Forensic Psychology and Law

Traditional Questions and New Ideas

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Institute of Forensic Research Publishers · Kraków 2000

Pp. 41-45

Poland

Retrospective Implications for the Probative Value of Psychologist's Testimony on Eyewitness Issues of Exonerations by DNA Evidence

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In a 1996 paper in the British journal *Expert Evidence*, the present authors reviewed the current knowledge in a number of eyewitness-identification domains about which psychologists testify in court with ever greater frequency (typically as experts called by the defence). The reviewed substantive topics included exposure duration, retention interval, the effects of stress, weapon focus, post-event information, unconscious transfer, line-up size and "fairness", cross-race effects, time estimation, and the relationship between confidence and accuracy. In addition, the review devoted a great deal of critical attention to methodological issues, such as face validity (legal verisimilitude), external validity, convergent validation, and the problems of individual differences, of interactions, and of measurement. Furthermore, the authors addressed such questions as: is juror knowledge about eyewitness memory accurate? How and why do expert witnesses decide to testify on some and not other issues in a particular case (the relevancy test)? Is the use of "hypotheticals" in expert testimony prejudicial?; and, finally: Is there a generally accepted theory of eyewitness memory? Our conclusions were that the psychologists' court testimony

"(...) has greater prejudicial than probative value and therefore should not be allowed in court. Not only does a generally accepted theory for eyewitness identification not exist, but the evidence in many areas is inconsistent, the procedures and measures used to study various relationships are not well tied to legal procedure, and there is no evidence that the experts who testify would be any better at detecting witness inaccuracy than uninformed jurors (...). The nature of what is known about human memory is so complex that an honest presentation of this knowledge to a jury would only serve to confuse rather than improve their decision-making" (Ebbesen & Konečni, 1996, p. 2).

In one of the subsequent critiques of our position that appeared in *Expert Evidence*, Yarmey (1997) brought up a number of issues. Whereas the specific criticisms will be addressed in our forthcoming rebuttal in the same journal, Yarmey's general conclusion was that psychologists' expert testimony on eyewitness memory issues does have probative value, especially in view of the recent research findings. In passing, one should note that psychologists who confidently claim that this or that set of recent studies justifies their testimony are often the same people

who have been testifying for literally decades with similar confidence – and without the benefit of such recently acquired information. The more central question, however, is: To the extent that sharp disagreements clearly remain among qualified psychologists concerning the degree of probative, as opposed to prejudicial, value of court testimony on eyewitness issues (never forgetting that at least some of the reasons for such disagreements are patently non-scientific and therefore unresolvable), is there a body of legal cases where the usefulness to juries of this type of testimony can be estimated with reference to some external, relatively objective, standard?

The proponents of expert testimony in court on eyewitness issues (almost always to the effect that eyewitness memory is unreliable for one or another of the above-mentioned reasons) clearly think that there is now a body of relevant cases that is helpful to their agenda – cases of people who had been convicted by juries and subsequently exonerated through the use of DNA evidence. For example, in a report by Connors, Lundregan, Miller, and McEwen (1996), prepared under the auspices of the US National Institute of Justice, there is a relatively detailed description of 28 such cases. The manner in which these DNA-based exonerations are being related to eyewitness issues is straightforward, if problematic (as we shall show later). For instance, in the first of the legal commentaries that constitute the foreword to the report, E. J. Imwinkelried, a law professor at the University of California, Davis, stated: "In all 28 cases, without the benefit of DNA evidence, the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate (...) mistaken identification was the cause of the 28 wrongful convictions discussed in this report" (p. IV). The obvious retrospective implication is that the wrongful convictions might have been avoided in these 28 cases had the juries had the benefit of hearing psychologists testify about the weaknesses and pitfalls of human perception, memory, and cognitive processes. The presumed prospective implication is that in the future cases that hinge solely on eyewitness identification – that is, cases in which DNA and other physical evidence is not available – psychologists should (perhaps routinely?) be invited to testify in court about the problems of eyewitness memory, in an effort to prevent wrongful convictions.

To evaluate the former implication, we and our students made a serious effort of estimating retrospectively the extent to which a psychologist's court testimony on eyewitness issues (a testimony of the kind that, for example, A. Daniel Yarmey could reasonably be expected to give) might have been helpful in preventing the 28 wrongful convictions that were described in the report by Connors et al. (1996). The analytical stance we adopted was: regardless of the degree to which Yarmey's reading of the relevant research literature on eyewitness issues is correct or incorrect, and of whether or not his reading can justifiably be translated into probative courtroom testimony, in how many of the 28 cases can it reasonably be expected that a "Yarmey" testimony (for the defence) might have contributed to swaying the respective juries away from the (erroneous) guilty verdicts, given other trial facts

and the various procedural (police-, prosecutor-, and forensic laboratory – related) aspects of the cases, including sloppiness and malfeasance?

The short answer is "three" or 10.7% (for the reasons described below). Of course, one does not know whether a "Yarmey" testimony in even these three cases (Callace, Chalmers, Piszczek) would have moved the juries' guilt certainty below their subjective "beyond a reasonable doubt" cut-offs. And perhaps the prosecutors in these three cases would have hired experts who would confidently (and, in our opinion, rightly) say that the "Yarmey" eyewitness testimony is too general, premature, and scientifically unjustifiable – which would have further reduced the probability of "not guilty" verdicts. In short, in the pre-DNA judicial world of these 28 cases, where for everyone other than the accused the truth was forever elusive, not even in retrospect can one frankly say that the "Yarmey" testimony would have served justice, as understood in common law.

Here is a brief account of the process of elimination by which the three cases were arrived at. In five of the 28 cases (Cruz, Hernandez, Linscott, Nelson, Woodall), eyewitness testimony played no legal part at all. (So much for the accuracy of Professor Imwinkelried's previously quoted opinion.) In another three cases (Bloodsworth, Brison, Vasquez), eyewitness testimony placed the defendant in the victim's presence and/or near the scene of the crime – and these eyewitness accounts were never challenged or disproved (wrongful convictions notwithstanding). In a further 10 cases, it was shown that the defendant had been framed by the victim (Bravo, Dabbs, Davis, Dotson, Hammond, Harris, Honaker, Kotler, Snyder) or co-defendant (Daye). In one case (Alejandro), two jurors testified that they had based their guilty verdicts solely on the (subsequently discredited) testimony of a forensic DNA specialist, and not on the "eyewitness" testimony of the victim (who had had a pillow case placed over her head by the assailant). The same discredited forensic expert (Fred Zain) was also involved in the above-mentioned Davis, Harris, and Woodal. In fact, many of the cases mentioned so far, as well as Bullock and Scruggs, were rife with police, prosecutor, court-clerk, and lab-specialist malfeasance (which actually led to some successful prosecutions), but that – coupled with occasional disgracefully poor lawyering – is another story.

To conclude the process of elimination: One case (Cotton), involved two separate incidents and different victims of rape, and DNA evidence in one of these was too deteriorated to be analyzed (Cotton was wrongfully convicted of the other crime). In another case (Green), one of the incidents was an attempted rape (without traces) and the other may have involved the use of a condom. (Green was exonerated of the latter because DNA from the semen on an item of the victim's clothing – which may have been deposited in unrelated sexual activity – did not match his.) And the DNA– related circumstances in Shephard – with apparently three different men's semen stains on the victim's body and clothes, two alleged rapists, and admitted and unanimated other sexual partners in the relevant time frame – are so confusing as to preclude responsible *post-hoc* analysis. Such cases

support the view expressed by George W. Clarke and Catherine Stephenson, Deputy District Attorneys who wrote another of the commentaries in the foreword to the Connors et al. (1996) report: "DNA-typing results that exclude a suspected assailant may not demonstrate innocence. Not uncommonly, evidence collected and subjected to DNA profiling may reveal results from biological material left by other consensual sexual partners unrelated to the offence investigated" (p. XXIV).

Finally, in one case (Jones), the appeal process in fact included the (unsuccessful) involvement of defence expert witnesses regarding "unconscious transference" and cross-racial identification issues. The remaining three cases that we mentioned earlier (Callace, Chalmers, Piszczek) hinged solely on eyewitness identification and were the ones in which we thought that a "Yarmey" expert testimony might have been helpful to the respective juries. In general, though, even in such cases, we feel that a "Yarmey" testimony might have probative value only to the extent that the defendant's attorney is poorly prepared or incompetent. In our considered opinion, therefore, the details of cases in Connors et al. (1996) do not retrospectively decrease the research-based scepticism about the probative value of psychological testimony on eyewitness issues that was expressed in Ebbesen and Konečni (1996).

A few concluding comments are in order regarding the broad optimism about DNA-based exoneration that is often voiced by, among others, the proponents of expert eyewitness testimony:

1. "the vast majority of sexual assault cases involving both child and adult victims do not require resolution of identity" (Clarke & Stephenson, p. XXXIII in Connors et al.);
2. serial rapists have resorted to the habitual use of condoms (e.g., the well-known San Diego "Bolder than most" case);
3. sexual assailants who do not leave traces of bodily fluids may go under-prosecuted, or erroneously acquitted or exonerated, by a legal system that may well become too DNA-dependent.

Then, there is, of course, the flip side of the coin. The number of people who have been exonerated (by demanding DNA testing – because they knew they were not guilty of the crime in question, or else knew that they left no traces, but that there was someone's trace) is, as we write, much smaller (about 55, including the Connors et al. cases, according to the Innocence Project at Cardozo Law School, New York City) than the estimated thousands that will be prosecuted and convicted of unsolved crimes once the backlog of some 300,000 DNA samples taken from prisoners in USA during the last ten years is handled. Many of these future prosecutions will be based on DNA "cold hits". Such use of DNA-typing and the US Justice Department's recent approval of the hiring of private labs to reduce the backlog displease privacy advocates. "It is interesting to observe how quickly some DNA-evidence opponents embrace the science when it benefits certain defendants' interests but how defensive they become when the evidence points toward other

defendants. But this is not unique to DNA evidence" (Ronald S. Reinstein, Presiding Judge, Criminal Department, Superior Court of Maricopa County, Arizona; p. XXI in Connors et al.). For example, the evidence that exonerated D. Vasquez (mentioned earlier) incriminated T. Spencer – who "became the first person in the United States executed on the basis of DNA testing" (Connors et al., 1996, p. 74).

References

Connors, E., Lundregan, T., Miller, N., McEwen, T. (1996). *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial.* Report NCJ 161258. Washington, DC: US Department of Justice, National Institute of Justice.

Ebbesen, E. B., Konečni, V. J. (1996). Eyewitness memory research: Probative v. prejudicial value. *Expert Evidence*, 5, 2–28.

Yarmey, A. D. (1997). Probative v. prejudicial value of eyewitness memory research. *Expert Evidence*, 5, 89–97.