purposes of their survey, select certain answers to questions about reliability as being 'correct' on the basis of current psychological research, and hence the view an expert witness might put to a court: Lindsay and Wells in Chapter 12 cast doubt on whether the 'correct' answer regarding cross-race identification is indeed the right one, and whether psychologists ought to be putting views on the matter before the courts at all. The book contains numerous such instances where what is taken as a working assumption or not discussed as an issue in one chapter, is fundamentally questioned in another. There are also points of disagreement within the book. It would obviously have been quite inappropriate and out of keeping with the purposes of this book to attempt to iron out these differences of viewpoint and opinion (even had it been feasible to do so) and attempt to present a false united front.

The book is organized in four parts. The three chapters in Part I are concerned in various ways with the impact which eyewitness evidence has on those who must take it into account in making decisions. In Chapter 2 Yarmey and Jones pick up the objection sometimes met in the courts, that the reliability of witnesses is a matter for the jury to decide using its own common sense. They report a survey designed to throw light on the question of how far psychologists as experts would in fact present a different opinion to the court from that which a jury would on its own arrive at. In Chapter 3, Wells and Lindsay develop a metamemory analysis of how lay jurors make judgments about the reliability of memory, and in Chapter 4, Saunders, Vidmar, and Hewitt discuss and challenge previous conclusions concerning the credulousness of jurors, and present results of their own experiments designed to replicate, extend, and clarify the earlier work.

The four chapters in Part II of the book concern the process of eliciting and assessing information from witnesses in the course of an investigation. Malpass and Devine, in Chapter 5, analyse the concept of fairness in identity parades, showing that it comprises two different types of fairness — size and bias. They discuss the empirical basis of these as well as ways in which they might be measured. Davies, in Chapter 6, examines the relative effectiveness of visual

versus verbal means of communicating information about appearance, both at the stage of interrogating witnesses, and when passing on descriptions to the public and to fellow police officers. Davies reviews the research evidence with particular reference to the various techniques used in police procedures such as the sketch artist, Identikit, and cued description. The emphasis in these two chapters, as in the literature generally, is on obtaining reliable evidence from cooperating witnesses, or at least on estimating the likely extent of its unreliability. The remaining two chapters in this part, however, turn to questions of a different type which have received much less attention in this context. In Chapter 7, Baddeley and Woodhead are concerned with the way in which we encode faces. They examine the possibility that the performance of witnesses in recognizing a face might be improved through training in strategies whereby one may commit a face to memory in such a way that it will subsequently be readily recognized. Gudjonsson's Chapter 8 provides a full and critical discussion of the various techniques of lie detection and the possible countermeasures a subject might adopt.

These four chapters are in a sense the most straightforwardly applied in the book. They focus directly and closely on actors and techniques within the legal process of investigation itself, with the explicit aim of furthering legally defined goals, and ultimately improving the quality of information obtained and/or accurately assessing its reliability, and avoiding errors. The variables studied fall within what Wells (1978) has termed 'system variables' — i.e. variables which the police can in principle do something about. The output of these researchers vindicates the view that psychology research geared specifically to forensic issues has the potential to yield information which can be applied to make identification procedures more effective and more just: at the least, it can establish limitations on the practical usefulness of techniques and strategies. However, as Malpass and Devine discuss in Chapter 5, psychologists as objective researchers can only go so far in this role: ultimately value judgments need to be made which are not the province of the psychologist. In the case of the fairness of a lineup, or identity parade, judgments need to be made about such issues as what is an acceptable risk of error of identification, given that the lineup can never altogether eliminate this possibility. Their contribution is to show how fairness of a lineup can be defined and quantified; to test the empirical basis of lineups in psychological assumptions about the impact of the similarity of foils on choices; and to suggest how this information might be put to practical use. But they point out that they cannot as psychologists take on the task of deciding what *ought* to be done on the basis of the information they can provide.

Part III concerns various aspects of the 'witnessing event' and its *sequelae*, and individual characteristics of the witness which may influence the quality of memory for the event — the raw material so to speak with which the preceding