

**IDENTIFICATION PARADES
UPHOLDING THE INTEGRITY OF THE CRIMINAL JUSTICE PROCESS?**

by

YVETTE MARIE TINSLEY

**A thesis submitted to The University of Birmingham
for the degree of
DOCTOR OF PHILOSOPHY**

**Faculty of Law
The University of Birmingham
September 1999**

UNIVERSITY OF
BIRMINGHAM

University of Birmingham Research Archive

e-theses repository

This unpublished thesis/dissertation is copyright of the author and/or third parties. The intellectual property rights of the author or third parties in respect of this work are as defined by The Copyright Designs and Patents Act 1988 or as modified by any successor legislation.

Any use made of information contained in this thesis/dissertation must be in accordance with that legislation and must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the permission of the copyright holder.



22119515

M01990215J

ABSTRACT

Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in one quarter of all contested Crown Court cases. However, the memory is a fragile and malleable instrument which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, as is illustrated in a number of famous miscarriages of justice. This thesis assesses the sufficiency of the protections offered to defendants in cases involving eyewitness identification by examining psychological research on memory, police procedures for the collection of evidence from eyewitnesses, and judicial discretion to exclude unreliable evidence found in *R v Turnbull* and section 78 of the Police and Criminal Evidence Act. In interview, startling levels of guessing were reported by witnesses attending identification procedures; and suspects were largely unaware of their rights. Current identification procedures are time-consuming and inefficient; and psychological research offers some guidance but few answers, precluding the usefulness of expert evidence. The thesis concludes that an increase in specialised identification officers, reform of procedures to allow for greater use of video identification, guidelines on the exercise of discretion under s.78, and judicial education regarding the importance of using a comprehensive *Turnbull* direction are required before an adequate level of procedural and evidential protection against erroneous identification can be offered to suspects.

ACKNOWLEDGEMENTS

In the process of researching and writing this thesis, I received help from number of generous and supportive people. First of all, I must thank my family, especially my parents, who gave me the chance to leave behind a future on the factory floor. I will always be indebted to them for their love, support and far-sightedness in the raising of their children. Secondly, my partner, Maikali, who has coped with so much during the final redrafting of the thesis: thankyou for your belief in me and your seemingly endless support and love: it is appreciated.

Great thanks also go to my supervisor, Professor John Baldwin and to all the West Midlands police officers and civilian staff who opened their doors to me in order to complete the empirical studies for the thesis.

Friends and colleagues in New Zealand have offered advice, encouragement and understanding: thanks especially to Leigh and Alison, for making the transition to a new country so easy and so much fun; to Kirstin Harvey and Claire Baylis for the support only other women can give around the workplace, you are both such great friends; to my secretary, Chris Polglase; and to Warren Young and Neil Cameron, who are friends, mentors and were extremely understanding about my need to take a short break from another research project in order to complete the final draft of this thesis.

TABLE OF CONTENTS

Chapter One: Introduction	
Identification Parades and the Criminal Process	1
A substantial cause of wrongful conviction?	3
Evaluating identification evidence and procedures	6
Synopsis	8
PART ONE: COLLECTING EYEWITNESS EVIDENCE	
Chapter Two: Psychological Research on Eyewitness Identification	13
Psychological theory on memory processes	15
Psychological experimentation on identification procedures	54
Are experimental findings forensically relevant?	65
Chapter Three: Collecting Identification Evidence	73
Early attempts to regulate identification procedures	74
Code of Practice D	85
Chapter Four: Suspects' Perceptions of Identification Procedures	119
Conducting the interviews	120
Findings	124
Chapter Five: Witnesses and Identification Procedures	146
Conducting the interviews	149
Findings	158
Chapter Six: Observations of Identification Procedures	186
How Identification Procedures are Organised	187
Breaches of Code of Practice D	192
Cancellations and Postponements	195
Volunteers for Identification Parades	200
Reform Suggestions	203

PART TWO: PRESENTING EYEWITNESS EVIDENCE IN COURT

Chapter Seven: Exclusion of Evidence and the Warning to the Jury	209
The Turnbull Guidelines	210
Code D and the Exclusion of Evidence under s.78 PACE	238
Chapter Eight: Expert Evidence in Eyewitness Identification Cases	252
Criticisms of Expert Evidence	253
The Rules Governing the Admission of Expert Evidence	263
Expert Evidence on Eyewitness Identification Issues	279
Conclusion: Alternative Uses of Psychological Knowledge	296
Chapter Nine: Conclusion - Identification Parades: Upholding the Integrity of the Criminal Process?	299
Procedural and Evidential Safeguards: Furthering the Protective Principle?	299
Can Psychology Further the Quest to Uphold the Integrity of the Criminal Justice Process?	304
Forward into the Twenty-First Century	305

APPENDICES

Appendix A:	Questionnaire for Suspects	307
Appendix B:	Supplementary Results from Interviews with Suspects	308
Appendix C:	Questionnaire for Witnesses	310
Appendix D:	Supplementary Results from Interviews with Witnesses	315
Appendix E:	Notice to the Suspect	320
Appendix F:	Figures from Identification Suites	331

TABLE OF CASES	334
-----------------------	------------

BIBLIOGRAPHY	341
---------------------	------------

CHAPTER ONE

INTRODUCTION

IDENTIFICATION PARADES AND THE CRIMINAL PROCESS

Introduction

This thesis assesses the current system of collection and presentation of identification evidence by evaluating the successes and failures of police procedures, the use of psychological research findings, and evidential safeguards in contested cases. Wide-ranging changes in the methods used to collect eyewitness evidence are proposed to increase the efficiency and reliability of police procedures. As over 70 per cent of Crown Court cases proceed on a plea of guilty,¹ only a minority of defendants will be afforded the protections of the *Turnbull*² guidelines and section 78 of the Police and Criminal Evidence Act 1984 (“PACE”). Ensuring that issues of reliability and fairness are assessed at the pre-trial stage is therefore of prime importance.

It is estimated that eyewitness identification evidence plays an important role in one quarter of contested Crown Court cases and is a less important part of the evidence in a further 20 to 25 per cent of cases.³ Although advances in the use of scientific identification techniques such as DNA profiling may lead to the conclusion that eyewitness identification would have diminished in importance, identification evidence is still widely thought to be a principal cause of miscarriages of justice.⁴ Unfortunately, protections against the admission of unreliable evidence are inconsistently applied. The provisions governing police procedures on

¹ The figure is much higher in magistrates’ courts, which deal with over 93 per cent of criminal cases: Zander, M., and Henderson, P., *The Royal Commission on Criminal Justice Crown Court Study Research Study No.19* (1993 London:HMSO), 2.

² [1976] 3 All E.R. 549.

³ According to Zander and Henderson’s 1993 Crown Court Study, *op.cit.*, 92.

⁴ See, for example, Rattner, A., “Convicted but innocent: Wrongful conviction and the criminal justice system” (1988) 12 *Law and Human Behavior* 283. The increased use of CCTV in city centres may result in less reliance upon individual eyewitnesses, or at least support for their identifications, for offences which are commonly committed in public, such as street robbery. This is dependant upon high quality video equipment being available. There has been no systematic study of the difference CCTV may have made, but the more traditional store and bank cameras do not offer a high enough quality tape to allow for confirmation of an eyewitness’ identification. This was evidence by the continued use of bank employees as live eyewitnesses in two cases during the empirical study as reported in Chapters 4 and 5 of this thesis.

identification in England and Wales are some of the best in the world,⁵ but their successful application is reliant upon adequate training of officers involved at all stages of the process. Specialist identification officers in the studies for this thesis followed the provisions carefully, but those involved as witness officers or as temporary identification officers breached the Code of Practice, often unwittingly. The importance of reliable identification procedures cannot be overemphasised, because once identification evidence reaches court, there is no coherent approach to the exercise of the general discretion to exclude improperly obtained evidence under section 78 of PACE, nor is there a *Turnbull* warning to the jury in almost half the cases where identification is an important issue.⁶ This thesis investigates why eyewitness identification is unreliable, the sufficiency of the procedures in place to combat that unreliability, and suggests some reform of procedural and evidential processes in eyewitness identification cases. A main objective of the thesis is to assess the level of protection from mistaken identification and wrongful conviction which is offered by the current criminal justice process. In order to carry out this assessment, the psychology behind witness identification as well as law and legal practice are examined.

The thesis concentrates on the interplay between psychology and legal practice. In particular it concentrates on two questions: firstly, whether psychological research is used to best effect in gaining reliable eyewitness identification evidence and protecting suspects from misidentification; and second whether the legal safeguards in place act to adequately protect suspects from mistaken identification. To this end, a discussion of current safeguards is followed in Chapter 8 by an examination of the role expert witnesses may be able to play in ensuring that suspects are given adequate protection from unreliable identification evidence. The empirical work in the thesis directly approaches these research questions by assessing the safeguards offered by Code of Practice D and the impact of psychological research on police practice.

⁵ Many other countries have no comparable provisions: Wagenaar, W., van Koppen, P., and Crombag, H., *Anchored Narratives: The Psychology of Criminal Evidence* (1993, Hertfordshire: Harvester Wheatsheaf), 138.

The thesis has as its main focus the live identification parade, which is viewed as the most reliable form of identification and is the most common identification procedure used by the police in England and Wales.⁷ The law in this thesis is as stated on 30th June 1999.

A Substantial Cause of Wrongful Conviction?

Miscarriages of justice due to misidentification began to be a cause of concern in the early 1900s due to several high profile cases. The most notable cases were those of Oscar Slater in Scotland and Adolf Beck in England. Oscar Slater was convicted of murder in 1909, after twelve witnesses testified that they had seen him loitering outside the tenement which contained the victim's apartment. Two witnesses also claimed to have seen Slater leaving the apartment itself. All of these witnesses identified him after only fleeting glimpses of a man in the vicinity of the apartment.⁸ Slater was not released from prison until 1928, after serving nineteen years.⁹

In 1895, Adolf Beck was identified in the street by a woman who reported him to a nearby police officer as the confidence trickster who had obtained money and jewellery by false pretences from her. Beck was positively identified by ten out of 22 women, and only one woman said that he was not the man. Twenty two years earlier, William Augustus Wyatt, known also as John Smith, was convicted on similar charges. Smith and Beck resembled each other, and police officers were convinced that Beck was Smith. Corroboration of the identifications of Beck was obtained from a handwriting expert, who announced that writings by Smith and Beck were in the same hand. Beck was convicted and sentenced to seven years penal servitude, and was released on licence in 1901. In 1904 several women had complained

⁶ Zander and Henderson (1993), op.cit., 93.

⁷ In assessing the use of identification parades, video, group and informal identifications, as well as confrontations, are examined. The importance of the use of photofit, identikit and photographs is acknowledged. However, the thesis concentrates on procedures used once a suspect has become "known" to the police, at which point photofit, identikit and photographs are not used. The general discussion regarding eyewitness reliability and the use of both *Turnbull* warnings and expert evidence is relevant to the use of all methods of identification.

⁸ Such identifications today would be subject to a judicial warning of care to the jury under *Turnbull* [1976] 3 All E.R. 549, which requires a cautionary direction to be given wherever the prosecution case rests wholly or substantially on the issue of eyewitness identification.

⁹ For a detailed account of the Slater case and appeal, see W. Roughead (ed.), *The Trial of Oscar Slater* (1950, Edinburgh: William Hodge).

to the police about deceptions following the same pattern as those in 1877 and 1895, and a covert street identification, in effect a confrontation, was arranged by the police. Five women testified against Beck in court and he was convicted once more. The judge, however, was not satisfied that Beck was Smith and deferred sentence. In the meantime, Smith was caught red-handed and Beck was released and pardoned for both convictions.¹⁰

A Committee of Inquiry was held to look into the Beck case, because "the fact that an innocent man could be not once only, but twice convicted, ... naturally created grave misgivings in the public mind as to the nature and workings of our system of criminal justice".¹¹ This committee concluded that:¹²

"Evidence as to identity based on personal impression, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury."

As a result of cases such as Slater and Beck, concern as to the safety of convictions based on eyewitness testimony grew, and provisions to reduce wrongful convictions were gradually developed. However, breaches of police procedures were subject only to adverse comment by the judge and practice continued to vary between police forces.

Public attention turned to eyewitness identification again in the 1970s, with the cases of Luke Dougherty and Laszlo Virag.¹³ These prompted such an outcry that the government assembled a Committee of Inquiry, chaired by Lord Devlin. The Committee was given a broad brief and

¹⁰ Proof that the women who had identified Beck were mistaken was later revealed, when it was confirmed that the fact that Beck could not be Smith was on record, because Smith was circumcised but Beck was not. For a more detailed description of the Beck case, see John Henderson "A Question of Identity" (1989) *Journal of the Law Society of Scotland*, 292.

¹¹ Committee of Inquiry into the case of Mr. Adolf Beck Cmnd 2315, (1904), (vii).

¹² Ibid., (vii)

¹³ The outcry continued through the 1970s and early 1980s: see, for example, Hain, P., *Mistaken Identity* (1976 London: Quartet); Cole and Pringle *Can You Positively Identify This Man?* (1974, London: Deutsch); Brandon, R., and Davies, C., *Wrongful Imprisonment* (1973 London: Allen and Unwin); Kennedy, L., *A Presumption of Innocence: The Amazing Case of Patrick Meehan* (1976 London: Gollancz); Foot, P., *Who Killed Hanratty?* (1971, London: Jonathan Cape). Debate about the guilt or innocence still rages, with DNA evidence being tested in 1998 accompanied by an application to exhume Hanratty's body: "Hanratty evidence hidden by police" *The Independent* March 30 1999, 7; "Innocent as charged" *The Daily Telegraph* November 15 1997, 3.

proceeded to evaluate all aspects of eyewitness identification. It reported in 1976, concluding that:¹⁴

“In cases which depend wholly or mainly on eyewitness evidence of identification there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess; the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken.”

The Devlin Report was swiftly followed by the Court of Appeal’s decision in *Turnbull*, which provided for safeguards in eyewitness identification cases.

The current safeguards offered to suspects are threefold: firstly, a Code of Practice governs police procedure for the collection of eyewitness identification evidence. The Code outlines best practice for all formal procedures and also governs when an informal identification procedure may be embarked upon. Second, cases which go to a contested trial and which depend wholly or substantially upon eyewitness identification are subject to a judicial warning commonly referred to as the *Turnbull* warning. This allows for the withdrawal of identification cases from the jury and, where a case is left before the jury, it stipulates that jurors should be warned about the dangers of relying on eyewitness identification. Third, the Police and Criminal Evidence Act 1984 a general discretion to exclude evidence in section 78. These safeguards are discussed in chapters three and seven of this thesis.

The fragility of memory continues to contribute to misidentifications even with the safeguards of PACE and *Turnbull*. A cursory look through newspapers or Law Reports allows an insight into the care which should be taken before convicting in cases where eyewitness identification is the main evidence, especially where those cases are suspect-driven.¹⁵ Rattner estimates that, in the United States, 52 per cent of wrongful convictions have eyewitness identification at their

¹⁴ Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976 London:HMSO), at para. 8.1.

¹⁵ See “Man cleared of five attacks” *Birmingham Evening Mail* November 28 1998, 20; “Bus-stop sex attacker is jailed for fifteen years” *Birmingham Post* February 27 1999, 5; “Five minute talk in police car doomed Stephen Lawrence murder trial” *Sunday Mirror* March 22 1998, 9; “Injustice for all” *The Guardian* January 4 1999, 8; “Case raises issue of vulnerability” *The Guardian* November 12 1993, 25.

root.¹⁶ It is unknown what the impact of misidentification is in the United Kingdom, but the study of eyewitnesses conducted for this thesis suggests that a disturbingly high number of them guess when presented with an identification test. On average, less than half of all witnesses make positive identifications. When a good proportion of those who do make a positive identification of the suspect are guessing, the reliability of eyewitness evidence must be questioned. Coupled with the fact that eyewitnesses can be confidently and honestly mistaken, the potential for wrongful conviction is evident. Regular review of the processes for collecting and presenting eyewitness evidence is required in order to minimise the harm caused by mistaken identification.

Evaluating Identification Evidence and Procedures

In its 1993 Report, the Royal Commission on Criminal Justice spoke of the compromise that has to be struck between crime control and due process values, so that “the risks of the innocent being convicted and the guilty being acquitted are as low as human fallibility allows”.¹⁷ There are references to the need to strike a reasonable balance between the protection of suspects’ rights and allowing the police the freedom to do their job throughout the Report, leaving the reader with the impression that if we could find this rather mystical balance, then all would be well.¹⁸ Less is said in the Report about how to create a balance, or assess whether the balance achieved is serving the public well.¹⁹

More attractive than a simple attempt at balancing is Ashworth’s call for a move to a principled approach. This involves prioritising rights and allowing deviation from them only where there is some reasoned justification. In cases involving eyewitness identification evidence, the logical starting point is the integrity principle, which “states that the agents of law enforcement should

¹⁶ Rattner (1988), op.cit.

¹⁷ The Royal Commission on Criminal Justice Report (“The Runciman Report”) (1993 London:HMSO) Cmnd 2263, 2.

¹⁸ See, for example, comments on pages 8 and 9: Ibid. See also the references to “compromise” in Sanders, A., and Young, R., *Criminal Justice* (1994 London: Butterworths), 417

¹⁹ This in itself creates further problems: for example, which sector of the public should the balance satisfy?; and what competing rights and interests should be taken into account?

not use, and the courts should not condone, methods of investigating crime that involve breaches of the rules”.²⁰ This promotes fairness to defendants and a moral consistency from the State: in responding to law-breaking the State should follow its own laws and rules. The integrity of the system is upheld, in my opinion, by both disciplining the police for serious or deliberate breaches of the rules (by exclusion of evidence as well as by internal disciplinary procedures) and by protecting the defendant from prejudice. Ashworth terms these the disciplinary and protective principles.²¹

The Runciman Report also made the point, trite though it is, that the maintenance of law and order is dependent on public goodwill,²² because otherwise the police would be unable to do their job and the system would lack the support necessary to uphold the law in a democratic society. If we are to believe psychological research which shows that procedural fairness is more important to most people than whether a conviction or acquittal results from a prosecution,²³ the need for public goodwill could be served by adopting principles which promote fairness and the protection of suspects’ rights. Furthermore, it is only by protecting the rights of suspects and excluding evidence which results in unfairness that the criminal process can retain (or regain) integrity.²⁴ Fair procedures are particularly necessary for the collection of reliable evidence in eyewitness identification cases, because memories are malleable and can be distorted by the use of improper questioning techniques or identification procedures.

At this point it could be tempting to advocate for the courts to place no reliance on identification evidence, but its importance in criminal prosecutions does not allow such a position without

²⁰ Ashworth, A., *The Criminal Process: An Evaluative Study* (1994 Oxford: Clarendon), 32; see also Zuckerman, A.A.S., *The Principles of Criminal Evidence* (1989, Oxford: Clarendon)

²¹ Ashworth (1994), *op.cit.*, 302; and Ashworth, A., “Excluding evidence as protecting rights” [1977] *Criminal Law Review* 723. Although Ashworth criticises the largely symbolic impact of the disciplinary principle, it is submitted that impact will be gained from public condemnation of improper practices. The protective principle, of which he is an advocate, works well in cases where there is actual prejudice caused, but potentially allows evidence to be admitted in cases where there has been a substantial or bad faith breach, which would send dangerous signals to the police and would surely undermine the integrity of the system.

²² The Runciman Report, *op.cit.*, 7.

²³ Tyler, T.R., *Why People Obey the Law* (1990 New Haven: Yale University Press), 101.

²⁴ See Choo, A., *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993, Oxford: Clarendon).

losing the goodwill of the public and compromising fairness to victims. Moving away from an absolute right of protection could therefore be justified on the grounds that evidence should be allowed where the breach causes little or no prejudice to an individual or to the aims of the process. Rather than excluding all evidence of identification, fairness can be promoted by insisting that procedural rules are followed and that an identification is supported by other evidence. Whilst the *Turnbull* guidelines look for supporting evidence, they allow the trial judge to admit unsupported identification evidence where it is of “good” quality. Assessments of quality need to be well informed by both psychological research and past errors before a fair decision can be made. Breaches of Code D should result in the exclusion of evidence where they result in prejudice to the defendant, or constitute a significant or bad faith deviation from the rules. This thesis broadly advocates the use of the integrity principle, combining aspects of the protective and disciplinary principles to arrive at a strict test for the exclusion of evidence. In cases where there is a breach Code of Practice D, it is only where the breach is minor, caused in good faith, and does not result in significant disadvantage to the defendant that evidence should be admitted. In order to protect the rights of defendants, judges should be educated about the factors affecting eyewitness reliability and should be encouraged to give a *Turnbull* warning in all cases where eyewitness identification is a significant part of the prosecution case. This thesis evaluates the protections offered to suspects against wrongful conviction based on misidentification and whether these protections could be enhanced by the greater use of psychological research. The thesis therefore questions whether the level of protection offered by the safeguards is high enough to uphold the integrity of the criminal justice process.

Synopsis

It has been said that eyewitness identification is a form of suspect-driven search,²⁵ whereby the suspect is the starting point for the investigation and subsequent evidence gathering. Although this view is rather simplistic, it does reflect the problem inherent in cases of wrongful

²⁵ Wagenaar et.al. (1993), op.cit., 134.

conviction based on misidentification: in constructing a case against a particular suspect, only evidence tending to show the guilt of that suspect may be assigned any importance by the police, leading to evidence in the suspect's favour being disregarded. In order to minimise the dangers of the suspect-driven approach to investigations, it is important that the basis of the original identification is sound. As discussed in chapter two of this thesis, there is little the system can do about a lack of reliability due to the prejudices or physical attributes of the witness, nor that due to the circumstances of the offence, but it can address the effect of procedures on reliability. The chapter asks whether psychological findings are being utilised to a sufficient extent, and whether psychology can aid in the task of offering protection from misidentification. The psychological research findings discussed in chapter two offer suggestions regarding appropriate procedures and, although the "real life" usefulness of the research must be questioned, some valuable lessons can be learned.

Chapter three examines Code of Practice D, which governs the conduct of identification parades in England and Wales. The Code contains detailed procedural guidelines for the police both when a suspect is known and when they have yet to determine his or her identity. In assessing whether the Code furthers the protective and integrity principles, chapter three asks when the protections of the Code are available and whether the availability is broad enough. In Annexes to the main provisions, identification officers are taken through their duties step by step and, providing that the provisions are not breached, the chapter concludes that the Code offers considerable protection to suspects. However, the empirical studies conducted for this thesis, discussed in chapters four, five and six, revealed a lack of education amongst non-specialist police staff which contributed to breaches of the Code. The studies also highlight the inefficiencies in the current system, and some suggestions are made for procedural reform to increase efficiency without creating a reduction in the reliability of evidence. Each of the three empirical chapters illustrate the way law, legal practice and psychology inter-relate in practice and highlight areas where, because protections from misidentification are lacking, the integrity of the criminal justice process is undermined.

It could be said that identification cases are unique in that they tend to relegate the *actus reus* and *mens rea* of an offence to secondary considerations. For example, where a defendant disputes evidence of identity, it would be rare to offer evidence that he or she did not intend to commit the act. Because identification evidence can become “the cornerstone in the construction of proof”,²⁶ supporting evidence is needed to protect defendants from wrongful conviction. Psychological research shows that the memory is unreliable, and the law has incorporated that knowledge, illustrated by a number of celebrated miscarriages of justice, into a judicial warning, the “*Turnbull* warning”. The warning is designed to offer protection from erroneous identification whilst allowing for the admission of what is often very important evidence to the prosecution. The *Turnbull* direction requires the judge to withdraw a case from the jury where poor quality eyewitness identification is unsupported by other evidence. However, the assessment of “good quality” is largely subjective and is reliant on the judge’s knowledge about memory processes. Chapter seven of the thesis examines whether the *Turnbull* direction to the jury offers the protection it purports to and examines the difficulties involved in giving protection via a warning in practice, in particular the issues surrounding the concepts of “quality” and “supporting evidence”. The use of results from psychological research in assessing the quality of identification evidence could be further enhanced, an issue which is built upon in chapter eight, which examines the role of psychology in informing the Court about the dangers of relying upon eyewitness identification. One option is to allow psychologists to give expert evidence in cases involving eyewitness identification. The chapter assesses the legal rules governing expert evidence and the viability and usefulness of expert psychological witnesses in eyewitness identification cases, in order to answer the question of whether more could be done to utilise psychology in the task of protecting suspects and thereby upholding the integrity of the criminal justice process.

Chapter nine concludes on whether the protections offered in Code of Practice D, PACE section 78 and the *Turnbull* warning are adequate, and whether they act to uphold the integrity principle. Protection offered by greater utilisation of psychological findings could act to further

²⁶ Wagenaar et.al. (1993), op.cit., 119.

the protective principle both at the time of identification procedures and at the stage where a case progresses to a contested trial. Reform of the methods of collecting eyewitness identification evidence and the means of protecting defendants from mistaken identification are proposed in order to strengthen the integrity of the criminal justice process.

PART ONE: COLLECTING EYEWITNESS EVIDENCE

CHAPTER TWO

PSYCHOLOGICAL RESEARCH ON EYEWITNESS IDENTIFICATION

Introduction

This chapter is concerned with the scientific basis of our understanding of the eyewitness identification process. Its objective is to assess, with reference to the available psychological literature, the relationship between the theory and practice of identification procedures. Whilst it is impossible directly to observe the mind, cognitive psychology has some generally accepted theory on the functions of memory, based on observation of how people behave. This theory can be seen to have influenced some practices within the criminal justice field. For example, the pre-trial and trial procedures discussed in later chapters have their basis, to some extent, in psychological theory on memory processes. The *Turnbull*¹ guidelines refer to a distinction between a "good" and a "bad" identification, reliant on such factors as visibility and viewing time. Whilst it may be argued that these are merely common-sense provisions, their significance has been highlighted and confirmed in experiments conducted by psychologists.² Many of the provisions of Code of Practice D also have their roots in the findings of social psychology. These include the provision in Annex A:12(i), whereby witnesses should be prevented from discussing the case; and Annex A:14, which provides that witnesses should be told that the offender may or may not be present on the identification parade. These provisions are designed to prevent cross-pollination of memory and pressure to choose respectively. Both issues have been the subject of much psychological experimentation,³ and they highlight the potential of the role psychology may be able to play in furthering the principle of protection

¹ [1976] 3 All ER 549.

² For a review of the literature in the area, see Cutler, B.L., and Penrod, S.D., *Mistaken Identification* (1995, Cambridge University Press), chapters six and seven.

³ For example, Warnick, D.H., and Sanders, G.S., "The effects of group discussion on eyewitness accuracy" (1980) 10 *Journal of Applied Social Psychology* 249-259, and Malpass R.S., and Devine, P.G., "Eyewitness Identification: Lineup instructions and the absence of the offender" (1981a), 66 *Journal of Applied Psychology* 482-489 .

of suspects from unfair procedures. Actual adherence to the protective principle through pre-trial procedural rules is discussed in chapter three.

The discussion in this chapter focuses initially on the generally accepted psychological theories concerned with the way the memory works. These theories give an insight into the physical process at work when someone witnesses a crime. The memory process is split into three main stages: acquisition, where an event is originally observed or information is taken in; retention, where the memory is stored; and retrieval, where memory is recalled. Some of the problems encountered in forming and recalling accurate memories are discussed. The chapter also explores the experimentation conducted on the problems and processes involved with the use of memory by witnesses to crime. Psychologists have identified a number of variables which may affect witness accuracy at each stage. The variables which can affect a person's memory can be split into two basic categories: system variables and estimator variables. The former are the more important for the purpose of this thesis because they are open to manipulation by the police and other criminal justice professionals. Any reliable conclusions gained from psychological research on systems variables could effect change in identification procedures. Unlike system variables, estimator variables are not open to manipulation and the chapter poses the question whether knowledge about them could assist those conducting identification procedures, even though they are powerless to effect any change.

The second part of the chapter examines the role of system variables in greater detail, with specific reference to the problems involved in conducting eyewitness identification procedures. Psychologists have addressed these problems by conducting experiments to determine the fairest method with which to test the memory of an eyewitness. The conclusions drawn from such experiments, and their applicability to the criminal justice process, are discussed. Although theory on memory processes is generally accepted within psychology and has strong support from years of experimental research, there are some areas of research on eyewitness identification which are open to greater debate. The usefulness of psychological research to criminal justice is limited by the use of the experimental method. Whether the results gained

from experiments can be extrapolated to real cases and individual witnesses is questionable. The experiments discussed in this chapter illustrate general trends rather than definite answers, which can help to inform legal professionals but cannot tell us whether an individual witness is accurate in their identification. The limitations of psychological research are discussed in the final section of this chapter.

Psychological Theory on Memory Processes

Any discussion of the relationship between legal procedure and psychological findings in the area of eyewitness identification must begin with a basic examination of the theories underpinning all individual experiments conducted. When a witness is asked to form a photo-fit, identify from photographs or view a suspect on an identification parade, group, video or confrontation, that witness's memory for events and faces is tested. Indeed, Clifford and Bull are of the opinion that "when a person is asked to identify someone he or she is being asked to do something that the normal human being was not created to do".⁴ In order to understand the processes which influence the accuracy of eyewitnesses to crime, a pre-requisite knowledge of how the memory generally works is needed. As a discussion of memory processes could span a whole thesis in itself, the examination in this chapter is necessarily brief,⁵ but does serve to provide a backdrop to the more specific experimentation on eyewitness identification.

The first thing to note about memory is that it is not a static process. Information is not taken into memory as a recording which will only fade and not change. According to cognitive psychology, the human memory is active, selective and constructive at all stages.⁶ For example, in the retention stage there is a great danger that the memory will become contaminated by what is termed "post-event information", whereby new or contradictory

⁴ Clifford, B.R., and Bull, R., *The Psychology of Person Identification* (1978, Boston: Routledge and Kegan), 16.

⁵ For a more detailed discussion of memory processes, see Gruneberg, M.M., and Morris, P.E., *Applied Problems in Memory* (1979, London: Academic Press), Neisser, U., *Memory Observed* (1982, San Francisco: W.H. Freeman) and Davies, G., Ellis, H.D., and Shepherd, J., (eds) *Perceiving and Remembering Faces* (1981, London: Academic Press). General memory processes, and their relationship to eyewitness identification, are discussed here. The finer points of facial recognition, such as facial mapping and perceptual gestalt, are not examined (see Clifford and Bull (1978), op.cit.).

information is given.⁷ Whilst the human memory is not passive in any instance, the difficulties in encoding an accurate memory are multiplied where the human face is involved. This is because "faces are complex, multidimensional and...are plastic rather than rigid in form...We have not one face but a thousand different faces."⁸ It is common for people to fail to recognise someone they know, or to mistake one person for another. When these factors are taken into account, it is easy to see why human memory cannot be trusted, least of all in the courtroom. The malleability and lack of reliability involved in the processes of memory underline the need to ensure that there are adequate safeguards incorporated into law and legal practice. It is only by providing protection from misidentification and convictions based on mistaken identification that the integrity of the criminal justice process can be furthered. Without safeguards, ideally developed with the aid of psychological knowledge, there is the danger of widespread reliance upon what is inherently unreliable evidence: a situation which offers little chance of maintaining procedural integrity.

As outlined in the introduction, it is usual for psychologists to divide the memory process into three main stages: the acquisition, retention and retrieval stages. When police officers gather eyewitness testimony, they test the retrieval stage of a particular witness's memory by requesting verbal recollection, which is usually followed by a visual recognition test.⁹ Emphasis on the retrieval stage of memory does not mean that the two earlier stages should be ignored, as any failure to retrieve accurate information can be caused by events at any stage. For example, the witness may not have perceived the event accurately, or may forget important details between the time of the event and its recollection. Each of the three stages of memory will be examined below.

⁶ See, for example, Crowder, R.G., *Principles of Learning and Memory* (1976, New Jersey: Erlbaum).

⁷ Eyewitness exposure to new material through questioning and discussion is examined later in this chapter.

⁸ Ellis, H.D., Introduction to Davies, Ellis and Shepherd, (eds) op.cit., 2.

⁹ There is some debate as to whether face identification memory differs from other visual memory. For a brief review of some of the arguments in this field, see Clifford and Bull (1978), op.cit., 35ff and Loftus, E.F., and Ketcham, K., "The Malleability of Eyewitness Accounts" in Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley and Sons), 159 – 172, at 166.

(i) *Acquisition and Perception*

The acquisition stage of the memory process, where data is encoded into the memory, is clearly vital. Without accurate encoding, any memory retained and retrieved will be unreliable. The perception stage does not involve a true recording of events, but an interpretation of information based upon an individual's beliefs, prejudices and experiences. The memory will strive to incorporate information into the existing scheme of knowledge and beliefs, so that there is no inconsistency between the perception of the current event and what an individual has already incorporated into her value system about people and things. As Loftus states, "we store in memory not the environmental input itself, nor even a copy or a partial copy, but the interpretation that we gave to the input when we experienced it."¹⁰

Morris similarly concludes that "the memory system stores the results of our making sense of our experiences rather than the experiences themselves."¹¹ The memory can therefore make sense of an event, deciding which items of information will be stored and the manner in which they are encoded. In terms of the criminal justice process, the selective and constructive nature of perception does not indicate reliable witness testimony. However, it does go some way to explaining why witnesses to the same offence will often produce completely different statements and descriptions.

In basic terms, before witnesses can be expected to recall the details of an offence or the description of an offender, the event must have occurred within their perceptual range. For example, they must have seen the offence take place or the offender running from the scene. As a criminal offence is a very complex incident, then even where it is within the perceptual range of witnesses, decisions will be made about which aspects of visual stimulus to concentrate on. Not all witnesses attend to the same aspects, and this is why statements to the police may vary greatly. Witnesses may not encode the information which would be of the most use to police officers investigating the offence in question, simply because they had not paid attention to the

¹⁰ Loftus, E.F., *Eyewitness Testimony* (1979, Cambridge: Harvard University Press), 111.

¹¹ In Gruneberg and Morris (1979), *op.cit.*, chapter 2, 30.

parts of the event in which the police are interested. We cannot encode what we do not pay attention to, as where a witness focuses on a weapon rather than the appearance of the offender holding it.¹²

The example of weapon focus is only one in a body of knowledge built up by psychologists. Most factors affecting encoding could be categorised as estimator variables, in that there is no way of altering them in a real event. Experimentation on such factors can still offer useful insights into the theory of how people perceive events and encode that perception into memory. The factors affecting perception can themselves be split into two categories: those which concern the event, and those which stem from witness themselves.

(a) Event factors

Event factors are part of the incident itself. They have been found to affect the ability of witnesses to recall accurate information. Courts in England and Wales have recognised the influence of event factors on memory accuracy, as illustrated by the *Turnbull* direction in eyewitness identification cases. The most obvious event factor is exposure time: how long the witness had to view the offender. Indeed, the *Turnbull* guidelines have been criticised for becoming a direction on the issue of exposure time alone.¹³ It seems to be a matter of common-sense that the longer witnesses observe an incident or an offender, the more accurate will be their perception. This has been confirmed by psychological research, such as that by Laughery et al.¹⁴, which conclude that the longer a witness has to view a face, the greater the chance that it will be accurately perceived and recognised later. In warning jurors of the danger in convicting where identification evidence is based on a “fleeting glance”, the courts have gone as

¹² See Loftus, E.F., Loftus, G.R., and Messo, J., “Some facts about “weapon focus”.” (1987), 11 *Law and Human Behavior*, 55-62 and Maass, A., and Kohnken, G., “Eyewitness Identification: Simulating the “weapon effect”.” (1989) 13 *Law and Human Behavior* 397-409.

¹³ See, for example, Walker, M., and Brittain, B., *Identification Evidence – Practices and Malpractices – A Report by JAIL*, (1978, London: JAIL).

¹⁴ Laughery, K.R., Alexander, J.F., and Lane, A.B., “Recognition of human faces: Effects of target exposure time, target position and type of photograph.” (1971) 59 *Journal of Applied Psychology*, 490-496. The experiment tested the number of times various features were mentioned by subjects after the viewing of slides of human faces. Some subjects viewed slides for two and a half seconds each, others for eight seconds each. Those

far as it is logical to go on this issue. To exclude such evidence would bar potentially accurate eyewitnesses from testifying, as the experiments conducted highlight a general trend and cannot predict that an individual witness is mistaken, or that inaccuracy begins where the exposure time is below a certain level. Too many other factors combine in the equation determining accuracy or inaccuracy for a low exposure time to be a definite bar to a correct identification.

If it can be assumed that the accuracy of a witness could be affected by the duration of an incident, then certain types of offence will result in more accurate witnesses than others. For example, witnesses to a street robbery would be less likely successfully to perceive and encode events than witnesses to an offence which involved extensive and close proximity, such as a kidnapping. However, the process is not quite so simple, and the duration of an event is not the only factor which affects the probable accuracy of memory. Some effects are a matter of common sense. For example, we all know that the greater the number of times we pay attention to something, the more likely we are to remember it. This forms the basis of rote learning of certain information in our school years. In terms of all events and information we wish to remember accurately, as Morris states:¹⁵

"It is easier to remember sense than nonsense. It is easier to remember a coherent story, the construction, elements and interconnections of which we understand than it is to learn apparently disconnected items...The main activities of the cognitive system are directed to making sense of and dealing with the ongoing interactions between the individual and the world."

It is therefore easier for an accurate recollection to be stored out of information which already makes sense to us through our past experience, rather than that which is alien to us, as it can be easily stored in one drawer of the filing cabinet of our memory. Items may be lost if they cannot be easily categorised or if there is no thread linking bits of information together.¹⁶

subjects who had viewed slides for a longer period were more accurate in choosing the target slide out of a later slide "photo-array".

¹⁵ In Gruneberg and Morris (1979), *op.cit.*, 29.

¹⁶ The difficulties of remembering isolated or nonsense pieces of information has been addressed by the techniques involved in mnemonics, where strategies are employed to add meaning, cues and organisation to the information in question. These are the techniques used by performers in the media who parade their superior powers of memory. For a discussion of mnemonists and other strange feats of memory see Neisser, U., (1982).

There will, inevitably, be details which are lost where the event is complex and not all information can be encoded. This is going to be the case for witnesses to a criminal offence. Some details will be more memorable to a witness than others. As perception is a selective process, the more memorable details will be given most attention. The following statement sums up how the selection process of memory works for general events:¹⁷

"The extraordinary, colourful, novel, unusual, and interesting scenes attract our attention and hold our interest, both attention and interest being important aids to memory. The opposite of this principle is inversely true - routine, commonplace and insignificant circumstances are rarely remembered as specific incidents."

Psychologists have termed those items of information which catch the attention as the most *salient details*, where "a salient detail is one that has a high probability of being spontaneously mentioned by individuals who witness a particular event."¹⁸ In identification in criminal cases, these details will normally form the basis for any later identification by an eyewitness. The more salient the detail, the more likely it is to be accurately recalled at a later date. The salient details for an eyewitness should be the appearance and actions of the offender, if any accurate identification is to be made.¹⁹

A number of experiments have been conducted on the relationship between the ability of eyewitnesses to recall details of a crime and the accuracy of their identifications. Recognition is thought to be easier than recall,²⁰ as different triggers are used within the mind, and recognition does not rely on the verbal descriptive skill of an eyewitness. The experiments were conducted out of a concern that an eyewitness may be discredited because she fails to recall peripheral details in court. Any details which do not involve the appearance and actions of the perpetrator of an offence are peripheral in an eyewitness identification case. It is natural that a jury will

op.cit., Part VII, especially the chapters by Luria, A.R., "The Mind of a Mnemonist", 382-390 and Gummerman, K., and Gray, C.R., "An Uncommon Case of Visual Memory", 405-412.

¹⁷ Gardner, D., "The perception and memory of witnesses" (1933) 18 *Cornell Law Quarterly*, 391-409, 394.

¹⁸ See Loftus (1979), op.cit., 25.

¹⁹ Whilst the appearance of the offender is seen as an objectively salient detail, the saliency of such details to individual witnesses is subject to their own biases and prior experiences. Not all witnesses will perceive and encode objectively salient details. For example, the study by Laughery et al. (1971), op.cit., found that, of all facial features, the eyes were mentioned most commonly. The eyes could therefore be classed as a salient detail. However, not all witnesses would spontaneously mention the eyes when describing the person in question.

consider a witness less accurate in her ability to identify the offender where there is poor recall of other aspects of the crime. However, a number of studies have concluded that the reverse of this natural assumption is true.²¹ Because the memory is selective at the perception stage and we cannot successfully encode all information, a witness who has concentrated on the offender will have a less accurate memory of other details connected with the offence but will be more likely to make an accurate identification than someone who has attended only to the peripheral details. This is counter-intuitive, as the natural response to eyewitnesses who have poor recall of the surrounding details of an incident is to doubt their accuracy in identifying the offender. Of course, the natural assumption will sometimes be correct, and the witness may have poor recollection altogether. The research gives no indication of how to separate inaccurate and accurate witnesses where peripheral details are poorly recollected, and it would be dangerous to rely on the results in any reform of practice or procedure either at investigation or trial stage.

Conversely, witnesses who have impressive memory for peripheral detail when cross-examined may be less likely to be correct in their recognition of the offender than it is common to assume. In concentrating on peripheral details, they may have missed salient details about the offender's appearance. General confidence²² and accuracy for what happened at the time of the crime will make a jury believe that the witnesses are also correct in their identification of the accused. For example, Cutler, Penrod and Martens²³ conducted a study where they found that memory for peripheral detail correlated with the tendency to make a choice on an identification task, but was inversely correlated with the accuracy of the identification made. They concluded that those witnesses who had good memory for peripheral detail were more likely to make a

²⁰ Recognition is also thought to add more detail to a verbal description: see Luus, E., and Wells, G., "Eyewitness identification and the selection of distractors for lineups" (1991) 15 *Law and Human Behavior* 43.

²¹ Wells, G., and Leippe, M.R., "How do triers of fact infer the accuracy of eyewitness identifications? Using memory for peripheral detail can be misleading." (1981) 66 *Journal of Applied Psychology* 682. Wells and Leippe found that subjects who performed well on an identification task performed poorly on an 11 point test of memory for peripheral details, and that the reverse also operated: subjects who performed well on the peripheral memory test performed poorly on the identification task.

²² The effect of the confidence of witnesses and the question of the existence of a confidence-accuracy relationship are discussed later in this chapter.

²³ Cutler, B.L., Penrod, S.D., and Martens, T.K., "The reliability of eyewitness identifications: The role of system and estimator variables." (1987a), 11 *Law and Human Behavior*, 223-258.

choice when faced with an identification task but were less likely to be accurate than their counterparts who had poor peripheral memory.

Psychological research results are interesting and informative, but offer no solution to the problem of how we separate the witnesses who are accurate overall from those who are accurate only on peripheral details. When faced with witnesses who recall the details of an offence well, it may be that they are simply very good eyewitnesses and have good recall and recognition skills. It is also impossible to stand our instinctive conclusions completely on their head and decide that witnesses who have poor memories for the minor details of an incident are more likely to be accurate in their identification of the offender than those who have good recall of minor points. However, the experiments on peripheral detail do indicate that we should not assume that good memory for minor details *always* means a greater likelihood of identification accuracy.

The salient , or central, details of an incident may not be perceived or encoded where the material witnessed is violent in nature. The differences in ability to perceive violent and non-violent events have been the subject of many psychological experiments. Other factors which may affect accuracy at any later identification procedure include the seriousness of the crime,²⁴ "weapon-focus", and the level of stress encountered by the witness when viewing the incident. Although stress is often categorised as a witness factor,²⁵ it is so entwined with the reaction to event factors that it will be included in the discussion in this section.

²⁴ The term "crime seriousness" can be interpreted in a number of ways for the purposes of psychological research on witness memory. Whilst it is being allied to the violence or danger involved in an offence here, it can also be used to mean the personal stake the witness has in the crime (for example, whether they are a victim or a bystander), which does not appear to affect the accuracy of later identifications, as in experiments by Hosch, H.M., and Cooper, S.D., "Victimization as a determinant of eyewitness accuracy" (1982) 67 *Journal of Applied Psychology* , 649-652 and Hosch, H.M., Leippe, M.R., Marchioni, P.M., and Cooper, D.S., "Victimization, self-monitoring, and eyewitness identification" (1984) 69 *Journal of Applied Psychology* 280-288; or the monetary value of property stolen or damaged, where a correlation between expense of item and accuracy was found in an experiment by Leippe, M.R., Wells, G.L., and Ostrom, T.M., "Crime seriousness as a determinant of accuracy in eyewitness identification" (1978) 63 *Journal of Applied Psychology*, 345-351.

Emotional stress, often termed “arousal” by psychologists, is a factor which has not only interested psychologists conducting experiments in the field of witnesses to crime, but also those concerned with general memory theory. However,²⁶

"Adequate laboratory research on the effects of such stress is lacking because of obvious ethical constraints. Despite the importance of knowledge in this area, one cannot simulate violent crimes and pose a threat to the well-being of naïve experimental subjects."

It is with a great caution that we accept the results of psychological experimentation on the effect of stress upon the memory, especially in eyewitness identification cases.²⁷ Because there are ethical and practical problems in recreating a violent event, research subjects will not feel comparable stress levels to those witnessing actual events. This takes away much of the applicability of research results to the criminal process. The area is also one of great debate, and there is little consensus on the effects of stress or the levels needed to create an adverse effect on identification accuracy.

Within the criminal justice process, it is generally expected that witnesses to violent crimes will experience a higher level of emotional arousal than those who view a non-violent crime. However, the question of the effect this has on the ability of witnesses to perceive details of the incident does not lead to an easy common-sense solution.²⁸ One of the earliest psychological experiments to highlight the differences in accuracy found between witnesses to violent and non-violent events was that by Clifford and Scott in 1978.²⁹ They concluded that there was greater difficulty in recalling events where subjects had viewed a violent incident. Although the

²⁵ For example in Loftus (1979) op.cit., although texts such as Cutler and Penrod (1995) , op.cit. view stress as an event factor. The likelihood is that the effect of stress, although part of the event, will have varying effects on witnesses and crosses over both categories.

²⁶ Cutler and Penrod (1995), op.cit.,103. It is interesting to note experiments conducted before the onset of these ethical concerns, such as Berkun, M.M., Bialek, H.M., Kern, R.P., and Yagi, K., “Experimental studies of psychological stress in man” (1962) 76 *Psychological Monographs* 534, where army recruits were subjected to high levels of stress by being told that they were accidentally being shelled with live ammunition.

²⁷ The general problems of extrapolating experimental results to actual situations are discussed later in this chapter.

²⁸ There appears to be a legal tradition of believing that high levels of stress will lead to improved eyewitness memory. This is presumably based in the idea that a startling event will be easier to remember than a more mundane one, see Deffenbacher, K.A., “The influence of arousal on reliability of testimony”, in Lloyd-Bostock and Clifford (eds) (1983), op.cit, 235-255.

²⁹ Clifford, B.R., and Scott, J., “Individual and situational factors in eyewitness testimony” 63 *Journal of Applied Psychology* 352-359.

experiment was concerned with recall (in the form of a questionnaire) rather than recognition, it demonstrated a general trend which has often been confirmed.³⁰ It is probable that any difficulties encountered by witnesses to violent crime are due to the increased stress levels which accompany being in the proximity of violence. Clifford and Scott concluded that :³¹

"A single emotional or arousing aspect of an event has a repressing effect that generalises to the whole event, shown by the fact that recall of both physical actions *and* physical descriptions were poorer for the violent film than for the non-violent film despite the fact that the physical descriptions of the targets were identical in both films."

So, according to Clifford and Scott, any part of an incident which is violent can affect the perceptual skills of a witness for the incident as a whole.

One aspect of an event which would undoubtedly qualify as "emotional and arousing" would be where the offender has a weapon. Psychologists have found that the selective process of perception tends to operate to attract attention to the weapon above any other detail. There are two forces at work to disrupt the encoding of a crime where there is a weapon involved: the increased stress to the witness and more attention given to the weapon than the offender. Psychologists have also video-recorded the eye movements of viewers of a series of slides, and found that they focused more on the weapon than on anything else.³² Where this occurs in eyewitness identification cases less attention to the appearance of the offender could mean an unreliable identification. Many psychologists have supported the theory of weapon-focus,³³ and a meta-analytic³⁴ report by Steblay³⁵ of 19 separate studies conducted on the issue found

³⁰ Examples are Sanders, G.S., and Warnick, D.H., "Some conditions maximising eyewitness accuracy: A learning memory model" (1980) 8 *Journal of Criminal Justice* 395-403; and Clifford, B.R., and Hollin, C.R., "Effects of the type of incident and the number of perpetrators on eyewitness memory" (1981) 66 *Journal of Applied Psychology* 364-370. There are some experiments which do not confirm Clifford and Scott's findings: see, for example, Cutler, Penrod and Martens (1987a), op.cit.

³¹ Clifford and Scott (1978), op.cit., 356

³² Loftus, Loftus and Messo (1987), op.cit.

³³ For example, see Cutler, Penrod and Martens (1987a) op.cit., Kramer, T.H., Buckhout, R., and Eugenio, P., "Weapon focus, arousal, and eyewitness memory: Attention must be paid" (1990), 14 *Law and Human Behavior* 167-184; Tooley, V., Brigham, J.C., Maass, A., and Bothwell, R.K., "Facial recognition: Weapon effect and attentional focus" (1987) 17 *Journal of Applied Social Psychology* 845-859; and Maass and Kohnken (1989), op.cit.

³⁴ On the use of meta-analysis in social science research, see Rosenthal, R., *Meta-analytic procedures for social research* (1991, Beverley Hills: Sage).

that there was a significant effect on identification accuracy where a weapon was viewed by eyewitnesses.

These experiments suggest that witnesses to violent crimes, and those who experience weapon-focus, suffer a decline in perceptual skill. These experiments are based upon the idea that the stress level of witnesses will rise where an event is violent or, in the case of focus upon a weapon, contains the threat of violence. Witnesses experiencing greater levels of stress will theoretically have less ability to perceive and encode the information in front of them. This may be due to a narrowing of the attention, as displayed in weapon-focus experiments. According to this theory, the witness who is under extreme stress will focus on a small number of details to the exclusion of others.³⁶

Therefore, where witnesses experience a decline in perceptual ability when under stress, the suggestion is that it is the stress itself that is responsible. Does emotional arousal necessarily impair memory process at the perception stage? The general theory accepted by many psychologists when considering the effect stress may have on the perception of an event goes back to 1908.³⁷ The principle is contained in the Yerkes-Dodson law,³⁸ which states that a moderate level of stress, or arousal, is the optimum at which successfully to perceive and encode information. At its most basic level, the Yerkes-Dodson law represents an inverted U shaped curve,³⁹ where low levels of arousal produce low attentiveness, and a moderate level heightens perception and attention to the task at hand. When stress or arousal levels become high, there is usually a resulting decline in ability to perceive accurately. However, different

³⁵ Steblay, N.M., "A meta-analytic review of the weapon focus effect" (1992) 16 *Law and Human Behavior* 413-424.

³⁶ See, for example, Easterbrook, J.A., "The effect of emotion on cue utilization and the organisation of behaviour" (1959), 66 *Psychology Review* 183-201. According to Jones, D.M., "Stress and Memory" in Gruneberg and Morris (1979) op.cit., 185-214, stress tends both to narrow the breadth and disrupt the stability of attention.

³⁷ In terms of the relationship of stress and eyewitness accuracy, one of the first articles to promote the idea that higher levels of arousal affected accuracy was by Hutchins, R., and Slesinger, D., "Some observations on the law of evidence: spontaneous exclamations" (1928) 28 *Columbia Law Review* 432.

³⁸ The law was actually developed as a result of experimentation on mice: see Yerkes, R.M., and Dodson, J.D., "The relation of strength of stimulus to rapidity of habit formation" (1908) 18 *Journal of Comparative and Neurological Psychology* 459-482, but human beings are taken to react to extreme stress in a similar fashion.

tasks have different levels at which the moderate arousal becomes "optimum", so that perception and attentiveness are at their highest. The effect that extreme stress has varies between tasks. As Loftus points out,⁴⁰

"A simple, well-learned habit would be much less susceptible to disruption by emotional arousal than a more complex response that depends upon the integration of several thought processes. In a moment of intense fear a person would probably still be able to spell his name, but his ability to play a good game of chess would be seriously impaired."

If Loftus is correct, then the use of memory to encode a complex event such as a criminal offence would be expected to be highly susceptible to disruption by emotional arousal. It has been shown that the process of perceiving and encoding information is in itself very complex.⁴¹

The Yerkes-Dodson law therefore leads to the conclusion that moderate levels of stress can actually enhance the potential accuracy of eyewitnesses by improving their perceptual skills. However, where this level of stress becomes high, the opposite is true. Deffenbacher allied seemingly conflicting pieces of research in 1983 by suggesting that the studies which found that stress increased accuracy were working with moderate levels of arousal,⁴² whereas those which found an adverse effect on accuracy were working with high levels.⁴³ The experiments could all be found to fit on the Yerkes-Dodson curve. It should be noted, however, that there is not universal agreement that the Yerkes-Dodson law can be applied to the specific area of

³⁹ See Hebb, D.O., "Drives and the conceptual nervous system" (1955) 62 *Psychology Review* 243-254.

⁴⁰ Loftus (1979), op. cit., 33.

⁴¹ See Deffenbacher (1983), op.cit., figure 13.1, which illustrates how performance is affected by arousal and by the complexity of the task. Optimal performance is lower for more complex tasks.

⁴² Such as Leippe, Wells and Ostrom (1978), op.cit.; Deffenbacher, K.A., Brown, E.L., and Sturgill, W., "Some predictors of eyewitness memory accuracy" in Gruneberg, M.M., Morris, P.E., and Sykes, R.N., (eds) *Practical Aspects of Memory* (1978, Academic Press), 219-226; and Sussman, E.D., and Sugarman, R.C., "The effect of certain distractions on identification by witnesses", in Zavala, A., Paley, J.J., and Gallati, R.R.J., (eds) *Personal Appearance Identification* (1972, Illinois: Charles Thomas).

⁴³ See Clifford and Hollin (1981), op.cit.; Buckhout, R., Alper, A., Chern, S., Silverberg, G., and Slomovits, M., "Determinants of eyewitness performance on a lineup" (1974) 4 *Bulletin of the Psychonomic Society* 191-192; and Siegel, J.M., and Loftus, E.F., "Impact of anxiety and life stress upon eyewitness testimony" (1978) 12 *Bulletin of the Psychonomic Society* 479-480.

eyewitness identification. Some critics argue that the research on the effect of stress on eyewitnesses does not support firm conclusions.⁴⁴

Even if the Yerkes-Dodson law does apply to witnesses to crime, then the decision as to whether a witness's memory has been enhanced or curtailed is bound to be a complicated one. In the absence of further psychological research, it is difficult to assess the level of emotional arousal in any given situation and for any given witness. The effect of a stressful situation would depend on the arousal level of a witness before the crime occurred. It would be difficult for an experiment to be conducted which could control the level of stress actually felt by a witness. This is because the effect on perception is not only due to situational variables but also to the individual reaction to stress of each witness. The former can be manipulated in experiments; the latter cannot. The situations in which the optimum level for accurate perception is passed are therefore difficult to predict. In view of these difficulties it is too simplistic an approach to state that all witnesses to a violent event will encounter a reduced perceptual ability.

However, Deffenbacher does generalize along these lines, stating that:⁴⁵

"The arousal levels engendered by crimes of violence, homicides, rapes, assaults, armed robberies, are almost invariably going to be greater than the Yerkes-Dodson optimum, given the reasonably high complexity of the task expected of eyewitnesses."

In other words, crimes of violence are likely to interfere with successful encoding of information. The question remains as to how to define the terms "violence" and "high emotional arousal" for the purposes of assessing whether the perception of an event has been interfered with by the stress involved in witnessing it.

It has been shown that psychologists encounter difficulties in controlling experimental variables which are entirely personal. These difficulties indicate that our ability accurately to perceive and

⁴⁴ A discussion on whether a firm conclusion can be drawn about the effect of stress on eyewitnesses can be found in McCloskey, M., Egeth, H., and McKenna, J., "The experimental psychologist in court: The ethics of expert testimony" (1986) 10 *Law and Human Behavior* 1-13.

⁴⁵ Deffenbacher (1983), *op.cit.*, 247. Following these arguments, the most accurate encoding will occur at the optimum level of the Yerkes-Dodson curve for that particular task. See also Deffenbacher, K.A., "A maturing of research on the behavior of eyewitnesses" (1991) 5 *Applied Cognitive Psychology* 377-402; and

encode information is highly individual. This is so even though certain variables, such as the duration of an event or the violence involved, may affect most people's ability. Acknowledging the individual nature of memory, psychologists have identified a number of variables pertaining to the witness herself which may affect accurate perception.

(b) Witness factors

As already noted, the emotional arousal involved in a situation varies in its effect on each individual's perceptual skills. In this section, the biases and expectations of witnesses will be discussed.⁴⁶ These are important because they may affect both what we perceive and our interpretation of that perception. According to Loftus, we interpret an event by calling upon: (1) portions of the initial input, ie. the event itself; (2) ideas from our store of general knowledge; and (3) inferences. In affecting our perception of events, our expectations serve to help the memory to fill in the gaps left by the selective process. In this way, memory is constructive as well as selective at the perception stage. Where memory is constructed by a witness to a crime, past experience and expectations can have a profound effect on the accuracy of any later statement or identification.

In her text on eyewitness testimony, Loftus identifies four different sorts of expectations that will affect perception: cultural expectations or stereotypes, expectations from past experience, personal prejudices,⁴⁷ and momentary or temporary expectations. She states that "when any of these are present, they can distort perception; the perceptual material that enters stored memory will accordingly be distorted in a manner consistent with the expectation."⁴⁸ In other words, we tend to see and hear what we expect to see and hear.

Christiaanson, S., "Emotional stress and eyewitness memory: A critical review" (1992), 112 *Psychological Bulletin*. 284-309.

⁴⁶ Individual or witness factors also include, for example, age and sex.

⁴⁷ See also Shoemaker, D.J., South, D.R., and Lowe, J., "Facial stereotypes of deviants and judgments of guilt or innocence" (1973), 51 *Social Forces* 427-433.

⁴⁸ Loftus (1979), op.cit., 37.

Let us take the example of cultural expectations. As the name implies, the expectation operates where there is a stereotype held about certain cultural groups. These stereotypes tend to be held by a large number of the population and are often inaccurate. The classic illustration of cultural stereotypes, and their influence on our perception of events, was conducted in 1947.⁴⁹ Its subject matter may be almost fifty years old, but it remains as relevant today. The experiment illustrated the cultural expectation that black males were more likely to commit violent offences, a stereotype which has attracted recent media attention with regard to street robbery. A picture was given to one subject which depicted a number of people on an underground train. Two of these people were standing, a black man and a white man. The white man was holding a razor blade. Reporting was based on the children's game of "Chinese Whispers", with information relayed from the original subject through six other people. In over half of the experiments, the black man was finally reported to be holding the razor blade. This was in line with a widely held cultural expectation that black people were more likely to act aggressively and that white people are more likely to be the helpless victims.

It is likely that our expectations, experience and biases will be at work throughout the different stages of the memory process. Not only will the stereotypes we hold affect our perception of events, but we may also fill in areas of doubt by recourse to our expectations. In terms of retrieval, it is possible that we recall events as we expect them to be, or recognise someone who fits into our stereotype of an offender.⁵⁰ Our use of stereotypes is one way in which our memory can increase the amount and rate of processed information. There is a huge amount of information being processed, and a suitable file is needed for each item of information. It is more efficient for the memory to process information according to past experience and available categorisation than it is for it to produce new categories. It is probably the case that⁵¹

"Most people file away some stereotypes on the basis of which they make perceptual judgements; such stereotypes not only fit in with prejudices but they are also tools for making decisions more efficiently."

⁴⁹ Allport, G., and Postman, L., *The Psychology of Rumor* (1947, New York: Henry Holt and Co.).

⁵⁰ See Bull, R., and Clifford, B., "Eyewitness memory" in Gruneberg and Morris (1979), op.cit., 155-160.

⁵¹ Buckhout, R., "Eyewitness testimony" (1974), 231 *Scientific American*, 23-31, 24.

The drawback, in terms of eyewitness identification, is that increased efficiency may be paid for with inaccuracy. An inaccurate identification may not be recognised as such and could result in wrongful conviction.

When considering the effect of expectations and biases on the ability of a witness successfully to perceive and encode an event, personal prejudices must also be considered. An important area in eyewitness identification research is that of own-race bias. The conclusion drawn is that people find it easier to recognise people of their own race than those of other races.⁵² Indeed, it is established that own-race bias does occur.⁵³ As early as 1914,⁵⁴ the problems of correctly identifying members of other races were noted. The cross-race effect also appears to affect white people more than members of other ethnic backgrounds.⁵⁵ An influential article by Brigham and Barkowitz in 1978 summarised the assumptions about identifications of other races as follows:⁵⁶

(1) There is an own-race bias in the accuracy of eyewitness identification.

⁵² See the studies by Malpass, R.S., and Kravitz, J., "Recognition for faces of own and other race" (1969) 13 *Journal of Personality and Social Psychology* 330-334; and Luce, T., "Blacks, whites and yellows: they all look alike to me" (1974) 8 *Psychology Today* 107-108. A vast number of experiments have been conducted on the issue of cross-racial identification: see, for example, Billig, M., and Milner, D., "A spade is a spade in the eyes of the law" (1976) 2 *Psychology Today* 13-15; Barkowitz, P., and Brigham, J.C., "Recognition of faces: Own-race bias, incentive and time delay" (1982) 12 *Journal of Applied Psychology* 255-268; Brigham, J.C., Maass, A., Snyder, L.D., and Spaulding, K., "Accuracy of eyewitness identifications in a field setting" (1982) 42 *Journal of personality and Social Psychology* 673-680; Hosch, H.M., and Platz, S.J., "Self-monitoring and eyewitness accuracy" (1984) 10 *Personality and Social Psychology Bulletin* 289-292; and Brigham, J.C., and Ready, D.J., "Own-race bias in lineup construction" (1985) 9 *Law and Human Behavior* 415-424.

⁵³ Although the form that own-race bias takes is questioned in a critique of studies by Lindsay, R.C.L., and Wells, G.L., "What do we really know about cross-race identification?" in Lloyd-Bostock and Clifford (1983), op.cit., chapter 12, 219-234, the authors concede that race probably has some impact on identification accuracy. The nature of that impact is unclear. The clearest conclusion drawn from their review of the literature as at 1983 was that white witnesses viewing white faces produced the highest level of accuracy (at 223). Lindsay and Wells criticise the lack of solid theoretical explanation and the inconsistent data on cross-race identifications. In support of the existence of own-race bias, see meta-analytic studies by Shapiro, P.N., and Penrod, S.D., "Meta-analysis of facial identification studies" (1986) 100 *Psychological Bulletin* 139-156; and Bothwell, R.K., Brigham, J.C., and Malpass, R.S., "Cross-racial identification" (1989) 15 *Personality and Social Psychology Bulletin*, 19-25.

⁵⁴ Feingold, G., "The influence of environment on identification of persons and things" (1914) 5 *Journal of Criminal Law and Criminology* 39-51. Further discussion of own-race bias can be found in Wall, P.M., *Eyewitness Identification in Criminal Cases* (1965, Illinois: Charles C. Thomas).

⁵⁵ According to a meta-analysis by Anthony, T., Cooper, C., and Mullen, B., "Cross-racial facial identification: A social cognitive intergration" (1992) 18 *Personality and Social Psychology Bulletin* 296-301.

⁵⁶ Brigham, J.C., and Barkowitz, P., "Do 'they all look alike'? The effect of race, sex, experience and attitudes on the ability to recognise faces" (1978) 8 *Journal of Applied Psychology* 306-318, 308.

(2) Highly prejudiced persons will be less accurate in their cross-racial identifications than more egalitarian persons will be.

(3) People who have had more experience with members of another race will be more accurate in their cross-racial identifications than will persons who have had fewer cross-racial experiences.

The first assumption has already been commented upon. The second may appear to be a matter of common-sense,⁵⁷ but it has not been supported by psychological experimentation. The general consensus is that the third assumption is not true either. However, there is limited evidence that training in familiarity produces an improvement in ability to recognise members of different races.⁵⁸ The majority of empirical evidence, however, fails to support the notion that greater experience leads to greater success in recognizing people from other ethnic backgrounds.⁵⁹

There has been no explanation as to why own-race bias is present in recognition tests or as to how the phenomenon operates.⁶⁰ One persuasive theory is that when witnesses view someone, they concentrate on the aspects of that person's face which are distinctive. Where the subject is someone of a different race, then it may be that witnesses concentrate on a distinctive feature which is common to a majority of that race, such as colour of skin, and not to their own.⁶¹ Therefore, whilst cross-race identification is often seen as a retrieval problem, its roots could well lie in the acquisition stage of the memory process.

⁵⁷ It would be fair to assume that a prejudiced person would be so blinded by that prejudice that they would not be able to pay as much attention to perceiving and encoding the features of a member of a different race as would someone who held few or no prejudices. It would also be logical to expect that those with experience of people from other ethnic backgrounds would have a greater ability to recognise people of other races than those with little experience. These were commonly held opinions which have largely been overturned by the work of Brigham and Barkowitz (1978), *ibid.* See Feingold (1914), *op.cit.*; and Wall (1965), *op.cit.*

⁵⁸ See Elliott, E., Wills, E., and Goldstein, A., "The effect of discrimination training on the recognition of white and oriental faces (1973) 2 *Bulletin of the Psychonomic Society* 71-73; and Malpass, R.S., Laviguer, H., and Weldon, D., "Verbal and visual training in face recognition" (1973) 14 *Perception and Psychophysics* 285, who suggest that there may be reduction or elimination of own-race bias after a training programme. Brigham, J.C., and Malpass, R.S., "The role of experience and contact in the recognition of own and other faces" (1985) 41 *Journal of Social Issues* 139-155 argue that it is not the amount of contact with members of other races which is important, but the quality of that contact.

⁵⁹ For example, see Luce (1974), *op.cit.*; and Cross, J., Cross, J., and Daly, J., "Sex, race, age and beauty as factors in recognition of faces" (1971) 10 *Perceptual Psychophysics* 393-396.

⁶⁰ There is also inconsistency regarding findings as to the form in which own-race bias works. Some experiments have shown a complete crossover, with all races affected, others an incomplete or one way crossover, with only certain races affected. For a discussion of the implications of these inconsistencies, see Brigham and Barkowitz (1978), *op.cit.*; and Lindsay and Wells (1983), *op.cit.*

This discussion of event and witness factors has illustrated the problems which can be encountered at the acquisition stage of the memory process. Some of the factors discussed, such as own-race bias, are specific in their relevance to eyewitness identification. Others, such as the duration of an incident and the saliency of details, are also relevant to other aspects of the criminal justice process, but especially to cases where witnesses are involved. It has been shown that all of these factors *may* influence witness accuracy. However, we do not know which factors affect which witnesses, or to what extent. This is largely dependent on the individual witness. So, the variables affecting accurate perception can only indicate general trends which have been shown to apply to a significant number of witnesses.

Even where the information required has been successfully encoded by a witness, it may be that the memory of the event, after interpretation, is incomplete on recall. It could be that only part of the information was interpreted or that some of the information initially stored has been lost in the time between perception and recall. In terms of visual tests for witnesses, this latter problem is likely to be quite common.⁶² The retention stage of memory is, therefore, fraught with its own difficulties.

(ii) *Retention: Forgetting and Post-Event Information*

The time between an event and recollection of it is very important, especially where the witness is being relied upon to identify the perpetrator of a criminal offence. Once material has been encoded in memory, memory for that material will not remain intact. As well as the possibility of memory fading over time, changes can take place. In this way, memory for events continues to be constructive at the retention stage.

⁶¹ See Loftus (1979), *op.cit.*, 136ff.

⁶² On loss of memory over time, see Loftus, E.F., Miller, D.G., and Burns, H.J., "Semantic integration of verbal information into a visual memory" (1978) 4 *Journal of Experimental Psychology: Human Learning and Memory* 19-31.

Common-sense suggests that memory fades over time.⁶³ As new information is introduced, older information can be pushed further away and details forgotten. Most people have experienced a fading of memory for facts, faces or events. If the common-sense assumption that memory fades over time is correct, then the implications for accurate eyewitness identifications are serious. There is often a delay of several weeks between a request for an identification parade and its taking place.⁶⁴ The time period could be considerably longer where the investigation has been lengthy or where the identification procedure is postponed. If memory fades gradually in this time, then the likelihood is that witness accuracy will also be in decline.

One of the earliest experiments which illustrated loss of memory over time was that by Ebbinghaus in 1885.⁶⁵ As a result of his work, he produced a "forgetting curve", which illustrated the rate at which memory was lost. According to Ebbinghaus, there is an immediate rapid loss of memory for details after an event (perhaps due to inaccurate or selective encoding). After this immediate loss, memory continues to decline over time, but at a more gradual rate. However, since early experiments such as that by Ebbinghaus were conducted, the forgetting curve has been shown to be far from the simple process it was first believed to be. It is now thought that not all memories fade away at the same rate or in the same way. Forgetting varies with how the memory was encoded and the type of material involved.⁶⁶

The variable rate of forgetting in relation to the type of material encoded leads to the question of how forgetting works in eyewitness identification cases. The average time after which the memory fades to absolute unreliability could aid prosecution agencies in their decisions as to whether to hold an identification test. In addition, judges could incorporate a more definite

⁶³ For example, Wall (1965), *op.cit.*

⁶⁴ See chapters four, five and six of this thesis on the waiting times to book a procedure in Birmingham's Identification Suite.

⁶⁵ Ebbinghaus, H.E., *Memory: A Contribution to Experimental Psychology* (1964 New York, Dover), reprinted from 1885 edition. Ebbinghaus used himself as subject, learning and relearning lists of syllables.

⁶⁶ Clifford and Bull (1978), *op.cit.*, 23.

direction to the jury in the *Turnbull*⁶⁷ guidelines regarding the effect of retention time on eyewitness accuracy. In attempting to find indications of the process of forgetting by eyewitnesses there have been several experiments relating to recognition memory. These experiments test whether eyewitness recognition⁶⁸ accuracy declines in relation to the amount of time between the offence and the identification test. In other words, does accurate retrieval of memory in the form of recognition decline in the same way as does retrieval by recall?⁶⁹

Research on the effect of the length of retention interval on recognition of faces has produced mixed results. Some studies have found that there is no significant decline in accurate recognition rates,⁷⁰ whereas others report declines with longer delays.⁷¹ A review of the studies suggests that there is a relationship between length of retention and decline in recognition accuracy, but that the decline is not as great as it is for recall memory. Many of these studies used pictorial recognition tests. Whilst these offer an insight into the effect of time delay on recognition ability, the subjects usually know that they will be expected to recognise a "target" figure.

Perhaps more relevant, then, are staged incidents, where experimental subjects often do not expect the event to happen and where the "target" is live. The recognition tests given to subjects are sometimes similar to identification parades, and sometimes take the form of a photographic lineup. These more accurately approximate the real tests given to eyewitnesses because the

⁶⁷ [1976] 3 All ER 549.

⁶⁸ As opposed to recall accuracy. In terms of eyewitness reports, or verbal statements on appearance, a decrease in accuracy as a function of time are well documented (see Loftus (1979), *op.cit.*, 54). However, recognition is generally thought to yield better results than recall, as it is a comparison and reminder process, where the memory has cues to work from. A feeling of familiarity is expressed in recognition tests (see Clifford and Bull, (1978), *op.cit.*, 22.) The different ways in which recognition and recall work led to questions about the effects of retention intervals on recognition.

⁶⁹ For a discussion of the effect of very long delays before identification is attempted, see the interesting account in Wagenaar, W., *Identifying Ivan* (1988, Hertfordshire: Harvester Wheatsheaf).

⁷⁰ Chance, J., Goldstein, A., and McBride, L., "Differential experience and recognition memory for faces" (1975) 97 *Journal of Social Psychology* 243-253, for example, where recognition rates after 48 hours showed no significant decline from the rate of accurate recognitions made immediately.

⁷¹ See, for example, Deffenbacher, K., Carr, T.H., and Leu, J., "Memory for words, pictures and faces: Retroactive interference, forgetting and reminiscence" (1981), 7 *Journal of Experimental Psychology: Human*

facial expressions and clothing of the target person are often changed. An example of a staged incident was conducted by Egan et al.,⁷² where, although the number of positive identifications did not change, the number of misidentifications increased as retention interval increased. By contrast, Shepherd⁷³ conducted four experiments using a number of different time delays which resulted in his conclusion that the rate of correct identifications was not affected by delays of four months and less but that accuracy declined significantly after four months. However, the number of misidentifications in Shepherd's study remained fairly constant. To complicate matters further, other studies have found that correct identifications (or "hit rates") decrease and false alarms increase after delays.⁷⁴ For example, Krafka and Penrod⁷⁵ found that even small time differences (between two and twenty-four hours) could result in substantial increases in misidentification and significant decreases in correct identifications. Similar results were obtained by Davies, Ellis and Shepherd using relatively short time delays of 48 hours to three weeks.⁷⁶

The studies conducted on the effect of the length of retention interval in eyewitness cases, therefore, appear to support no firm conclusions. However, it could be that the difference lies in long and short time delays.⁷⁷ A meta-analysis by Shapiro and Penrod,⁷⁸ which included the

Learning and Memory 299-305; and Shepherd, J., and Ellis, H.D., "The effect of attractiveness on recognition memory for faces" (1973) 86 *American Journal of Psychology* 627-633.

⁷² Egan, D., Pittner, M., and Goldstein, A., "Eyewitness identification: Photographs v. live models" (1977) 1 *Law and Human Behavior* 199-206. Subjects were recalled after delays of two days, 21 days or 56 days and they viewed either a photographic or a live parade. The percentage of subjects who misidentified increased from 48 per cent at two days, to 62 per cent at 21 days and to 93 percent at 56 days.

⁷³ Shepherd, J.W., "Identification after long delays" in Lloyd-Bostock and Clifford (eds) (1983), op.cit., 173-187.

⁷⁴ In a study conducted by Malpass, R.S., and Devine, P.G., "Guided memory in eyewitness identification" (1981b) 66 *Journal of Applied Psychology* 343-350, it was found that identification accuracy decreased after five months, both in terms of number of correct identifications and number of misidentifications made.

⁷⁵ Krafka, C., and Penrod, S., "Reinstatement of context in a field experiment on eyewitness identification" (1985) 49 *Journal of Personality and Social Psychology* 58-69.

⁷⁶ Davies, G.M., Ellis, H.D., and Shepherd, J., "Face recognition accuracy as a function of mode of representation" (1978) 63 *Journal of Applied Psychology* 180-187. Overall accuracy declined in the group who experienced a longer time delay.

⁷⁷ This could explain the results of some studies which reported a slight enhancement of accuracy after very short delays. One theory is that a very short time delay allows for the encoding of material into memory. See Milner, B., "Visual recognition and recall after right temporal lobe excision in man" (1968) 6 *Neuropsychologia* 191-209, who increased the time from immediate to 90 seconds; and Wallace, G., Coltheart,

length of retention interval, grouped the studies in terms of the length of delay they had used.⁷⁹ It was found that longer delays did indeed lead to fewer correct identifications and more false identifications.⁸⁰ The conclusion to be drawn from psychological research is that current evidence points to there being a decline in recognition accuracy where information is retained for long periods before it is retrieved. Evidence therefore appears to uphold, with some qualifications, the common-sense assumption shared by many within (and outside) the legal profession.⁸¹ However, further research is needed to assess whether waiting periods for eyewitnesses within the criminal justice process are detrimental to accurate identification rates.

Once psychologists had established that the memory does indeed fade over time, different rates of forgetting did not present the only challenge. Establishing why we forget events and details was also seen to be important. There has been extensive research conducted on theories of forgetting. This research will not be examined in detail here.⁸² None of the theories can completely explain the process, but they do illustrate different types of forgetting. These include the passive decay theory;⁸³ distortion of memory;⁸⁴ interference theory,⁸⁵ whereby

M., and Forster, K., "Reminiscence in recognition memory for faces" (1970) 18 *Psychonomic Science* 335-336, who increased memory performance test time from immediate to 45 seconds. The phenomenon is termed "reminiscence".

⁷⁸ Shapiro and Penrod (1986), op.cit. As well as analysing studies which manipulated retention interval, Shapiro and Penrod looked at all studies in the meta-analysis, including those which did not directly manipulate retention interval. It was found that retention interval was an important determinant of correct identifications, but not with regard to false identifications.

⁷⁹ But even if psychologists assert that there are different effects for long and short time delays, it is difficult to draw an arbitrary line as to what is classed "long" and what is classed "short".

⁸⁰ Longer retention intervals were found to lead to 51 per cent correct identifications as against 61 per cent, and false identifications increased with a longer retention interval from 24 per cent to 32 per cent.

⁸¹ See, for example, Woocher, F.D., "Did your eyes deceive you? Expert psychological testimony on the unreliability of eyewitness identification" (1977) 29 *Stanford Law Review* 969-1030.

⁸² But see Clifford and Bull (1978), op.cit., chapter 2; and various chapters in Neisser (1982), op.cit., Part IV.

⁸³ Brown, J., "Some tests of the decay theory of immediate memory" (1958) 10 *Quarterly Journal of Experimental Psychology* 12-21. This theory has not received much support, because it does not explain how we can forget something, only to recall it at a later date.

⁸⁴ See Thorndyke, P., "The role of inferences in discourse comprehension" (1976) 15 *Journal of Verbal Learning and Verbal Behaviour* 437-446. Systematic distortion is at work where a witness repeats a mistake, becoming convinced that the mistake is part of the original memory. The witness's own recall is remembered rather than the original memory itself: Mandler, J., and Parker, R., "Memory for descriptive and spatial information in complex pictures" (1976) 2 *Journal of Experimental Psychology: Human Learning and Memory* 38-48.

similar memories cannot be distinguished from each other; and motivated forgetting, where a witness represses painful or anxiety-related memories. Retrieval failure, discussed in the following section of this chapter, may also manifest itself in forgetting. Some of the theories advanced to explain why we forget, or perceive our memory to have faded over time, form the basis of eyewitness research on other aspects of memory change during the retention period. The most important body of research, in terms of identification tests, is based on the distortion and interference theories. Where a memory is distorted or interfered with, a witness may become less accurate whilst remaining convincing. The effect of post-event information again illustrates the active nature of the retention stage of memory.

Psychologists have concluded that post-event information can come in a number of forms, and can effect a manifested change in an eyewitness's memory for the original event. For example, where witnesses discuss the appearance or actions of an offender there is a danger of "cross-pollinisation", whereby they influence each other's memory. Other forms of post-event information include inferences gained from questioning, and guesses made which are subsequently confirmed. In both cases, the exposure to new information about an incident can radically affect memory of it. Before examining in more detail how post-event information can affect witnesses,⁸⁶ it is important to note that new information is not necessarily detrimental to accuracy, but can enhance memory. The danger lies in the fact that it can also distort or change memory altogether.

⁸⁵ Postman, L., "A pragmatic view of organisation theory", in Tulving, E., and Donaldson, W., (eds) *Organisation of Memory* (1972, New York: Academic Press). Unconscious transference, discussed later in this chapter, can be explained by the use of interference theory. Familiar faces can be displaced by memory from one situation to another.

⁸⁶ On the effect of post-event information, see Bekerian, D.A., and Bowers, J.M., "Eyewitness testimony: Were we misled?" (1983) 9 *Journal of Experimental Psychology: Learning, Memory and Cognition* 139-145; Gibling, F., and Davies, G., "Reinstatement of context following exposure to post-event information" (1988) 79 *British Journal of Psychology*; McCloskey, M., and Zaragoza, M., "Misleading post-event information and memory for events: Arguments and evidence against memory impairment hypotheses" (1985) 114 *Journal of experimental Psychology: General* 1-16; Okamoto, S., and Sugahara, Y., "Effects of post-event information on eyewitness testimony" (1986) 28 *Japanese Psychological Research* 196-201; and Hall, D.F., Loftus, E.F., and Tousignant, J.P., "Postevent information and changes in recollection for a natural event", in Wells, G., and Loftus, E.F., (eds) *Eyewitness Testimony: Psychological Perspectives* (1984, Cambridge University Press).

Where memory of a detail is correct, mentioning that detail to a witness may enhance their memory of it. Loftus⁸⁷ illustrated this by asking two groups of subjects about the speed of a car involved in a filmed accident. One group's question mentioned a stop sign. When subjects were recalling events later, 53 percent of those asked about the stop sign reported that they had seen it. Only 35 per cent of the subjects to whom the stop sign was not mentioned reported seeing it. The implication of this experiment is that recall for a particular detail can be enhanced where it is mentioned in questioning. However, actual crime situations cannot be controlled in the way experiments are. One question raised by the Loftus experiment was that if subjects can be helped to remember a sign which was present at the time of the incident, can they be prompted to "remember" one which was not? In other words, can memories be created by post-event information? If so, cross-pollinisation and unskilled questioning could contribute to the creation of inaccurate but confident witnesses.

It appears that where new information conflicts with the original memory, there are a number of possible effects on what is subsequently recalled.⁸⁸ For example, it may be that a witness will make a compromise between their earlier memory and the post-event information.⁸⁹ This will usually happen where the new information concerns something which is already encoded in memory. In the case of eyewitnesses, an example would be the colour of someone's hair or eyes. However, it is not so easy to compromise where the information given post-event did not exist originally.⁹⁰ In such cases, it is more likely that a witness will either reject the new information completely, retaining their original memory, or completely replace the original

⁸⁷ Loftus, E.F., "Leading questions and the eyewitness report" (1975) 7 *Cognitive Psychology* 560-572. The experiment consisted of a film of a car accident, after which subjects were asked ten questions.

⁸⁸ See Loftus, E.F., and Hoffman, H., "Misinformation and memory: The creation of new memories" (1989) 118 *Journal of Experimental Psychology: General* 100-104.

⁸⁹ See Loftus, E.F., "Shifting human color memory" (1977) 5 *Memory and Cognition* 696-699.

⁹⁰ An example of the effect the introduction of new details has on memory for an event can be seen in Loftus, Miller and Burns (1978), op.cit., where subjects were asked about a roadway stop sign or yield sign. Some subjects were asked about the sign they had actually seen in slides earlier. Others had not seen the sign they were asked about, and so were being given misleading information. When shown pairs of slides again, less than half of those who had been given misleading information correctly recognised the sign seen before. This was below the accuracy expected of a person who was merely guessing. By contrast, those given consistent information recognised the correct sign in 75 per cent of cases.

memory with the new information. By simply mentioning an object or a detail of an event, the likelihood of later recall is enhanced.⁹¹

The malleability of memory at the retention stage has implications in criminal cases where police officers take witness statements. During questioning, any new information given, even unwittingly, may result in a witness recalling a slightly different memory to that encoded.⁹² Where officers have a suspect in mind when taking a statement, it is possible that they will tailor questions to fit that particular suspect. Therefore, police may, in the process of obtaining information, also impart it.⁹³ The great danger is that, where the new information is incorporated, it becomes a crucial element in the prosecution case.

Where witnesses discuss the case, there will be a similar danger that new, and not necessarily accurate, memories will be formed.⁹⁴ This is the case whether memory is compromised or replaced. Code of Practice D, Annex A:12 guards against discussion of the offence between witnesses attending an identification procedure, although it is impossible to prevent discussions between witnesses outside of the police station, especially where witnesses are close friends or relations. Police procedure can therefore do little to prevent post-event information affecting the memories of some witnesses to crime.

⁹¹ On resistance to misleading information, see Greene, E., Flynn, M.S., and Loftus, E.F., "Inducing resistance to misleading information" (1982) 21 *Journal of Verbal Learning and Verbal Behavior* 207-219.

⁹² Misinformation is more likely to be taken on board by a witness where the source is authoritative, such as a police officer: see Dodd, D.H., and Bradshaw, J.M., "Leading questions and memory: Pragmatic constraints" (1980) 19 *Journal of Verbal Learning and Verbal Behavior* 695-704. On communicator expertise, see Smith, V.L., and Ellsworth, P.C., "The social psychology of eyewitness accuracy: Misleading questions and communicator expertise" (1987) 72 *Journal of Applied Psychology* 292-300.

⁹³ The information given does not have to be verbal, but can also be given implicitly, as where a police officer inadvertently directs attention to the suspect when a witness is viewing an identification parade. This is one reason for the limitation on the number of people who can be present in the identification corridor.

⁹⁴ Loftus, E.F., and Greene, E., "Warning: Even memory for faces can be contagious" (1980) 4 *Law and Human Behavior* 323-334; on group discussion see Warnick and Sanders (1980), *op.cit.*; and Hollin, C.R., and Clifford, B.R., "Eyewitness testimony: The effects of discussion on recall accuracy and agreement" (1983) 13 *Journal of Applied Social Psychology* 234-244.

However, the memory appears to be more susceptible to change or compromise where the details are not central to the incident in question.⁹⁵ It has already been noted that the salient details of an event are the ones which will be spontaneously mentioned by a witness. Peripheral details do not command the same attention and time for encoding at the perception stage of the memory process. So mistakes on peripheral details do not mean less accuracy on salient ones. That the central, important aspects of memory for an event are more difficult to change suggests that many eyewitnesses retain their original memory of the offender even where they are given misleading information. This is because the offender's appearance and actions are central to the memories of most witnesses to crime. There is danger, however, where witnesses have not focused their attention on the offender. The results of research on weapon focus, discussed above, suggest that not all eyewitnesses concentrate their attention and perception on the perpetrators of the crime. In addition, some witnesses do not realise that a crime is taking place, for example in deception cases involving bogus callers, and it is unlikely that full attention would be paid to the offender in such a case. These witnesses would be at most risk of being influenced by post-event information, because the offender was a peripheral detail in their memory for events.

Post-event information can also come from witnesses themselves. In interviews with witnesses at Birmingham Identification Suite, the most striking finding was that many of the witnesses making a choice were guessing.⁹⁶ Psychological experimentation shows that, where a witness guesses at the identity of a suspect, a dangerous process can result. This is because guessing will occur where the witness is uncertain. The guess acts to fill in the gaps in a witness's memory. If a witness retrieves the information later, the guess may become incorporated into memory, resulting in the guess being mistaken for a real memory.⁹⁷

⁹⁵ See Loftus (1979), *op.cit.*, 63.

⁹⁶ See Chapter five of this thesis.

⁹⁷ This also appears to be the case where a witness identifies from a police photograph. The appearance of the person in the photograph overtakes the original memory of the perpetrator. Thus, witnesses are being tested more on their recognition of the person in the mugshot than the offender (Brown, E., Deffenbacher, K., and Sturgill, W., "Memory for faces and the circumstances of the encounter" (1977) 62 *Journal of Applied Psychology* 311-318; Doob, A.N., and Kirschenbaum, H.M., "Bias in police lineups: Partial remembering" (1973) 1 *Journal of Police Science and Administration* 287-293; and Gorenstein, G.W., and Ellsworth, P.,

This process explains why a number of the witnesses interviewed in Birmingham were uncertain at the time of their guess, but reported feeling very confident a few minutes later. The confidence increase probably occurs because "a witness is now 'seeing' an item that she herself has constructed in memory."⁹⁸ However, memory theory is unlikely to offer a full explanation for guessing and subsequent growing confidence, and the phenomenon must also be a result of societal pressures. It is likely that one reason for guessing is that the witness is concerned to do well. An identification procedure takes time and money to set up and witnesses do not want to fail. Where witnesses are the victims of offences, they will also be anxious for the offender to be convicted. A positive identification is one step on the road to successful prosecution. The knowledge that the police suspect is present on the identification parade will also increase the likelihood of guessing. Where the guess is confirmed by the police, witnesses understandably become more confident in their own accuracy. Buckhout noted the growing certainty of eyewitnesses in his research cases, noting that reports got ⁹⁹

"more complete and less ambiguous as the witness moves from the initial police report...to testimony at the trial. The process of filling in...can lead to unreliable recognition testing: the witness may adjust his memory to fit the available suspects or pictures...he may be unaware he is distorting or reconstructing his memory. In his very effort to be conscientious he may fabricate parts of his recall to make a chaotic memory seem more plausible to the people asking questions."

Whilst psychologists are not in dispute over the existence of post-event factors and their effect on accuracy of retrieval, there is no consensus as to how it works. It is not known whether the original memory is transformed, or whether it remains,¹⁰⁰ obscured but not replaced by new

"Effect of choosing an incorrect photograph on a later identification by an eyewitness" (1980) 65 *Journal of Applied Psychology* 616-622). This is not a problem where they are one and the same, but is where they are not: Brigham, J.C., and Cairns, D.L., "The effect of mugshot inspections on eyewitness identification accuracy" (1988) 18 *Journal of Applied Social Psychology* 1394-1410, found that the interference on identification accuracy by prior exposure to mugshots was largely dependent on the decision made by a witness at the mugshot stage. Decisions made about mugshots were reaffirmed in a later recognition test. This implies that a false identification will lead to a further misidentification on a parade. Code of Practice D2.15 (viii) provides that suspects are told when a witness has previously been shown photographs, photofit, identikit or similar pictures.

⁹⁸ Loftus (1979), op.cit., 82.

⁹⁹ Buckhout, R., "Eyewitness Testimony" in Neisser (1982), op.cit., 116-125, 120.

¹⁰⁰ As Sigmund Freud believed. He described "lost" memories as fish resting in the bottom of a very deep pond, inaccessible and part of the unconscious. Those representing adults who suddenly realise that they were abused in childhood adhere to Freud's viewpoint. The reports by those claiming that they were abused are often detailed and vivid (see Lindsay, S., and Read, J., "Psychotherapy and memories of childhood sexual abuse: A cognitive perspective" (1994) 8 *Applied Cognitive Psychology* 281-338). It has been suggested (Loftus, E.F.,

versions.¹⁰¹ There has been much dispute over whether original memories co-exist with new ones, or whether there is an irrevocable alteration. For the purposes of eyewitness identification, however, the most important finding is that the retention stage of memory is not passive, and that a number of post-event factors may alter any retrieval of memory that is attempted. The final stage of the memory process, where information is recalled, also has its dangers.¹⁰²

(iii) *Retrieval*

The retrieval stage of memory is where the success of the perception and retention stages is tested. In simple terms, there are two main types of retrieval: recall and recognition. During recall, there is an attempt to retell what was seen or heard. Typically, recall is categorised as retrieval of information without any external help, such as where a witness is asked to provide a description.¹⁰³ This is also termed a narrative or free report. However, it is usual for police officers, when taking a statement from a witness, to ask specific questions, such as "how tall was the offender?" or "what was the colour of the offender's hair?". In this way, specific pieces of information can be gained. This is termed "cued recall" (or controlled narrative), because cues are used to trigger retrieval of information. An example of the cued recall method is where a photo-fit or identikit is constructed.¹⁰⁴ Comparisons between eye shapes, noses and other facial features can be made. Further, each feature is considered, which may not happen

"The reality of repressed memories" (1993) 48 *American Psychologist* 518) that these memories are a result of post-event information, given by therapists and enhanced by patients.

¹⁰¹ If the original memory remains, but is unavailable, it is possible that techniques such as hypnosis could reveal the true memory. Yarmey, A.D., and Yarmey, A.L., "Relaxation-hypnotic enhanced memory and photographic lineup identification" (1993) 2 *Expert Evidence* 115, showed through relaxation-hypnotic enhanced memory that the effect of a slightly altered memory can radically affect identification choices.

¹⁰² See Loftus, E.F., and Ketcham, K., "The malleability of eyewitness accounts" in Lloyd-Bostock and Clifford (eds) (1983), op.cit, 159-173, for a general discussion on the malleable nature of memory.

¹⁰³ See Clifford and Bull (1978), op.cit., 19.

¹⁰⁴ For a detailed discussion of face recall by means of facial composite systems such as Identikit and computer based systems such as EFIT, see Shepherd, J.W., and Ellis, H.D., "Face recall: Methods and Problems", in Sporer, S.L., Malpass, R.S., and Kohnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum), 87-116.

where there is free recall. This is because the witness will probably have paid more attention to some aspects of the offender's appearance than others. The situation is similar where alternatives are given, such as "did the offender have fair or dark hair?", known as interrogatory reporting. Where there is a cue, the memory has to trigger details which may not be the most salient to the witness.¹⁰⁵ Finally, in cognitive interviews witnesses are encouraged to remember by placing themselves back in the context of the original incident. This form of cued recall has been heralded as a more efficient and accurate form of questioning.¹⁰⁶

In contrast to recall, recognition occurs where there is a re-representation of the original material. A witness simply has to express a feeling of familiarity when confronted with the identification test.¹⁰⁷ It is the recognition process which is utilised in all live identification procedures under Code of Practice D and in the showing of photographs. It is generally accepted that most people find it easier to recognise than to recall,¹⁰⁸ because the cues given are so strong. The main drawback to recognition tests is that, where there is only partial overlapping between a witness's memory of the offender and the suspect in front of her, the likelihood of a misidentification is increased where the overlapping details are ones which are salient to the witness.¹⁰⁹ In addition, accurate recall does not necessarily make for accurate recognition, because it is thought that verbal and visual information, although affected by the same witness and event factors,¹¹⁰ are encoded in different ways. The advantages and pitfalls of the use of different types of retrieval methods could direct police officers to the most efficient method of gaining reliable witness testimony.

¹⁰⁵ There has been increasing interest by psychologists in the use of hypnosis as an aid to accurate recall, although it has not gained much popularity or support: see Yarmey and Yarmey (1993), *op.cit.*, and Orne, M.T., Soskis, D.A., Dinges, D.F., and Orne, E.C., "Hypnotically induced testimony" in Wells, G.L., and Loftus, E.F., *Eyewitness Testimony: Psychological Perspectives* (1984 Cambridge University Press), 171.

¹⁰⁶ Geiselman and Fisher have conducted a number of experiments comparing the cognitive interview technique with other methods of questioning, and have consistently found that cognitive interviewing offers enhanced recall: see Fisher, R.P., and Geiselman, R.E. (1992), *Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* (Springfield: Thomas).

¹⁰⁷ Clifford and Bull (1978), *op.cit.*, 22.

¹⁰⁸ For example, see Brown, Deffenbacher and Sturgill (1977), *op.cit.*

¹⁰⁹ A number of commentators have called for the original description of an offender to be the basis upon which volunteers or photographs are chosen for an identification procedure, rather than the appearance of the suspect, as discussed later in this chapter.

Clifford and Bull state that "recognition gives better memory performance than cued recall, and cued recall gives better performance than uncued recall."¹¹¹ It is certainly the case that, where cues are given, information extracted from memory is fuller. In terms of amount of information, Clifford and Bull are correct to state that uncued recall is the least effective type of retrieval method to use. But where cues are used to enhance retrieval, there is a danger that the memory will be altered by suggestion from those cues. Uncued recall could be the most accurate form of retrieval, although sparse in detail. When police officers are questioning a witness to a crime, they cannot choose between a factually complete statement and a factually accurate one. For a successful investigation and prosecution, the ideal is to have an abundance of accurate information. A combination of methods of questioning could yield the best results. For example, Loftus recommends the use of free reporting, where no cues are given, followed up by more specific questioning, such as cued recall or interrogatory reporting. There would then be spontaneous information padded out by directed questions.¹¹² Proponents of cognitive interviewing argue that it offers the best form of questioning, and comprises the best combination of methods.¹¹³

Various factors which may interfere with accurate retrieval were discussed above with regard to the acquisition and retention stages of the memory process. The retrieval stage itself may also result in contamination or change of a witness's memory.¹¹⁴ The best method of extracting

¹¹⁰ See Davies, G.M., "Forensic face recall: The role of visual and verbal information", in Lloyd-Bostock and Clifford (eds) (1983), op.cit., 103-124.

¹¹¹ (1978), op.cit., 23.

¹¹² (1979), op.cit., 92. See also Penrod, S., Loftus, E.F., and Winkler, J., "The reliability of eyewitness testimony: A psychological perspective", in Kerr, N.L. and Bray, R.M., (eds) *The Psychology of the Courtroom* (1982, New York: Academic Press), 119-168.

¹¹³ The cognitive interview is discussed further later in this chapter.

¹¹⁴ An example of this is the "unconscious transference effect", where a person seen in one situation is confused with or recalled as a person seen in another situation. This is a particular problem where the suspect was a bystander to the offence, or where presence at the scene of the crime is admitted by the suspect but involvement is not. Whilst the issue is not discussed in detail here, it is likely to present a problem in only a small number of cases: see Loftus, E.F., "Unconscious transference" (1976) 2 *Law and Psychology Review* 93-98; Read, J.D., "Understanding bystander misidentifications: The role of familiarity and contextual knowledge" in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 56-79; Ross, D.F., Ceci, S.J., Dunning, D., and Toglia, M.P., "Unconscious transference and lineup identification: Toward a memory blending approach" in Ross, Read and Toglia (eds) (1994), *ibid.*, 80-100; Read,

details from memory is therefore an issue of prime importance. Police officers need to be aware that they can influence the details a witness remembers and then reconfirms. For example, it has been shown that small changes in the wording of questions during recall can dramatically alter someone's memory.¹¹⁵ One of the most famous experiments illustrating the point was conducted by Loftus and Zanni in 1975.¹¹⁶ A film of a car accident was shown, after which viewers were asked either "did you see a broken headlight?" or "did you see the broken headlight?". There was no broken headlight. The hypothesis was that the use of "the" presupposed the existence of the broken headlight and would result in a higher number of respondents claiming that they had indeed seen the headlight.¹¹⁷ This proved to be the case, with twenty per cent saying they had seen a broken headlight as against six per cent who had been asked whether *a* broken headlight had been seen.¹¹⁸ This experiment illustrates how easy it is to change the report a witness gives about an event.

The fragility of the memory even at the retrieval stage means that police officers should be careful when taking statements from witnesses, because they could, albeit inadvertently, influence the content of them. Statements could then be used to aid in the apprehension of a suspect, the organisation of an identification procedure,¹¹⁹ or even publicized in newspapers and on radio and television. It is difficult enough for witnesses to describe someone's face,

J.D., Tollestrup, P., Hammersley, R., McFadzen, E., and Christensen, A., "The unconscious transference effect: Are innocent bystanders ever misidentified?" (1990) 4 *Applied Cognitive Psychology* 3-31.

¹¹⁵ See Loftus, E.F., and Palmer, J., "Reconstruction of an automobile destruction: An example of the interaction between language and memory" (1974) 13 *Journal of Verbal Learning and Verbal Behavior* 585-589, where speed estimates of a car involved in a collision varied with the wording of the question asked. For example, the use of the word "smashed" generated far higher speed estimates than did "bumped".

¹¹⁶ Loftus, E.F., and Zanni, G., "Eyewitness testimony: The influence of the wording of a question" (1975) 5 *Bulletin of the Psychonomic Society* 86-88.

¹¹⁷ In court, this would be seen as a leading question. Where police conduct an interview, the situation is very different to that in the courtroom. Minor word changes could be made unintentionally, but could alter a witness's memory of events for the rest of the prosecution process. For example, appearance cues by police where they have a suspect in mind could subtly alter memory for the offender, which could be translated into the identification made at a parade. The identification would then be re-confirmed at later stages.

¹¹⁸ In Experiment II. Those in the group who were asked about *a* broken headlight were also far more likely than those who were questioned about *the* broken headlight to admit that they did not know whether they had seen it or not. The suggestion that the broken headlight existed seemed to lead more people to guess. Similar reluctance not to guess is shown in Chapter 5, regarding witnesses viewing identification procedures.

¹¹⁹ The original description by a witness of an offender now has to be kept, and a copy given to the suspect at identification procedures in England and Wales under Code of Practice D2.0.

since our vocabulary for the task is rather limited.¹²⁰ Influential questioning could serve to confuse matters further.¹²¹

(a) Confidence

Where a witness is influenced by the type of questioning they are subjected to, there are implications for the rest of the case. Not only will the altered information be remembered as being the original memory, but the confidence in the accuracy of that memory is likely to be enhanced. That a witness will increase in confidence with every confirmation and reiteration was noted with respect to post-event information. The same principle is at work in the retrieval stage of memory. For example, where a witness is asked a leading question, that information may become part of her memory for the original event.¹²² Any confirmation of this at subsequent retrieval exercises, such as an identification parade, will result in the witness becoming more confident that her memory for that detail is correct. A confident witness is likely to be very persuasive in court.¹²³ Yet the piece of information could have originated from a police officer who had the appearance of a certain suspect in mind when questioning the

¹²⁰ See Sporer, S.L., "Psychological aspects of person descriptions" in Sporer, Malpass and Kohnken (eds) (1996), op.cit., 53-86, who discusses the difficulties involved in witnesses providing verbal descriptions and also the reader of that description reconstructing a visual image. Faces are best encoded holistically, whereas a verbal description requires a piecemeal approach for each individual feature.

¹²¹ On the issue of question order, see Morris, V., and Morris, P.E., "The influence of question order on eyewitness accuracy" (1985) 76 *British Journal of Psychology* 365-371; and on question repetition Poole, D., and White, L., "Effects of question repetition on the eyewitness testimony of children and adults" (1991) 27 *Developmental Psychology* 975-986. Where the person asking the questions is biased, contamination of memory is very likely to be a problem: for example see Smith, J., Pleban, R., and Schaffer, D., "Effects of interrogator bias and a police trait questionnaire on the accuracy of eyewitness identification" (1982) 116 *Journal of Social Psychology* 19-26. As with post-event information, the status of the person asking questions will affect how they are answered: see Smith and Ellsworth (1987), op.cit.; and Marshall, J., *Law and Psychology in Conflict* (1966, New York: Anchor Books).

¹²² See Ryan, R.H., and Geiselman, R.E., "Effects of biased information on the relationship between eyewitness confidence and accuracy" (1991) 29 *Bulletin of the Psychonomic Society* 7-9.

¹²³ See Cutler, B.L., Penrod, S.D., and Stuve, T.E., "Juror decision-making in eyewitness identification cases" (1988) 12 *Law and Human Behavior* 41-55; and Lindsay, R.C.L., Wells, G.L., and Rumpel, C.M., "Can people detect eyewitness accuracy within and across situations?" (1981) 66 *Journal of Applied Psychology* 79-89. Wells, G.L., Lindsay, R.C.L., and Ferguson, T.J., "Accuracy, confidence and juror perceptions in eyewitness identification" (1979) 64 *Journal of Applied Psychology* 440-448, found that mock jurors were more likely to believe that an eyewitness was accurate where they were confident. Ascribing confidence accounted for 50 per cent of the variance in mock-jurors assessments of eyewitness accuracy.

witness.¹²⁴ The witness may be mistaken, but unaware of it. Leippe describes the process succinctly:¹²⁵

"Eyewitnesses might not recognise that subtle social stimuli, such as leading questions from a police interrogator, may have distorted their memory for the transgressor's face...eyewitnesses might not be cognizant of social variables...that bolster their confidence but do not improve accuracy of memory...if people are unaware of whether, and to what extent there have been internally produced alterations of their memory, they should be poor judges of the accuracy of their recollections if indeed such alterations occurred."

Where witnesses identify someone from photographs, it is also likely that they will identify the same person at a later identification parade. The new image will be the one which they later recognise. It is for this reason that the showing of photographs is restricted: a subsequent identification parade will only confirm that witnesses can recognise in the flesh someone they have seen in a photograph. Yet such witnesses are likely to be very confident in their own accuracy. This suggests that confident witnesses are not necessarily accurate. It is also possible that accurate witnesses may not be convincing when they are hesitant. The question of a confidence-accuracy relationship is therefore of great importance to the way eyewitnesses are viewed in a criminal court.

Unfortunately, psychological experimentation has not provided any definite answer to whether confidence and accuracy are indeed related. The common-sense answer would be that the more accurate witnesses are, the more confident they will be. However, the discussion on post-event information and contamination through prior retrieval tasks shows that witnesses may think that they are accurate when in fact they are not. Their confidence level may therefore be high notwithstanding the fact that they are mistaken. This is borne out in the results of experiments on confidence and accuracy. Many of the experiments are laboratory based, and often deal with recall rather than recognition. Most relevant to an assessment of whether confidence and

¹²⁴ As with post-event information, distortion of memory during questioning will be largely dependent on the individual witness and the saliency of the detail in the original memory trace.

¹²⁵ Leippe, M.R., "Effects of integrative memorial and cognitive processes in the correspondence of eyewitness accuracy and confidence" (1980) 4 *Law and Human Behavior* 261-274, 264.

accuracy are related in eyewitness identification tests, rather than statements, are those studies which ask subjects to view an identification parade.¹²⁶

Some experiments show a fairly strong confidence-accuracy relationship where, the more accurate witnesses are, the higher their confidence in their testimony.¹²⁷ For example, in Lipton's study, subjects were asked questions about a film and then were asked to rate their confidence in their own accuracy. A strong confidence-accuracy relationship resulted.¹²⁸ Other studies, such as Clifford and Scott in their 1978 consideration of the effect of the violence of an event, find no confidence-accuracy relationship at all. The danger of information after the event distorting the memory trace of witnesses has been illustrated in those studies which actually find an inverse relationship between confidence and accuracy, so that the more confident witnesses were, the less likely they were to be correct.¹²⁹ Buckhout et al. found that witnesses with a higher tendency to choose from an identification parade or photo-array were more confident in their ability. Subjects were shown two identification parades, one with and one without the target person. Subjects who chose someone from both of the parades tended to be very confident. This led Buckhout et al. to the conclusion that "high confidence signals a witness who is too quick to stereotype, to please the authorities and identify *someone*."¹³⁰

Is there a confidence-accuracy relationship? The general consensus amongst psychologists appears to be that there may be a low correlation. For example, Wells and Murray found that eyewitness confidence accounted for less than ten per cent of the variance in eyewitness

¹²⁶ See Luus, C.A.E., and Wells, G.L., "The malleability of eyewitness confidence: Co-witness and perseverance effects" (1994) 79 *Journal of Applied Psychology* 714-723.

¹²⁷ See Brigham, J., "Perspectives on the impact of lineup composition, race and witness confidence on identification accuracy" (1980) 4 *Law and Human Behavior* 315-322.

¹²⁸ Lipton, J., "On the psychology of eyewitness testimony" (1977) 62 *Journal of Applied psychology* 90-95. The confidence-accuracy relationship was categorised by $r=+0.44$.

¹²⁹ Loftus, Miller and Burns (1978), op.cit.

¹³⁰ Buckhout, R., Alper, A., Chern, S., Silverberg, G., and Slomovits, M., "Determinants of eyewitness performance on a lineup" (1974) 4 *Bulletin of the Psychonomic Society* 191-192, 192. There were 13.5 per cent positive identifications, 13.5 per cent impeached identifications (where the subject picked the suspect but then impeached their identification by making another choice), 40.3 per cent mistaken identifications, and 19.2 per cent nonidentifications.

identification accuracy.¹³¹ Similarly, a meta-analysis by Bothwell et al.¹³² found an average correlation of .25. This indicates that highly confident witnesses are only slightly more likely to be correct than those witnesses who are less confident. In addition, confidence can be affected by certain variables,¹³³ and this could alter the nature of any confidence-accuracy relationship.

Luus and Wells, in their review of literature on eyewitness confidence, concluded:¹³⁴

"Eyewitnesses' statements of confidence in their identifications might be only partly determined by how similar the identified person is to their memories of the culprit...in many cases, a statement of confidence could derive from social influences as well as individual differences across witnesses.."

It is clear that confidence can be affected by factors at all stages of the memory process. Where an identification has been made by a witness which is confirmed by the police, then confidence will rise. This does not mean that accuracy is guaranteed or enhanced. Confidence is poor as a predictor of accuracy. The psychological experimentation on memory processes leads to the conclusion that more emphasis should be placed on factors affecting accuracy at the encoding stage of memory and less on the outward confidence of a witness.

From the psychological theory and experimentation on the retrieval stage of memory, it is possible to gain an idea of the malleability of memory even as it is used for recall or recognition. The problems of all of the stages of memory are in part insurmountable, as they are based in the event or the witness herself. However, techniques have been developed by psychologists, some of which are in use in the criminal justice process on a regular basis,

¹³¹ Wells, G.L., and Murray, D.M., "Eyewitness confidence", in Wells and Loftus (eds) (1984), op.cit., 155-170.

¹³² Bothwell, R.K., Deffenbacher, K.A., and Brigham, J.C., "Correlation of eyewitness accuracy and confidence: Optimality hypothesis revisited" (1987) 72 *Journal of Applied Psychology* 691-695.

¹³³ These variables will not be discussed in any detail here, but see Leippe (1980), op.cit.; Deffenbacher, K., "Eyewitness accuracy and confidence: Can we infer anything about their relationship?" (1980) 4 *Law and Human Behavior* 243-260; and Narby, D.J., Cutler, B.L., and Penrod, S.D., "The effects of witness, target and situational factors on eyewitness identifications" in Sporer, Malpass and Kohnken (eds) (1996), op.cit., 23-52.

¹³⁴ Luus, C.A.E., and Wells, G.L., "Eyewitness identification confidence" in Ross, Read and Toglia (eds) (1994) op.cit., 348-361, 359. The influences which can affect confidence include the quality of the encoding conditions, often termed the "optimality hypothesis": Deffenbacher (1980) op.cit.; Bothwell, Deffenbacher and Brigham (1987) op.cit; and factors which affect confidence but not accuracy, or vice versa: Leippe (1980) op.cit.; and Wells, G.L., Ferguson, T.J., and Lindsay, R.C.L., "The tractability of eyewitness confidence and its implications for triers of fact" (1981) 66 *Journal of Applied Psychology* 688-696. For example, post-event information may affect accuracy but will not affect confidence. However, making a decision will probably affect confidence without affecting accuracy. A good general overview is contained in Wells and Murray (1984), op.cit.

which aim to enhance memory. It is hoped that by enhancing memory, fuller and more accurate accounts will be retrieved from memory stores.

(b) Memory enhancement¹³⁵

Over eighty years ago, Gustave Feingold posed the following question:¹³⁶

"Does the feeling of familiarity or strangeness which is aroused by the general environment so colour consciousness with its own particular tone as to make a new item appear familiar in the one case, and a previously experienced item appear strange in the other?"

Psychological theory indicates that the ability to remember information is greatly influenced by the relationship between the storage of the information and the context in which it is retrieved. Where retrieval is attempted in the same context as the original event, the result will be better than where the environmental context is changed. Despite early moves by Feingold into the area, more general interest in context as an aid to enhancing memory is fairly recent. Because of its relative youth as an area of study, using context in interviews is still developing. The basic idea is that the more elements held in common between the stored memory of an event and the environment in which it is recalled, the more successful the retrieval. Malpass cites the example of facial recognition where the offender had worn a disguise, "the fewer facial elements in common between the original observation and the subsequent request for identification, the less likely a correct identification will occur."¹³⁷ A contrast has been gained where additional information has been given to subjects, in a sort of reversal of the use of disguise. For example, Cutler and Penrod gave additional cues to some subjects and not to others. Those receiving additional cues made more correct identifications and fewer incorrect ones.¹³⁸ Cues

¹³⁵ See Davies, G., and Thompson, D., (eds) *Memory in Context, Context in Memory* (1988, Chichester: Wiley) on the use of context to enhance memory.

¹³⁶ (1914), op.cit., 43.

¹³⁷ Malpass, R.S., "Enhancing eyewitness memory", in Sporer, Malpass and Kohnken (eds) (1996) op.cit., 177-204, 181. Disguise has been used to illustrate the fragility of memory where facial features are changed. Recognition ability can be affected quite dramatically: see Bruce, V., "Changing faces: Visual and non-visual coding processes in face recognition" (1982) 73 *British Journal of Psychology* 105-116; and Sanders, G.S., "Effects of context cues on eyewitness identification responses" (1984) 14 *Journal of Applied Social Psychology* 386-397.

¹³⁸ Cutler, B.L., and Penrod, S., "Context reinstatement and eyewitness identification" in Davies and Thomson (eds) (1988) op.cit. The use of cues also increased recognition accuracy in Cutler, Penrod and Martens' (1987b) experiment, especially where members of the parade were very similar to each other: Cutler, B.L.,

are thought to work because different elements of an event are linked together, so that a reminder of one element can lead to enhanced recollection of others.

Studies show that the effect of context is not restricted to the appearance of an offender. The most obvious change in environmental context where any eyewitness is given a recognition test, be it the showing of photographs, a video or a live identification procedure, is that of physical setting.¹³⁹ Although in 1914 Feingold recommended that eyewitnesses and suspects should go back to the scene of the crime to attempt an identification, such an absolute context reinstatement is hardly practicable. However, reinstatement of context in some measure has been shown to work.¹⁴⁰ As physical context reinstatement will often be impossible, other approaches have to be used.

Malpass and Devine tested the applicability of reinstatement through interview. They termed this "guided memory" interview,¹⁴¹ which involves reminding witnesses of an event and asking them to visualise its taking place. The key to the experiment was that visualisation of the original event was attempted so that it was reinstated in the mind of the witness. The result was that sixty per cent of witnesses who had undergone a guided memory interview made a correct identification, as opposed to forty per cent who had no such interview. Similar results have been gained in other studies, such as Krafka and Penrod's¹⁴² experiment with convenience store clerks. Half of the clerks were exposed to context reinstatement, whilst the other half were not. Where there had been context reinstatement, 55 per cent correct identifications were made, as opposed to 29 percent where there was no context manipulation.¹⁴³ From studies

Penrod, S.D., and Martens, T.K., "Improving the reliability of eyewitness identifications: Putting context into context" (1987) 72 *Journal of Applied Psychology* 629-637.

¹³⁹ For the general effect of change of physical context, see Davies, G., and Milne, A., "Recognizing faces in and out of context" (1982) 2 *Current Psychological Research* 235-246.

¹⁴⁰ See Malpass and Devine (1981a), op.cit.; and Brigham, Maass, Snyder and Spalding (1982), op.cit.

¹⁴¹ Malpass, R.S., and Devine, P.G., "Guided memory in eyewitness identification" (1981b) 66 *Journal of Applied Psychology* 343-350.

¹⁴² Krafka, C., and Penrod, S.D., "Reinstatement of context in a field experiment on eyewitness identification" (1985) 49 *Journal of Personality and Social Psychology* 58-69.

¹⁴³ Krafka and Penrod also used blank (or target-absent) parades. Context reinstatement did not have an effect on identification errors.



such as those by Malpass and Devine and Krafka and Penrod, it appears that context reinstatement can serve to increase the likelihood of a correct identification without simultaneously increasing the rate of false identifications.¹⁴⁴ Shapiro and Penrod undertook a meta-analysis of context reinstatement research, and found that substantial increases in recognition ability resulted from manipulation of contextual cues.¹⁴⁵ It may even be that a guided interview technique can offset the effect of misleading post-event information.¹⁴⁶

The visualisation of context, as in guided memory interviews, is also used in cognitive interviewing, as constructed by Geiselman and Fisher. The cognitive interview is becoming an increasingly popular technique in the criminal justice process. Four general methods are used in cognitive interviewing: the circumstances are reconstructed in the interviewee's mind; the witness is asked to report everything they remember; events are recalled in a different order, either back to front or starting with the aspect which made the greatest impression; and witnesses are told to try to recall the event from a different perspective, for example imagining what other people saw.¹⁴⁷ These methods remain the basis of the technique, although refinements have been made by looking to the social dynamics of the interview.¹⁴⁸ Whilst the cognitive interview undoubtedly serves to increase recall, its effect on recognition accuracy appears rather limited.¹⁴⁹ Because of this, cognitive interviewing will probably serve to improve accuracy and detail in witness statements, but will not greatly improve performance on recognition tests such as the identification parade.

¹⁴⁴ Some studies give only limited support for the use of context reinstatement: for example Cutler, B.L., Penrod, S.D., O'Rourke, T.E., and Martens, T.K., "Unconfounding the effects of contextual cues on eyewitness identification accuracy" (1986) 1 *Social Behaviour* 113-134.

¹⁴⁵ Shapiro and Penrod (1986), op.cit.

¹⁴⁶ See Gibling and Davies (1988), op.cit.

¹⁴⁷ See Fisher, R.P., McCauley, M.R., and Geiselman, R.E., "Improving eyewitness testimony with the cognitive interview" in Ross, Read and Toglia (eds) (1994) op.cit., 245-269, 250.

¹⁴⁸ Discussions of the refinement of the technique can be found in Fisher, R.P., Geiselman, R.E., Raymond, D.S., Jurkevich, L.M., and Warhaftig, M.L., "Enhancing enhanced eyewitness memory: Refining the cognitive interview" (1987) 15 *Journal of Police Science and Administration* 291-297; and in Fisher, McCauley and Geiselman (1994), ibid.

¹⁴⁹ Fisher, McCauley and Geiselman (1994), ibid., 261. According to the authors, it is thought that the cognitive interview provides access only to verbal information, rather than pictorial information. As such, the cognitive interview technique appears to be rather limited with regard to eyewitnesses to crime, being useful only at the stage where a verbal description is given.

In general, reinstating context and using context cues have the greatest effect where memory for the main element of the event is poor. By contrast, where memory for the main element is clear and complete, context cues will not serve to enhance memory to any great degree.¹⁵⁰ In terms of eyewitness identification, this suggests that where a witness is fairly clear on the appearance of the original offender, there will be no advantage to be gained by the use of context cues. The witness will not enhance her recognition ability through using context cues unless there has been some other factor at work, such as weapon focus, which prevents clear memory for the appearance of the offender.¹⁵¹ However, where memory is poor (for instance where there has been a long retention interval or where the original viewing time was short), the greater the number of context cues, the more likely it is that the memory for an event will be activated, working along associations and links. Correct recollection and recognition may therefore be enhanced.

It has been shown that much of the general theory and experimentation on the way the memory works is relevant to the specific case of eyewitness testimony. In wishing to expand the level of knowledge about the process of eyewitness identification, a wide range of research has been conducted about identification procedures. These suggest that it is not only the limitations of memory and information processing which may be at fault when eyewitnesses are inaccurate. The methods employed by the criminal justice process to extract information from eyewitnesses can also exacerbate the problem. For example, a witness statement recalling events and descriptions is often followed by a recognition test, because verbal recall descriptions do not usually give sufficient information to say whether or not the suspect is the offender. Recognition tests therefore serve to uncover information from memory that was not available in recall.¹⁵² But recognition may also create inaccuracies in eyewitness evidence. At the heart of

¹⁵⁰ Krafska and Penrod (1985), *ibid.*

¹⁵¹ This was illustrated by Cutler and Penrod (1988) *op.cit.*, where enriched information was most effective in instances where the target had been disguised or had had a weapon, so that encoding of appearance was disrupted.

¹⁵² Wells, G.L., Seelau, E.P., Rydell, S.M., and Luus, C.A.E., "Recommendations for properly conducted eyewitness identification tasks", in Ross, Read and Toglia (eds) (1994) *op.cit.*, 223-244, 225.

the psychological findings discussed below is the desire to minimise the likelihood of mistaken identifications and maximise correct identifications.

Psychological Experimentation on Identification Procedures

In this section, the results of experiments on the dangers and best practice of identification techniques are reviewed. Many of the experiments attempt to yield forensically relevant results. In examining the body of literature on identification procedures, a number of main areas have been chosen, and these tend to focus on identification parades and "system variables".¹⁵³ System variables are those variables which are open to manipulation by those involved in the identification procedure.¹⁵⁴ Some of the factors contained in the broad band of "estimator variables" were discussed above. These are variables which are not open to manipulation, such as stress, weapon focus, the type of incident viewed.

At the basis of psychological experimentation on identification procedures is the assumption that an identification should have the following characteristics:¹⁵⁵

1. It must be based on the contents of the witness' memory of the initial observation of the offence.
2. Accidental similarities between the attributes of the offender and the suspect must not be allowed to determine whether an identification will be made.
3. Information about the identity of the police suspect or the choice favoured by others must not be available to the witness.
4. Influences on the witness to make or not make an identification must be minimized.

Experimental manipulation attempts to present the best way to achieve these characteristics in a real life setting. Where the characteristics are not present, the risk of mistaken identification is increased.

¹⁵³ As with the discussion of memory theory above, the available body of literature is so broad that an examination of all possible areas would result in a thesis of its own. It is therefore proposed to explore a representative sample of the work on the most forensically relevant aspects of psychological experimentation on identification procedures.

¹⁵⁴ See Wells, G.L., "Applied eyewitness testimony research: System variables and estimator variables" (1978) 36 *Journal of Personality and Social Psychology* 1546-1557; and Cutler, Penrod and Martens (1987a) op.cit.

¹⁵⁵ Koehnken, G., Malpass, R.S., and Wogalter, M.S., "Forensic application of lineup research" in Sporer, Malpass and Kohnken (eds) (1996)op.cit., 205-232, 207. Code of Practice D attempts to address some of

Bearing the above characteristics in mind, it is thought that misidentifications will have at their root one of three main causes.¹⁵⁶ Firstly, the witness may choose the suspect by chance, where any other parade member was as likely to be chosen. Second, a misidentification may result from any of the factors already discussed, such as post-event information or unconscious transference. The organiser of an identification procedure is most likely to be unaware that such factors are at work and would be powerless to alter their effect. Finally, misidentifications may occur where the system is at fault, so that the parade procedure or composition leads a witness to choose a suspect even where the suspect is not the offender. This examination concentrates on those experiments concerning identification procedures, because it is with regard to the conduct of procedures that the integrity principle can be furthered most. The integrity of the system will be improved by ensuring that officers follow the fairest practice possible. Offering a high level of protection to the suspect by incorporating the practices which, according to psychological theory, act to minimise the risk of misidentification also ensures that the integrity principle can be furthered in the area of eyewitness identification.

(i) Instructions and the use of relative judgment

One criticism of the use of identification parades is that they do no more than show that the person chosen looks more like the offender than anyone else present. Many psychologists believe that witnesses use a relative judgment process,¹⁵⁷ whereby they choose the parade member who most resembles their memory relative to the other parade members. Where the suspect is the offender, relative judgment will work well as a device to aid identification. However, if witnesses use relative judgment where the offender is not on the identification parade, then there is a risk that the innocent suspect could be identified. Where there are no breaches of Code of Practice D, such a suspect could then be wrongfully convicted. Relative

these issues, such as Annex A:12, which, for example, prevents a witness seeing a suspect before the identification parade commences.

¹⁵⁶ Koehnken, Malpass and Wogalter (1996), *ibid.*, 208.

¹⁵⁷ See Wells, G.L., "The psychology of lineup identifications" (1984) 14 *Journal of Applied Social Psychology* 89-103; and Luus, C.A.E., and Wells, G.L., "Eyewitness identification and the selection of distractors for lineups" (1991) 15 *Law and Human Behavior* 43-57.

judgment is based on the saliency of the details encoded by witnesses. Where an innocent suspect shares salient features with an offender and other parade members do not, then it is likely that the suspect will be chosen. This is because, in comparison to everyone else on the parade, the suspect most resembles the offender. In other words, where relative judgment is at work, it is not the absolute similarity of the suspect to the offender which is important but the relative similarity of that suspect when compared with other parade members. If relative judgments are made, then a parade will not be fulfilling its proper function, where "a lineup should be a test of the witness's memory, not a test of the witness's deductive reasoning."¹⁵⁸

The problem of chance errors being made by witnesses may also occur where they feel under pressure to choose if their memory for the offender is poor. Witnesses may not want to let the police down when effort has been made to organise an identification procedure. They may have a vested interest in obtaining a conviction (for example where they are the victims of the crime), or believe that suspects are not asked to attend a parade unless they are guilty.¹⁵⁹ Where such pressures are at work, witnesses may view a no choice response as a failure and make a guess. It is most likely that they will trawl what memory they have of the offender and choose the person who most resembles that memory.¹⁶⁰ When considering the pressures on eyewitnesses, Buckhout et al. stated that:

"our feeling is that the lineup itself, with its formality, its authority figures, and its potential for reinforcing the witness and the police for 'solving a case', encourages identifications, mistaken or not."¹⁶¹

One method of limiting relative judgments, which has been tested quite extensively by psychologists, is that of informing witnesses that it is acceptable to make a no choice decision. The easiest way to do this is to state that the offender may or may not be present on the parade. This is part of current police procedure.¹⁶² A biased instruction is one where witnesses are not

¹⁵⁸ Luus and Wells (1991), *ibid.*, 45.

¹⁵⁹ This is sometimes termed the culprit-present fallacy, which makes a relative judgment more likely: see Wells, Seelau, Rydell and Luus (1994) *op.cit.*; Malpass and Devine (1981a) *op.cit.*; and Wells (1984), *op.cit.*

¹⁶⁰ See chapter 5 of this thesis, where witnesses interviewed in Birmingham Identification Suite were shown to have a tendency to guess, most often choosing between two or three individuals.

¹⁶¹ Buckhout, Alper, Chern, Silverberg and Slomovits (1974) *op.cit.*, 192.

¹⁶² Code of Practice D, Annex A:14.

told that the suspect may not be present, thereby confirming any pressure to choose. The majority of experiments found that relative judgments are not eliminated when unbiased instructions are given,¹⁶³ but that they are reduced where the offender is not present on the parade.¹⁶⁴ These experiments suggest that unbiased instructions reduce the rate of mistaken identifications, and that the provisions in Code D offer a valuable method of reducing the pressure witnesses may feel to make an identification.¹⁶⁵

The problem of relative judgment can therefore be offset to some degree by careful instructions to witnesses before they view an identification procedure. In their search for explanations of the relative judgment effect, psychologists have also looked at system variables and their effect on identification procedures. The ways in which the construction of an identification parade or photo array vary have been found to affect the likelihood of mistaken identifications.

(ii) *A carrot in a bunch of bananas?*¹⁶⁶

¹⁶³ See Wells, G.L., "What do we know about eyewitness identification?" (1993) 48 *American Psychologist* 553-571.

¹⁶⁴ One of the first experiments dealing with biased instructions was that by Malpass and Devine (1981a), op.cit. In the study, Malpass and Devine reasoned that biased instructions would be most detrimental where the suspect resembled, but was not the perpetrator. They staged a crime, an act of vandalism, in front of 350 students. One hundred students were then split into four groups. One group saw a parade where the offender was present and they received biased instructions, a second group where the offender was present but with unbiased instructions. The other two groups viewed a parade where the offender was absent, one with biased and the other with unbiased instructions. Biased instructions increased positive identifications where the offender was present, but did not increase accuracy. The most striking result did indeed come from the offender-absent conditions, where 78% of those receiving biased instructions made a false-positive identification, as opposed to 33% of those receiving unbiased instructions.

¹⁶⁵ For example, see Buckhout, R., Figueroa, D., and Hoff, E., "Eyewitness identification: Effects of suggestion and bias in identification from photographs" (1975) 6 *Bulletin of the Psychonomic Society* 71-74; Cutler, Penrod, O'Rourke and Martens (1986) op.cit.; Cutler, Penrod and Martens (1987a and 1987b) op.cit.; O'Rourke, T.E., Cutler, B.L., Penrod, S.D., and Stuve, T.E., "The external validity of eyewitness identification research: Generalizing across subject populations" (1989) 13 *Law and Human Behavior* 385-395; and Warnick and Sanders (1980) op.cit.

Koehnken, G., and Maass, A., "Eyewitness testimony: False alarms on biased instructions?" (1988) 73 *Journal of Applied Psychology* 363-370 asked whether results from previous experiments were reliable, as all crimes were staged so that witnesses knew that they were not in a real-crime situation, making them less likely to be cautious. However, Koehnken and Maass's results can themselves be criticised (see Cutler and Penrod (1995) op.cit., chapter 8). Whilst the effects of biased instructions may to be greater for real than staged crimes, they are still an important factor in relative judgments leading to mistaken identifications: see Paley, B., and Geiselman, R.E., "The effects of alternative photospread instructions on suspect identification performance" (1989) 7 *American Journal of Forensic Psychology* 3-13. For a summary of the results of the main studies on the effect of biased instructions in identification procedures, see Cutler and Penrod (1995) op.cit., Table 8.1, 122.

¹⁶⁶ Foot, P., *Who Killed Hanratty?* (1971, London: Jonathan Cape), a reference by an eyewitness to James Hanratty on his identification parade.

Psychologists have conducted many experiments which investigate ways of improving the ratio of accurate identifications to false identifications. This is usually referred to as increasing the “diagnosticity” of identification procedures. In England and Wales, for example, a parade is fair where the probability that a person who did not witness the crime will choose the suspect is one in nine.¹⁶⁷ This probability ratio would occur where all volunteers were sufficiently similar in appearance to the suspect.

According to the majority of studies, the key to an assessment of fairness is that parade members will be similar in appearance to the suspect and also to the description of the offender. Without such similarity, the parade would not be fair. This is where the *functional* and *nominal* size of an identification parade become important.¹⁶⁸ For example, where a suspect is placed on a parade with eight other people, nine is the nominal size of the parade.¹⁶⁹ If the volunteers are not sufficiently similar to the suspect, then experimental results¹⁷⁰ suggest that the suspect would be as well served by a smaller parade size. It is functional size which is the crucial factor. Increasing the number of volunteers who are unlike the suspect or the description would mean that they could be immediately rejected by someone who was not a witness to the offence. No purpose would be served because the extra volunteers would merely be filling in spaces without increasing the real, or functional, size. Where a parade has a good functional size (and so is fair), then mock¹⁷¹ witnesses would make choices which were fairly evenly

¹⁶⁷ Psychological literature suggests that there should be at least five “distractors” or volunteers on every parade: Wells, Seelau, Rydell and Luus, op.cit., 229. Some researchers believe that five volunteers is the optimum number, and that an increased number above this are not effective in reducing the likelihood of an inaccurate identification: Luus and Wells (1991), op.cit.; Wells, G., and Lindsay, R., “On Estimating the Diagnosticity of Eyewitness Non-identifications”, (1980) 88 *Psychological Bulletin* 776. There is potential in this finding for the Police service to save time and money by cutting the size of parades from nine to six. However, greater research on the topic would be needed before a change in procedure is warranted.

¹⁶⁸ Whilst there is a wealth of literature on all aspects of diagnosticity of identification parades, the experimental literature on functional and nominal size is comparatively small.

¹⁶⁹ Some experiments have shown that accurate identifications will mainly occur where the suspect is chosen from a large pool: for example Cutler, Penrod and Martens (1987b) op.cit.; and Cutler, Penrod, O'Rourke and Martens (1986) op.cit.

¹⁷⁰ For example, see Nosworthy, G.J., and Lindsay, R.C.L., “Does nominal lineup size matter?” (1990) 75 *Journal of Applied Psychology* 358-361; Lindsay, R.C.L., and Wells, G.L., “What price justice? Exploring the relationship of lineup fairness to identification accuracy.” (1980) 4 *Law and Human Behavior* 303-314; and Wells (1993) op.cit.

¹⁷¹ People who were not witnesses to the event but are asked to view the identification parade are termed mock-witnesses in the psychological literature.

spread across the whole parade, because all parade members would be similar in appearance.¹⁷²

Whether or not this occurs is one way of assessing the functional size of any parade.¹⁷³

However, it is unrealistic for psychologists to expect police officers to arrange a parade and then assemble non-witnesses to aid in an assessment of functional size. Bearing in mind the number of parades conducted every day, and the time consuming nature of arranging identification procedures for all involved,¹⁷⁴ assessing functional size along the lines suggested by psychologists would be an almost impossible task.

However, a fair parade is of prime importance.¹⁷⁵ For example, a study by Lindsay and Wells¹⁷⁶ illustrated how a suspect who was similar in appearance to the offender could easily be the victim of mistaken identification. In identification tests where the offender was absent, Lindsay and Wells substituted someone who was either similar to the rest of the parade or someone who stood out. Where there was a difference in appearance between the substitute and the other parade members, 70 per cent identified him. By contrast, 31 per cent identified the substitute when he was similar in appearance to other parade members. More recent studies have suggested that parades should not be constructed on the basis of the similarity of volunteers to the suspect alone, but that similarity to the original description of the witness should also be considered.¹⁷⁷ There is some concern that matching volunteers to the suspect will create “clones” as there is no specification as to the extent to which volunteers should be

¹⁷² Parade members should be similar with regard to the important, or “salient” features remembered by the witness.

¹⁷³ See Malpass, R.S., and Devine, P.G., “Measuring the fairness of eyewitness identification lineups” in Lloyd-Bostock and Clifford (eds) (1983) op.cit., 81-102; and Wells, G.L., Leippe, M.R., and Ostrom, T.M., “Guidelines for empirically assessing the fairness of a lineup” (1979) 3 *Law and Human Behavior* 285-293.

¹⁷⁴ See chapters 4, 5 and 6 of this thesis.

¹⁷⁵ See Lindsay, R.C.L., “Biased lineups: Where do they come from?” in Ross, Read and Toglia (eds) (1994) op.cit., 182-200; Buckhout, R., Rabinowitz, M., Alfonso, V., Kanellis, D., and Anderson, J., “Empirical assessment of lineups: Getting down to cases” (1988) 12 *Law and Human Behavior* 323-331; Navon, D., “How critical is the accuracy of an eyewitness memory? Another look at the issue of lineup diagnosticity” (1990) 75 *Journal of Applied Psychology* 506-510; Wells, G.L., and Luus, C.A.E., “Police lineups as experiments: Social methodology as a framework for properly conducted lineups” (1990) 16 *Personality and Social Psychology Bulletin* 106-117; and Brigham, J.C., and Pfeifer, J.E., “Evaluating the fairness of lineups” (1994) in Ross, Read and Toglia (eds), op.cit., 201-222.

¹⁷⁶ Lindsay and Wells (1980), op.cit.

¹⁷⁷ See Wells and Luus (1990) op.cit.; and Luus and Wells (1991) op.cit.

similar to the suspect.¹⁷⁸ It is submitted that this concern is a rather unrealistic one, given the problems in finding volunteers of sufficient similarity for identification parades in the United Kingdom.¹⁷⁹ There is a more realistic concern that any features witnesses did not recall when giving their descriptions will be shared by a number of volunteers, and it is those very features which are likely to trigger recognition at the identification parade.¹⁸⁰ This would make the witnesses' task much more difficult. However, the main problem with the "match to description" method of constructing identification parades is that the suspect may not be similar to the description given by witnesses. Any identification parade which followed match to description guidelines would be unfair to the suspect, who would stand out from all other parade members. It has been suggested that the best alternative is to construct an identification parade where the volunteers are both similar to the features of the suspect and the description given by the witness. Where the suspect is unlike the description, the volunteers should be chosen for similarity to the suspect.¹⁸¹ This appears to achieve nothing better than the method currently employed, and would certainly involve practical difficulties for police officers charged with finding volunteers for an identification parade.¹⁸²

(iii) Are fairness and accuracy affected by identification test methods?

As well as looking at the size and potential bias involved in the construction of an identification parade, psychologists have explored increasing diagnosticity through the use of alternative

¹⁷⁸ In matching volunteers to the witness' description of the offender, there is a finite number of features. The "matching" stops when all features mentioned in the description have been considered.

¹⁷⁹ In observing well over one hundred identification parades in the West Midlands, the author did not come across one where the volunteers could have been described as anything close to "clones" of the suspect.

¹⁸⁰ An identification parade is designed to provide witnesses with "triggers", in the hope that they may recognise features which were not recalled when describing the offender. If the volunteers are chosen for similarity to the suspect, rather than the original description, the witnesses' task will be made more difficult, because several volunteers may share the features not recalled at the time of the description.

¹⁸¹ Mayer, C., "Due Process Challenges to Eyewitness Identification Based on Pre-trial Photographic Arrays", (1994) 13 *Pace Law Review* 815. See also Koehnken, Malpass and Wogalter (1996), *op.cit.*, 215; and Doob, A.N., and Kirschenbaum, H.M., "Bias in police lineups: Partial remembering" (1973) 1 *Journal of Police Science and Administration* 287-293.

¹⁸² It is unclear when a suspect could be said to be dissimilar to a description. The police would have to decide when a suspect is sufficiently dissimilar to description to warrant matching volunteers to the appearance of the suspect. Deciding on cut-off points and considering two sets of criteria for similarity of volunteers would put extra pressure on police officers who already find difficulty in constructing fair identification parades. This would be compounded where there was more than one witness and they had given descriptions which differed greatly. Different parades would need to be constructed for each witness, making for a lengthy and expensive process. Use of video libraries for identification procedures would offset these concerns to some degree: see the discussion in Chapter 6 of this thesis.

methods of testing eyewitness recognition accuracy. Although the use of instructions which allow witnesses to feel comfortable making no choice have been shown to reduce the use of relative judgment where the suspect is not the offender, no instructions could ever completely eliminate the effect, because witnesses will understandably assume that police officers would not take the trouble to organise an identification procedure unless they are sure that the offender is present. Even without any bias on the part of the police, the assumption that the offender is on the parade will lead to an increased tendency to guess.

Psychologists have approached the relative judgment problem from a number of angles. As well as examining the effect of instructions on witnesses' choosing patterns, they have explored alternative methods of presentation from the traditional identification parade. One method, used widely as an experimental technique, is what is known as a "blank" parade, where the suspect is not present.¹⁸³ The theory is that, where witnesses use relative judgment and have poor memory for the appearance of the offender, they will choose someone from the blank parade. This will be evidence that they will be more likely to choose falsely, at random, from any parade where the suspect is present. It seems likely, then, that the use of blank parades allows for some kind of assessment of the reliability of witnesses who positively identified the suspect.¹⁸⁴ The procedure works well on an experimental level. However, its implementation into police procedure would create more problems than it would solve. For example, if the blank parade was routinely shown as a first parade to witnesses, it would soon be common knowledge and any benefit would be eroded. The use of blank parades would also result in even more time consuming identification procedures, because two parades, not one, would have to be organised. The implications of running two parades are widespread: police officers would have to find twice as many volunteers, where finding enough for one parade is

¹⁸³ See Wells (1984) *op.cit.*, where the blank parade procedure was tested. Where the suspect was absent in both the first and second parades, witnesses who chose from the first parade were twice as likely to choose from the second parade than were witnesses who made no choice on the first test (55.6 per cent:23.3 per cent). Where a blank parade was followed by a parade where the suspect was present, 33 per cent of witnesses who had mistakenly identified from the blank parade correctly identified the suspect at the later one. This was much lower than the 60% who made a correct identification where they had earlier made no choice.

¹⁸⁴ Lefcourt, G., "The blank lineup: An aid to the defense" (1978) 14 *Criminal Law Bulletin* 428-432 outlines the advantages for defence counsel were blank parades in use.

often a hard task; all volunteers would still have to be paid, increasing the expense of running an identification procedure; the stress and anxiety witnesses often suffer would be unnecessarily increased; and because more time would be taken for each parade, waiting times for a parade to be scheduled would be increased.

In recognition of the practical problems involved in the use of blank parades, psychologists have considered alternative methods of presentation. Some have called for the use of two modes of representation, so that more than one of the senses was used, such as sight and sound.¹⁸⁵ The proposal which has gained most support, however, is that of the sequential parade,¹⁸⁶ where parade members are shown to witnesses one by one rather than in a simultaneous line. Witnesses are not told how many people or photographs they will see, and so relative judgment is reduced. Each member of the parade must be considered by witnesses on the spot, so that no comparisons are made. Once witnesses pass over a parade member, they cannot go back after a comparison with the people they are shown later in the parade.

Studies show that the sequential presentation of an identification parade reduces the number of false identifications made where the suspect is absent, but does not affect the correct identification rate of witnesses where the suspect is present. For example, in Lindsay and Wells' study in 1985, the number of correct identifications made where the suspect was present did not differ greatly between the simultaneous (58 per cent) and sequential (50 per cent) parades, but significant differences resulted where the suspect was absent on the parade. Where witnesses viewed the suspect-absent parade simultaneously, 48 per cent incorrectly identified the suspect's replacement. Where viewing was sequential, only 17 per cent identified the suspect's replacement. These results, confirmed in follow-up studies,¹⁸⁷ suggest that relative judgment is greatly reduced where parade members are presented sequentially.

¹⁸⁵ Melara, R.D., DeWitt-Rickards, T.S., and O'Brien, T.P., "Enhancing lineup identification accuracy: Two codes are better than one" (1989) *74 Journal of Applied Psychology* 706-713.

¹⁸⁶ As proposed by Lindsay, R.C.L., and Wells, G.L., "Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentation" (1985) *70 Journal of Applied Psychology* 556-564.

¹⁸⁷ For example, Lindsay, R.C.L., Lea, J.A., and Fulford, J.A., "Sequential lineup presentation: Technique matters" (1991) *76 Journal of Applied Psychology* 741-745; Lindsay, R.C.L., Lea, J.A., Nosworthy, G.J.,

That witness are ignorant of the size of the parade is an important factor in sequential presentation, because otherwise they may have a tendency to choose close to being shown the last parade member, knowing that they are running out of choices. However, if witnesses were not told how many people would be in the parade, then there would be no standard police procedure regarding parade size. Whilst it has been shown that the nominal size of a parade is unimportant if the functional size is low, regulation of police practice is imperative in the interests of fairness to suspects.

Whilst this thesis concentrates on the role of identification parades, many of the experiments already reviewed (such as that by Lindsay and Wells on sequential presentation), use photoarrays (where a number of photographs are presented to witnesses) rather than live parades. As well as manipulating the medium of the identification parade, there has also been some work on which is the better medium: live or photographic.¹⁸⁸ In Dent and Gray's study¹⁸⁹ for example, using full length colour slides or a live parade significantly affected how often witnesses made a choice. They found that there was a significantly higher rate of correct identifications made with the slides. Dent and Gray concluded that the live parade inhibits witnesses from making a choice because they feel apprehensive when confronted with the offender. Egan, Pittner and Goldstein also found that more identifications were made when using photographs, but that they were more likely to be incorrect.¹⁹⁰ The restriction of the use

Fulford, J.A., Hector, J., LeVan, V., and Seabrook, C., "Biased lineups: Sequential presentation reduces the problem" (1991) *Journal of Applied Psychology* 796; and Cutler, B.L., and Penrod, S.D., "Improving the reliability of eyewitness identification: Lineup construction and presentation" (1988b) 73 *Journal of Applied Psychology* 281-290. For a comparison of mean results from several studies, see Cutler and Penrod (1995) op.cit., Table 8.3, 134.

¹⁸⁸ Many studies have compared different modes of representation: for example, Davies, G.M., Ellis, H.D., and Shepherd, J., "Face recognition accuracy as a function of mode of representation" (1978) 63 *Journal of Applied Psychology* 180-187, looked at the results yielded by line drawings and photographs. They found that photographs were significantly more effective in recognition tests than line drawings, which in turn were more effective than outlines. These results were used by Davies, Ellis and Shepherd in their recommendations for the development of computer-based face reconstruction systems. Psychologists have also investigated the usefulness and reliability of other identification test media. For example, the same researchers tested the efficiency of Photo-fit. They found that witnesses' ability to construct a good likeness was very limited.

¹⁸⁹ Dent, H., and Gray, F., "Identification on Parade" (1975) 1 *New Behaviour* 366-369.

¹⁹⁰ As did Hilgendorf and Irving's (1978) study (Hilgendorf, E.F., and Irving, B.L., "False positive identification" (1978) 18 *Medicine, Science and the Law* 255-262) whose findings were consistent with Dent and

of photographs was recommended, especially where they preceded a live parade, stating that:¹⁹¹

"The photographic identification procedure...has to be employed with extreme caution because its use can set the stage for a series of interlocking errors beginning with a witness who is 'positive' that the face in the mug book is *the* culprit followed by another 'positive' identification of a live person. Since the first judgment has some error associated with it, the second judgment may well be nothing more than a confirmation of the mug book identification."

Most of the experiments discussed in this section were conducted before the PACE Codes of Practice were implemented. Therefore, the experimental results hold for a time when there was no standard police procedure, and where live parades almost always involved a witness being in the same room as the suspect. One-way screens are now used in most police forces in England and Wales, and they can reduce the apprehension that witnesses presented with a live parade may feel. In addition, more recent studies have shown less of a disparity in the reliability of different identification methods. For example, Cutler et al., in a review of recent literature, found that:¹⁹²

"there is no reason to believe that live lineups, videotaped lineups, or photoarrays produce substantial differences in identification performance...given the apparent comparability of live lineups and photoarrays, it is not worth the trouble and expense to use live lineups."

Videotaped parades have also been the subject of much interest in recent years.¹⁹³ Whilst Cutler et al. concluded that these do not have any advantage over live representation of parade members, it may be that further research is warranted. The studies conducted so far have used basic equipment and technicians who are unskilled. It is possible that future experiments will find that there is increased accuracy when using videotaped lineups. This is simply because sophisticated equipment offers a chance to manipulate parades in a way that cannot be achieved when they are live. Slow motion movement, pausing on a specific frame, or blowing up

Gray's ideas. Hilgendorf and Irving concluded that more false positive identifications arose where photographs were used, and recommended the restriction of their use.

¹⁹¹ Egan, Pittner and Goldstein (1977) op.cit., 205.

¹⁹² Cutler, B.L., Berman, G.L., Penrod, S., and Fisher, R.P., "Conceptual, practical and empirical issues associated with eyewitness identification test media" in Ross, Read and Tolia (1994) op.cit, 163-181, 181. It should be noted that a photoarray alone is different from showing photographs followed by an identification parade. A photoarray is a single identification test comparable to a live parade. Where photographs are followed by a live parade, the problem of compounding any errors remains: see Code D2.15(viii) and Annex D.

particular features on screen could all add to the image given to a witness. Video-libraries are cheaper and simpler than live parades, easing the difficulty in finding suitable volunteers. In addition, whilst stress has been reduced with the introduction of one-way screens, some witnesses are still very nervous about the prospect of meeting the offender face to face.¹⁹⁴ A video-taped parade could solve this problem.

Psychological experiments suggest that there are ways in which the identification process could be improved. They also highlight the fact that mistaken identifications will not necessarily occur simply because the witness has a poor memory of the offender. The way in which a procedure is run can also affect the accuracy of any identification made.

Are Experimental Findings Forensically Relevant?

Although psychological research has offered much to law in the area of eyewitness identification, the findings should not be accepted without entering into a consideration of the limitations of psychological research, such as the predominance of laboratory type experimentation and the impracticality of some suggestions by psychologists. It may be that the concentration of psychological experimentation in laboratory and simulation studies could bar its acceptance as expert evidence in a criminal trial, or as a reform option in police procedure. There are a number of problems involved in attempting to extrapolate from psychological studies to "real-life" situations. For example, ethical standards will prevent any absolute re-creation of a violent criminal offence. The justification for risking the traumatising of witnesses, in order to gain experimental results, would be hard to find.

It has been illustrated in this chapter that psychology has expanded knowledge of the way in which the memory works and how the procedural system of parades can affect the reliability of

¹⁹³ Examples can be found in Cutler, B.L., and Fisher, R.P., "Live lineups, video-taped lineups, and phot arrays" (1990) 3 *Forensic Reports* 439-448; and Cutler, B.L., Fisher, R.P., and Chicvara, C.L., "Eyewitness identification from live versus videotaped lineups" (1989) 2 *Forensic Reports* 93-106.

¹⁹⁴ See chapter 5 of this thesis.

eyewitness identification. But it is arguable that gaining knowledge is not enough: it should be able to aid fairness within the criminal justice process, or at least be applicable in a “real world” situation. If the results of psychological experimentation can do neither of these things, then its practical use is very slight indeed. The question posed here is whether knowledge gained from psychological experiments can ever serve a practical legal purpose, and if so, how.

It has been said that “society has nowhere else to turn for guidance and direction than to the social sciences in general and psychology in particular”.¹⁹⁵ Whilst this claim exaggerates the importance of psychology to criminal justice, much of the experimentation carried out in psychology has relevance to a field of law, and has the potential for practical application. As Lloyd-Bostock states,¹⁹⁶

“[R]esearch in perception and memory applies to questions about the reliability of witnesses; research in decision-making to sentencing; physiological psychology to lie detection; child psychology to cases involving children; and social psychology to courtroom processes, legal skills, and the questioning of witnesses and suspects.”

However, there are a number of barriers standing in the way of true practicality, some of which are simply due to the differing natures of law and psychology as disciplines. It will be argued that they start from isolated perspectives and often have very different aims in mind. This prevents true understanding and may be a bar to using psychological information most effectively.

One of the barriers to practical application of psychological research in legal settings is that of the experimental method. A function of the method is to isolate particular variables and test them to the exclusion of any other factors. This allows the psychologist to gain knowledge of the effect of a small number of variables and to gain confidence that a particular variable does a particular thing in a defined setting. Whilst it is useful for lawyers to know that, for example, stress may have an effect on eyewitness accuracy following the Yerkes-Dodson curve, this alone does not help the court to decide on the accuracy of a particular eyewitness. Too many other factors, such as the identification procedure, the retention interval, the effect of any post-

¹⁹⁵ Deese, J., *Psychology as Science and Art* (1972, Harcourt Brace Jovanovich, New York), 107.

event information, and the witness' innate level of ability also play their part in determining accuracy. The point is that psychological experiments can tell us that a particular factor increases or decreases likely accuracy in isolation, but the combination of factors are often too complex to reach a definite conclusion. In addition, there are instances where psychology does not give a firm conclusion on even a single, isolated variable. An example here would be the existence of a confidence-accuracy relationship in eyewitness cases.

The limitation of the experimental method¹⁹⁷ illustrates the differing aims of psychology and law. The law needs a complete picture for each individual case, or at least a strong indication of the effect of certain factors when they appear in a particular combination. The indication could then be weighed with other evidence, bearing in mind the differing abilities of recognition we all have. This would leave a fairly high degree of uncertainty, but would probably be enough to warrant the label of "helpfulness" for the jury. In contrast to the law's requirement of certainty, psychologists can accept a trend as being statistically significant and require no more. Much experimentation is completed to further psychological theory on perception or cognition, and knowledge of the effect of one variable can add much to theory. To apply experimental results to individual and complex cases involves speculation, because it is likely that the particular combination of factors has never been tested in the laboratory or in a field setting. If the number of factors commonly present in actual criminal cases were used for experimental purposes, then little could be ascertained about the effect of each individual factor. Years of experimentation would be needed in order to build up a knowledge base of how each variable reacts with others. And even then, the unknown of individual ability in eyewitness identification tasks would still be an issue.

A useful illustration of these difficulties is offered by Rabbitt,¹⁹⁸ who describes reaction-time experiments. These at first seemed simple, involving finger flexions in response to single

¹⁹⁶ Lloyd-Bostock, S., *Law in Practice* (1988, London: British Psychological Society and Routledge), 140.

¹⁹⁷ For a discussion of the inappropriateness of the experimental method for psychology, and its limitations, see King, M., *Psychology In and Out of Court* (1986, Oxford: Pergamon), pp. 21-25 and 28-44.

¹⁹⁸ Rabbitt, P., "Applying Human Experimental Psychology to Legal Questions about Evidence", in S. Lloyd-Bostock, *Psychology in Legal Contexts* (1981, London: Macmillan), chapter 1.

signals. However, work began in the area over 100 years ago and has uncovered a number of contradictions in human behaviour. Variables affect reaction times when tested singly, some have marked affect when in particular combinations, and others only independently of other variables. This work highlights the complexity of any human behaviour, even that which we think is simple or based on “common-sense” foundations,¹⁹⁹

“Faced with similar complexities in all the experimental tasks which they use, psychologists have adopted the standard scientific strategy of exploring the effects of changes in only one variable at a time, holding all others constant, proceeding eventually to test the effects of joint changes in two or more variables...The natural reaction of competent academic psychologists faced with a complex applied problem is to look for ways of restricting the focus of the investigation.”

The needs of psychology and law can therefore be seen to be quite different: psychologists attempt to narrow down their field of enquiry, obtaining data which is relatively simple for them to apply to other experimentation and to current theory. However, lawyers need answers to questions about behaviour in complex situations, and data from experiments on one or two variables does little to aid in the search. To the contrary, the use of such experimental results could do harm: the simultaneous effect of changes in many variables could be completely different to the effect of each of the variables when investigated singly or in simple combinations. The danger lies in an expert witness offering confident and compelling evidence which is in fact misinformed or contains an inflated view of the ability to apply experimental results to real life situations. This danger, which stems from the differences between the two disciplines, lies at the heart of judicial reluctance to admit evidence of experimental results in fields such as memory, perception and cognition.

Despite the differing needs of psychology and law as disciplines, those conducting eyewitness identification research often do so because they feel that their work may²⁰⁰

“contribute to the solution of the practical problems of obtaining accurate criminal identifications, to assist legal fact-finders in evaluating eyewitness testimony, and to assist lawmakers in formulating procedures for developing valid eyewitness evidence.”

¹⁹⁹ Ibid., 5.

²⁰⁰ Malpass, R.S., and Devine, P.G., “Realism and Eyewitness Identification Research”, (1981c) 4 *Law and Human Behavior*, 347. See also Konecni, V.J., and Ebbesen, E.B., “Courtroom Testimony by Psychologists on Eyewitness Identification Issues: Critical Notes and Reflections”, (1986) 10 *Law and Human Behavior* 117-126 on the problems in enhancing the external validity of experimental results.

This desire to help is, however, hampered by the use of the experimental method and also by the necessity to allow those taking part in experiments to know that the offence they witness is not real. This makes for identifications made without the pressure witnesses to real offences have on them: there will be no consequences for the “offender” or the witness as a result of an experimental identification parade or photo array. Many of the experiments which form the basis of psychological theory and recommendations on eyewitness identification did not involve subjects viewing a realistic crime occurring. Clifford has noted that “the assumed impotence of psychology in eyewitness cases stems not from a paucity of research but rather from a surfeit of inappropriate research”.²⁰¹

Because of the lack of realism of one degree or another, it is unsurprising that criminal justice professionals have viewed the results of experimentation with caution. In the words of Malpass and Devine, researchers in the area of eyewitness identification “have a deserved credibility problem”.²⁰² Although a greater number of experiments dealing with realistic events have been conducted since the time of Malpass and Devine’s concern in 1981, the broad criticism that,²⁰³

“Although we may have a great deal to say that is of relevance to the criminal justice system, the empirical base of our contribution is derived from studies that appear to only remotely reflect the conditions experienced by witnesses to actual criminal events”,

continues to hold true. If experiments were truly realistic, then the control needed to gain reliable results would be lost. Ultimately, psychologists cannot reconstruct real criminal offences in their quest for knowledge and study.²⁰⁴ Experimental results offer useful insights into the workings of the human memory, but will never be able to give law definitive answers

²⁰¹ Clifford, B., “Eyewitness Testimony: The Bridging of a Credibility Gap”, in D.P. Farrington, K. Hawkins and S.M. Lloyd-Bostock (eds.) *Psychology, Law and Legal Processes* (1979, Macmillan, London), 167-183, at 167.

²⁰² Malpass and Devine, (1981c), op.cit., 348.

²⁰³ Ibid.

²⁰⁴ Yuille and Cutshall did manage to use a real crime to see whether experimental results were reliable. They interviewed twenty-one witnesses to a shooting and had access to police interview transcripts. Higher levels of accuracy were found than in experiments, but the incident was certainly unusual. Some useful points were noted, such as poor memory for peripheral detail showing no relationship with inaccuracy on salient details. Those with poor peripheral memory could still be accurate on important aspects of the case. See Yuille, J.C., and Cutshall, J.L., “A Case Study of Eyewitness Memory of a Crime”, (1986) 71 *Journal of Applied Psychology* 291-301.

on the reliability of individual eyewitnesses.²⁰⁵

Despite the limitations of research findings, and the assertion of the Devlin Report²⁰⁶ that, in the area of eyewitness research,²⁰⁷

“...a gap exists between academic research into the powers of the human mind and the practical requirements of courts of law and the stage seems not yet to have been reached at which the conclusions of psychological research are sufficiently widely accepted or tailored to the needs of the judicial process to become the basis for procedural change”,

it can be seen that the criminal justice system has utilised some of the ideas found in psychological theory. For example, Code of Practice D, used for eyewitness identification procedures, illustrates that experiments recommending the use of unbiased instructions have been taken on board (Code D, Annex A:14), and the use of the *Turnbull*²⁰⁸ warning has its roots in experimentation showing that eyewitnesses can be mistaken especially where the initial viewing was brief, or in poor lighting. Other areas of law can be seen to apply psychological findings also, such as the existence of evidential rules against leading questions. Although lawyers may claim that such provisions are common sense, or that the findings cannot replace common sense,²⁰⁹ Yarmey is persuasive in his argument that:²¹⁰

“Applications of psychological theories and findings have a tendency to be adopted in due time in spite of the law’s lack of awareness or resistance to accept, to utilise, or even to credit psychology for its contributions. What one generation of lawyers prefer to understand as “common sense” often depends upon the theory and findings of the previous generation of investigators.”

The language of psychology and law may differ, but they are both disciplines who strive to understand and evaluate human behaviour. With this common aim in mind, they should learn what they can from each other, and have respect for the differences between them. Psychology does have much to offer law, but law should proceed with caution and with the knowledge that psychological research results on eyewitness testimony are indicative, not definitive.

²⁰⁵ Some psychologists claim that the problem of realism and external validity has been overplayed: see Goodman, J., and Loftus, E.F., “Judgment and memory: The Role of Expert Psychological Testimony on Eyewitness Accuracy”, in Suedfeld and Tatlock *Psychology and Social Policy* (1992, Hemisphere), 267-282, at 276.

²⁰⁶ Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976, London HMSO)

²⁰⁷ Ibid., p.76.

²⁰⁸ [1976] 3 All E.R. 549

²⁰⁹ Stone, M., *Proof of Fact in Criminal Trials* (1984, Edinburgh: W.Green), 28.

Conclusion

What has emerged very strongly from this discussion of psychological research on identification procedures is that there is an identification accuracy problem. Wells²¹¹ claims that there are three observations which prove that a problem does exist. Firstly, a large number of experiments which use simulated or staged crimes²¹² have yielded results which show a high number of false identifications.²¹³ Secondly, in most cases, the false identifications in these experiments were compounded by the witnesses confidently believing that they were correct. This manifests itself in the considerable confidence felt by witnesses in their decisions.²¹⁴ Since the experiments show that there is little correlation between confidence and accuracy, the widely-held assumption that a confident witness should be believed must be questioned. Thirdly, a number of wrongful convictions have resulted directly from mistaken identification. In other words, actual cases uphold psychological findings.²¹⁵ Psychological theory posits that human memory is not a reliable tool. There are potential problems at all three main stages: acquisition, retention and retrieval. The nature of memory is not stable: rather it is active, selective, and malleable; open to new (and often distorting) information.

The malleability of memory is evident in eyewitness testimony, both in witness descriptions and in recognition tests. How an event is witnessed, the stress involved, and even how the information is retrieved, can affect the accuracy of eyewitness evidence. Understanding of how eyewitness memory works is limited, and the sufficiency of current methods of informing the jury of the danger of convicting on eyewitness evidence alone will be questioned in the Chapter

²¹⁰ Yarmey, A.D., *The Psychology of Eyewitness Testimony* (1979, New York: Free Press), 227.

²¹¹ Wells (1993), op.cit.

²¹² Staged and simulated crimes are thought to be forensically more relevant than pure laboratory based experiments involving recognition tests.

²¹³ There are many examples, including Brigham, Maass, Snyder and Spaulding (1982) op.cit.; Cutler, Penrod and Martens (1987a and 1987b) op.cit.; Ellis, Shepherd and Davies (1980) op.cit.; Leippe, Wells and Ostrom (1979) op.cit.; Wells, G.L., Lindsay, R.C.L., and Ferguson, T.J., "Accuracy, confidence and juror perceptions in eyewitness identification" (1979) 64 *Journal of Applied Psychology* 440-448; Lindsay and Wells (1985) op.cit.; Loftus and Greene (1980) op.cit.

²¹⁴ See, for example, Wells, G.L., and Murray, D.M., "Eyewitness confidence" in Wells and Loftus (eds) (1984) op.cit., 155-170.

seven. The advantages and drawbacks of suggestions to aid parade diagnosticity have shown that not all psychological remedies will be practical in the criminal justice setting. Experimental results can be misleading and limited in scope. The extent to which experimental results may aid knowledge about the unreliability of eyewitness evidence will be the focus of an examination, in Chapter eight, of the potential advantages to the use of expert evidence in cases involving identification testimony. What the more general discussion in this chapter illustrates is that the integrity principle can be aided by an understanding of the dangers of eyewitness identification. In particular, such understanding enables furtherance of the protective principle by the introduction of fair procedures to guard against the dangers of misidentification and consequent wrongful conviction.

²¹⁵ See texts such as Foot (1971) *op.cit.*; Cole, P., and Pringle, P., *Can you positively identify this man?* (1974 London: Deutsch); and Brandon, R., and Davies, C., *Wrongful Imprisonment* (1973 London: Allen and Unwin).

CHAPTER THREE

COLLECTING IDENTIFICATION EVIDENCE: THE PROCEDURES GOVERNING THE CONDUCT OF IDENTIFICATION PARADES

Introduction

The development of identification procedures began at the turn of the twentieth century and they are still evolving today. Major changes have occurred along the way, with the introduction of national guidelines in 1925, 1969 and 1984. The most recent changes in police procedure took place in April 1995 with an amended Police and Criminal Evidence Act ("PACE") Code of Practice D.¹ Until the turn of the century, the question of identification attracted little attention or concern. Parades were informal affairs and there were no national guidelines for police forces to follow. Many forces had no internal guidelines and left the conduct of identification procedures entirely to the discretion of individual officers. The use of an identification parade to gain evidence against a suspect had been common for a number of years². The method was seen as superior to confrontation, where a witness views only the suspect and is asked "is this the man?"; and to dock identifications, when witnesses view the suspect for the first time in court. Obvious bias exists in the use of both confrontation and dock identification, in the former because witnesses are not tested in their ability to distinguish the offender from other people and in the latter because it is clear that the person standing in the dock is the accused.

¹ There have been subsequent amendments to other parts of the Codes of Practice, but not to Code D.

² According to the Devlin Report 1976, para. 1.10, the identification parade was then already "well over a century old", and invented by the police (the first record of an identification parade was in a Police Order of 1860) after judicial criticism of direct confrontations: Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976 London: HMSO).

This chapter examines the provisions of Code D, focussing on areas of difficulty and contention, such as the right to an identification parade and when the Code applies. There has been extensive judicial debate about whether an identification parade needs to be held after an informal identification has taken place and about when a suspect becomes “known” for the purposes of Code D. Fair procedures are particularly important where the evidence being gathered is susceptible to distortion, as in eyewitness identification cases. It is with regard to pre-trial procedures that the protective and disciplinary principles become paramount. The procedural rules in place throughout Code D offer a structure for the courts at any later proceeding both to enforce the disciplinary principle where there has been a major and/or intentional breach of the Code, and to ensure that the protective principle operates to exclude evidence where even a well-intentioned or innocent breach results in unfairness for the accused. Officers must avoid giving both verbal and non-verbal cues to witnesses and should ensure protection of the suspect’s right to a fair procedure at all times. The outcome of an identification parade can affect decisions relating to arrest and whether an investigation is advanced and this chapter discusses those issues, and outlines the requirements placed on the police by the Code. Observations of police procedures are contained in Chapter 6, and the exercise of discretion under s.78 PACE is examined in Chapter 7.

Early attempts to regulate identification procedures

The first attempt at formulating common police practice on identification parades was a Police Circular in 1905, following the Beck Committee inquiry. In this circular, the rules for identification parades used in the Metropolitan Police District were commended to all Chief Constables.³ However, the Circular was unofficial, and the first official guidelines came in the form of a Home Office Circular in 1925. This Circular was in effect an

³ See Devlin Report 1976, Appendix A, 158.

expansion of the 1905 rules which had attempted to standardise police practice, reflecting the growing concern about misidentification.

An example of this arose with the case of a Horse Guards Officer, Major Sheppard, who was arrested for burglary, resulting from evidence obtained at an identification parade arranged late at night and in a hurry. The ability of the police to provide suitable volunteers in such circumstances was in doubt. A Home Office Inquiry⁴ resulted from "the moral indignation at the summary treatment this officer received from the police",⁵ concluding that other suspects besides Major Sheppard must have been similarly treated. Reforms contained in the 1925 Circular, slightly amended in 1926, resulted from the Sheppard inquiry and the 1929 Royal Commission on Police Powers and Procedures considered and published the amended guidelines as an appendix to its Report.⁶

The main provisions contained in the 1925 guidelines are still reflected in current procedural rules. It was seen as "desirable" that arrangements for the identification parade be made by an officer other than the officer in charge of the case⁷ and that witnesses should not see the suspect before the parade or be assisted by photographs or descriptions of the suspect. A further provision was that witnesses be shown the parade singly and not be allowed to communicate with others still waiting to make an identification.⁸

⁴ See The Report of the Tribunal of Inquiry on the Arrest of Major R.O. Sheppard DSO, RAOC (Cmnd 2497) 1925.

⁵ Cole, P., and Pringle, P., *Can You Positively Identify This Man?* (1974, London: Deutsch), p.168.

⁶ Royal Commission on Police Powers and Procedures, Cmnd 3297 1929.

⁷ Code of Practice D2.2, which provides that no officer involved in the case may take part in the procedures, reflects the 1925 guideline. However, unlike the current practice, it was acceptable in 1925 for the officer in charge of the case to be present at the identification parade.

⁸ The same provisions are contained in Code of Practice D, Annex A 12(i) - (iv).

Suspects themselves were given certain rights, such as having a solicitor present during the parade,⁹ to raise objections to the conduct of the identification procedure,¹⁰ choosing his or her own position in the line¹¹ and being able to change position after each witness left.¹² Perhaps the provision in the 1925 guidelines which had the most influence on future procedure, however, was that the accused should be placed among persons who as far as possible were of the same height, age, general appearance and position in life. This is almost identical to the requirement contained in Code of Practice D¹³, excepting the crucial omission of any stipulation as to the number of members required to make up an acceptable identification parade. Without such a requirement, the system was open to abuse.

The guidelines were not mandatory, and differences of practice between police forces developed. Individual forces could pick and choose which of the guidelines to follow, resulting in a lack both of consistent procedures¹⁴ and adverse consequences where police officers ignored the provisions. Much scope was left for interference with identification parades.¹⁵ It can be assumed that at that time many parades took place which today would be regarded as highly prejudicial to the suspect. The 1925 guidelines, although reviewed in 1929, were not amended or reviewed further until 1969, when the next major move to regulate police practice was made by the government.

⁹ This provision is currently contained in the Notice to the Suspect, Code D2.15 (iii), and Code D, Annex A 1.

¹⁰ This guideline is also contained in the current Code of Practice D, at Annex A 10.

¹¹ See Code of Practice D, Annex A 11.

¹² Ibid.

¹³ Annex A 8.

¹⁴ The failure of Circulars and guidelines to prevent variations between (and within) forces can be seen in other areas of criminal justice also. For example, guidelines on cautioning made little difference to variable police practices: see Evans, R., and Wilkinson, C., "Variations in police cautioning policy and practice in England and Wales" (1990) 29 *Howard Journal of Criminal Justice* 155.

¹⁵ For example, it was probable that witnesses were often unduly influenced in making their choice from an identification parade. Suspects may have stood out due to obvious differences in dress or general appearance. A further source of influence was that witnesses could be told who the suspect was verbally or by someone "accidentally" pointing him or her out.

By the 1960s it was clear that the 1925 guidelines had not been effective in preventing wrongful convictions and as a result concern regarding misidentification grew. The practical consequence of the existing rules had faded over the years, and the police service had adapted them to foster convenient working practice. This inevitably involved some disregard of recommended procedure. In 1964, the Criminal Law Revision Committee conducted an inquiry into the workings of the court system¹⁶, including the issue of eyewitness identification. However, before the Committee reported, a further memorandum concerning the conduct of identification parades was issued by the Home Office in 1969. This recognised the unease felt by both those involved in the criminal justice process and the general public regarding the reliability of eyewitness evidence. The government attempted to create a greater impact by placing a requirement of fairness at the beginning of the memorandum, which stated that,¹⁷

1. The object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been *fairly* and *adequately* tested.

2. Identification parades *should be fair, and should be seen to be fair*. Every precaution should be taken to see that they are so, and, in particular, to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed specially to the suspected person instead of equally to all the persons paraded. (My emphasis)

It is noteworthy that the Home Office, when drafting the Circular, was anxious that identification parades should be "seen to be fair". This reflected government concern regarding the public perception of identification parades.

The provisions improved on the requirement in the 1925 Circular that the suspect should be placed in a line of people who were, as far as possible, of the same age, height, general appearance and position in life by recommending the minimum acceptable number of

¹⁶ Criminal Law Revision Committee Eleventh Report, Evidence (General), 1972. Cmnd 4991.

¹⁷ Home Office Circular No. 9/1969, paras. 1 and 2. The Circular was first published in a Home Office Circular to the police and was later issued as a pamphlet. To achieve wider circulation, it was

volunteers for a fair parade. It was stipulated that where there was a single suspect there should be eight volunteers¹⁸ for each parade. This number increased to twelve where two suspects were to be paraded together.¹⁹

Guidelines regulating the conduct of identification parades for multiple witnesses were also contained in the 1969 Circular, allowing the police to hold one parade for two suspects where they were similar in appearance. The Circular stipulated that, where there were more than two suspects attending in relation to the same offence, "an identification parade should not include more than two of the possible suspects"²⁰. This was an improvement upon the 1925 rules, where no provision at all was made for parades involving multiple suspects. In 1969 the Home Office appeared to acknowledge that parading more than two suspects at any one time was not only prejudicial to those suspects involved, but also failed to test witnesses' power of recognition. Taking the most extreme scenario, where all the members of an identification parade were suspects, a witness could view a parade and any choice made would be a positive identification upon which the police would be able to act.²¹

Paragraph 12 of the memorandum also made a change to procedure regarding instructions to witnesses as reproduced below,

reprinted in Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 38th Ed. (1973), paras. 1351-1353. The Devlin Report (1976) reproduced the Circular in Appendix A, 158.

¹⁸ Psychological research refers to the volunteers on an identification parade as "distractors" or "foils". However, police guidelines and judicial commentary usually refer to the use of "volunteers".

¹⁹ Home Office Circular No. 9/1969, para. 8. Two suspects could only be paraded together where they were similar in appearance. If they were not, or if there were more than two suspects, then separate parades were required. These provisions are closer to the current Code of Practice than were the 1925 provisions. See Code D Annex A, para. 8.

²⁰ Ibid., para. 9. The provisions of this paragraph correspond quite closely to those of Code of Practice D, Annex A, paras. 8 and 9.

²¹ This would involve negligible testing of a witness's memory. It is probable that this would be a good example of the "relative judgment process" (see Wells, G.L., "The psychology of lineup identifications" (1984) 14 *Journal of Applied Social Psychology* 89) whereby a witness, rather than using an absolute standard, chooses the parade member who most resembles his or her memory of the offender compared with the other persons paraded. If the relative judgment process exists, the chances of misidentification increase, especially in a situation where an identification parade consists only of suspects.

The witness should be asked whether the person he has come to identify is on the parade. He should be told that if he cannot make a positive identification he should say so.

This provision has continued as an important procedural rule,²² and is seen as an effective method of reducing the pressure witnesses may feel they are under to make a choice when they are in fact unsure. Witnesses are aware that there has been police time and effort expended in order to construct the identification parade, and may be influenced by police belief that the suspect is the offender. Psychologists conducting research in the area of eyewitness identification have emphasised the influence instructions given to witnesses may have on their propensity to choose.²³

The 1969 Circular represented a long overdue update on police practice while attempting to increase the fairness, both real and perceived, of identification parades. A major problem with the 1925 provisions was that there had been no real incentive for police forces to follow the rules. In 1969, this difficulty was addressed by the inclusion of a warning that "failure to observe its provisions may well result in the judge, in his summing up to the jury, commenting on the reliability of the evidence obtained".²⁴ Although the Circular publicised the power of the judge to discipline police for breach of its provisions, it did not provide a discretion to exclude evidence which had been unfairly obtained. The lack of any effective method of dissuading the police from carrying on with old practices proved to be a major problem in successfully implementing Home Office Circular 9/1969.

²² See Code D, Annex A, para. 14, which is very similar to the provision in paragraph 12 of the Home Office Circular 9/1969. However, the current Code of Practice provides for the identification officer inform the witness that the offender may or may not be present on the parade, a warning which is missing from the 1969 guidelines. This could be an important part of the formula, as it conveys to the witness that it is acceptable to make no identification. Theoretically, the pressure which is brought to bear on a witness should be reduced as should false identifications: see Malpass, R.S. and Devine, P.G., "Eyewitness identification: Lineup instructions and the absence of the offender" (1981) 66 *Journal of Applied Psychology* 482.

²³ Kohnken, G., and Maass, A, "Eyewitness testimony: False alarms on biased instructions? (1988) 73 *Journal of Applied Psychology* 363 questioned the positive effects of instructions to witnesses.

Because judges were given no specific discretion to exclude evidence obtained outside the provisions of the Circular,²⁵ there was no strong incentive for the police to adhere to them. Judges could question the validity of evidence, but even this proved to be unusual, as the judiciary was accustomed to turning a blind eye to the use of unfair police practice to obtain eyewitness evidence.²⁶ Because the rules of 1969 were not enforceable as law, the intention of government to give suspects rights via regulation of police practice did not become a reality. Had the modifications to recommended procedure been mandatory, major changes in the way identification evidence was obtained would have occurred. However, the lack of effective enforcement supported the *status quo* and miscarriages of justice began to come to light in the early 1970s.²⁷ An in-depth examination of identification issues was long overdue, and the result of two wrongful convictions which came to light in 1974 was the formation of a Departmental Committee chaired by Lord Devlin.²⁸ When the Committee reported in 1976, it proposed a number of reforms designed to prevent further wrongful convictions.

The Devlin Report was particularly concerned with the convictions of two men, Luke Dougherty and Laszlo Virag, whose cases resulted in considerable public anxiety in

²⁴ Contained in the preamble to the Circular.

²⁵ It was, however, open to the defence to invite the judge to exclude evidence obtained from an unfair parade under a general discretion to exclude evidence prejudicial to the defence. Such an exclusion of evidence (as acknowledged by the Devlin Report at paragraph 5.43) was a rarity. Perhaps if the exclusion of unfairly obtained evidence had been included as a possible sanction in Circular 9/1969, the discretion would have been exercised more widely.

²⁶ Hain, P., *Mistaken Identity* (1976, London: Quartet), 131.

²⁷ In 1972 the Criminal Law Revision Committee (CLRC) published its Eleventh Report, acknowledging that "mistaken identification [is] by far the greatest cause of actual or possible wrong convictions" and that "there is also the difficulty that the identifying witness may very likely be obviously perfectly honest and his evidence is likely to seem entirely convincing". The CLRC proposed a statutory requirement of a judicial warning of care to the jury when considering convicting on the basis of disputed evidence of identification and discussed the issue of corroboration of eyewitness testimony, matters examined in Chapter 7 of this thesis. Despite far-reaching recommendations regarding the presentation of eyewitness evidence in court, the committee made few suggestions regarding police procedure in gathering that evidence: see Criminal Law Revision Committee Eleventh Report (Evidence) 1972, Cmnd. 4991.

²⁸ The Devlin Report, *op.cit.*, (1976).

1974.²⁹ In order to assess these cases, the Committee undertook a review of both the existing rules regarding the conduct of identification parades³⁰ and a limited amount of the available psychological literature, concluding that "honest but mistaken identification by prosecution witnesses was the prime cause of the miscarriages of justice".³¹

Although the Dougherty and Virag cases were the catalyst for the appointment of the Devlin Committee, a background of other mistaken identifications had contributed to public concern about eyewitness evidence.³² Commentators acknowledged that the memorandum of 1969 could be effective if it contained mandatory provisions.³³ As Cole and Pringle stated:³⁴

"The question is not really one of changing the 1969 memorandum in any radical fashion but of devising means of encouraging the police to follow it... The National Council for Civil Liberties has favoured a solution where the procedures are made statutory. Another way is for the courts to reject all identification evidence in cases where the procedures have been disregarded."

The responsibility placed on the Devlin Committee was to find solutions to the problems which had prompted the furore over identification evidence in 1974. In discharging this responsibility, the Committee examined procedure concerning identification at three stages:

²⁹ In 1974 and 1975, a number of television programmes and newspaper articles documented the unreliability of eyewitness identification. A detailed discussion of the Virag and Dougherty cases can be found in chapters 2 and 3 of the Devlin Report.

³⁰ The Devlin Committee also considered three other committee reports which referred to identification issues: Criminal Law Revision Committee Eleventh Report 1972 (Cmnd 4991); Second Report on Criminal Procedure in Scotland 1975 (Cmnd 6218), "The Thomson Report" and The Report No.2 Interim of the Law Commission Of Australia on Criminal Investigation, which was published towards the end of the Devlin Committee Inquiry.

³¹ The Devlin Report (1976), op.cit., para. 1.2

³² Some of these cases were documented by popular authors such as Ludovic Kennedy (*A Presumption of Innocence* (1976, London: Gollancz) on the case of Patrick Meehan, accused of robbery and murder in 1969) and Paul Foot (*Who Killed Hanratty?* (1971, London: Jonathan Cape) which was one of many books documenting the A6 murder in 1961, for which James Hanratty was hanged), thereby increasing the pressure on the government to take some kind of action.

³³ For example Hain (1976), op.cit., and Cole and Pringle (1974), op.cit.

³⁴ Cole and Pringle (1974), op.cit., 177. This text concerns the investigation of "The Barn Murder" of 1972, where witnesses were shown photographs of the suspect, George Ince, before an identification parade took place. Ince was acquitted, but the case was the subject of an internal police inquiry and attracted considerable media attention, causing problems for the government in the early 1970s.

trial, pre-trial and post-trial, and appeared to be in agreement with commentators of the time in emphasising the importance of rules governing the conduct of identification parades. As the Committee put it:³⁵

“When the police arrest a man because he answers to the description of one who has been seen to commit the crime, they want to get a positive identification as soon as they can... A witness, once he has identified the suspect on a parade, is unlikely to be shaken at the trial. So the fair conduct of a parade has become a matter of great concern to the defence. Hence the necessity for rules.”

Despite this promising start, the Devlin Report proved to be a disappointment to many of those who had pushed for reform. Few radical recommendations emerged from the Committee's deliberations.³⁶ The Committee put forward a number of recommendations concerning the treatment of identification evidence once a case got to court, but little regarding the pre-trial police procedure for conducting parades. Its aim was to improve the enforceability of procedures for conducting identification parades, rather than reforming their content. Whilst acknowledging that "the parade...is not a scientific test and cannot safely be treated as one",³⁷ the Committee could find no real defect in identification procedures which substantially increased the risk of error³⁸ and was convinced that identification parades were being operated under a system which was working well.³⁹ This reflected the prevailing opinion that the 1969 Circular needed to be refined but that, if it were adhered to by police officers, it would work well. The Committee's desire for a standard code was finally implemented in 1984, with the first edition of Code of Practice D. Code D contains the salient points of the 1969 Circular and requires a standard approach to the conduct of identification procedures for all of the police service.

³⁵ Devlin Report, op.cit., para.1.10.

³⁶ The recommendations of the Devlin Committee are contained in chapter 8 of the Report.

³⁷ The Devlin Report (1976), op.cit., para. 5.31

³⁸ Ibid., para.8.2.

³⁹ See, for example, paragraphs 5.31 and 5.44.

Although the Committee recommended little change to existing working practices regarding identification parades, a number of proposals were made which are now included in Code of Practice D. For example, the Committee suggested that identification parades should be photographed, thereby allowing the court to decide whether the suspect stood out from the other members on the parade.⁴⁰ Due to objections by the police that parade volunteers would balk at having their photograph taken by the police, the proposal did not become a Committee recommendation. Rather, it was suggested in paragraph 8.15 that tests be conducted to assess the practicality of such a rule and that, if these proved to be successful, it could then be implemented. So, in one of the few areas where new ground could have been broken, the Devlin Committee took the middle road. The question of photographing identification parades was a hotly debated issue until April 1995, when taking a photograph of each identification parade became standard police practice.⁴¹ Evidence from psychologists that witnesses may feel under pressure to make a positive identification was used as a basis for the Devlin Committee recommendation that the officer in charge of the parade should tell witnesses, immediately prior to viewing the parade, that the offender may or may not be present.⁴² The recommendation has become part of current procedure⁴³ and gives witnesses reassurance if they cannot make a positive identification.

In attempting to ensure that a breach of the rules governing identification procedures should result in more than judicial comment, the Committee was faced with a choice: either a

⁴⁰ At paragraphs 5.47 and 8.15. The recommendation of a black and white photograph in preference to a colour one seems strange: had James Hanratty's parade been photographed in black and white, could the jury have noticed that his hair "stood out like a carrot in a bunch of bananas"?

⁴¹ The amended Code of Practice D provides for the parade to be photographed or video recorded at D2.5 and Annex A19.

⁴² Devlin Report, *op.cit.*, para.5.63 and para.8.16. The Committee was at pains to point out that the fears of psychologists were not borne out by the statistics, and it seems that the recommendation was a way of paying mere lip-service to psychological evidence. It is unclear how the Committee could be so certain about the validity of the findings of psychologists.

⁴³ Code of Practice D, Annex A 14

breach should result in the automatic exclusion of identification evidence unless it could be proved that such a breach was immaterial; or the matter should be left to the discretion of the trial judge. It opted for the middle road:⁴⁴

“By concentrating upon the object of the rules as a whole rather than on the wording of any one of them we think that there can be avoided on the one hand too severe a rigidity and on the other too wide a discretion”

The Committee recommended that the rules be given the status of the Highway Code. Trial judges would therefore have to have regard to the rules but would not be confined by them. Trivial breaches would not preclude the admissibility of identification evidence if the object, namely to test a witness's ability to identify the suspect, had been fulfilled. Thus, the Devlin Committee placed the decision about the effect of breaches of the rules firmly in the hands of the judiciary.

The Devlin Report had limited effect. The Government's response was to issue a new Circular in 1978 which had exactly the same status as that of 1969, namely that⁴⁵

“Failure to observe its provisions may well result in the judge, in his summing up to the jury, commenting on the evidence so obtained.”

The Government had effectively ignored the main plank of the Devlin Committee recommendations. Whilst some reform was undertaken, such as telling the witnesses that the person they saw might not be on the parade⁴⁶, this was largely worthless when the major problem was adherence to the rules by police. A harsher sanction than judicial comment was required.

⁴⁴ Devlin Report, *op.cit.*, para. 5.86

⁴⁵ "Identification Parades and the Use of Photographs for Identification", 1978, Circular 109/1978, 3.

⁴⁶ *Ibid.*, rule 18, p.6. The standard forms advocated in the Devlin Report were also recommended for use by police forces. Examples of these are the Notice to the Suspect and the record of the identification

It can be seen that the law governing identification procedures has developed piecemeal throughout the 20th century, with change usually occurring only where public opinion demanded it. Even though the recommendations contained in the Devlin Report were modified, they have influenced the procedure in use today. They formed the first steps to a judicial warning to the jury in identification cases as well as a standard police Code of Practice. The status of rules governing identification parades was at last raised with the implementation of the Police and Criminal Evidence Act 1984 Code of Practice D.⁴⁷ A breach of these rules could result in the exclusion of identification evidence under s.78 of PACE.

Code of Practice D

Code of Practice D governs all identification procedures conducted by the police service. However, as is the case with s.78 PACE and the *Turnbull* warning, many suspects will not be afforded the protection of PACE procedures because they are involved in a minor offence. For example, in *Barnes v DPP*⁴⁸ the defendant was charged with failing to supply a specimen for analysis. The only evidence offered at trial was a dock identification of the defendant by a police officer. It was held that dock identification was customary in the magistrates' court and that "if there had to be an identity parade in every case of disputed identity, the whole process of justice in a magistrates' court would be severely impaired". The judgment clearly derogates from the protective principle in favour of speed and financial expediency. Such derogations may well be justified in very minor cases, although care must be taken that the protections of Code D do not become exclusive to those charged with very serious offending.

parade, to be made available to the defence in all cases where proceedings were brought. Samples of the layout of these forms were included in the Circular at pages 11 to 19.

⁴⁷ There were further recommendations to introduce a statutory scheme before this time, however. The 1981 Royal Commission on Criminal Procedure ("The Phillips Report") did not make any detailed proposals because of the Government intention to avoid reform in the area. However, the Committee did briefly recommend that, in line with their general approach, identification procedures should be subject to statutory control (p.69, paragraph 3.138).

The provisions considered here are contained in Code D2 and Annexes A to E. The various annexes to Code D give procedural guidance to Identification Officers regarding the conduct of identification parades, group identifications, video identification, confrontation and the showing of photographs. PACE Codes of Practice are issued under s66 of PACE, and s67 governs the revision and issue of Codes of Practice by the Home Secretary. Although breach of the Codes may result in exclusion of evidence and disciplinary proceedings against the officer involved, s.67 provides protection for police officers from civil and criminal proceedings brought on the basis of the breach alone.

A parade is to be offered, where practicable, before any other method of identification procedure is considered. It is well established that a confrontation is only to be considered where all other options fail.⁴⁹ This reluctance to allow the use of confrontations as a method of obtaining identification evidence has been a common feature of the recommendations of various Committees and Circulars dealing with the issue of eyewitness identification.⁵⁰ The primary importance of the identification parade is therefore beyond dispute. The hierarchy of procedures under Code D is provided by D2.1 and D2.3:⁵¹

“2.1 In a case which involves disputed identification evidence, and where the identity of the suspect is known to the police and he is available, the methods of identification by witnesses which may be used are:

- (a) a parade;
- (b) a group identification;
- (c) a video film;
- (d) a confrontation.

⁴⁸ *The Times* May 6 1997

⁴⁹ Evidence gained from a confrontation is viewed by the courts as less reliable than that gained by other methods of identification. Examples of case law illustrating the preference for identification evidence gained by the use of a parade rather than a confrontation include *Nagah* [1991] Crim.L.R. 55 and *Britton and Richards* [1989] Crim.L.R. 144.

⁵⁰ Such as the Devlin Report and the Home Office Circular 9/1969.

⁵¹ There has been some discussion recently of whether Code D covers voice identification procedures: see *R v Hersey* [1998] Crim.L.R. 281; and *R v Gummerson and Steadman* [1999] Crim.L.R. 680. Although it has been held that Code D has no application in voice identification cases, some provisions are necessary, and research on earwitness evidence should be utilised. In New Zealand, new procedures proposed by the Law Commission in the Evidence Code apply to both voice and visual identification.

2.3 Wherever a suspect disputes an identification, an identification parade shall be held unless paragraphs 2.4 or 2.7 or 2.10 apply. A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents.”

Paragraph 2.4 allows the use of other procedures where it is not practicable to hold a parade; paragraph 2.7 for a group identification where a parade cannot be held, and paragraph 2.10 for a video identification where a parade or group cannot be organised.

The identification parade has long been viewed as the best method of gaining reliable eyewitness identification, because the suspect can be seen in a real setting, amongst people who are similar in general appearance. Because it is live, witnesses can view the suspect in three dimensions, as opposed to the two dimensional images of photographs and video. The parade also allows witnesses to see the general build of the suspect, which the head and shoulders photographs in “mug books” cannot do. Finally, witnesses can sometimes be allowed to see parade members move or speak, allowing for the memory to be triggered by contextual cues. There is limited support for the pre-eminence of the identification parade from the findings of psychological research. It has been found in some studies that live procedures produce more reliable results than video or photographic representations.⁵² However, a review of eyewitness identification experiments by Cutler, Berman, Penrod and Fisher found that the use of live, video or photographic procedures made very little difference to eyewitness accuracy:⁵³

“[T]here is no reason to believe that live lineups, videotaped lineups or photo arrays produce substantial differences in identification performance...it is not worth the trouble and expense to use live lineups.”

In light of these findings, the reliance on the identification parade as the most reliable form of identification procedure must be questioned. Witnesses are likely to be more comfortable

⁵² See Cutler, B.L., Fisher, R.P., and Chicvara, C.L., “Eyewitness identification from live versus videotaped lineups” (1989) 2 *Forensic Reports* 93; Egan, D., Pittner, M., and Goldstein, A.G., “Eyewitness identification: Photographs v. live models” (1977) 1 *Law and Human Behavior* 199.

⁵³ Cutler, B.L., Berman, G.L., Penrod, S.D., and Fisher, R.P., “Conceptual, practical, and empirical issues associated with eyewitness identification test media” in D. Ross, J.D. Read and M.P. Toglia *Adult*

identifying an offender when viewing a video than when facing a live parade, and the expense and time spent on live parades could be avoided. With advances in technology, videos can represent three dimensional moving images and the use of video libraries should be considered. This would reduce the problems in finding volunteers where the suspect is singular in appearance, would allow the police to arrange procedures quickly, and would be more convenient for witnesses.⁵⁴

(i) *The Conduct of Identification Parades*

Code of Practice D is detailed in its provisions for the conduct of identification procedures, including identification by body samples and by fingerprints. However, this thesis concentrates on identification by witnesses and so the provisions for other forms of identification are not discussed.

Identification procedures should be carried out by an identification officer, who is in uniform and of the rank of inspector or above. This reflects the importance of the decisions the identification officer has to make, such as when a parade is impracticable and when a group identification, video identification or confrontation should be held. The officer is also responsible for delivering the Notice to the Suspect and making a record of the parade.

The psychological experimentation discussed in chapter two is reflected in some aspects of Code D. For example, at Annex A:14, the Code implements the psychological finding that the use of non-biased instructions may reduce the incidence of relative judgments. Where the Code is followed properly by the officers conducting a live parade, such provisions accord well with the protective principle, as they potentially offer increased protection for suspects from witnesses who pose a risk for misidentification.

Eyewitness Testimony: Current Trends and Developments (1994: Cambridge University Press), 163, at 181.

⁵⁴ The provision of video libraries instead of live parades is discussed further in Chapter 6.

Annexes A,B,C and E contain detailed guidelines about the conduct of identification procedures. These include provisions for the suspect's solicitor to be present and fully informed; for the suspect to choose his or her own position in a line of "at least eight people (in addition to the suspect) who so far as possible resemble the suspect in age, height, general appearance and position in life";⁵⁵ for the instructions to and treatment of witnesses; and for the documentation of the parade, group, video or confrontation. Annex D governs the showing of photographs, which should only be attempted where the identity of the suspect is not known to the police.⁵⁶ Nothing in Code D prevents video film or photographs of an incident being shown to the public at large to trace suspects, allowing for release of security videos and photographs on programmes such as *Crimewatch*.

Several cases have highlighted the potential problems encountered when an eyewitness is shown photographs.⁵⁷ The practice was discussed at length by the Devlin Committee.⁵⁸ It may be necessary for the police to show photographs to a witness when there is no known suspect for whom an identification parade can be held. However, if this is done and there is a subsequent identification parade, then by virtue of Code D2.15(viii) and Annex D paragraph 7, the identification officer must explain to the suspect that photographs have been shown to a particular witness. This is the case whether or not the witness identified the suspect from photographs shown. Disclosure of all information is necessary, because the defence may benefit from the knowledge that a witness attending an identification parade has previously chosen someone other than the suspect from a photographic file. Alternatively, if a witness had chosen the suspect from photographs, then any positive identification made at a parade would not prove that the witness was confirming that the

⁵⁵ Code D, Annex A:8.

⁵⁶ The annex governing the showing of photographs also covers photofit and identikit.

⁵⁷ The procedures governing the showing of photographs, which should only be implemented where the identity of the suspect is not known (D2.18), are found in Annex D of Code of Practice D.

suspect was the offender. Rather, it would merely illustrate confirmation that the suspect was the person seen in a photograph.⁵⁹ In accordance with the recommendations of the Devlin Report⁶⁰, if one witness makes an identification from photographs, photofit, identikit or similar picture, then other witnesses should not be shown photographs at all but should attend a formal identification procedure.⁶¹ This appears to be straightforward. However, there is a considerable risk of a breach of Code D where the identification officer is reliant upon the investigating officer for information. Assuming that witnesses will remember whether they have been shown photographs, the easiest route may be to ask them as well as the investigating officer. Early detection of any lack of information may serve to avoid a breach of the Code of Practice.

Code D also attempts to avoid the contamination of witnesses' memories by providing in Annex A:12 that:

“The identification officer is responsible for ensuring that, before they attend the parade, witnesses are not able to... communicate with each other about the case or overhear a witness who has already seen the parade...”

Despite the requirement of "before they attend the parade", the provision can realistically only act to prevent witnesses discussing the case after they arrive at the police station to attend an identification procedure. There is nothing that can be done to prevent discussion before this time. Many eyewitnesses will have been victims or observers of the same offence as their family members, friends or colleagues. Because of this, there will be opportunities for witnesses to discuss the case outside of the police station and before any

⁵⁸ The Devlin Report, op.cit., paragraphs 5.16-5.28.

⁵⁹ It would, however, be difficult for the defence to argue this point in court, as any discussion would highlight to the jury that the defendant was on police photographic files and therefore had a criminal record. Similarly, where a witness identifies a suspect from a photograph and makes a subsequent positive identification at a parade, it is usually only the evidence from the identification parade which will be admissible. If an identification from photographs was admissible, it would indicate that a suspect had a criminal record: see *Bleakley* [1993] Crim.L.R. 203 for an example of the circumstances in which evidence from photographic identification will be admissible.

⁶⁰ Devlin Report, op.cit., at para.8.8

⁶¹ Code of Practice D Annex A, paragraphs 5 and 6.

identification procedure takes place. In other words, the damage could already be done long before witnesses arrive for an identification parade. As the time between the offence and the identification parade increases, there will be more opportunity for discussion. Where discussion takes place, the original memory may be lost completely, and replaced by a memory adjusted to fit with other eyewitnesses' perceptions of what happened and what the offender looked like.⁶²

Annex A:12 is a provision which, whilst being the ultimate responsibility of the identification officer, is necessarily delegated to other police officers.⁶³ The officers with the responsibility for looking after the witnesses will often be unfamiliar with the provisions of Code D.⁶⁴ The result of this could be that there is cross-pollination of memory even where witnesses do not know each other. Even where witnesses claim that they have not discussed the case, if the witness officer leaves the room then there will be the danger that any identification evidence gained on that day will be excluded at a subsequent trial. It is probable that many investigations are threatened because of the ignorance of witness officers,⁶⁵ but often a breach of Annex A:12 will never come to light. After all, if the witnesses do not mention it, who will? There is obvious potential for the integrity of the criminal justice process to be undermined by poor adherence to Annex A:12. Each time the provision is breached, there is the possibility that unfairness to the suspect will result, and yet may never be recorded or rectified in any later proceedings.

⁶² For a summary of research on retention intervals and forgetting, see Cutler, B.L., and Penrod, S.D., *Mistaken Identification* (1995 Cambridge University Press), 105-106.

⁶³ The delegation to other officers must take place because the identification officer will be busy arranging the identification procedure and ensuring that the suspect receives the Notice to the Suspect (D2.15).

⁶⁴ This is because the witness officers are rarely trained staff dedicated to the task of assisting with identification parades.

⁶⁵ This observation is based on the my own studies in Birmingham, where there were a number of instances when police officers responsible for ensuring that Annex A:12 was complied with left the room altogether, giving witnesses the opportunity to talk amongst themselves. Anecdotal evidence from the identification officer in Birmingham confirms that this is one of the most common problems encountered by identification suite staff.

(ii) Recent changes to Code D

The most recent revision of Code D resulted in few fundamental changes to police procedure.⁶⁶ However, two of the new provisions are particularly important and are long overdue. These concern the photographic recording of identification procedures⁶⁷ and the recording of the first description made by the witness⁶⁸. These follow recommendations made by the Royal Commission on Criminal Justice in 1993.⁶⁹ In addition, a new annex (Annex E) has been created to deal specifically with group identifications, which were previously dealt with under Annex A. The old versions of the Code merely provided that a group identification should be run, as far as possible, in exactly the same way as an identification parade. The lack of detail as to how this was to be achieved was clearly unsatisfactory.

The introduction of the requirement for a photograph or video recording to be taken of identification parades has been the subject of debate for a number of years. Until the 1995 revision of Code D, photographs were taken only where the suspect was not legally represented and had no friend present at the identification procedure. A photographic record allows the jury or magistrate at any subsequent court proceedings to assess the fairness of the identification procedure for themselves. This is particularly important where it is claimed that the volunteers on an identification parade were not sufficiently similar in general appearance to the suspect and therefore that the parade was unfair. Of course, the provision will also be helpful to the prosecution. Where the identification parade consisted of a satisfactory line-up, any evidence resulting from it could only be increased in value.

⁶⁶ Although there have been subsequent revisions of the Codes of Practice, the most recent being of Code A in March 1999, no revisions to Code D have been undertaken since 1995.

⁶⁷ At D2.5

⁶⁸ At D2.0, D2.15(x), Annex A:2A, Annex B:8A, Annex C:2A, Annex D:1A and Annex E:11.

D2.0, which provides that the police should make a record of the first description given by the witness, has also been the subject of much debate.⁷⁰ Whilst it is acknowledged that witnesses will often find it easier to recognise a suspect than to recall a description verbally⁷¹, it is important to be able to compare the original description given by a witness with the actual appearance of a suspect. Where an identification parade is assembled on the basis of general appearance, a witness may recall certain features which the volunteers on the parade do not share with the suspect. The witness would be likely to choose a parade member who shares those features. This creates the danger of an unfair identification parade and regard to an original description could foresee and attend to the problem. This is because those recruiting volunteers would be able to refer to features which were particularly striking to the witness rather than merely recruiting on the basis of a description of the suspect. Psychological research also indicates that matching the volunteers on the parade to the original description given by the witness is a better method of constructing a parade than matching to the appearance of the suspect.⁷² However, suspects may not match the description given by the witness and it is important to ensure that they do not stand out on the parade. The practical use of matching volunteers to the original description of the witness is therefore limited.

Under D2.0, the defence will also have access to the original description given by the witness before the identification procedure commences. This is important, as a legal representative will then be able to look at the witness' original description when helping the

⁶⁹ The Royal Commission on Criminal Justice Report ("The Runciman Report") (1993: London HMSO) Cmnd 2263, chapter 2, para.10.

⁷⁰ The idea was proposed by the Criminal Law Revision Committee in its 11th Report, op.cit., at paragraph 196, and was discussed by the Devlin Committee at paragraphs 5.06-5.15. See also Heaton-Armstrong, A., "Identification: Descriptions of suspects" [1986] *Criminal Law Review* 215.

⁷¹ However, the method of questioning used may affect the reliability of verbal recall and any subsequent recognition. For example, see Loftus, E., *Eyewitness Testimony* (1979, Cambridge: Harvard), chapter 5.

⁷² Luus, E., and Wells, G., "Eyewitness identification and the selection of distractors for lineups" (1991) 15 *Law and Human Behavior* 43; Mayer, C., "Due process challenges to eyewitness identification based on pre-trial photographic arrays" (1994) 13 *Pace Law Review* 815.

suspect to choose volunteers from the pool offered by the police. In this way, volunteers sharing some of the features mentioned in an original description of an offender may be chosen instead of those who merely look like the suspect.

(iii) The Right to an Identification Parade and the Need for Consent

In examining the effect of the provisions of Code D on eyewitness identification, it is important to consider when an identification parade should be held. Code D2.3 and D2.4 offer some assistance in this consideration. Code D2.3 provides that:

“Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents... A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents.”

The 1995 redrafting of the Codes of Practice⁷³ saw a change in this provision, withdrawing the explicit right of the suspect to request an identification parade.⁷⁴ In most cases the right will remain implicitly, because if a parade is to be held whenever there is disputed identification evidence, then the suspect can request an identification parade by disputing identification evidence in the case.⁷⁵

Difficulties may occur in deciding when identification evidence is disputed. Where the police decide not to conduct a parade, defendants may argue that they should have the right to adduce identification evidence in their favour. It will be useful to the defence if they can

⁷³ Effective from 10 April 1995.

⁷⁴ This provision is discussed briefly below with regard to the case of *Nagah* (1991) 92 Cr App R 344. As the provision was mandatory, where a suspect insisted on a parade the only valid ground for refusal was that it was impracticable to hold one. That was the case even where there had been a prior street (or chance) identification, as discussed below and in *Brown* [1991] Crim L.R. 368, or where recognition is claimed, for example in *Conway* [1990] Crim. L.R. 402. (For a discussion of the difference recognition evidence makes, see the provisions offered by *Turnbull* [1976] 3 All ER 549). However, the right to request a parade would not extend to the right to request any other form of identification procedure, such as a group identification or confrontation. The decision regarding the conduct of these types of identification procedure has always been at the discretion of the identification officer, see *Joseph* [1994] Crim L.R. 48.

⁷⁵ The entitlement of a suspect to an identification parade, where this is practicable, was evidenced in *Allen* [1995] Crim.L.R. 643, where the police had seen no need to conduct an identification parade, resulting in a breach of D2.3 which was admitted by the prosecution.

show that a number of eyewitnesses failed to identify the accused. However, if the police have no obligation to run a parade, then the defence could have difficulties in securing the cooperation of witnesses. This will almost certainly be the situation where the witness is also the victim. It is usual that it is the police who will first approach a witness and a subsequent approach by defence counsel may be treated with suspicion. Furthermore, the police are the only agency with the resources to carry out evidentially admissible identification parades. Whilst the balance of resources is undeniably to the advantage of the prosecution, it is understandable that police funds would be reluctantly spent on aiding a defendant who insisted on staging an identification parade which the police and Crown Prosecution Service view as unnecessary.⁷⁶

In *Hope, Limburn and Bleasdale*⁷⁷, the Court of Appeal held that, where the defendant admits to being present at the scene of the offence but denies involvement, then there is no disputed identification. It was a jury decision as to whether the witness was correct in stating that the defendant was involved. In cases where the defendant admits presence but denies involvement, the requirement for a *Turnbull*⁷⁸ warning may also be negated.⁷⁹ But it does not follow that there will be no need to hold an identification parade. If, as in *Hope, Limburn and Bleasdale*, the defendant denies assaulting, but admits begging from a victim, then the nature of the identification evidence is clearly disputed and a parade may be of benefit, certainly to the defendant. *Hope* seems to suggest that where the police decide that an identification parade is not needed, then there is no compulsion for them to arrange one. The refusal to arrange a parade would be on the basis that there is no disputed

⁷⁶ It would be a very rare situation where the Crown Prosecution Service would go ahead with a prosecution when there is disputed identification evidence yet no identification procedure has been carried out (However, this does happen, as can be seen in *Allen* [1995] Crim.L.R. 643 and in *Graham* [1994] Crim.L.R. 212). This may be to the consternation of police personnel, who view CPS requests for identification parades as an unnecessary expense in some cases, such as where there has been a street identification or where the witness knows the suspect well.

⁷⁷ [1994] Crim.L.R. 118.

⁷⁸ [1976] 3 All E.R. 549.

identification,⁸⁰ even though it is possible that, on viewing an identification parade, the witness would decide that the defendant was not involved.

Although an identification parade is a source of hope for the suspect in disputing an identification, it is a slim one because many witnesses, in recognising the defendant as someone who was present at the scene of the crime, would equate presence with involvement. Psychologists term the phenomenon “unconscious transference”.⁸¹ Where a stressful incident has occurred, the memory of a person may remain without an accompanying memory of the actions of that person. It remains that there is disputed evidence of identification in such a case. This disputed evidence would be that of the role played by the defendant, rather than the usual question of whether the defendant was present at all. As Code D stands,⁸² to deny a defendant an identification parade in those circumstances, when one is practicable, would surely constitute a breach of D2.3. This is because the purpose of an identification parade is as much to afford the defence the opportunity of challenging the case against the suspect as it is for the prosecution to gain evidence to strengthen that case. Although there are practical difficulties in determining the limits of the ability to demand an identification parade, as well as problems for suspects who wish to take up the opportunity to test an eyewitness without the support of the police (such as the difficulty in securing witness cooperation), the ability to challenge the case against you by whatever practicable means is a vital element of the integrity principle. Without it, suspects who are at a resource disadvantage at the outset would see protection from misidentification reduced, and the fairness of the process would be open to question.

⁷⁹ See *Oakwell* [1978] 1 All ER 1223 and *Curry and Keeble* [1983] Crim.L.R. 737.

⁸⁰ *Hope, Limburn and Bleasdale* was held before the current version of Code of Practice D was introduced, but it appears that the situation is the same.

⁸¹ A number of examples of bystanders being identified as offenders can be found in Loftus, E., *Eyewitness Testimony* (1979), op.cit., 142-144.

⁸² To change this would mean excepting the *Hope* type of situation from Code D.

In addition to a requirement of disputed identification, Code D2.3 provides that "an identification parade shall be held if the suspect consents". Where identification evidence is disputed or where the investigating officer sees a need for an identification parade, but the suspect does not consent to one, then the police have the option to proceed covertly with some other form of identification procedure.⁸³ Before this is considered, the police will often attempt to arrange a group or video identification with the suspect's consent.⁸⁴ It may be that the suspect refuses to take part in an identification parade (for example if he or she is unhappy with the volunteers offered by the police), but does consent to a group identification. Similarly, under Code D2.10 and D2.11, suspects may consent to a video identification where they have refused to take part in either a parade or a group identification. In such a case a video identification would almost certainly be conducted with the suspect's consent⁸⁵ in preference to covertly arranging for the suspect to be identified by any other method. It is clear that the last resort is a confrontation, which should only be held where all other methods are impracticable.

Where a suspect does not consent to any identification procedure, it would be almost impossible to proceed with an identification parade. But a group identification or confrontation can be organised without the suspect's knowledge. This step can also be taken where the suspect has agreed to take part in an identification procedure but has failed to attend.⁸⁶ In practice, a suspect will be given more than one chance to attend an identification parade and it may take up to three non-attendances for the police to decide that they will proceed by means of a covert identification.⁸⁷

⁸³ The option to proceed covertly was introduced specifically for the first time with regard to group identifications in the 1995 revision of Code D, at D2.7 and Annex E:4 and 33.

⁸⁴ Code D2.6.

⁸⁵ In this way the suspect would be given the safeguards contained in the Notice to the Suspect, under D2.15 and D2.16, see below.

⁸⁶ Under Code D2.6 for identification parades and Code D2.7 for group identifications.

⁸⁷ This is what happened at an Identification Suite in the West Midlands when police procedures were observed over a period of several months. There will be more than one chance for a suspect to attend, partly

It is in the best interests of all parties involved that suspects consent to the procedure. Suspects will at least have some control over the people with whom they are viewed by the witness. For example, when attending an identification parade suspects can exercise some choice over the volunteers who sit in the line, choosing eight from a pool.⁸⁸ If a non-stationary group is arranged suspects can choose when to walk past the witnesses and in a stationary group will be able to decide where to stand. Similarly, a video identification will often involve a limited choice regarding the other people who will appear on film with suspects. Where suspects consent, certain rights are conferred, such as the right to object to any part of the procedure.⁸⁹ The police will also benefit from obtaining suspects' consent, because if evidence does result from an identification, it will be all the stronger for having resulted from a formal, organised procedure. As evidence from an identification parade is regarded to be more reliable than that resulting from any other method of identification, the police prefer to organise identification parades. Where there is no option but to proceed with an identification procedure without the consent of the suspect, the identification officer will often opt for a covert group or video identification rather than organising a staged confrontation, simply because any evidence resulting from the procedure will be stronger if the case goes to court.

because then the court will realise that the police have given the suspect every opportunity to participate in a formal identification procedure. A suspect may be able to offer a good reason for not attending one or even two identification parades, but three non-attendances would be difficult for a suspect to explain away. Giving suspects several chances to attend therefore gives the police a justification for continuing covertly whilst feeling that their actions will be evidentially sound.

⁸⁸ Usually this pool consists of at least twelve people. The size of the pool depends on the relative singularity in appearance of the suspect. In Birmingham, the identification officer aims to have a pool of sixteen. However, success in constructing a good parade will not be measured by how many people the suspect has to choose from, but the similarity in appearance to the suspect of the volunteers. From this point, a complete lack of choice where the volunteers are all similar in appearance to the suspect would be preferable to a hundred volunteers who were nothing like him or her.

(iv) *Impracticability*

As well as where suspects do not attend or consent, identification parades may not be able to take place because the identification officer is of the opinion that it is impracticable to go ahead with a parade.⁹⁰ Code D2.4 provides that

“A parade need not be held if the identification officer considers that, whether by reason of the unusual appearance of the suspect or for some other reason, it would not be practicable to assemble sufficient people who resembled him to make a parade fair.”

An identification officer may encounter problems in assembling eight people of similar age, height, general appearance and position in life to that of the suspect.⁹¹ It may be that the suspect is singular in appearance, in which case it is highly unlikely that any breach of Code D2.3 and D2.4 would occur were the identification officer to resort to a group or a video identification.⁹² However, the situation is more problematic where difficulties in assembling volunteers are surmountable given a reasonable amount of time and resources, but where the identification officer fails to arrange an identification parade.

There is a lack of precision regarding exactly when an identification parade will be impracticable and when a breach of the provisions of D2.3 and D2.4 occurs. In *Tomkinson v. DPP*⁹³, a parade was requested, but a group identification was arranged instead. It was held that there was no breach of D2.3 and D2.4 unless the identification officer's decision was unreasonable in the circumstances. An important point raised by the Court of Appeal in this case was that there was a distinction between the inconvenience of assembling people for an identification parade and the impracticability of doing so.

⁸⁹ The rights of the suspect are contained in the Annexes governing the various identification procedures and in the Notice to the Suspect at D2.15.

⁹⁰ Code D2.6 provides that where there is refusal, failure to attend, or impracticability, then a group identification, a video identification, or a confrontation should be arranged.

⁹¹ A requirement contained in Annex A, paragraph 8 of Code of Practice D.

⁹² Indeed, where there is genuine difficulty in assembling a parade, it may be fairer to the suspect to arrange a group or video identification. An example of this can be seen in a Sheffield case where police officers “blacked-up” white men after having difficulty finding suitable volunteers for a parade. The parade was described by the local MP as “a ludicrous procedure”: “Police defend blacked up identity parade” *The Independent* July 26 1997, 7; “Star of the black and white identity parade” *The Times* July 25 1997.

The key to the provision in D2.4 is that the decision is left to the identification officer. If he or she considers that it is impracticable to assemble sufficient volunteers to make an identification parade fair, *for any reason*, then some other method of identification should be employed. This gives a wide discretion to the identification officer, and creates variations of practice throughout the country. For example, identification officers may differ in how much time they think it is reasonable to spend in the search for volunteers. Because of differing practice, a suspect may have the opportunity of standing on an identification parade in one identification suite or police station but not in another in the next town. Whilst this may seem unfair, it is necessary to give the identification officer some discretion regarding the day to day running of identification procedures. It would be impossible for any guideline to cover every situation where it would be impracticable to hold an identification parade.

Guidance on what constitutes impracticability has been given in some measure by case law on alleged breaches of Code D2.3 and D2.4. The lack of suitable volunteers coming forward for identification parades has led to much dispute in court, where the prosecution has claimed that it constituted a ground for impracticability, but where the defence suggest that a breach of Code D occurred. What is clear from these cases is that the discretion of the identification officer is not absolute: there is a requirement of reasonableness involved. In other words, the police are not entitled to conclude in every case that to go ahead with an identification parade is impracticable. In line with the disciplinary and protective principles, some form of a check on the identification officer's discretion is necessary in order to ensure that, in all situations where an identification parade is practicable, one is carried out. Otherwise, situations may arise where another form of identification is used simply because it is easier under the circumstances. Discretion may therefore lead to poor practice, causing

⁹³ [1995] Crim.L.R. 60

identification officers to abandon identification parades in favour of, ultimately, a confrontation.⁹⁴

It has been confirmed in the case of *Penny*⁹⁵ that the lack of suitable volunteers at the time of the identification parade does not necessarily make that parade impracticable. Although the appeal was dismissed,⁹⁶ Stuart-Smith L.J. stated that,⁹⁷

“It does not follow that because insufficient volunteers could not be obtained on that day, it was impracticable to obtain volunteers on another day; nor does the agreement of the appellant to take part in a group identification necessarily mean that he accepts that it is impracticable to hold a parade.”

This seems to suggest that where there are not enough volunteers available for an identification parade on one day, then the identification officer should arrange to try again on another day. Although this may involve considerable inconvenience for the witnesses attending the identification procedure and would be at further cost of police time and resources, it seems to be only fair to the suspect. There is obviously a sensible limit to this: if there is another failed attempt to find suitable volunteers, then it is doubtful that any court would suggest that the police had not fulfilled their duty under D2.4. In practice, many identification officers make more than one attempt to find suitable volunteers. This is

⁹⁴ This problem of unfair practice is addressed in part by a judicial limit to an identification officer's discretion and in part by the provision that the identification officer is not involved in the investigation of the case.

⁹⁵ (1992) 94 Cr.App.R. 345

⁹⁶ It was held that, even if there was a breach of D2.4, then the trial judge had a right to exercise his discretion to allow the evidence (under PACE s78), that a group identification did not necessarily act to the disadvantage of a suspect and that there was no evidence that the police had acted to try and get around the provisions of the Code. It was probably the case that, had the identification evidence been the only evidence, it would not have been admissible. But as there was other, strong evidence against Penny, it was held that the judge had made the correct decision in the circumstances. However, the police could have arranged an identification parade on another day; it was simply that most of the volunteers had been used for an identification parade involving another suspect to the same offence. The identification officer was probably concerned with getting the identification over and done with on that day, not least because to arrange a parade on another day would mean that the witnesses would have to attend again. Although it is true that there is a fine balance between fairness for witnesses and suspects, it is submitted that, if the suspect was not singular in appearance and volunteers could have been found on another day, then a clear breach of Code D2.4 had occurred.

⁹⁷ *Penny* op.cit., at 349

because the police are concerned to safeguard a possible prosecution case, which will only be achieved if it can be shown that everything within sensible limits was done to assemble a parade before resorting to any other method of identification.⁹⁸

It is possible that a parade which would be impracticable on one day may be practicable at another time. In situations where that is the case, it may well be that ignoring future practicability would constitute a breach of Code D2.4. It is submitted that this may have been the case in *Ladlow, Moss, Green and Jackson*⁹⁹, where the prosecution submitted that it would have been necessary for the police to hold 231 identification parades for 21 suspects on a Bank Holiday. While there was obviously a problem in finding volunteers, the police surely did not have to hold the parades there and then. Given a relatively short amount of time to organise volunteers, it is likely that identification parades could have gone ahead. To arrange 231 parades sounds a daunting task, but in effect only 21 parades would have to be organised, as all 11 witnesses could view, one by one, the individual suspects in the same line-up. Confrontation was resorted to instead, and the judiciary showed that it was prepared to invoke the disciplinary principle and use its discretion to exclude evidence to ensure compliance with Code of Practice D.¹⁰⁰ The case seems to be a clear illustration that an identification parade may be impracticable on one day, but not on another.

⁹⁸ This is certainly the case in Birmingham, where two or three attempts are usually be made before a group or video identification is arranged. There may be some justification for not trying further where the suspect is obviously singular in appearance. It could be argued that in such a case, the scheduling of another identification parade would be a waste of time and resources.

⁹⁹ [1989] Crim.L.R. 218

¹⁰⁰ There was no suggestion by the judge that identification parades could be organised on another day. Instead, he felt that there was a breach of Code of Practice D because a group identification could have been arranged rather than a confrontation. However, his assertion that two or more suspects could have been placed within a group of six volunteers showed a lack of comprehension of the provisions contained in Code of Practice D. Annex A, which at that time governed group identifications, clearly stated that the arrangements for a group identification should follow as closely as possible those for an identification parade (at paragraph 19 of the 1st edition of the Codes of Practice), namely that no more than two suspects can be paraded together and that, if two suspects are paraded together, then there should be at least twelve other persons paraded with them.

However, there will be also be a limit to this proposition. If there are too few volunteers to construct a fair identification parade today but there is a good chance that suitable volunteers will be found in six months time, there would obviously be a good case for stating that an identification parade was, for the purposes of Code of Practice D, impracticable. To conclude otherwise, expecting the police to delay the investigation for a considerable length of time, would be unreasonable. This point is illustrated by the case of *Jamel*¹⁰¹, where it was possible to arrange an identification parade, but it would have taken some weeks.¹⁰² The identification officer decided that a parade was impracticable and arranged for a group identification procedure to take place. The Court of Appeal ruled that "practicable" under Code of Practice D involved the question of *when*, as well as if, it was practicable to hold an identification parade. The delay of a few weeks, especially when it may have taken the police a considerable time to arrest a suspect in the first place, is a matter for the concern of both the prosecution and the defence. It is desirable that inaccurate identifications are kept to a minimum and an eyewitness's memory may fade.¹⁰³ However, it is not uncommon for there to be long waiting lists for identification parades.¹⁰⁴ Where a delay is within normal limits then the desire for a swifter conclusion to the identification process should not take over. If a parade is practicable, but does not take place, there is a clear breach of D2.4. The reasonable limits should be based on both national averages and local norms. There has to be a delicate balance between the right of the suspect to have the

¹⁰¹ [1993] Crim. L.R. 52

¹⁰² Similarly, in *Tomkinson v. DPP* [1995] Crim.L.R. 60, a group identification was arranged because it was viewed to be impracticable to arrange two parades involving juveniles in the school holidays. The police doubted they would find enough juveniles and parental consent: a school would be able to give consent, but could not do so in the school holidays. To delay until the start of the school term would not be appropriate due to the seriousness of the charge. The Court of Appeal did not seem convinced by the argument that this was a police policy, but held that there had been no breach of Code D.

¹⁰³ See Cutler and Penrod (1995), *op.cit.*, 105.

¹⁰⁴ For example, officers in the West Midlands have to wait four to eight weeks between booking an identification parade and its taking place.

opportunity of standing on an identification parade and the interests of the public in bringing the investigation swiftly to its conclusion.

Where suspects change their appearance between the time of the offence and the identification parade, the identification officer may decide that the change is so important that a parade is impracticable. Under Code D4.1 and 2.1 (vii) a, suspects are informed when they have their photograph taken at the time of arrest and in the Notice to the Suspect that any significant change in appearance before the identification procedure is attempted may result in evidence being given about the change in court. A change of appearance also allows the identification officer to consider other methods of identification.¹⁰⁵ For minor changes of appearance, a parade should still be practicable, because hats can be worn when hair has been grown or shaved, or sticking plasters can cover small tattoos.

The most common ground for finding that there is a lack of suitable volunteers (and therefore that it is not practicable to hold an identification parade) is that the suspect is of an unusual or "singular" appearance. Indeed, the unusual appearance of the suspect is cited in Code D2.4 itself as a ground for impracticability. The decision as to when it would not be practicable to hold a fair parade for this reason is again left to the discretion of the identification officer. The most striking illustration of the difficulty encountered where a suspect is of a singular appearance can be seen in *R v Campbell and another*.¹⁰⁶ The police may have difficulty in arranging parades where the suspect is a member of a group who form a small percentage of the population, or who are reluctant volunteers.¹⁰⁷ To some extent, this varies from area to area, but some groups tend to be rare in the population or

¹⁰⁵ The prevalence of changes in appearance by suspects is discussed in Chapter 6. See also Bucke, T., and Brown, D., *In Police Custody: Police Powers and Suspects' Rights Under the Revised PACE Codes of Practice* Home Office Research Study 174 (1997 London:HMSO), 50.

¹⁰⁶ [1993] Crim.L.R. 47

¹⁰⁷ There may be a number of reasons, besides mistrust of the police, for reluctance to stand on an identification parade. For example, office workers may not want to give up time in their working day to sit on a parade.

unwilling to volunteer on a national basis.¹⁰⁸ These include black women, white men with red hair,¹⁰⁹ older black males and Rastafarians.¹¹⁰ Rastafarians in particular stand out as the group most reluctant to volunteer to stand on identification parades. *Campbell* is a classic example of the problem, which unfortunately failed to give a solution to the question of how much time, trouble and expense the police should go to before deciding that an identification parade is not practicable.

The identification method used in *Campbell* was a confrontation because, the police claimed, other Rastafarians were not prepared to stand on an identification parade. There would have been too few people in any given crowd who were similar in description to Campbell to warrant a group identification. The Court of Appeal condemned the lack of cooperation between the police and Rastafarians, and found it "deplorable"¹¹¹ that the protection of Code of Practice D was not being extended to a section of the community, albeit because of the attitude of its own members. The court said it was unfair that some members of the public were able to participate in an identification parade and some were not, as standing on an identification parade is part of the process which makes an investigation and any subsequent trial fair. In other words, the integrity of the criminal justice process is undermined where the protective principle is not in place at the pre-trial stage for a particular group in the population. The result is that a suspect who is part of the group who are not given the protections offered to the rest of society is at a disadvantage. It

¹⁰⁸ Although volunteers are paid between £5 and £15 depending on the area in which the parade is conducted.

¹⁰⁹ See, for example, *Knowles* [1994] Crim.L.R. 217. Incidentally, the Court of Appeal in the case thought that the difficulties of assembling a parade may have been overstated, without explaining why it thought this.

¹¹⁰ See the analysis of the interviews conducted with suspects, below, for a further discussion of the groups in society who seem reluctant to act as volunteers, or who are comparatively rare in the population. Each police force has discretion as to how much they pay volunteers. The methods employed to obtain volunteers vary from keeping a number of "regulars", searching for volunteers in public places and recruitment from schools or other organisations, to recruitment with the aid of employment agencies. See "Rich Pickings", *Police Review* 18/09/92, 1725.

¹¹¹ See 156 *Justice of the Peace* (1992), 610.

was for this reason that the Court of Appeal despaired that Rastafarians were denying members of their own community the protection of PACE. The Metropolitan Police Force¹¹² was urged to make greater efforts to ensure that conditions were provided where identifications could be held for Rastafarians. The provisions of Code of Practice D can therefore be seen to be failing for certain sections of the community.

Where there is a problem such as the one in *Campbell*, it is easy for the Court of Appeal to urge that greater cooperation take place: it is difficult to see how it will be achieved. It is possible that some sort of press campaign would help, ideally led by members of those sections of society who are reluctant to cooperate. The act of volunteering to stand on an identification parade could then be portrayed in terms of helping friends and peers rather than aiding the police. However, there are several difficulties with taking such a route. For example, how do the police go about recruiting trusted community members to help with the campaign? How is the campaign run without highlighting, disproportionately, the amount of crime committed by the particular section of the community? Is the long term effort and expense justified when few identification procedures are needed in relation to a group such as Rastafarians? The solution may lie in the introduction of video libraries. When *Campbell* was originally heard, video identification was not an option, but has been since 1991. Whilst a video library of groups such as Rastafarians may take some time to build up, it would offer a better form of identification procedure than a confrontation. It is obvious that cash incentives do not hold enough appeal for the members of these groups. Although incentives must be given, the basic problem must be addressed, certainly in the case of Rastafarians: that of general mistrust of the police. How to do this is another matter, but without doing so, the provisions of Code D offer little protection.¹¹³

¹¹² The statement also applies to any other police force experiencing difficulties in persuading certain groups to volunteer to stand on identification parades.

It can be seen that, where the suspect is a member of a group in society for which the police experience difficulty in finding volunteers,¹¹⁴ it is unlikely that the decision of the identification officer to resort to some other form of identification procedure will be seen as a breach of Code D. It could be the case that, although the police would be unable to recruit suitable volunteers, the suspect would have little difficulty in doing so. Where there is an unexplored possibility of the defence assisting in the recruitment of volunteers, it is doubtful that the identification officer will be seen to have done all that is reasonable to afford the defendant the "right" to a parade and any identification evidence may be excluded under s.78 PACE.

The abstract possibility of allowing defence assistance in the recruitment of volunteers raises a number of questions. For example, does every suspect have the right to bring his or her own choice of volunteers, or does the principle only apply when the police experience difficulty in constructing an identification parade?¹¹⁵ If the former, is there the danger that there will be a resulting dependence upon the defence to recruit volunteers, removing the onus from the police to ensure a fair parade takes place and effectively placing it on the suspect? Another question is whether the defence can decide that they are unhappy with the volunteers presented by the police and insist that they provide their own.

A number of cases have dealt with the extent to which the defence can play an active role in the construction of an identification parade. For example, in *Thorne*¹¹⁶, the suspect had insisted upon substituting a volunteer of his choice, although the police had sufficient volunteers on the identification parade. The Court of Appeal held that it was up to the police to select the volunteers for a parade and not a matter for the suspect. This case was

¹¹³ See Gilchrist, S., "When the parade passes by" (1992) 136 *Solicitor's Journal* 889.

¹¹⁴ This also applies to members of religious groups, such as traditional Sikhs.

¹¹⁵ The identification officer in Birmingham appears to have little objection to the suspect bringing friends or family members to stand as volunteers on the identification parade.

heard before the introduction of PACE. Code D provides that the suspect has the right to object to any person on the parade and that the person would be removed if practicable.¹¹⁷ It seems to follow that, if the suspect has a substitute for the parade member objected to, then it will be practicable to replace the subject of the objection.

The ability of the defence to provide volunteers is the key to the first instance decision in *Gaynor*¹¹⁸, where evidence of identification was excluded on the basis that there was a breach of Code D because the identification officer, in considering the practicability of a parade, had not properly exercised his discretion. The police experienced difficulty in assembling sufficient mixed race males for an identification parade. There was evidence that the defence could have made up the numbers of volunteers in a short time, and it was held that the suspect should have been given 24 hours to assemble a pool of volunteers, as there was no urgency involved. The court went further in *Britton and Richards*¹¹⁹, where it was held that a request of a week to find volunteers should have been acceded to. In addition, the Court stated that the identification officer should himself have considered whether the defence were in a position to help.¹²⁰

The decisions in both *Gaynor* and *Britton and Richards* are fine in principle, but implementation may entail problems in some cases. Firstly, who makes the decision that there is no urgency involved in any particular case? It is the identification officer's job to make any decisions regarding identification. Yet an identification officer cannot be involved in the investigation of the case. The decision as to urgency would therefore lie with the

¹¹⁶ [1981] Crim.L.R. 702

¹¹⁷ At Annex A, paragraph 10.

¹¹⁸ [1988] Crim.L.R. 242

¹¹⁹ [1989] Crim.L.R. 144.

¹²⁰ In an effort to avoid exclusion of evidence in any subsequent prosecution (and also to achieve what they see to be the most reliable form of identification), many identification officers now take the initiative and ask suspects if they will be able to provide volunteers at a rearranged time. The points noted about the

investigating officer, who is supposed to play no part in the identification procedure. To do so may invite the exclusion of evidence in court. Secondly, a number of problems arise even if a case is not viewed as "urgent" for identification purposes because, due to long waiting lists at identification suites, it is likely that some weeks would have elapsed between the apprehension of a suspect and the conduct of an identification parade. Witnesses would have to be asked to attend again, with no guarantee that a parade would go ahead the next time.¹²¹ Further, with the advent of the dedicated identification suite, it would be impossible in many areas to give the suspect a 24 hour period (or indeed one week as in *Britton and Richards*) to find volunteers, as suites are heavily booked in advance. The period would be more likely to be a matter of weeks. This in turn would affect the decision as to urgency.

It can be seen that the courts in *Gaynor* and *Britton and Richards* may have put some pressure on police resources by ruling that the suspect has the right to assist in the gathering of volunteers where the police have difficulty in doing so. However, the cases also highlight the preference for a parade above any other identification procedure, and the willingness of the judiciary to exclude evidence where there is not strict observance of that preference. The problems of delay and busy identification suites could be avoided should the widespread use of video libraries be allowed under Code D. Video parades could be arranged quickly and a national library kept on computer would mean that police forces have access to a wide range of volunteers on video. The efficiency of identification procedures could be greatly enhanced without compromising on the standard of evidence gained.

ruling in *Gaynor* and *Britton and Richards* merely highlight problems which *may* be encountered in doing so.

The courts offer guidance to identification officers regarding best practice in a number of situations. The case law discussed so far has, however, depended on the fact that there has been an effort to conduct an identification parade in the first place. What happens when a formal identification procedure is not attempted has also proved to be a problematic issue.

(v) When is a Suspect “Known? ”: Confrontation, Street Identification and Recognition

Under the provisions of Code D, it is beyond dispute that the identification parade is the preferred method of identification procedure in all cases where the suspect is known. What is not beyond dispute, however, is when the identity of the suspect actually becomes known and whether an identification parade should be held where an informal identification has already taken place.

When a suspect is known to the police, Code D2.0-2.16 applies. However, the Code also offers guidance to police officers on how they should proceed where they do not have a known suspect. Code D2.17 and D2.18 provide that:

“2.17 A police officer may take a witness to a particular neighbourhood or place to see whether he can identify the person whom he saw on the relevant occasion. Before doing so, where practicable a record shall be made of any description given by the witness of the suspect. Care should be taken not to direct the witness’s attention to any individual.

2.18 A witness must not be shown photographs, photofit, identikit or similar pictures if the identity of the suspect is known to the police and he is available to stand on an identification parade. If the identity of the suspect is not known, the showing of such pictures to a witness must be done in accordance with Annex D.”

Whether the suspect is known to the police has caused considerable dispute in the past. For example, in *Campbell*¹²² the defendant was the owner of a car involved in an offence and the police officer who had witnessed the offence identified him from a photograph. The

¹²¹ Whilst witnesses would probably have to attend again if an alternative identification procedure was proposed, at least they would have the reassurance that an identification procedure was almost guaranteed to go ahead.

¹²² [1994] Crim.L.R. 357

Court of Appeal held that, at the time the police officer viewed the photograph, Campbell was not a suspect who was "known" and D2.18 applied. It is submitted that the suspicion of the police officer, Campbell's ownership of the car, and his failure to report it stolen would amount to his being "known" for identification purposes. An identification parade could have been arranged, at which the police officer could have attempted to identify the offender in a way which complied with Code D. Since *Campbell*, Code D has been amended to include direction to police officers on when a suspect will be considered as "known". Note for Guidance 2E provides that a suspect is known where "there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence".

Whilst Code D2.17 and D2.18 allow police officers to use street and photographic identification where they have no known suspect, if the witness identifies someone in the street or from photographs the police will then have a known witness. There is always a possibility that a witness will spot the offender by chance and it would be unfair to exclude evidence where the identification was of such an informal nature. There is very little the police can do to prevent such identifications. Indeed, common sense demands that, even if there was a method of avoiding chance identifications, it should not be employed, as they represent the most natural mode of recognition. However, once the informal identification has been reported to the police, they have a known suspect and, on a literal reading of Code D, should arrange an identification parade. Whether a parade or other procedure under D2.1 has to be held following a street or informal identification has proved to be a problematic issue.

The approach to the matter depends on whether the interpretation of D2.3, that “whenever a suspect disputes an identification, an identification parade shall be held”¹²³ should be approached literally or purposively. As Code D can be revised by the Home Secretary more easily than an Act of Parliament,¹²⁴ there is something to be said for a literal approach: the judiciary should not interfere because the executive could change any provision which undermined the purpose of the Code.

A good example of the purposive approach to Code D2.3 can be found in the case of *Long*¹²⁵, where the driver of a car being chased by the police managed to get away and later reported at the police station that his car had been stolen. The police officers who had witnessed the reckless driving incident entered the police station and immediately identified Long as the driver. Because of the nature of the identification, no parade was held. As a result, the defence sought to exclude the identification evidence, claiming a breach of Code D2.1. It was held that Long did not become a suspect at the police station until the identification had taken place and that D2.1 did not apply.¹²⁶

The logic behind this judgment is clear: it was due to chance that the officers bumped into Long, and Code D was not designed to prevent evidence of informal identifications being

¹²³ Unless it is not practicable to arrange a parade, or a group or video identification is held: if D2.4, 2.7 and 2.10 apply, a parade does not need to be held.

¹²⁴ When the Home Secretary proposes to amend the Codes of practice, he or she publishes a draft and considers representations made upon that draft. The Codes must then be approved by both Houses of Parliament.

¹²⁵ [1991] Crim.L.R. 453

¹²⁶ The situation was compared to the possibility that the police officers would go to Long's address to further their enquiries and then identify him. In such a case there would be no need for an identification parade. The identification at the police station was seen as comparable: Long had voluntarily and unexpectedly entered the police station, as opposed to being asked to attend. (See the case of *Kensett* (1993) J.P. 620, where a speeding vehicle was on lease to the defendant. With this knowledge, the police visited Kensett's home. At this point, it was held by the Court of Appeal, Kensett was a suspect and an identification parade should have been arranged). However, the Court of Appeal did hedge its bets somewhat in *Long*, by stating that, even if there had been a breach of D2.1, then the trial judge had exercised correctly his discretion to admit the evidence under s.78 PACE. This addition regrettably confuses the issue.

presented to the courts.¹²⁷ The important aspect of such informal identifications is that they take place by chance or "accidentally". If the identification of Long had been deliberately devised to enable the police officers to identify him without complying with Code D, it is almost certain that the evidence would have been excluded under the judicial discretion contained in s.78 of PACE.¹²⁸ The reasons for this are twofold: the suspect would have been known, for the purposes of Code of Practice D; and a planned identification which does not comply with Code D would be viewed as a deliberate attempt to evade the safeguards contained in it.¹²⁹

In using the purposive approach, the courts have had an eye to the practicalities of policing. This was illustrated in the case of *Kelly*¹³⁰ where the Court of Appeal held that, when a complainant made a tentative identification within minutes of the offence occurring but in difficult light and at a distance, then the natural and sensible reaction would be to take her for a closer look.¹³¹ An implicit suggestion in this approach to D2.3 is that once a street identification has taken place, there is usually little point in arranging an identification parade, because any positive identification at a parade which followed a street identification

¹²⁷ Rather, Code of Practice D was designed as a coherent set of procedures for the identification of known suspects, and procedures for selecting a suspect by the showing of photographs, or taking witnesses back to the vicinity of the offence (Code D2.17).

¹²⁸ See Chapter 7 for a discussion of the effect of "bad faith" actions by the police on the exercise of discretion under s78 PACE.

¹²⁹ The case of *Oscar* [1991] Crim.L.R. 778 offers a further example. There, a witness identified the suspect within minutes of the offence, after his arrest near the scene. Oscar's appeal was dismissed, because the Court drew a distinction between cases where the police arrest a suspect after some days and those where the suspect is arrested and is subject to a confrontation within minutes. Code D was seen to be required in the former but not the latter type of case. The Court of Appeal unfortunately also referred to the case not as being a true identification case but rather one of identification of clothing. The implication was that a formal identification parade would have been of little use in the circumstances because the suspect would be wearing different clothes. See also *Rogers* [1993] Crim.L.R. 386.

¹³⁰ [1992] Crim.L.R. 181

¹³¹ The commentary in *Kelly* suggests that when police officers take a witness to the suspect within minutes of the offence, it should be seen as a form of confrontation under Code D2.13. This is problematic, because D2.13 is only to be used where the alternative methods of identification under D2.1 are impracticable. It is difficult to see that an identification parade would be impracticable in a case such as *Kelly*. The commentary goes on to recommend that if the idea of confrontation at the scene of the crime is

would only prove that the witness is confirming that the person on the parade is the person they saw in the street. This is certainly a more efficient approach, saving the time and cost of arranging identification parades where suites are already overbooked. In *R v Hickin and others* the Court of Appeal said that “Code D is not to be interpreted in such a way as to require the police to act in a manner which would be an affront to common sense.”¹³²

However, those who favour the literal approach think it fair to offer the suspect a chance to show that the witness cannot make an identification from a parade. This reflects a belief that identification procedures should offer suspects the chance to show their innocence as well as give the prosecution a chance to gain evidence indicative of guilt.¹³³ This point was highlighted by the Court of Appeal in *Brown*,¹³⁴ where the witness had viewed the offender for a few seconds in poor lighting, but made a positive street identification ten minutes after the offence had occurred. At trial, the judge held that the street identification made an identification parade otiose. The Court of Appeal disagreed, pointing out that the witness might have had doubts or identified another person when faced with several men of the same description and that unless it was impracticable to hold a parade, there was no reason not to do so. The view of the Court was that D2.3 is mandatory, and requires an identification parade to be held regardless of what had gone before.

not achievable within Code of Practice D, then the Code should be amended. The recent amendment in April 1995 has not included the suggested provision.

¹³² [1996] Crim.L.R. 584. The court declined to “tie the hands of the police”, but did suggest that where there were two or more witnesses to an offence, only one should be allowed to informally identify the suspect. This would mean that the remaining witnesses could view an identification parade. See also *Bush* Unreported, 27 January 1998; and *Anastasiou* [1998] Crim.L.R. 67.

¹³³ Whilst they followed the decision in *Popat* (discussed below), the Court of Appeal in *R v Whelan* (Unreported 31 July 1998) concluded that there should be some assessment of what is useful to the suspect as well as what is useful to the Crown.

¹³⁴ [1991] Crim.L.R.368. It is the practice in the West Midlands to hold a parade after a street or informal identification is made. For example, one case I observed during interviews with witnesses involved a street identification after an attempted robbery which took place over a period of ten minutes in good lighting. It was deemed necessary to follow up a spontaneous street identification with an organised identification parade. See also *R v Macmath* [1997] Crim.L.R. 586; *R v Wait* [1998] Crim.L.R. 67.

Several recent cases on Code D2.3 have fuelled the debate. In *Popat*¹³⁵ the appellant was convicted of attempted rape and indecent assault following a street identification by the victim. The police did not hold an identification parade. In delivering the judgment of the Court of Appeal, Hobhouse L.J. stated that, in some situations, the holding of an identification parade will be required even where there has been an informal identification, and that the identification officer should exercise discretion in deciding when it would be useful to do so in “the interests of justice”. Further, he said that “Code D is not to be construed as if it expressly provided for all possible situations. It provides a scheme to be followed and principles to be applied.”¹³⁶ The court drew a distinction between the line of cases which had followed *Brown* and *Popat* on the basis that in the latter the identification made was “fully satisfactory”, whereas in *Brown* and other cases D2.3 applied because of some problem with the original identification:¹³⁷

“If it is a one to one identification carried out under good condition and there is no risk of any corruption of the reliability of the identification then made, the identification by the witness is complete and it can truly be said that no further identification is required and no useful purpose would be served by holding an identification parade.”

The court therefore firmly rejected the literal approach to D2.3 in favour of a purposive assessment of whether it would be useful to hold an identification parade. Hobhouse L.J. was firmly of the opinion that it was not correct to say that suspects who had been identified informally should be stood on an identification parade if they continue to dispute the identification.

The decision in *Popat* meant that where an “actual and complete” identification of the accused had been made, Code D2.3 did not apply. Whilst the court acknowledged that the assessment of whether an identification is actual and complete can be difficult to make, and

¹³⁵ [1998] 2 Cr.App.R. 208. See also *R v Malashev* [1997] Crim.L.R. 587; *El-Hannachi, Cooney, Ward and Tanswell* [1998] 2 Cr.App.R 226; *R v Bell* [1998] Crim.L.R. 879, where the conclusion in *Popat* that D2.3 was not mandatory after a street identification was followed, but where a parade would have been useful because the witness identified a group of people rather than individuals.

¹³⁶ *Ibid.*, at 215.

will depend on the facts of the case, it is submitted that the difficulty was underestimated. Furthermore, it is the police who would have to make that assessment. Whether they are either equipped or best placed to make those assessments is questionable. Deciding whether an identification is both “fully satisfactory” and “actual and complete” requires some examination of the fairness of the evidence. That is best left to the judge to consider when determining if evidence should be excluded under s.78 PACE. *Popat* seems to conflate the fact of a breach with the reliability of the evidence, and further requires the police to assess fairness in deciding whether to hold an identification parade. Although fewer parades could increase identification suite efficiency, a standard procedure is fairer and easier to administer.

A number of cases followed the approach in *Popat*, adopting a purposive approach to Code D2.3. It appeared that *R v Forbes*¹³⁸ had swung the pendulum back in favour of a literal approach, by deciding that Code D2.3 is mandatory, even where the holding of an identification parade is of no, or very limited, utility. According to *Forbes*, the only exemptions from the duty are those specified by the Code, namely where it is not practicable to hold a parade, or where a video or group is held instead. In reviewing the decision in *Popat*, the court were dismissive of the requirement to assess whether there had been an “actual and complete” street identification in deciding whether D2.3 applied, stating that it was “very difficult to see how there could be such shades of grey in the answer to what ought to be a relatively hard-edged issue” because the terms of D2.3 are “quite unambiguous”.¹³⁹ The court followed the reasoning in *Brown*, stating that the decision in *Popat* amounted to a re-writing of the Code. After *Forbes*, Code D was again subject to a literal interpretation, but it was a short-lived circumstance. In July 1999, the Court of Appeal reaffirmed *Popat* and concluded that it should be the guide until the matter is

¹³⁷ Ibid.

¹³⁸ The Times, May 5 1999.

¹³⁹ Ibid.

reviewed by the House of Lords. Whilst the purposive approach appears to now be quite settled, given the flux in the area over the 1990s it remains to be seen whether it will continue its ascendancy. It is submitted that, in terms of the integrity principle, it is correct to take the literal approach to D2.3: the purposive approach gives a great deal of discretion to officers in assessing fairness and increases the number of suspects who will not be afforded the protections of Code D. The literal approach may have its practical problems, but offering protection for as many suspects as possible and ensuring that the police operate to the discipline of procedural rules is worth some inconvenience for officers in individual cases.

Conclusion

Code of Practice D is the focus for the operation of the disciplinary principle in eyewitness identification cases. The Code sets out best practice and the limits to police discretion, from which the courts can glean the seriousness of an alleged breach of the Code or whether any breach was intentional. In other words, the Code acts as a guide to officers, suspects and the courts, enabling all parties to assess whether the police conducted a procedure fairly. Cases on whether it was practicable to hold a live parade illustrate the point welling the police discretion whilst maintaining an emphasis on the pre-eminence of the live parade. The Code is also the home of the protective principle for eyewitness identification cases, offering protection to suspects from both intentional breaches and, to some extent, mistaken witnesses. It outlines the boundaries of fair and unfair procedures in many cases. The issue of whether real unfairness has been caused to the suspect because of a breach of the Code cannot be assessed from the Code alone, but it is a useful tool in judging what should be deemed to be fair in the circumstances. Unfortunately, those charged with minor offences and those who plead guilty are not afforded the evidential protections which result from the Code. However, most suspects do benefit from the pre-trial procedural fairness which Code D encourages at the time an identification procedure is undertaken.

All formal procedures must comply with the rules governing identification, but it is debatable whether they apply to situations where the witness sees a suspect by chance and spontaneously identifies him or her. Under D2.17 and D2.18, where the suspect is not known to the police, witnesses may be shown photographs or taken around the area where the offence occurred in an attempt to identify the culprit. Whether an identification parade is also required has proved to be a problematic question. Where the suspect is known to the police and denies that he or she is the offender, the rules are more clear cut. Although several methods of identification may be used, the identification parade is the preferred method. Accordingly, a parade must be arranged in all cases where it is practicable to do so. In all cases where another method is used, the identification officer must be able to show that a parade was impracticable. Identification evidence is not only a tool for the prosecution, but may also serve to benefit the defence where no positive identification is made. The following chapters assess the ability of Code D to offer defendants protection from mistaken identification and evaluate police diligence in following its procedural guidance.

CHAPTER FOUR

SUSPECTS' PERCEPTIONS OF IDENTIFICATION PROCEDURES

Introduction

This chapter discusses the views of suspects involved in identification procedures at Ladywood Police Station in Birmingham. The interviews with suspects ranged over a number of issues, including their general feelings about identification evidence and its usefulness, their understanding of the procedures involved, and how this related to their actual understanding of key points about what would happen once the procedure was under way.

The main objective in interviewing suspects attending identification procedures, which most commonly take the form of identification parades¹, was to obtain their perception of the process and its fairness. Suspects' perceptions of the identification process have not been examined in any previous study of identification procedures. Yet they are the most important participants. Indeed, without their consent, identification procedures adhering to Code of Practice D could not go ahead. It is necessary to examine, for instance, how much suspects understand about what is about to happen on the parade, group identification or confrontation. Code of Practice D² requires that the Identification Officer give a written copy of the Notice to the Suspect to every suspect attending an identification procedure and that this be read aloud to suspects. The Notice outlines what will happen during the parade and the rights of the suspect. Most suspects also have legal representation. A further objective of the research was to assess the adequacy of these methods of imparting information. It is only where suspects understand what is happening that they can exercise

¹ In accordance with Code of Practice D2.1

² At D2.15

their rights under Code D. If the protections of Code D fail through a lack of adequate information then not only will the protective principle be undermined, but with it the integrity of the criminal justice process as a whole. Where suspects do not understand their rights, then the rights effectively do not exist for that suspect, because there is no way for a suspect to access rights of which he or she is unaware.

Conducting the interviews

A sample of fifty suspects attending identification parades at Ladywood Police Station in Birmingham was interviewed between June and November 1993.³ A further four suspects refused to be interviewed, and one suspect was not lucid enough to interview at the time of his identification parade.⁴ Separate samples of witnesses and suspects attending different parades, group identifications, or confrontations were interviewed⁵. Five pilot interviews were initially conducted, and these indicated that a rigidly structured interview schedule would not be appropriate.

A sample of suspects was drawn, without regard to type of offence, sex or race of suspect, or whether the suspect was being detained in custody. The vast majority of interviews were tape-recorded.⁶ The suspects were interviewed both before and after the identification procedure (where one took place) in order to assess any change of attitude as a result of

³ Three of the suspects approached during this period refused to give an interview, one of these on his legal representative's advice. Five of the fifty suspects interviewed declined to speak to the researcher after an identification procedure had taken place.

⁴ This suspect was a schizophrenic, who was deemed fit to take part in the identification procedure, but who did not appear to me to be able to give an interview. Also, from the identification officer's point of view, the time spent and risk taken in my interviewing the suspect was not advisable.

⁵ An initial proposal to interview witnesses and suspects involved in the same procedure had to be abandoned, due to a number of practical considerations. The system in use at Ladywood Police Station, under which parades are scheduled at two hourly intervals, made this task a difficult one to achieve. With only one interviewer, the time restriction proved to be too great to attempt to interview witnesses and suspects involved in the same procedure. This difficulty was magnified where a procedure was attended by multiple witnesses.

⁶ Four interviews were not tape-recorded, in three cases on the advice of the suspect's legal representative, who was the same person in each instance. Some suspects needed reassurance that their

appearing on a parade. One aim of the research was to examine the suspects' perception and knowledge of the identification process before the parade took place and their feelings after the experience, including their level of satisfaction with all aspects of the procedures involved.

An initial concern was that suspects might be reluctant to speak to a researcher, especially at what was for many a stressful time. Whilst this was rarely a problem, many of those interviewed were rather uncommunicative and needed considerable prompting to encourage them to speak. Others showed substantial insight into the process and what it meant to them.

A difficulty in conducting the interviews was that many respondents wanted to talk about the offence for which they were appearing on the parade⁷ or about other factors which affected their case rather than the identification process. Some took the opportunity to protest their innocence; others asked for legal advice or information about how identification procedures worked, especially where a legal representative was not in attendance. Steering respondents back on course sometimes proved to be a difficult task.

Cancellations and long waiting periods also made the task of interviewing suspects quite frustrating. Much time was spent waiting for a parade to begin, and the sheer number of cancellations made the process very time consuming and wasteful. For this reason, the expected time allocated to interviewing had to be expanded, and some days spent in Ladywood police station proved fruitless. Days when four parades went ahead as planned

views would be anonymous and that the researcher was in no way connected with the police service. On the whole, however, both suspects and their representatives seemed quite happy about the use of a tape recorder.

⁷ As this would be at the forefront of their minds at the time of the identification procedure, the problem is hardly surprising. The difficulty was compounded by the fact that they appeared to have a willing listener, and as such it would have been strange if many had not protested their innocence.

were unusual⁸, and "wasted" days or half days were not uncommon. There were also a number of postponements due to a lack of suitable volunteers. Problems regarding the number of suitable volunteers occurred where the suspect was of a "singular appearance" in the identification officers' terminology. However, "singular" includes a number of broad bands, such as Rastafarians (noted nationwide to be reluctant participants); black females, especially when over the age of eighteen; older black males; white males with red or blonde hair; and men with facial hair. Whilst the Ladywood Identification Suite has no shortage of volunteers for the most common categories of suspect - mixed race young males, young black males, and white males with light brown to dark hair - other categories present more serious difficulties.

The difficulties discussed above meant that the task of carrying out fifty interviews with suspects became protracted and caused much more frustration than anticipated. The problems outlined above nonetheless meant that more time was spent observing the day to day running of the Ladywood Identification Suite, which enhanced my understanding of the process.

The study has a number of limitations. Firstly, it involved a small sample of cases, which prevented comparisons of the treatment of suspects with regard to ethnic background, gender, or type of offence.⁹ The size of the sample also meant that comparisons of the "success" of witnesses and the fairness of procedures between parades, group identifications, video identifications and confrontations could not be made. Indeed, the vast

⁸ For example, in October 1993, of the 137 identification procedures booked at Ladywood, only fifty went ahead. Fifty-seven of those which collapsed did so within less than two days of the planned procedure. Where costs were incurred for a collapsed parade, the average was £53. In December 1993, 96 identification procedures were booked, but only 37 were carried out, thirty of those which collapsed doing so less than two days before the identification procedure was due to be carried out. It can be seen that collapsed and cancelled parades account for a great deal of expenditure and lost time. (A collapsed parade incurs around half the cost of one which goes ahead).

⁹ For example, only two of the respondents were female.

majority of identification procedures in the sample were identification parades, and so the discussion in this chapter focuses mainly on issues regarding parades. Second, separate samples of witnesses and suspects were used due to time constraints. This limits the ability of the study to assess the strength of an eyewitness' identification, because I did not have access to the full versions of witnesses' descriptions and had little or no information on the circumstances in which the offence took place. Third, it was not practicable to track cases through the system after the identification parade and so there is no information in this chapter regarding the use made of the identification evidence gained in the sample at later stages in the criminal process. Fourth, there were amendments made to Code D after the empirical study with suspects had taken place. The main area where this potential to create a difference in the results is the introduction of Code D2.0, whereby the witness' original description is made available to the defence by the time of the parade. It could be that the introduction of the provision in D2.0 has resulted in an increase in the number of legal representatives who advise their clients to object to parade members or refuse to take part in a parade. However, conversations with the identification suite staff and the impression gained from the empirical study with witnesses suggests that D2.0 has made little difference to the operation of identification procedures in Birmingham. This is unsurprising given the general level of apathy amongst legal representatives witnessed whilst undertaking this study. It can therefore be concluded that the revisions to Code D did not significantly change the operation at Birmingham identification suite and therefore that the results of this study would not be noticeably different had it been conducted after the 1995 revisions.

Findings

The most striking finding to emerge from the interviews with suspects was the overwhelming passivity of the respondents. Most possessed little ability to have input into their own identification procedures. This acquiescence was expressed in a number of ways. For example, when interviewed many respondents would not be satisfied that the volunteers on the parade had fulfilled the requirement of sufficient similarity. Yet it was rare that any objection regarding volunteers was made to the identification officer. The opinion of legal representatives was placed before any reservations suspects themselves had. Respondents tended to feel rather helpless in the face of an official identification procedure, and that they had no choice but to take part. There was also considerable anxiety amongst those respondents attending their first parade about what would happen once the procedure was under way. This apprehension increased amongst those suspects who not previously been involved in a parade. It is probable that the underlying reason for the evident passivity of respondents was their lack of knowledge about identification procedures and the rights conferred them. The effect of this ignorance is also evidenced by suspects' perceptions of the officers working in the identification suite, which altered considerably after their parades had taken place.

(i) Suspects' Characteristics and the Rate of Positive Identifications Made

The 50 suspects questioned in this part of the research were, as noted above, a convenience sample. The vast majority of respondents, 96 per cent, were male,¹⁰ and 20 per cent of those questioned were juveniles, 90 per cent of whom were mixed race or black males. In terms of ethnic background, the respondents can be categorised as in Table 1 below.

¹⁰ All five suspects who were not interviewed were adult males

Table 1: Ethnic Background of Respondents¹¹

Ethnic Background	Percentage
Asian	12
Black	40
Mixed Race	10
White	38
Total	100

Suspects in my sample of 55 suspects (of whom 50 were interviewed) overwhelmingly faced charges relating to property offences. 70 per cent of respondents were suspected of involvement in theft, burglary, robbery and deception offences. Seven per cent were suspected of assault, seven per cent of indecent assault, and 3.5 per cent of wounding. One respondent was suspected of committing driving offences (which were not specified further), 3.5 per cent of criminal damage, 3.5 per cent of violent disorder and 3.5 per cent of attempted murder.

In the sample of 55 suspects, 49 per cent of suspects were identified, 42 per cent were not identified, and nine per cent had their parade aborted.¹² Whilst the percentage of suspects identified appears to be much higher than the average "hit rate" in Manchester and Birmingham, which was between 30 and 35 per cent in the years 1992-1995, the figures in my sample record the number of suspects identified, rather than the number of procedures where there is a positive identification. This could skew figures because parades may be run for one suspect but involve several witnesses. For example, only one of six witnesses may identify a suspect. In my study, that is recorded simply as an identification. In police

¹¹ Police classification of the suspect on the day of his or her parade has been used. There are drawbacks in using this approach, as the categories are simplistic. Similar problems were encountered in Gudjonsson, G., Clare, I.C., Rutter, S., and Pearse, J., "Persons at risk during interviews in police custody: The identification of vulnerabilities", Royal Commission on Criminal Justice, Research Study No.12 (1993) (London:HMSO), 10.

¹² The 49 per cent of suspects who have been classed as "identified" were identified by at least one witness. Where there were multiple witnesses, even where one or more did not identify the suspect, this has still been taken to mean that the suspect was identified. For example, one suspect, case 22, was only identified by one witness out of six. However, this was seen as enough to charge him, and as such he was, for all intents and purposes, identified.

statistics, there will be one identification and five “misses” recorded. In addition, monthly figures in Birmingham do rise in some instances to over 50 per cent.¹³

The vast majority of the suspects in my study took part in an identification parade. 83.5 per cent of suspects took part in an identification parade on the day their procedure was booked, nine per cent had their procedure postponed to another day, five per cent took part in a confrontation (one without consent), and 1.5 per cent took part in a group identification. Photographs had been shown to witnesses in three suspects’ cases, but in only one case did the photographs shown include the suspect. In two cases, witnesses were asked questions other than “Can you make a positive identification?”, in one case by British Transport Police, and in the other by the suspect’s legal representative.

(ii) *Suspects’ Lack of Knowledge about Identification Procedures*

Although the identification officer fulfilled his duty¹⁴ to read aloud the Notice to the Suspect and also to give the suspect a written copy, this often proved ineffectual when dealing with those who were participating in an identification parade for the first time. The failure of suspects to fully understand the Notice can be partly attributed to its hasty delivery by the identification officer at the Ladywood Identification Suite. Whilst complying with Code of Practice D, the Notice was read too quickly for the suspect to follow important passages in at least 35 cases.¹⁵ It is therefore not surprising that suspects did not seem to assimilate the information given to them by means of the Notice to the

¹³ For example, in May and October 1995. The figures are also comparable to those found in my study on witnesses and identification procedures: see Chapter 5.

¹⁴ Under Code of Practice D2.15.

¹⁵ This point is also made by Brown, D., *PACE Ten Years On: A Review of the Research Home Office Research Study 155 (1997)* (London: Home Office), with regard to the reading of the Notice to Detained Persons: “What is to the custody officer a highly routinised procedure, the provision of rights, may not be so to the suspects, some of whom may fail to take in the information they are given” (at 244). The take-up of rights may also be affected by the manner in which they are orally conveyed to the suspect: see Brown, D., Ellis, T., and Larcombe, K., *Changing the Code: Police detention under the Revised PACE Codes of Practice* Home Office Research Study No.129 (1992, London:HMSO). Brown et.al found that rights were conveyed unclearly or too quickly in some cases.

Suspect. In interview, the information given in the Notice was rarely mentioned and, as discussed later, over one third of suspects had no idea of what was going to happen during the parade. This was despite the fact that, in the vast majority of cases, suspects had received legal advice as well as the Notice before the interview was conducted. Whether these methods of imparting knowledge to suspects are sufficient is brought into question.

In a minority of cases, it was unsurprising that the advice given to suspects by their legal representatives did not appear to enhance their knowledge about their rights or about what would happen during the identification procedure, because representatives arrived late or spent very little time talking to their clients. In one case, the solicitor's firm sent a female legal representative to advise a client who refused to allow a woman to represent him. The firm were aware of this, and it made for an uncomfortable episode for the representative, as well as an unproductive session of legal advice for the suspect. In another case, the legal representative simply failed to arrive, and although the suspect was accompanied by his father, a lack of qualified advice may have contributed to the suspect's acceptance of what was an unfair parade. The suspect had a moustache, yet many of the volunteers were clean shaven, and none had a moustache which was as full as the suspect's. Legal representatives arrived over an hour late in a further two cases, and in one of these the representative was an ex-police officer who had not met the suspect before. He commented that he was unable to give his client advice on the similarity of volunteers because he found it "difficult to tell the difference between black people". As with other studies of legal advice at police stations,¹⁶ many of the representatives attending identification parades were clerks, legal executives and "runners".¹⁷ Since the time of my study, the Law Society have

¹⁶ See, for example McConville, M., Hodgson, J., Bridges, L., and Pavlovic, A., *Standing Accused* (1994, Oxford University Press), 83-90; McConville, M., and Hodgson, J., *Custodial Legal Advice and the Right to Silence* Royal Commission on Criminal Justice Research Study No.16 (1993 London: HMSO); and Sanders, A., Bridges, L., Mulvaney, A., and Crozier, G., *Advice and assistance at police stations and the 24 hour duty solicitor scheme* (1989 London: Lord Chancellor's Department).

¹⁷ "Runners" tended to be retired police officers, who had considerable knowledge about identification procedures, but who were generally unwilling to challenge volunteers and were sometimes less than

introduced a scheme for accreditation of legal representatives who are not qualified solicitors, and a study by Brown found that ¹⁸

“the proportion of unqualified legal staff advising at police stations has declined, due to a rise in solicitors attending and the introduction of ‘accredited representatives’. Whether this development has led to any improvement in the legal advice suspects receive remains unclear.”

Although the sample in my study is too small to comment on the general level of legal advice to suspects in identification procedures, there appeared to be little difference in the abilities and attitudes of legal executives and qualified solicitors. Contrary to the view of McConville and Hodgson,¹⁹ there was no apparent lack of confidence amongst non-qualified legal advisers in this study. In addition, whilst the advice given by ex-police officers was often lacking, some of the legal executives had extensive experience and a high level of knowledge about identification parades. A small number of legal representatives had met with their clients beforehand and had told them what to expect when appearing on a parade, or in a group or confrontation. However, most met their clients for the first time in the identification suite and offered cursory advice, and very few objected to any part of the identification procedure.

A further barrier to suspects’ knowledge about identification procedures was that they were all given a written copy of the Notice to the Suspect, but only a few read it. In fact only seven suspects made any real attempt to read the Notice. That many suspects do not read their rights highlights the importance of well-delivered verbal information. A reluctance for suspects to read official notices was also a feature of Gudjonsson et al.’s study on the Notice to Detained Persons, where respondents stated that they could not be bothered to read the Notice, they never read forms, they found it too complicated, or had not had a

sympathetic towards their client. McConville and Hodgson (1993), *ibid.* suggest that non-qualified advisers may over-identify with the police, because they are dependant on police co-operation, or because they are former police officers.

¹⁸ Brown, D., (1997), *op.cit.*, 70.

¹⁹ (1993), *op.cit.*

chance to read it.²⁰ The first three reasons could well apply to the suspects in my study also. Many of them appeared to be too nervous to read an A4 typed sheet, and after a quick glance they soon gave up.

As the volume and complexity of material contained in the Notice to the Suspect may deter suspects from reading it, one solution could be to hand suspects a small card with the most important points simply stated. It should include information regarding the right to legal advice, the right to have a legal representative present during the identification procedure, the right to refuse consent to take part in the procedure and the consequences of doing so. In piloting an alternative to the Notice to Detained Persons, Clare and Gudjonsson²¹ found that a laminated card containing short pieces of information increased respondents' recall of their rights, and arguably their ability to exercise them.²²

The failure of suspects to absorb the information given to them may also be attributed in part to the timing of its delivery. The day of their identification parade is not the best time to try to explain to a suspect what will happen once the procedure is under way. This is because anxiety may understandably stand in the way of some suspects' ability to digest the information given. As one respondent put it:

"I'm listening but I'm not listening. I just want to get it over with and go"
(Case 37).

There are advantages to giving information immediately before the identification procedure takes place, when consent to taking part in the parade is given, and when many suspects

²⁰ Gudjonsson et.al., op.cit., 18.

²¹ Clare, I.C.H., and Gudjonsson, G., "Devising and piloting an experimental version of the 'Notice to Detained Persons'" Royal Commission on Criminal Justice Research Study Number 7 (1992) (London:HMSO).

²² Ibid., 5 and 26. However, the positive benefits of the card were lost when combined with a more complicated information sheet. Clare and Gudjonsson conclude that "the most likely explanation for this finding is that, because the further information leaflet is very detailed, access to it confused, rather than assisted, subjects." (at 26). As the study was conducted under experimental conditions, it is unclear whether the results would be replicated under "live" conditions: see the discussion on the applicability of psychological research findings to the criminal justice process in Chapter 2 of this thesis.

meet their legal representatives for the first time. However, suspects may have more success at understanding and remembering information if it was given to them earlier. Earlier explanation of identification procedures need not be at the expense of the information given on the day of the identification parade. On the contrary, the retention of the requirement for the Notice to the Suspect to be read just before the identification procedure takes place would serve to reinforce and clarify important points. Whether this should be the responsibility of the police force involved or of legal representatives is debatable.

Many suspects had difficulty in actually explaining procedures, yet the vast majority, 39, said that they understood the procedures involved.²³ This could be because of a reluctance to admit lack of knowledge, as in the following example:

"All it is really is an identification parade...You've nothing to know about, have you?" (Case 24)

Not surprisingly, those suspects who had taken part in identification procedures before were the most knowledgeable about what would happen. They were more likely to be familiar with one-way screens, the number of volunteers who would be present and other salient details. As one with earlier experience stated:

"I'll sit behind a black screen in a room with eight other lads, they should look like me. The witnesses will come in on the other side of the screen and I won't be able to see them, and they'll pick who they think they saw. They'll pick a number". (Case 23)

But most knew only the general purpose of the identification parade and little about procedures, as in the following examples:

"As far as I know I'm going to go in there, sit down or stand up, and the witness is going to come in, walk past, look at everyone. I haven't ever been to an identification parade, I'm only just guessing. I'm just guessing on what's going to happen, I don't know". (Case 2)

²³ Of the remaining eleven respondents who were not certain about this point, six thought that they understood.

"I'll go on, and I'll sit there with them [the volunteers] and the witness will try to identify me if he can". (Case 6)

"You stand with some others, about ten others, that they have to choose one of, the witness does. They go in and walk past you and if they recognise you they point you out". (Case 9)

"I just stand in line with a load of others. You're either picked out or not as the case may be. Far as I know anyway". (Case 10)

"All I know is, the witnesses walk past the window and if they pick you out then that's it...That's about all I know about it". (Case 24)

"This is my first time. I've seen like on TV when people's lined up. The witness has to say which one is which". (Case 29)

As can be seen above, the bulk of information given by suspects centred around references to witnesses viewing the identification parade and trying to identify the perpetrator of the offence. Most knew that a witness had to attempt to choose them, but did not know how the procedure was to be carried out.²⁴ 36 per cent of suspects had no real idea of what would happen once they were on the parade. As a rule, this was because it was their first involvement in an identification procedure.

It is evident that suspects who have appeared on an identification parade before are more confident and comfortable in their knowledge of what will happen. Those taking part in an identification procedure for the first time have little knowledge of the important details, beyond the fact that the witness has to try to pick them. This lack of knowledge seemed to have increased anxiety in some instances. A possible remedy might be to ensure that the rights given to the suspect are understood fully.

Although suspects' knowledge on the subject of identification procedures is poor, it appears that they are aware of the problems surrounding the use of identification evidence,

²⁴ The limitation of knowledge to that of basic rights or information was also a feature of Gudjonsson et al.'s study: op.cit., 18; and Brown et. al. (1992), op.cit.

and their fears are legitimate ones. Witnesses may have questionable memories²⁵, and as a result may mistakenly identify an innocent suspect. That this is a possibility, and that a conviction could result from such an identification, does not go unrecognised by suspects. Similarly, some of the scepticism noted in much of the psychological experimentation dealing with eyewitness identification and memory processes is echoed in the responses of suspects. For example:

"Well, it matters how long ago, after the incident, really. Memory and recollection fades pretty quickly. If the ID parade isn't held within the first two weeks I think it's basically a waste of time" (Case 11)

The time span involved in setting up an identification parade can be lengthy,²⁶ which may mean that a witness's memory will fade. A speedy investigation benefits all parties and would ensure greater reliability of eyewitness evidence.²⁷ The problems with reliance on an eyewitness's memory were highlighted in case 11 above, where a volunteer had been identified. The suspect continued:

"... just imagine it now if that guy was the one in my shoes. He'd have been going through a court case now for something he hadn't done... there's got to be better ways of getting a conviction".

The problem of mistaken identifications being made by witnesses is one which suspects are aware of,²⁸ and worried about, as illustrated in the examples below:

"It could be anyone in that line could be picked out really, couldn't they? You know, I could be sitting there, you've got a one in nine chance. If you happen to be the unlucky one, you're the suspect and the one who they pick. It could be you even if you was never there or anything else. It could be you, you could be picked out" (Case 10)

"People can get convicted on identification evidence when it probably wasn't them anyway. So it should be... physical evidence, not like a geezer coming in and saying "Yes, that's him"". (Case 43)

²⁵ See texts such as Loftus, E., *Eyewitness Testimony* (1979 Cambridge: Harvard).

²⁶ Even where the police find a suspect soon after the commission of the offence, the waiting list for an identification parade is usually at least six weeks.

²⁷ See Malpass, R.S., and Devine, P.G., "Guided memory in eyewitness identification" (1981) 66 *Journal of Applied Psychology* 343.

²⁸ Illustrations of mistaken identification can be found in Foot, P., *Who Killed Hanratty?* (1971 London: Jonathan Cape) and Hain, P., *Mistaken Identity* (1976 London: Quartet).

"I don't think you can ever be 100% right, can you... I think that they've got to change it somehow, I don't know how. I don't think it's fair. Look at all the wrong people who get picked out. You can never be 100% sure unless you're like we are now... But if it's only a fleeting glimpse then you would have problems, wouldn't you?" (Case 1)

Whilst it was clearly important to suspects that the identification procedure provided them with an opportunity to prove their innocence, the experience was a bewildering one for most respondents. It was evident that an identification parade was viewed as something which happened *to* the suspects, rather than as an evidential procedure in which they could actively play a part. Suspects' understandable concern about wrongful conviction and mistaken witnesses did not prevent their own input into their identification parade being almost exclusively limited to obediently standing in line. A lack of knowledge can be seen to be the single main contributor to the reluctance of suspects both to take an active role in decisions regarding their identification procedure and to object where they are unhappy with any aspect of the conduct of the parade. Suspects who are unaware or unsure of their rights will clearly be unable to fully exercise them.

Although the Code of Practice on identification gives considerable protections to the suspect which ensure that the police follow coherent practices and which go some way towards an attempt to avoid misidentification, the protections offered are not satisfactory when suspects are not knowledgeable enough to be able to exercise their rights in relation to the operation of the parade. Without greater efforts from both the police and legal representatives to ensure that suspects understand the areas where they can exercise some control over their own procedure, Code D fails in its attempt to uphold the integrity of the criminal justice process, because where protections are undermined, ease of practice and efficiency may take over, to the detriment of suspects. Where suspects are unaware of the areas where they can affect the identification procedure, the Code is not fulfilling its full potential to protect suspects from the dangers of misidentification.

(iii) Suspects' Confidence in the Fairness of Identification Procedures

When asked what they thought about identification procedures, and how they felt about taking part in a procedure, 18, or 36 per cent of the suspects said that they wanted to prove that the police were wrong. These suspects therefore saw an opportunity to extricate themselves, as in the following examples:

"I'm quite happy to take part. The word's not happy but I'll go along, you know. Take part, clear my name" (Case 7),

"Well, this policeman, he thinks I did it. It was a policeman that was at the scene of the crime, but it don't bother me coming here to do it, because I know I'm not going to get picked out, because I know that it wasn't me who did it" (Case 8)

"[it's] to my advantage... Maybe because I wasn't the culprit and if I'm not picked, that will prove my innocence wholly" (Case 12)

"I don't really care you know, at the moment, because I never done it anyway. So, I'll go on a parade quite confident that I won't get picked out" (Case 29)

"If the suspect's been accused of something then to clear his name he can go in front of an identification parade ... to prove his innocence". (Case 34)

These suspects recognised the importance of identification evidence in their cases and hoped that, if the witness could not make an identification, it would force the police to abandon their investigation. After the parade, one suspect, happy that the witness did not identify him, stated that:

"...sometimes they can make sure they've got the right person... I've had an ID parade and I'm in the clear you see. If I never had an ID parade, they would probably have said "You're lying" and ... locked me up or whatever". (Case 6)

However, only 8 of the 18 suspects saw the chance to "prove" their innocence in a positive light, with the other 10 feeling that they were forced to take part in an identification procedure because the police had left them no choice in the matter:

"...the only way to prove I'm not [guilty] is to stand here, isn't it? Because if I don't do it, then I'm admitting guilt, aren't I? Because they're convinced it's me and I'm 100% sure it wasn't me. Therefore I've got to stand, otherwise they're going to charge me anyway" (Case 1)

"I'm just not happy about it. As far as I'm concerned, right, I haven't done what they've said I've done. They're just wasting my time. That's all they're doing" (Case 2)

"...it's wasting my time. It's just pissing me off because I haven't done it" (Case 11)

"Well, my brief... said that when they ask me to go on an ID parade I can refuse, but he said that if it does go any further it's always going to look worse for you if you've refused it. So I was in a damned if you do, damned if you don't sort of thing". (Case 11)

"...it wasn't me who committed the offence... If they want to go ahead with an identification parade then that's it. They're wasting money at the end of the day, because I know deep down that it wasn't me...it just isn't right. I'm not satisfied. I know the law just isn't going down the right way. Somebody ought to go about it the right way. It just isn't right" (Case 28)

"I've got no option. I have to do it really. I don't like it. I shouldn't be here in the first place"(Case 39)

Although some suspects felt that standing on an identification parade was "better than just you on your own" (case 23)²⁹ and "sensible ... witnesses come over and can look for themselves" (case 33), the overriding feeling was that there was no choice but to participate in an identification procedure. This feeling affected both suspects who were saw the positive aspects of a chance to prove their innocence and those who were thoroughly dissatisfied, so that 60% of suspects expressed the feeling that they had no choice in whether they participated or not. This was despite the provision in the Notice to the Suspect that the suspect be told "that he does not have to take part in a parade, or co-operate in a group identification, or with the making of a video film."³⁰

²⁹ Sitting with other people on a parade was viewed by suspects as preferable to having to undergo a confrontation. It is unclear whether the preference for an identification parade rather than any other form of identification is due to common sense, which determines that if they are placed with other people the witness is less likely to choose them than if they stand on their own. Alternatively, the preference may be due to experience, either their own or others'. It could even be the result of advice from a legal representative, who may have explained that government rules for police practice favour identification parades above other identification procedures, as categorised in Code of Practice D 2.1.

³⁰ Code D2.15 (vi). However, the following section of the Notice provides that the police may "proceed covertly" should the suspect decline to give his or her consent.

Suspensions about police malpractice were rife among the respondents in the sample. There was a particular concern that the police would inform the witness of their identity. Although suspects claimed to be confident that they would not be picked by any witness, there were obviously underlying worries. Horror stories were recounted, and four suspects in particular doubted that the police would adhere to Code of Practice D:³¹

"If they pick me out, I'll be more than shocked, I'll be more than shocked. We'll put it to the test. We'll see how honest they [the police] are." (Case 1)

"Hopefully, they'll [the witnesses] be honest people, that's all I can hope for, and that the Old Bill are playing it straight. I don't care what he says [the Inspector] about them lot playing it straight. We've all seen enough to know that they don't always play it straight". (Case 11)

"The police have too much opportunity to show people photographs. It should be before you're charged not after three months in custody" (Case 21)

"...I never done it anyway. So, I'll go on a parade quite confident that I won't get picked out. If I get picked, it's the police that's told the person, you know" (Case 29)

Many suspects, particularly persistent offenders, were observed to be as uncomfortable about being in a police station as they were about participating in an identification procedure, with eight suspects actually expressing the feeling verbally.³² Ladywood Police Station is operational,³³ with many people passing through, and this factor perhaps increases anxiety that they may not be dealt with fairly. If suspects are already suspicious that the police may not conduct the identification procedure fairly, then seeing people both in reception and walking past the identification suite could increase that suspicion. Suspects do not know who is connected with their case and who is not. As can be seen in the

³¹ Suspects' suspicions about the integrity of the police, and accounts of police improprieties, are documented in McConville, M., Hodgson, J., Bridges, L., and Pavlovic, A., *Standing Accused* (OUP 1994), 77-78. The use of persuasive tactics by police in interviews, or the perception of the use of such tactics, understandably shape the impressions suspects have of police officers in all contexts: see also Sanders et.al (1989), op.cit.; and McConville, M., "Videotaping interrogations: Police behaviour on and off camera" (1992) *Criminal Law Review* 532.

³² Gudjonsson et.al., op.cit., found that subjects in their study also felt distressed being in a police station, and "appeared preoccupied about being let out of the police station" (at p.15).

³³ ie. is used for other police business. The West Midlands Police now have a purpose-built identification suite, which is unaffected by other police business. This solves some of the problems encountered during the study and may increase the confidence of suspects in identification procedures.

following example, this worry can extend to the volunteers waiting in reception when the suspect arrives:

"I just don't like being here with all that lot down there. It's just like a cattle market... I never expected that lot to be waiting outside the front door... I think they should have their own place, keep it away from public view. Anybody could walk through that door. All they've got to do is say "That's him" or whatever, then you're earmarked... you don't know who's coming in, who's going out". (Case 1)

As can be seen from the following examples, suspects felt far from relaxed in the atmosphere of a police station:

"...if you've been in police stations, like I have, oh, lots of times, then you're on edge even if you come in to make a complaint. You don't want to be here. You just want to get your arse out of here, because of what's gone on before. I just don't want to be here. I don't like them. I don't put nothing past these bastards" (Case 1)

"...being in a police station is what's worrying me. I don't really like them. That's the only worry of probably everybody, you know, because you know you're innocent but when they put you in a police station, when they put you on an ID parade, what can you do?... Policemen stitch you up by telling the person who is meant to pick out the person "pick out that person". They can do all them kind of things". (Case 28)

"I just want to get it over with. I'm just a bit nervous being in here" (Case 48)

When questioned after their parades, however, the vast majority of suspects, 39 in all, were satisfied with the way their parade had been conducted and with the arrangements in place at Ladywood police station. Suspects were also generally satisfied with the conduct of identification officers, who were seen as separate from the rest of the police officers who were involved. In the minds of the majority of suspects, identification officers could be separated from police officers conducting the investigation into their case and were seen as "just doing their job" (case 31). The attitude of suspects to the identification officers is a further illustration of the harm done by ignorance of procedures. Before their identification parades, many suspects doubted the integrity of the identification suite staff, because they did not know what to expect. Once they had had the experience of an identification parade, the more general suspicions about police malpractice remained, but particular fears about the identification procedure (such as police influence of witnesses) dissipated.

Only six of the 45 suspects who expressed an opinion on the matter of the conduct of the parade had any doubts at all about the fairness of the procedure. Of these, only one was completely dissatisfied with the way his parade had been conducted. This suspect focused on the provision and behaviour of volunteers:

"Most of the people in here knew each other... all laughing and joking, while I just sit here... straight and normal. I stood out - I reckon I stood out a lot ... everyone should have sat here all calm and normal, no messing about. Like I was. Then I reckon I would have stood more of a chance, wouldn't I?" (Case 2)

This sentiment was echoed by others who, whilst happy with the conduct of their parade, had reservations, for example:

"I thought everyone should have just sat quiet because it's obvious I'm not talking to anyone" (Case 40)

"I think they should give you more time to organise everyone in here. Apart from that it was all right" (Case 42)

The behaviour of the volunteers appearing on the parade was a cause of anxiety for a minority of suspects. The fear was that it would be obvious who was the suspect if volunteers were laughing and joking. This problem was also noted by the researcher during observation of parades. For twenty-four per cent of suspects, volunteers were chatting loudly, laughing, or listening to personal stereos. In over half of those cases, suspects either joined in, or only one or two volunteers were involved. However, five suspects did stand out because of a general raucousness which did not involve them. All but one of these suspects were identified. It is difficult to draw conclusions from such a small sample, and it is impossible to know how strong the eyewitnesses in the cases were. It remains that the behaviour of volunteers must have allowed witnesses to exclude some members of the parade, and so contributed to an unfair procedure. It is clear from the psychological literature on relative judgment that, where volunteers are listening to personal stereos or are chatting amongst themselves, the functional size of the parade will diminish.

Where suspects stand out because of the behaviour of other members of the parade, there is an obvious undermining of the protective principle at work: whatever the number of other protections, if the suspect stands out in the mind of the witness because of the nature of the procedure as opposed to the strength of the witness' memory then mistaken identification may occur. The problems which did occur were not, as suspects feared, due to deliberate police malpractice, but rather to problems in discipline of volunteers. Officers used the intercom system to warn volunteers to be quiet, and so some effort at discipline was attempted. However, no volunteer was replaced on the parade, usually because officers were mindful of the time constraints they were under, and the two volunteers who were observed nodding in time to their stereo headphones were not spoken to at all. Furthermore, the suspect's legal representative objected in only one of the cases, where a volunteer was pointing to the person sitting next to him.

The greatest dissatisfaction expressed by respondents concerned the similarity of volunteers³⁴. Only thirteen suspects were satisfied or thought that the volunteers were "all right". The general feeling was that there could have been volunteers offered who had greater similarity to the suspects in general appearance and position in life, so satisfying the criteria contained in Code of Practice D. Volunteers at Ladywood police station are paid "regulars", a system which facilitates police routines. If regular volunteers are not available, it is more time consuming to find appropriate people willing to stand on an identification parade. At an identification suite where demand for parades is high, this could delay procedures further.³⁵ However, the police time saved by using regular volunteers may prove to be detrimental to some suspects, as less effort will be made to obtain those who are sufficiently similar. This point is illustrated in the following examples:

³⁴ Code of Practice D2.8 stipulates that a parade should "consist of at least eight persons... who so far as possible resemble the suspect in age, height, general appearance and position in life".

³⁵ A possible alternative would be to use video libraries, which are especially useful when dealing with "difficult" groups such as Rastafarians or traditional Sikhs.

"It could have been better. I mean I was under the impression that there was going to be eight people with slim build, short dark hair and a moustache, but you just get whoever turns up at the front door to earn a bit of money, don't you?" (Case 8)

"Basically they've just gone out and picked up any young black man they could find,... not even people fitting my description. One of them there is about six foot four and as black as the ace of spades...these lads are just coming for their eight quid, they don't care, and the police don't care, they haven't got the time to be going out looking for the description" (Case 11)

"There could have been a lot more steps taken to make people look like me because loads looked five or six years older. They should have arranged to get people that look like me to come in. They should go out looking - maybe have a service, you know like you have a jury service, you should have to come to an ID parade" (Case 41)

There was a particular problem in finding volunteers for parades concerning juveniles: it was in those parades where the identification officers placed volunteers who were older or physically bigger than the suspect on the parade. For example, in Cases 14 and 15, the suspects were put on a double parade, because they were both juveniles, although they weren't particularly similar, and in Case 36 many older volunteers were used on a juvenile's parade.

Comments expressing dissatisfaction with the volunteers available were made despite legal representatives being present at the time of the identification parade. Legal representatives usually accepted the best volunteers from the pool offered by the police and only one, who acted for four suspects in my sample, was particularly pro-active about noting the level of similarity to the suspect. He made detailed notes regarding skin tone and similarity of features.³⁶ Other legal representatives rarely made any notes at all. Legal representatives in only two cases made any comment to the police about the similarity of volunteers: one requested that the volunteers wear hats because of his client's distinctive hair style; the other advised his client to reject the volunteers. (This was the only case where the suspect rejected the volunteers.) In the other cases which were aborted, the identification officer

took the decision that the suspect was so singular in appearance that a fair identification parade could not be run. Although there were many other parades which featured volunteers who had very different skin tones, facial hair and general appearance to the suspect, legal representatives did not object to the procedure going ahead.³⁷ These observations reflect the findings of Brown et.al's study regarding police interviews, where legal advisers only intervened in eight per cent of cases.³⁸ Where legal representatives had objected in the past, they were viewed by the police officers as troublesome and uncooperative. Several studies have found that legal advisers are at a disadvantage in the police station, because they are on police territory and any intervention to protect their client's interests can result in obstructive measures by some officers.³⁹ The result in this study was that legal representatives overwhelmingly "fall in with police routines and are responsive to police expectations".⁴⁰

Given the lack of intervention by legal representatives, the temptation for suspects to go ahead with a parade even if they are unhappy with it is understandable. The tendency of suspects to take a passive role in their identification parades may be attributed to a lack of knowledge regarding their right to object. When ignorance and confusion are combined with a desire to "get it out of the way" (Case 34) and a legal adviser who is happy to let the parade go ahead, it is not surprising that suspects do not object.

³⁶ However, he never advised his client to object to the volunteers: rather he was gathering evidence to use at any later trial.

³⁷ For example in Case 35, where the suspect had distinctive tattoos and was wearing a short-sleeved shirt. Although the study was conducted before the 1995 introduction of D2.0, whereby the defence are given access to the witness' original description of the offender, the general lack of proactive measures undertaken by legal representatives in the study leads to the conclusion that D2.0 would have made little difference to the pre-trial actions of legal representatives.

³⁸ Brown et.al. (1992), op.cit.; higher participation rates were found by McConville and Hodgson (1993), op.cit. and Baldwin, J., *The Role of Legal Representatives at Police Stations* Royal Commission on Criminal Justice Research Study No.3 (1992 London: HMSO). However, in both Baldwin and McConville and Hodgson's studies, intervention by legal advisers was often warranted but did not occur.

³⁹ Baldwin (1992), op.cit.; Sanders et.al. (1989), op.cit., Cape, E., *Defending Suspects at Police Stations* (1993 Legal Action Group).

Conclusion

Suspects' lack of knowledge of what was going to happen to them and their failure to play an active role⁴¹ were the most striking findings to emerge from this study. Ignorance is likely to increase apprehension and anxiety. It is clear that the Notice to the Suspect and the attendance of a legal representative, measures in place to inform suspects of their rights and how the identification parade will proceed, are not working as efficiently as they might. This is due in part to the timing of the information given to the suspect. Such a widespread lack of knowledge is indicative of the fact that many suspects are appearing on identification parades with no real grasp of the rights they have. It was rare for suspects to object to any aspect of the conduct of their parade, even though some felt dissatisfied, especially with the similarity of the volunteers paraded with them. The vast majority of suspects rely completely upon the advice of their legal representatives, even when choosing volunteers or deciding where to sit. Suspects' poor level of knowledge regarding identification procedures, when questioned in the few minutes before their parade took place, suggests that the current methods of imparting information are failing substantially.

In terms of taking part in an identification procedure, there was a general feeling of apprehension, particularly amongst those suspects who were appearing on an identification parade for the first time. This often manifested itself in comments about unfair police practice, and there was a general tendency for respondents to be suspicious about how the police would conduct the parade. There seems to be no solution to this problem, as it is a matter of widely held mistrust.

Some suspects were also apprehensive about appearing on an identification parade held in an operational police station. Identification parades are more likely to be fair when the

⁴⁰ McConville et.al., (1994), op.cit, 100.

⁴¹ By, for example, objecting to volunteers or changing their position in the line.

suspect is relaxed, because if nervous he or she may stand out from the other members of the parade. Therefore, holding parades in an operational police station could well bias procedures against the suspect. Since the study was conducted, Birmingham has a purpose-built Identification Suite, which should alleviate some anxiety felt by suspects when arriving for their identification procedure.

Suspects were aware of the dangers of mistaken identification,⁴² which were the subject of much concern. Therefore, suspects' knowledge of the workings of identification parades may be poor, but they are more than aware that things can go wrong. Some of their fears may be allayed by more careful provision of information about the safeguards in place in Code of Practice D, but this would be unlikely to eliminate worries. Indeed, the available evidence suggests that eyewitness identification is not a reliable form of testimony.⁴³ The fear is that if a witness is guessing, then there is a one in nine chance that the suspect will be randomly chosen. A guess will then be treated as admissible evidence. This fear is illustrated by examination of the existence of the theory that witnesses use a "relative judgment process". The exponents of this theory claim that witnesses viewing an identification parade are likely to identify the person who most resembles their recollection of the offender. Of course, the person closest to a witness's memory of the offender is not necessarily guilty of committing the offence. In this way, an innocent suspect may be identified simply because he or she resembles the perpetrator more than other members of

⁴² General discussions of the danger of false-positive identifications are contained in Goldstein, A.G., "The fallibility of the evidence: Psychological evidence" in D.B. Sales *Psychology in the Legal Process* (1977, New York: Spectrum), 233; and in Hilgendorf, E.L., and Irving, B.L., "False positive identification" (1978) 18 *Medicine, Science and the Law* 255.

⁴³ The recognition unreliability, especially with a "fleeting glimpse" type of identification, is the basis of the measures in place today which attempt to keep unreliable identification evidence to a minimum. The case of *Turnbull* [1976] 3 All E.R. 549, for example, warns of the dangers of mistaken identification in all cases which rely substantially on identification of the accused.

the identification parade.⁴⁴ This evidence implies that suspects are justified in their concern about being positively identified and subsequently convicted on the strength of the evidence of a witness who made a guess at an identification.

Many suspects saw identification parades as an opportunity to prove their innocence and were happy to be given a chance to stand in line with eight other people rather than participating in a confrontation. The official preference of the parade above any other method of identification is one which meets with suspects' approval. Many suspects see identification parades as a lesser form of evil - imperfect, but the best option open to them. However, there was a general feeling amongst the suspects in my sample that they had little choice but to participate in an identification procedure of some sort, and in agreeing to take part in an identification parade, even when they were unhappy with the volunteers offered by the police, they could get through the process more quickly. Suspects displayed reluctance to exercise their right to object to volunteers, although they did express dissatisfaction during their interview with me. Many were unaware that they had the right to object, and few had definite understanding before the identification procedure about what would happen during it. Legal representatives usually did little to enlighten suspects about identification procedures, with many arriving late and meeting the suspect for the first time immediately prior to the parade. As discussed earlier in this chapter, without awareness of the rights available to them, suspects cannot hope to exercise them. Where there is general ignorance, then the protections of Code D in offering suspects the opportunity to have some control over the procedure is nullified. Where volunteers are not objected to despite reservations, the protective principle is further undermined by the increased potential for unfairness when the functional size of a parade diminishes, in turn causing an increased risk of misidentification. In short, where suspects are ignorant of their rights and are not

⁴⁴ On the subject of the relative judgment process, see Wells (1984), *op.cit.*, and Luus, C.A.E., and Wells, G.L., "Eyewitness identification and the selection of distractors for lineups" (1991) 15 *Law and*

encouraged by legal representatives to exercise them, Code D does not offer a satisfactory standard of protection from misidentification.

Suspects should be given a copy of the Notice to the Suspect at the time their parade is booked, and should then be given verbal information and a short summary card of their rights on the day of the identification procedure. The current methods of imparting information are obviously insufficient, as most of the suspects in my sample who were attending an identification procedure for the first time were lacking in any knowledge other than that gained from seeing identification parades in movies or other forms of popular media. It is only by increasing suspects' understanding about identification procedures that their confidence in the process, their ability to exercise their rights, and therefore the level of real protection offered by the provisions of Code D, can be improved.

CHAPTER FIVE

WITNESSES AND IDENTIFICATION PROCEDURES

Introduction

The purpose of this chapter is to examine the views of witnesses attending identification procedures in Birmingham. The particular focus is upon the confidence felt by witnesses in the correctness of their choice, and on the factors which influence their confidence and accuracy.¹ Witnesses were interviewed about how they felt about participating in an identification procedure and their knowledge about what would happen once the procedure was underway. They were also asked to describe the circumstances in which they originally viewed the offender, and reference is made to the *Turnbull*² guidelines and to psychological research on witness and event factors.³ As noted earlier in this thesis, in addition to the variables surrounding the witnessed event itself identification procedures can affect the reliability of any identification made and therefore affect the level of protection from misidentification offered by the criminal justice process. Witnesses were questioned about the identification procedure they attended, including such issues as the similarity of

¹ The question of the existence of a relationship between the confidence and accuracy of eyewitnesses has produced an abundance of conflicting research by psychologists. The generally accepted view is that confidence is no indication of accuracy (see Wells, G.L., and Murray, D.M., "Eyewitness Confidence" in Wells, G.L. and Loftus, E.F., (eds) *Eyewitness Testimony* (1984 Cambridge University Press) 155). However, there is a growing body of research which suggests that there may be a confidence-accuracy relationship, especially where the viewing conditions are good (see, for example, Cutler, B.L., and Penrod, S.D., "Forensically relevant moderators of the relation between identification accuracy and confidence" (1989) 74 *Journal of Applied Psychology* 650).

² [1976] 3 All ER 549.

³ The term "witness and event factors" is used here to include such issues as the effect of witnessing a violent crime (which, for example, may include stress and weapon focus), visibility at the time of the event in question, as well as individual factors such as the personal biases of the witness in question. Such factors cannot be influenced by procedural rules on identification. In other words, they are variables which are out of the control of the police when staging an identification procedure.

volunteers,⁴ and the pressure upon witnesses to make a choice. Pressure can stem from a desire to please the police, in the knowledge of the time and effort expended to stage an identification procedure, and from the idea that there is "no smoke without fire". In other words, witnesses may feel that suspects would not be present if they were not guilty. Such pressure is supposedly offset by the provision in Code D, Annex A:14, whereby witnesses are told that the person they saw may or may not be present on the parade, and that if they cannot make a positive identification they should say so. The perception of pressure to choose can result in a form of guessing, which can in turn increase the possibility of inaccurate identifications being made. Whether Code D successfully prevents witnesses feeling under pressure to choose is therefore explored.

The study focuses on the confidence levels of witnesses at various stages of the identification process. The relationship between the confidence and accuracy of witnesses is an important one, because where witnesses are confident it is more likely to impress a jury or magistrate than where they are hesitant. The acceptance of evidence could therefore be affected by the credibility and demeanour of the witness presenting it. Whether accurate witnesses are usually more confident in their testimony than those witnesses who are mistaken is a crucial question. This problem can affect all kinds of testimony, but is increased where the evidence is that of an eyewitness. As stated in the Devlin Report,⁵

“Identification...is evidence of a special character in that its reliability is exceptionally difficult to assess. It is impervious to the usual tests. The two ways of testing a witness are by the nature of his story - is it probable and

⁴ See Code of Practice D, Annex A:8. There is some evidence to show that poor similarity of volunteers may affect the functional size of the identification parade, making the requirement for eight volunteers a nonsense: see Nosworthy, G.J., and Lindsay, R.C.L., “Does nominal lineup size matter?” (1990) *75 Journal of Applied Psychology* 358. However, some researchers are of the opinion that the similarity of the volunteers to the suspect is not the important issue. Rather, their similarity to the original description of the witnesses is: McKenzie, I., “Psychology and legal practice: Fairness and accuracy in identification parades” (1995) *Criminal Law Review* 200. For a discussion of functional and nominal size of identification parades, see chapter 2 of this thesis.

⁵ Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976 London:HMSO), at paragraph 4.25. The point is also made at paragraph 1.24.

coherent? - and by his demeanour - does he appear to be honest and reliable?...But in identification evidence there is no story; the issue rests upon a single piece of observation...Demeanour in general is quite useless...Witnesses who are themselves convinced of the truth of their identification and who are able to impart to a jury their own sense of conviction, have not infrequently been found to be mistaken.”

Whether or not there exists a confidence-accuracy relationship has great potential to affect the integrity of the criminal justice process with regard to eyewitness identification, because if there is no positive relationship between confidence and accuracy, the danger of wrongful conviction is heightened. Conversely, the conviction of the guilty could be obstructed where the correct evidence of a hesitant witness is not accepted. Ideally, the system should have in place strong protection for suspects from erroneous but convincing identifications.

The relationship between confidence and accuracy may therefore be of prime importance to the outcome of any prosecution in a case involving disputed eyewitness testimony. The confidence-accuracy relationship is inherently difficult to assess where the identification is made in a real, rather than simulated, situation, because there is no way of knowing whether a positive identification of a suspect is accurate or inaccurate. Picking out a volunteer, however, can be reliably classed as an inaccurate identification. Rather than entering into the debate on the existence of a confidence-accuracy relationship, this chapter seeks to assess the effect of parade factors, event factors, and whether witnesses' choices are confirmed on their *professed* confidence levels.

It was a striking finding of the study that many witnesses used a relative judgment process when choosing from the identification parade. Quite often, those members of the parade who were unlike the offender were discounted quickly, and a comparison of the remaining members was undertaken to see which one looked most like the offender. There is a danger that witnesses are simply choosing the person who is the most similar in appearance to the suspect, rather than looking at each parade member in isolation and deciding whether or not

they *are* the offender. This can be fatal for the innocent suspect who shares some of the offender's characteristics, as was illustrated by the cases which triggered the Devlin Committee's inquiry into eyewitness identification evidence, those of Luke Dougherty and Laszlo Virag.⁶ This chapter, in outlining the extent of the use of the relative judgment process⁷ amongst the sample of 50 witnesses, explores the problem of its use, especially where witnesses are very confident that they are accurate.

Conducting the interviews

A sample of 50 witnesses attending identification procedures in Birmingham was interviewed, before and after the viewing of the procedure, between August and October 1995. A further 19 witnesses were interviewed before the viewing of an identification procedure only.⁸ All interviews were tape-recorded. A pilot study of five interviews was conducted to assess the suitability of the questions posed.

The fifty interviews took place at two sites, Dudley Road and Bridge Street West Police Stations.⁹ Witnesses wait at a different police station from the one housing the identification suite, in order to prevent any accidental viewing of the suspect (or any of the volunteers) prior to the identification procedure.¹⁰ In order to have sufficient time to speak to witnesses before they viewed an identification procedure, interviewing involved travelling between the two police stations. In this way, it was ensured that witnesses were

⁶ Ibid., chapters 2 and 3.

⁷ Wells, G., "The psychology of lineup identifications" (1984) 14 *Journal of Applied Psychology* 89.

⁸ Out of these 19 cases, the identification procedure did not go ahead in 17, for a variety of reasons, the most common being the non-attendance of the suspect. The remaining two witnesses did view a procedure, but left the Identification Suite immediately afterward. Two witnesses refused to speak to me. These were bank staff who did so on the advice of a senior member of their company. One further witness agreed to be interviewed but spoke very little English. The interview was, to all intents and purposes, abandoned for this reason.

⁹ Bridge Street West Police Station is the site of the purpose-built Identification Suite, and differs from the site used for identification procedures when interviews with suspects were conducted two years earlier.

¹⁰ Such a viewing would be likely to constitute a breach of Code D, Annex A:12.

interviewed both before and after their viewing of the identification procedure. Changes in confidence levels and in opinions about the organisation of identification procedures were monitored.

Without exception, the main sample of 50 witnesses viewed identification parades.¹¹ As with suspects, the sample of witnesses was drawn without regard to the type of offence they had witnessed, the sex, race or age of the witness or the suspect, or whether the suspect was in police or prison custody at the time of the identification procedure.

Under Code D, Annex A:14, all witnesses are required to walk along the line at least twice before making a choice. The identification officer routinely writes down, in the presence of the suspect's friend or legal representative, the words spoken by each witness. It was noted in Birmingham that where witnesses simply state that they are unsure, the identification officer will not press them further. Witnesses can be frustrated by being unable to elaborate, as was the case with witness 44:

"All I said was 'not sure' and he didn't ask me anything else. It could have been number 9, but he didn't ask me."

The identification officer was right to take the approach he did, because any tentative identification made would not be evidentially strong. Indeed, where witnesses did choose, but were tentative or stated that they were not one hundred per cent sure, statements were not taken. It is impossible to say if evidence from an unsure witness would ever be used in cases in Birmingham, as there were only three instances of tentative identification during my study, one of which was an identification of a volunteer.

(i) *Problems and Limitations*

There were a number of limitations borne in mind when conducting this study. It is important to note that a different sample of cases was used for suspects and witnesses. It would have been preferable to follow cases through, having interviewed both main participants. However, this was not a realistic option. Firstly, time constraints in the identification process would have made the task a difficult one to achieve.¹² It is also likely that defence solicitors would have objected if I had planned to speak to both parties, with the suspicion that witnesses would be given clues as to the appearance of the suspect. Time constraints also affected my ability to follow cases through to their conclusion, given both the time taken for a case to reach court and the time available to me for empirical study.

It follows that the findings from a small scale study such as this run the risk of distorting the importance of identification evidence in criminal cases, especially where the case is not followed through to any court hearing. Similarly, there is a danger that the time spent in the identification suite did not offer a representative sample of cases. In order to counter this danger, data are compared with monthly averages obtained from the Identification Suite over a two year period. Whilst this only gives comparisons as to positive identification rates and "collapsed" procedures, an indication will be gained of the general applicability of the findings from the sample used.¹³

Whilst the study of suspects' perceptions of identification procedures was accompanied by the observation of their parades, the present study with witnesses did not involve

¹¹ Out of the 19 respondents remaining, one had been told that she was to view a group identification.

¹² As discussed above in Chapter 4.

¹³ See Appendix D for identification figures from Birmingham and Manchester Longsight Identification Suites.

observation of the actual procedure.¹⁴ This meant that no comparisons could be made between witnesses who had spent a long time viewing the parade and those who made immediate identifications, for example.¹⁵ It was impossible to follow the arrangement of procedures in the identification suite through from start to finish. This was because witnesses wait at a different site, and interviews often took place whilst the parade was being arranged. However, adopting this approach had the benefit that all aspects of the identification procedure were covered over the course of interviews with both suspects and witnesses. Witnesses were also interviewed immediately after their viewing of the parade and I waited outside the viewing corridor.

Conducting interviews in two sites in Birmingham in itself led to many hurried journeys across the city. More problematic, however, was the lack of communication between the two police stations. The waiting area for witnesses in the Dudley Road Police Station was open only for limited hours. Although the station was quiet and provided sufficient space for a witness waiting room, police there often had no idea of the number of identification procedures scheduled or the number of witnesses expected on any day. Where witnesses made their own way to the station, there was often no attending witness officer present on their arrival to ensure that the requirements of Code D, Annex A:12 were met. This provision states that the witness officer is responsible for ensuring that witnesses do not communicate with each other about the case, see any member of the parade (including the suspect), or be reminded of any photograph or description of the suspect before the parade. In some instances, witnesses had ample opportunity to discuss the case by the time witness officers arrived, reducing the protection intended by Code D and increasing the risk that witnesses would affect each other's memory of the offender, thereby potentially increasing

¹⁴ As my arrival at the Identification Suite would be at a time when the procedure had been arranged and the suspect was seated, a request for consent to view the parade would have added stress to the suspect, and would most likely have been met with a refusal.

the risk of misidentification. Much of the time wasted when conducting interviews with witnesses could have been prevented had myself or the staff at Dudley Road Police Station been informed by the Identification Suite staff that the identification procedure would not go ahead and witnesses would not be attending.

The facilities at Dudley Road station are far from satisfactory. The witness waiting room has limited refreshment and entertainment provision. Whilst this may seem a minor point, it was a cause of much complaint amongst witnesses. Some witnesses were left waiting for hours in a cold room without a hot drink, TV and magazines, or a comfortable chair to sit on. This is in contrast to the witness waiting rooms at the fairly new purpose-built identification suite at Bridge Street West Police Station, which are much more comfortable. Yet witnesses spend a very short time, on average five minutes before the procedure and five minutes afterwards, in a witness waiting room in the identification suite. The poor facilities at Dudley Road Police Station were a source of complaint for 62 per cent of witnesses in the study.

Witnesses commonly had a long waiting period because of the way identification procedures are organised. They are asked to arrive at Dudley Road at the same time the suspect is expected to attend at the Identification Suite. The arrangements for the procedure, such as the reading of the Notice to the Suspect¹⁶ and the choice of volunteers,¹⁷ are conducted at that point. Witnesses are left waiting at the other police station whilst this happens. The average waiting time was over one hour with some witnesses waiting over two hours, which can seem a waste of time because nothing appears to be happening.

¹⁵ In observing parades in my study on suspects' perceptions of the identification process, the longest time a witness took to view the parade before making a choice was just under two minutes. Most identifications take place very quickly: see Chapter 4.

¹⁶ Found in Code D2.15.

¹⁷ For some suspects, this is the point at which volunteers are looked for. For others, enough volunteers will have attended the identification suite and there will simply be a choice. The latter course is obviously less time-consuming.

However, if the procedure was arranged before witnesses had to arrive at the station and they then did not attend, there would be a considerable waste of police time and resources.

The length of the whole process provoked much comment from witnesses, who had usually taken time from work or family commitments. There was general dissatisfaction with what often amounted to a half day spent in police stations waiting for an identification procedure which took only minutes to be completed. This dissatisfaction was increased where witnesses had attended more than once for the same offence, as in the following examples:

"It has cost a day's wages just for me to come here, and hours of waiting around. Giving him another chance to get off with it as far as I'm concerned...I don't see why he should have that chance. If he hadn't turned up then it would have fell through again. Why have that other chance, taking it later in time?" (Case 13)

"This is the third time I've been here and nothing has happened yet...It was quite annoying...(1) not knowing if it was going ahead, and (2) not knowing when. I think a really major thing as well is not having a really nice, calming room, like a Green Room for people to sit in. It is not conducive to saying, 'Will you come back if it does not go ahead now?'" (Case 63)

"Well, I feel happy to help the police. But the last time we came they couldn't organise it and now they have called us again and there is no sign that it will happen. So it seems that we are victimised twice, not once. Once in the City Centre and once in the police station. If they can't organise the parade then they shouldn't call the witnesses in." (Case 65)

It was striking that, although no specific question was asked about the waiting period during the interviews with witnesses, 34 per cent¹⁸ of the main sample mentioned it spontaneously during their interview.¹⁹ Comments outside of the interview regarding the waiting time were made in 83 per cent of all cases.²⁰ A consequent concern of the researcher was that after a long wait, witnesses might not wish to take extra time to be

¹⁸ Where necessary, percentages are rounded up or down to the nearest whole percentage.

¹⁹ The number was lower for those 19 respondents who were interviewed only before their procedure (hereafter referred to as the PPI sample), 16 per cent, making for a combined percentage of 29 per cent. However, when it is considered that the PPI respondents would be interviewed only at the beginning of their wait, this is not surprising.

interviewed after they had viewed an identification parade. In the event, this only occurred in two cases. Although a long waiting period was the cause of much frustration for witnesses, it was not without its benefits for the researcher because witnesses tended to chat in a relaxed way about their feelings.

Related to the long periods of waiting is the recurrent problem of late cancellations of parades. It has already been noted that those witnesses who were attending for the second or third time in relation to the same offence and suspect expressed a great deal of dissatisfaction about the time taken up by the identification process. It can therefore be seen that the cancellation of identification parades at a late stage is counter-productive to retaining the goodwill of eyewitnesses.

After the interviews with suspects attending identification procedures had been conducted, the West Midlands Police moved its Identification Suite site to Bridge Street West Police Station. This resulted in a great improvement in the facilities available, although a number of problems remain. Late cancellation and postponement of parades are two of those problems. Cancellations a couple of days before the procedure is due to take place only affect witnesses indirectly, because they are usually informed by the officer in charge of the investigation that they will no longer be required to attend. However, it will mean that there will be a longer period of time between the offence and the identification procedure. An increased retention period has been found by psychological researchers to result in a decline in accurate identifications, and possibly an increase in incorrect identifications.²¹ If procedures are cancelled at a stage where it is too late to move forward or book another suspect's parade, then the identification suite will be left empty, a considerable waste of

²⁰ This broke down as follows: 84 per cent of respondents from the main sample and 79 per cent of respondents from the PPI sample spoke of their dissatisfaction whilst waiting.

²¹ Shapiro, P.N., and Penrod, S.D., "Meta-analysis of facial identification studies", (1986) 100 *Psychological Bulletin* 139.

resources. The long waiting periods for identification parades are in part due to the inefficiency of the system. Not only do postponements waste resources, but they add to the congestion in bookings when they are re-scheduled. Although as a rule four parades a day are booked, fewer are held. This has not noticeably changed since the opening of a purpose-built suite. Indeed, the problem is exacerbated, because expensive facilities lie idle and more staff are working at a slow rate, resulting in greater financial loss than when there were fewer resources available for identification. There is little attempt to fit new bookings into cancellation slots, or to move existing bookings forward.²²

When there has been no prior cancellation of an identification procedure, witnesses feel the effects the most. Cancellations occur for a variety of reasons, such as where the suspect fails to attend. If this is the case, witnesses wait for at least 30 minutes only to be informed that the identification procedure has been postponed. Where an identification parade is postponed because of the lack of availability of suitable volunteers, or defence objections to the volunteers offered to them by the police, the waiting period is likely to be much longer than 30 minutes before witnesses are informed that the parade will not go ahead.

In 17 out of the 69 cases in the study, no identification procedure went ahead, and there were other cases where Identification Suite staff informed me that it would be pointless to attend. This was because they knew that they would be unable to produce a sufficient number of suitable volunteers and the parade would not go ahead.²³

Although there are now more staff assigned on a full time basis to the running of identification procedures in Birmingham, these are used mainly in a clerical capacity, or to

²² For further discussion about the inefficiency of the Identification Suite in Birmingham, see Chapter 6.

²³ Indeed, none of the 12 cases where police anticipated difficulty in assembling a suitable parade resulted in the successful running of an identification parade, or other identification procedure, on that day.

find and supervise the volunteers who sit with the suspect on the identification parade. Officers from the same station as the investigating officer, rather than identification suite staff, are responsible for looking after the witnesses before the procedure is underway. As with the period spent in the Identification Suite when interviewing suspects, the majority of police errors observed involved allowing witnesses to talk with each other about the case, a breach of Annex A:12(i).

The main practical function of the witness officer is to prevent discussion between witnesses about the case or the description of the offender.²⁴ The witness officer was late or left witnesses alone in the waiting room on seven separate occasions during the study. In three of these cases, the witness officer was absent for the majority of the time.²⁵ Although this number is fairly small, it represents a large enough proportion of cases to be of concern.²⁶ To be fair to the officers involved, attempts to limit the difficulties in adhering to Annex A:12 were observed during the study. For example, in many instances (especially where there were three or more witnesses attending a procedure) more than one witness officer was in attendance. This kept to a minimum any difficulty caused by one officer's short absence, for example to contact the identification suite or take one witness to the toilet. Identification suite staff also regularly reminded officers of the provisions of Code D, and placed photocopies of Annex A:12 around the waiting area and the identification suite itself. This is a step in the right direction, but because of the lack of trained and well-informed witness officers it does not always have the desired effect. Where witnesses are left alone, there is a danger that they will discuss the appearance of the offender and distort their own memory of events. Although the Code cannot prevent such discussion outside of

²⁴ The basis of this provision is the prevention of contamination of a witness' memory. For psychological theory and experimentation on the matter, see Loftus, E., "Leading questions and the eyewitness report" (1975) 7 *Cognitive Psychology* 560.

²⁵ The length of absence varied from a couple of minutes to 55 minutes.

the police station, it attempts to offer protection from such contamination of memory while witnesses are attending the identification procedure itself. The protection is far from perfect in the first place, but it diminishes to no protection at all when witness officers omit to perform their duty. Contamination of memory poses a risk of misidentification occurring, and therefore more should be done in order to maximise the protection Code D offers in practice.

Findings

Out of the fifty cases in the study where the identification procedure went ahead, twenty-eight per cent of witnesses made no choice, eighteen per cent chose a volunteer and fifty-four per cent chose a suspect. The first thing to note about these figures is that the number of positive identifications made are much higher than the average percentage "hit rate" in both Manchester and Birmingham, which sits at 30-35 per cent over the years 1992-1995. However, it is clear that the percentage of positive identifications in Birmingham, although averaging around 33 per cent, has risen in some instances to over 50 per cent.²⁷ In my study on suspects' perceptions of identification procedures, 100 witnesses viewed parades for 55 suspects. Of those, 46 per cent chose the suspect, 22 per cent identified a volunteer and 32 per cent made no choice. It can be seen that the figures from my earlier study are comparable to those gained in this study.

The number of "collapsed" procedures, where parades did not go ahead, totalled 29, or 36 per cent, in my study. In seventeen of these I interviewed the witness prior to the identification procedure. In the remaining twelve, the Identification Officer advised me the day before the parade that it would not go ahead. These 29 cases do not include the

²⁶ In none of these cases was the issue brought to the attention of the suspect's legal representative. It is likely that that is usual for breaches of Annex A:12, because witnesses are kept at a separate site to suspects. If so, then many breaches of Code D go undetected each year.

²⁷ For example, in April, September and November 1994; and May and October 1995.

instances where parades were cancelled more than two days in advance. The percentage of procedures which were not carried out in my study is comparable to both Birmingham and Manchester, where “collapsed” parades occurred at rates between 39 and 69 per cent. The figures from the identification suite in Birmingham are generally higher than those in Manchester, largely because they include instances where parades were cancelled more than two days in advance.²⁸

(i) *Witness Characteristics and Biases*

(a) Gender, Age and Ethnicity

As was noted in relation to the interviews with suspects attending identification parades, the majority of suspects were male. In the main sample, 49 out of the fifty cases involved suspects who were male.²⁹ The majority of witnesses, 66 per cent, were also male, leaving the most common relationship being a male witness attempting to identify a male suspect.³⁰ Eighteen, or 39 per cent, of the male witnesses interviewed were also victims of the offender in question. This increased to 55 per cent where the witness was female, suggesting that although there are fewer female witnesses attending identification procedures, the ones who do attend are the victims of the offence, rather than bystanders, on a more regular basis. Although the sample is small, and so may not be representative of cases overall, witnesses who are also victims of the offence generally experience greater stress both in experiencing the event and attempting a later identification of the offender.³¹ An increase in stress can reduce the reliability of any identification made, as discussed later in this section.

²⁸ For further discussion of the cost of identification procedures, and the inefficiency of the current system, see Chapter 6.

²⁹ In the PPI sample, all suspects were male.

³⁰ In some cases, more than one witness to the same offence was interviewed, because their experiences will necessarily be different on a personal basis. In terms of correspondence of witnesses and suspects both on gender and race bases, a suspect may appear more than once. However, figures on race and gender, and their correspondence, are still valid: the suspect was in effect experiencing a different identification procedure for each witness.

Out of the 69 cases, twelve involved juvenile suspects. Four of these were white, seven were black and one was mixed race. Twelve of the witnesses were also juveniles, five of whom were victims of the offence in question. Four were Asian, 7 were white and 1 was black. Table 1 shows the ethnicity of all respondents and the suspects they had been asked to view.

Table 1: The Ethnicity of Participants in the Study

	Witnesses	Suspects
Asian	18	12
Black	3	20
Mixed Race	-	9
White	48	28
Total	69	69

The general descriptions used by identification suite staff when advertising for volunteers are followed in Table 1. The ethnic categorisations are very simplistic,³² but as they are used routinely by police officers in the identification suite, and I did not see all suspects to make my own judgment, using police descriptions was a practical necessity.

It can be seen from Table 1 that the majority of witnesses viewing identification procedures were white. Similarly, the majority of witnesses were attending the Identification Suite to view a white suspect. Despite this, other races, especially black suspects, were over-represented in terms of percentage of population. This is borne out by the interviews conducted with suspects, where twenty respondents were black and five mixed race,

³¹ Deffenbacher, K.A., "The influence of arousal on reliability of testimony" in S. Lloyd-Bostock and B.L. Clifford (eds) *Evaluating Witness Evidence* (1983 London: Wiley), 235.

³² For example, Afro-Caribbeans and Africans are both categorised as "black". Similarly, there is no precise breakdown of the term "Asian" (the term includes Indian, but not Chinese or Malaysian people, for example).

totalling half of the sample.³³ As the sample is small, it is impossible to speculate on the reasons for, or wider implications of, the over-representation. However, some of those respondents who had witnessed an offence committed by a black or mixed race offender did tend to adhere to social stereotypes of the criminal activity of those groups, as in the following example:

"These people doing these things, it's all black men. Since it happened, I'm suspicious of all the black people coming into the shop. It's not just because of what happened, it's because they're all doing it."(Case 2)

The general tendency of witnesses to guess or choose the person who most resembles the offender increases where a witness simply looks for a certain colour or shade of skin. Table 2 shows how the ethnicity of respondents and the suspects they were to view corresponded on a case by case basis.

Table 2: Ethnic Relationship Between Respondents and Suspects

	Percentage
White suspect/ white witness	37.5
White suspect/ asian witness	3
Black suspect/ white witness	19
Black suspect/ black witness	1.5
Black suspect/ asian witness	8.5
Asian suspect/ white witness	1.5
Asian suspect/ black witness	1.5
Asian suspect/ asian witness	14.5
Mixed race suspect/ white witness	11.5
Mixed race suspect/ black witness	1.5
Total	100

46 per cent of respondents attended an identification procedure where the suspect had a different ethnic background to themselves. It is usual that a witness will find it easier to identify someone of the same race than of another ethnic grouping.³⁴ The potential for the

³³ See chapter 4 above. A detailed discussion of the possible basis of the apparent over-representation of black and mixed race suspects is outside the scope of this study.

³⁴ On the existence and causes of own-race bias, see Lindsay, R.C.L. and Wells, G.I., "What do we really know about cross-race identification?" in Lloyd-Bostock and Clifford (1983), op.cit.; and Bothwell, R.K., Brigham, J.C., and Malpass, R.S., "Cross racial identification" (1989) 15 *Personality and Psychology Bulletin* 139.

use of relative judgments or for misplaced confidence is therefore greater in almost half of the cases in the study, as those witnesses would be unable to differentiate quite as well as would a member of the same ethnic background as the suspect. Witnesses were asked about the sufficiency of similarity of parade members, and the following examples illustrate the dangers of own-race bias well:

"They were all Asian, that's all I saw" (Case 10)

"Black people, they do tend to look more like others than, say, white people." (Case 42)

"Well, they were all black" (Case 48)

"Not being prejudiced but he's coloured black and to me they're all blacks. I find it hard to recognise them." (Case 62)

Two of these four witnesses made a choice and were very confident, when interviewed a few minutes after their parade, that they were correct. The role of expectations and stereotyping, especially with regard to identifying those of other races, is discussed in some detail in Chapter 2 of this thesis.

(b) Stress

It is well established that, while there are individual differences between eyewitnesses,³⁵ accuracy can nevertheless be affected by other factors.³⁶ The conditions surrounding an eyewitness's original encounter with an offender undoubtedly affect the ease with which the individual witness will successfully encode, retain and retrieve the information contained in such an encounter.³⁷ It follows that the circumstances surrounding a witnessed event could affect the reliability of any eyewitness identification evidence later adduced in

³⁵ Examples of research in this area can be found in Loftus, E., *Eyewitness Testimony* (1979 Cambridge: Harvard), chapter 8 and Stephenson, G.M., *The Psychology of Criminal Justice* (1992, Oxford: Blackwell) 164-168.

³⁶ There is extensive research on the type and effect of differing witness and event factors. For a general review see Cutler, B.L., and Penrod, S.D. *Mistaken Identification* (1995 Cambridge University Press).

court. It is for this reason that the *Turnbull*³⁸ guidelines require an assessment of the quality of identification evidence before it is left to the jury.

Police officers tend to view a no choice as a simple failure to identify an offender who was present. The witness who chooses a volunteer is clearly mistaken. It was an aim of the study to assess whether the circumstances of the original offence for those witnesses who chose a volunteer or who did not choose at all were generally less conducive to accurate identifications than in those cases where the suspect was chosen. In doing so, certain key aspects of the offences were examined, including stress, visibility and length of time available to view an offender, both of which are taken into account when assessing the quality of eyewitness evidence in court.

It is likely that the stress aroused by a violent incident will adversely affect the accuracy of a later identification.³⁹ Witnesses attended the police station with regard to a variety of offences, and a sample of fifty is too small to make comparisons on the basis of type of offence. However, it is useful to compare the number of positive identifications made by witnesses to violent and non-violent offences. The increased stress levels involved in witnessing a violent incident may be a factor which tends to decrease identification accuracy,⁴⁰ as documented in the psychological research on "weapon focus".⁴¹ This is because of the interference that extreme stress may have upon a witness's perception of an event.

³⁷ Such event factors are the subject of much psychological experimentation. See, for example, Cutler, B.L., Penrod, S.D., and Martens, T.K., "The reliability of eyewitness identifications: The role of system and estimator variables" (1987) 11 *Law and Human Behavior* 223.

³⁸ [1976] 3 All ER 549

³⁹ See Deffenbacher (1983), op.cit.

⁴⁰ This idea is generally termed the Yerkes-Dodson law, which states that stress can aid learning and perception up to a point, after which performance begins to decline. Examples of literature in this area can be found in Loftus (1979), op.cit., 33 and Deffenbacher (1983), op.cit. on the optimality hypothesis.

A far greater number of violent than non-violent offences were the subject of identification parades in this sample. Robbery (including attempted and armed robbery), aggravated burglary, assault, wounding and sexual assault numbered 47 (68 per cent) of the sample as a whole.⁴² This is consistent with the average spread of offences in Birmingham in 1993, 1994 and 1995.

As the eyewitnesses who were the victims of crime were likely to experience greater stress levels than those who were bystanders, the problems of interference with the memory by increased stress theoretically are the highest for victims of a violent crime. Of those respondents who chose a volunteer, and were therefore mistaken, over half were victims of the offence in question. Of those witnesses who chose a suspect (54 per cent of the main sample) 18, or 66 per cent, had witnessed a violent event and 12 (or 44 per cent) were victims of crime. It appears, therefore, that violence of an incident and increased stress from being the victim of a crime, did not greatly affect choosing and confidence in the identification procedures in this study. However, the sample is a small one. It may also be that, although the rate at which witnesses made a choice is not affected, accuracy rates are.

Whilst it has been found that extreme stress did not affect the choosing and confidence rates of the sample as a whole, the effect of stress on individual witnesses came across quite strongly during interviews. It became clear that individual differences in identification ability and personalities accounted for the varying coping strategies employed. Put simply, some eyewitnesses could cope with stressful situations better than others. One particularly

⁴¹ See chapter 2 above for a discussion of the psychological experimentation conducted on the presence of weapon focus, and Kramer, T.H., Buckhout, R., and Eugenio, P., "Weapon focus, arousal and eyewitness memory? Attention must be paid" (1990) 14 *Law and Human Behavior* 167.

⁴² This broke down as follows: 30 (60%) of respondents in the main sample and 17 (90%) of the PPI sample had witnessed a violent offence.

striking example of the effect of being the victim to a violent event illustrated the theory of "weapon focus":

"I looked up and glanced and then I saw the knife and I never took my eyes off it again. Hopefully I will pick him, but I didn't really look at him at all."
(Case 4)

This respondent's confidence was clearly affected and she made no choice. The current sample is not large enough to make any firm conclusion on the effect of stress on identification accuracy, but it is clear that individual respondents were greatly affected by the events they witnessed.

(c) Fears and anxieties

Many witnesses felt natural anxiety about their ability to identify the offender and a desire to further the prosecution case. The anxiety to be "successful" and to aid the police in the prosecution of the offender also led to pressure to make a choice, with the anxiety centring around making the 'right' choice:

"You just feel as though you've let them down. They've organised all this to try and put this man away and I didn't recognise him so it's a waste of time." (Case 4)

"I was just worried because I kept thinking, say if now when I've picked number 9, say it's the wrong one and say it was number 6. I'm thinking, is that going to ruin it all, is that going to let him get away with it." (Case 13)

"It's like, if they turn round to me and say, well you picked number 9 and he was one of the stooges, well, I'll be, OK, carry on, do whatever you've got to do. But I'd feel like I'd made a right balls-up." (Case 19)

"I'm anxious that I'll be successful, that's all." (Case 34)

"I'm anxious that I'll still be able to recognise the chap that did it. It's been a good few weeks now." (Case 49)

These witnesses had understandable concern that they would in some measure fail to help the police prosecute the offender.

Related to this is the general nervousness felt by witnesses at some point during the procedure. Out of the 50 respondents in the main sample, 33 commented during the pre-

parade interview that they were nervous or frightened. Nervousness before the identification procedure was in part due to the lack of information given to them before they are taken to the identification suite. Whilst some witness officers do attempt to tell eyewitnesses what will happen, this is a rather hit-and-miss exercise, particularly as those officers are often unfamiliar with the details of the process themselves. It was clear that much of the knowledge of identification procedures that witnesses did possess came from friends or television. This is unsatisfactory. Although witnesses are spoken to on their arrival at the identification suite, it is after they have experienced a long wait at another police station. They should be given information at an earlier stage.⁴³ Perhaps then, fears and speculation would be reduced. There are some fears and apprehensions, of course, that are in the nature of the process, as in these examples given in the interviews after the parade had taken place:

"Everyone was looking at me, as to how I reacted looking at the line. And they say look at them twice. But when you know its that person you don't want to go over and over it. I just wanted to get out of there. My heart was going, and you feel under suspicion in a way because all these people are concentrating on you." (Case 42)

"It all made me uneasy. Four people watching me while I was trying to identify him. I just wanted to get out the room as soon as possible." (Case 44)

"It' s a bit nerve-wracking. I don't know why but it does unnerve you." (Case 46)

However, over half of the 33 witnesses who professed anxiety and fear, 18, felt nervous about whether the suspect would be able to see out from behind the screen. Perhaps, as the respondent in case 15 suggests, witnesses could be shown the viewing corridor before the parade is arranged. This could even take place on a different day. There would be some

⁴³ The poor treatment of witnesses to and victims of crime throughout the criminal justice process, especially in terms of the lack of information imparted to them, has been the subject of much debate: see Lacey, N., Wells, C., and Meure, D., *Reconstructing Criminal Law* (1990 London: Wiedenfield and Nicolson) and Mawby, R., and Walklate, S., *Critical Victimology* (1995 London: Sage).

organisational pressures put onto the identification suite staff if this became standard.⁴⁴ However, there may be an improvement in the confidence and accuracy of eyewitnesses once the fear that they can be seen is erased. This fear was not alleviated by simply being told that the suspect could not see them, after the parade had taken place, and is evidenced in the following examples:

"It scares the hell out of you, you're frightened to death because its got all glass and they[the police] tell you its one-way, but you're frightened they[the parade members] can see...It's a pity they can't show you from the other side first, that would be a good idea. I mean, I've never looked through a on-way screen." (Case 15)

"It felt like they could see me." (Case 18)

"Walking up there I was thinking, oh God, if I see him, what am I going to do?...it seems a lot of pressure on the witness. I think it's better if they have pictures in a book and you can choose like that, because if you're face to face with somebody, it's just so nerve-wracking. You're thinking, God, can they see me, even though they can't." (Case 37)

"I felt like they could see me because I could see them laughing and they were looking straight at me. Are you sure they can't see me?" (Case 39)

"I was really frightened because they look at you and you think they can see you." (Case 40)

The distress of some of these witnesses is clear. It is also easy to reduce by a more careful explanation of the identification process. Where witnesses are more relaxed, it is more likely that the integrity of the process will be upheld, because they will be more attentive to instructions and more likely to take time to look carefully at the parade members before making a choice. Where witnesses want to get out of the viewing corridor as quickly as possible, the protections of Code D are bound to fail because, for example, anxiety will get in the way of listening to the instructions designed to decrease the risk of misidentification.

⁴⁴ Use of video identification would prevent much of the nervousness involved in confronting the suspect, as well as being easier to arrange: see chapter 6.

(ii) *The Confidence of Eyewitnesses*

(a) Before the Identification Procedure

Prior to an identification procedure, the vast majority of eyewitnesses in the sample were confident about their ability to pick out the offender. Table 3 shows how confident respondents were about their own ability as eyewitnesses.⁴⁵

Table 3: The Confidence of Eyewitnesses Prior to an Identification Procedure

	Percentage
Very Confident	43.5
Confident	17.5
Unsure	13
Very Unsure	26

It is interesting to note that those respondents lacking confidence in their own ability as an eyewitness often expressed frustration about the time between their original viewing of the offender and the arrangement of the identification procedure.⁴⁶ This is illustrated in the following examples:

"The length of time, from when it happened to now, is over a year...They [the police] have got to go through their process of detection and all the rest of it and do what they can to grab hold of whoever has done whatever. But the time lapses you know. I'm sitting here wondering if I'm going to be able to remember the face." (Case 19)

"It's too long ago, isn't it?" (Case 30)

"If you had asked me that a couple of weeks ago, I would have said yes, definitely" (Case 33)

⁴⁵ Table 3 represents responses from all 69 witnesses who were interviewed prior to the identification procedure. In some instances, respondents' level of confidence was difficult to categorise. In those cases, professed confidence levels of 99 or 100 per cent were classed as 'very confident'. Levels at 50 per cent and below were classed as "very unsure". Those who stated that they may or may not be able to identify, depending on the circumstances, were placed in the 'unsure' category.

⁴⁶ The length of retention interval has been considered as an accuracy variable by a number of researchers in the field of eyewitness evidence, for example see Shepard, R.N., "Recognition memory for words, sentences and pictures" (1967) 6 *Journal of Verbal Learning and Verbal Behavior* 156. Indeed, it appears to be a matter of common sense that, the longer the period of retention of a memory before recall, the greater the possibility that the memory will be affected by fading or post-event information.

"...it's such a long time. When the police told me I would have to do an identity parade, I thought it would be a week later, or two weeks later. But three months, no, I'm not too confident." (Case 44)

"The longer it goes, the more you forget. I think that is quite worrying in the respect that you could identify the wrong person because the time gap has dulled your memory." (Case 63)

"Not that confident. I was more confident before, but then it was cancelled." (Case 68)

A concern about the time gap between offence and identification was not confined to a lack of confidence before the identification procedure, but was also a common source of complaint after the parade had taken place. The retention interval between the offence and the identification procedure affected the confidence of witnesses quite markedly after they had viewed the parade and it became clear that witnesses were not complaining without reason. It was an important finding in the research that witnesses often waited for a considerable period of time between the commission of the offence and when an identification was attempted. Whilst witnesses lacking in confidence cited a long retention interval as a cause, unease was not limited to those respondents who were not confident in their abilities. As one witness explained:

"There shouldn't be such a delay. They should arrange it quicker so the witnesses have got it fresh in their minds and they know what the person looks like. It would be easier to pick them out. Better chance of picking them out because you tend to forget their face if you don't see them soon afterwards." (Case 44)

It is acknowledged that police investigations may take some time, and that there is often no immediate obvious suspect. However, in case 44, the suspect had been apprehended immediately, but no identification parade was held for three months. In the study, the average waiting period between offence and identification parade was three months. This rose to over 18 months for three witnesses and over six months for a further six witnesses. 58 per cent of witnesses waited for more than three months, and no witness attended a procedure within six weeks of the offence. This is unacceptable, as six weeks is in itself a considerable delay.

The average retention period of three months was used as a cut-off point to measure the effect of longer delays on eyewitness confidence before the identification parade. There was no difference in levels of confidence between those witnesses waiting for more than three months to attend the identification procedure and those waiting less than three months.⁴⁷ However, none of the witnesses had very short retention periods, and so it is impossible to fully assess the effect of longer retention intervals on eyewitness confidence, except to state that many of those who admitted to a lack of confidence did so because of the length of time between the offence and the identification procedure. When reviewing eyewitness performance after the identification procedure, it emerged that seven of the nine witnesses who chose a volunteer, and so were mistaken, had had a retention interval of more than three months. The remaining two had witnessed an offence ten weeks prior to the identification procedure.

Some delays are unavoidable, but there is a clear need for shorter waiting times and increased efficiency regarding the booking of identification parades. This does not by any means apply solely to identification suite staff, but also to investigating officers who are responsible for booking and keeping to the date of identification parades. Some provision for slotting in parades where others are cancelled one or two days before they are due to go ahead would greatly reduce the waiting time for some witnesses, and increase the likelihood of accurate identification evidence.⁴⁸

Whilst those respondents who were “very unsure” about their memory of the offender prior to any identification procedure highlighted the length of memory retention periods, those witnesses who were “unsure” of their own ability had different concerns. These focused on

⁴⁷ 60 per cent of those whose retention interval was more than three months, and 58 per cent of those where the retention interval was less than three months classed themselves as “very confident” or “confident” about their ability to identify the offender.

⁴⁸ For further discussion of the effects of long retention intervals on the reliability of memory, see chapter 2.

the belief that a further viewing of the offender would trigger a memory which had proved difficult to recall in the meantime.⁴⁹ In the examples below, witnesses describe their hope that, although they felt unable to put the description of the offender into words, a further viewing may result in recognition:

"I can't remember him that well, but it might just jog my memory if I see him again" (Case 24)

"If you asked me to describe him I might struggle, but I think I might recognise him." (Case 27)

"I just don't know...I mean, I might know him straight away and I might not know him at all. I'm not very good at recognizing people again anyway." (Case 36)

"Well, I don't know until I see him. In my own mind I think 'will I be able to recognise him or not'. I feel just a little bit doubtful, but it might all come back to me, you see." (Case 46)

"Usually if I see someone for the first time, I can't see their face in my mind, but if I see them again I recognise them. That might happen today." (Case 49)

"I can't remember what happened last week, never mind four months ago. I have got a major problem with memory for faces and names. I know one person who has been through it and that was five months. They said they never forgot the face, so I'm working on the premise that there will be some remnants of memory in there somewhere." (Case 59)

Amongst those witnesses who felt unsure about their ability to make an identification, there was a concern that offenders would have changed their appearance since the time of the offence. There was a general emphasis on superficial aspects of an offender's appearance, such as dress or hairstyle. One respondent who was not sure about his ability to identify was positive about the benefits of triggers, stating:

"I'm just going to go in and do my best. I don't think I will be able to pick him, but then again I might just see something that reminds me of him." (Case 57)

⁴⁹ It is generally the case that witnesses find it easier to recognise than verbally to recollect an individual's features: see Luus, C.A.E., and Wells, G.L., "Eyewitness identification and the selection of distractors for lineups" (1991) 15 *Law and Human Behavior* 43.

It is worth noting that this witness does not speak of seeing actual features, superficial or otherwise, but relies on a reminder of the original offender as a trigger to his memory of events. The danger to a suspect who is not the offender but who does remind such a witness of that offender is clear: a positive but mistaken identification could be made, possibly resulting in a wrongful conviction.

One third of respondents commented before the parade that their confidence level was dependent on the stability of some particular feature. It was understandable that some of these features, such as piercings, were noticed and highlighted in witnesses' memories:⁵⁰

"I'm confident in as much that, providing he hasn't changed his appearance, that is, that he hasn't changed his blonde front bit that he had got in his hair." (Case 43)

"Well, there's obviously some distinguishing features, like his hair, so if they have been changed, say his hair's changed, I think it will make it more difficult." (Case 58)

However, such features will not necessarily be peculiar to the offender, as in this example:

"I'll know him anyway because of his nose stud. Unless he has taken it out."
(Case 54)

As a particular hairstyle or piercing does not necessarily mean that the suspect is the offender, the Identification Suite staff covered distinctive features⁵¹ with a hat or sticking plaster. Otherwise, the suspect would stand out as the only member of the identification parade who had that feature. The covering of piercings and distinctive hairstyles tests the witnesses on their ability to identify the offender by reference to features other than those which are unusual. This certainly applies to cosmetic features, but will also probably apply to scars and tattoos. However, any distinctive feature will be evidence which would be likely to sway a jury to believe the testimony of an eyewitness. Indeed, it would be odd if a witness did not mention an outstanding feature in an original description. The observation

⁵⁰ This reliance on superficial features was also observed in the study on suspects. For example, in Case 41, the witness made no choice from the parade but stated to police in the viewing corridor that "If he'd got the same clothes on I'd be able to identify him".

of such details could make an eyewitness more reliable. The problem arises where the memory of the offender consists of only those features, especially when the memory revolves around a particular style of clothing.

The level of reliance on superficial features among respondents in the study was striking. It not only affected the level of confidence witnesses felt before the identification procedure, but also contributed to witnesses' difficulty in, or failure to, identify the suspect. The discovery that a suspect had changed his or her appearance understandably shook the confidence of eyewitnesses when interviewed in the few minutes after the parade. As the following witness stated:

"I cannot believe that. It was so hard. I just felt that I would know him straight away. He was just so clean and his hair. I thought I would have been able to get him without even looking at the rest of the lineup...He was clean shaven and really taken time. None of them looked as thin." (Case 3)

The witness above illustrates that concern about change of appearance was not limited to those witnesses who focused on one aspect of an offender's appearance. Just under half of the respondents expressed some concern about changes of general appearance, or were confused (as in case 3) when general aspects of appearance were changed.⁵²

The confidence of witnesses was also affected by the length of time they had to view the offender and visibility at the time of the offence. It was a clear finding that the longer witnesses had had to view an offender, the more confident they were before the identification procedure. Similarly, the witnesses who had viewed an offence in the dark were less likely to be very confident than those who had seen the offender in the middle of the day. However, these factors did not affect the likelihood of witnesses making a choice, and a lack of confidence continued only where no choice was made. The implication here is

⁵¹ Where the feature was not shared by a number of the volunteers.

⁵² Police officers also expressed concern about suspects' changes of appearance in Bucke, T., and Brown, D., *In Police Custody: Police Powers and Suspects' Rights Under the Revised PACE Code of Practice* Home Office Research Study 174 (1997 London: HMSO), 50.

that witnesses are just as likely to make a choice, and be confident that they are right, where they had a fleeting glimpse of an offender in poor light as where they witnessed a lengthy offence in a well lit area. Where the circumstances of the original identification meant that the offender was not seen clearly, the memory is likely to fill in gaps to coincide with the general expectations of the witness.⁵³

It can be seen, therefore, that although 61% of witnesses attending identification parades were confident in their ability to identify the offender before the parade took place, long retention intervals and fears about changes in the offender's appearance could damage that confidence.

(b) After the Identification Procedure

Eyewitnesses were interviewed immediately after their viewing of an identification procedure in order to assess the confidence they felt in their choice. Once police officers have informed witnesses of the "correctness"⁵⁴ or otherwise of their choice, then confidence levels can be affected, because confirmation that the person chosen was the suspect is likely to make witnesses more confident.⁵⁵ Similarly, the knowledge that they have chosen a volunteer will almost certainly decrease their confidence in the identification made.

⁵³ For a discussion of the selective and constructive processes of memory, see Loftus (1979), op.cit., chapter 3.

⁵⁴ "Correctness" is used in the sense that the witness had chosen the suspect. Although the choice may still be incorrect, witnesses would, quite understandably, view their choice as correct in such circumstances.

⁵⁵ This is termed "bolstering" and has been found to occur in experiments where police officers confirm that the person chosen was the suspect: see, for example, Loftus, E.F. "Psychologist in the Eyewitness World" (1993) 48 *American Psychologist* 550

This assumption was confirmed in twenty cases,⁵⁶ where I talked to witnesses for a third time after the police had spoken to them. All of the five witnesses who had chosen a volunteer felt less confident in their choice. Only one of the fifteen witnesses who had chosen a suspect claimed to feel the same level of confidence after their choice had been confirmed. All others felt an increase in confidence. Results from psychological experiments suggest that this confidence would be likely to carry on increasing as a form of self-confirming exercise, resulting in a very confident and persuasive eyewitness should the case reach court.⁵⁷

This study also examined whether such self-confirmation begins at an earlier stage than the time witnesses are told whether they chose the suspect or not. If self-confirmation does begin earlier, confidence levels will change in the few minutes between the identification and the interview. To facilitate this, there follows an evaluation of the confidence witnesses felt immediately after the identification parade. This takes two forms: firstly, if witnesses made a choice, how confident were they that they had made the correct choice. This applies to cases both where witnesses chose the suspect and where they chose a volunteer. Secondly, if no choice was made, what was the witness' level of confidence that the offender was not present on the identification parade.

The witnesses who chose a volunteer are the ones who are certainly mistaken.⁵⁸ Out of the nine witnesses who chose a volunteer, five were victims of the offence. Table 4 categorises the levels of confidence felt by these witnesses.

⁵⁶ It proved impossible to speak to all witnesses after they had seen a police officer, as the researcher often had to travel back to Dudley Road Police Station immediately after the identification parade had taken place. Fourteen of the fifty had made no choice, so speaking to them for a third time would have been pointless. Out of the twenty cases where I did speak to the witness again, five had chosen a volunteer and fifteen had chosen the suspect.

⁵⁷ See Cutler and Penrod (1995), *op.cit.*, chapters 6 and 7, and the discussion in chapter 2 of this thesis.

⁵⁸ It would be very unusual indeed for a witness to choose a volunteer who was indeed the offender.

Table 4: The Confidence of Witnesses Who Chose a Volunteer

Case No.	Before Parade	At Time the Choice was Made	Minutes After Parade
1	Very Confident	Not Sure	Less Confident
9	Very Confident	Very Confident	Very Confident
10	Very Confident	"Looks Like Him"	"Looks Like Him"
13	Confident	70-80% Sure	70-80% Sure
15	Very Confident	90% Sure	90% Sure
26	Confident	Not 100%	More Confident
32	Very Confident	"Pretty Sure"	"Pretty Sure"
34	Confident	Confident	More Confident
49	Unsure	Very Confident	More Confident

In only one of these cases did the respondent, a mistaken eyewitness, suffer a declining confidence in the few minutes it took to interview her (this is in stark contrast to the 100% rate of decline in confidence for the five who were later told by the police that they had chosen a volunteer). Three witnesses stated that they were more confident after a few minutes than they had been when they had made the identification. Although some witnesses acknowledged that they could not be sure about their choice, none of them felt outright that they had made a mistake. The relative certainty of mistaken witnesses confirms the necessity for caution when relying on eyewitness identification in criminal cases. The confidence of the following witnesses who identified a volunteer, when interviewed minutes after the parade but before they were spoken to by police, highlight this point:

"I'm very confident, because I saw him from up close, and when you see someone from ten steps away and then you are asked to identify him from thirty or forty steps away then you get a good chance. I'm positive I'll say."(Case 9)

"His face just leapt out at me." (Case 49)

If witnesses who have identified a volunteer can be this confident, so can a mistaken witness who has identified a suspect. It is this danger which forms the background to the *Turnbull* guidelines, and was the reason for the Devlin Committee inquiry in 1976. The public outcry over the cases of Laszlo Virag and Luke Dougherty,⁵⁹ both victims of mistaken but certain witnesses, highlighted the problems in reliance on eyewitness identification. My study confirms that mistaken witnesses can be very confident about their choice. This is particularly dangerous for innocent suspects who are similar in appearance to the offender, because witnesses may choose them on the basis that they are the person on the parade who looks most like the offender. That those witnesses who chose a volunteer were in general confident in their choice confirms that the protections of Code D alone, however rigidly adhered to, will not eliminate the danger of misidentification. However, a well organised parade which maximises the protections Code D has to offer may minimise the effect of the relative judgment process by ensuring that the suspect does not stand out when the parade is seen by a non-witness. Protection will be enhanced when rigorous application of Code D is combined with the protection offered by the *Turnbull* guidelines. It is imperative for furtherance of the protective principle that jury members are aware of the dangers of misidentification and that they understand that procedural fairness cannot eliminate the potential for mistaken identification.

The danger of misidentification by a confident witness is illustrated further by witnesses who were prepared to choose even where they were unsure. There has been debate regarding the existence of a relative judgment process.⁶⁰ The process rests on the idea that eyewitnesses do not choose on the basis of the suspect's similarity to the offender alone. Rather, a comparison takes place, whereby the member of the identification parade most

⁵⁹ Devlin Report, *op.cit.*, chapters 2 and 3.

⁶⁰ For examples of the literature on the relative judgment process, see Lindsay, R.C.L., Lea, J.A., Nosworthy, G.J., and Fulford, J.A., "Biased lineups: Sequential presentation reduces the problem" (1991) *76 Journal of Applied Psychology* 796; and Wells (1984), *op.cit.*

like the offender *when compared with everyone else in the line* is chosen. Six of the nine witnesses who chose a volunteer were evidently using comparison in making their choice, as the following examples illustrate,

"Well, it looks like him, that's all I will say. He is the closest one I can get to. His [the suspect's] build and height are much like him [the offender]. He is the closest." (Case 10)

"I brought it down to two; and I wouldn't say it was 50:50 between them. I would say it was more like 80:20...I wanted to make a choice. I think if I hadn't made a choice I'd be thinking I should have. I just keep thinking the two of them were fairly alike...I definitely remember him[the offender] being thinner than myself. Two were similar, but one was a bit more gaunt than the other one...and that's how I made my choice. If I'm wrong now it's not going to matter, is it?...I'll be surprised if it wasn't him." (Case 13)

"He looked most similar to the offender." (Case 26)

Taking Case 13 as an example, the choice came down to which one of two members of the parade was thinner. The witness obviously had some difficulty in choosing, yet stated that he would be surprised if he had not chosen correctly. This appears to be the relative judgment process at work.

An important finding to emerge was that those witnesses who picked out the police suspect were by no means immune to the relative judgment process. The difference is that in many of their cases, a criminal prosecution will rely to some degree on eyewitness evidence. In ten of the 27 cases (37 per cent) in which a witness identified a suspect, the respondent stated that they had chosen between two or three, but that the one they did choose looked most like the offender. This is a disturbingly high proportion. The following examples offer an insight into the processes used by those respondents who identified the suspect on a comparison basis:

"There were two similar. They were both sitting together which is why I'm not sure." (Case 7)

"They all looked the same. He just looked the most like him." (Case 24)

"They could all have been him. There were about two others I was guessing with, but he took it seriously." (Case 31)

"I say it's number six but it might not be. You know, looking at all the others you think, well it can't be them, it's got to be him. He's[the suspect] the one who looked most like him[the offender]." (Case 42)

The way an identification procedure is organised affects the way witnesses choose and their accuracy in making that choice. It is clear that, where there is little similarity, the functional size of the parade will decrease.⁶¹ In other words, it will be easier for the witness to "guess" which person the suspect is because a number of parade members can be immediately rejected.⁶² In the study, well over half of respondents, 58 per cent, felt that not all the parade members were sufficiently similar to each other, or to the initial description witnesses had given of the offender, as illustrated by the following examples:

"They were quite different. Well, their colour is the same, but otherwise their appearances were different." (Case 1)

"They were in little groups of who looked similar to each other." (Case 15)

"The first four or five looked similar, until you went down to the end and then you saw them change." (Case 35)

"Their hair was sort of similar, but not really, no." (Case 40)

"There was too much comparison. Long hair, short hair, skinny and fat. It wasn't a match." (Case 45)

Psychologists recommend the use of cautionary instructions as a means of limiting the relative judgment process. The high incidence of relative judgment in this study suggest that the cautionary instructions to witnesses in Code of Practice D, stating that the offender may or may not be present on the parade, are not very effective. The instructions have a sound basis in psychological theory,⁶³ and were implemented in order to alleviate the pressure felt by witnesses. Respondents who chose from the line, whether it was a suspect

⁶¹ On functional and nominal size of identification parades, see Nosworthy and Lindsay (1990), *op.cit.*

⁶² In case 38 of the study on suspects, the process of relative judgment could be seen at work for two witnesses. Their descriptions were of a light-skinned black male, but the suspect was dark-skinned. The witnesses actually chose light-skinned members of the parade, illustrating that they had discounted members of the parade who had darker skin tones, including the suspect. This is not to assume that the suspect was the offender, but simply illustrates that witnesses may discount or choose members based on relative judgment.

or a volunteer, had evidently not always taken on board the instructions they were given, suggesting that Code D has minimal effect in protecting suspects from misidentification where a witness' memory is lacking.

Psychological research also suggests that the relative judgment process can be limited by changing the presentation of the identification parade, photo-array or video. Rather than allowing witnesses to view all of the volunteers, photographs or videos together, they recommend sequential presentation, where each parade member is shown one at a time to the witness. In this way, comparison between members is reduced. This would not prevent random guessing, but would limit relative judgments.⁶⁴

When examining the confidence levels of those 27 witnesses who chose the suspect from the identification parade, only one felt less confident at the end of the post-parade interview minutes after the parade than when the choice was initially made. This witness (case 24) had been unsure as to his ability to choose the offender before the procedure took place. He was not confident immediately after making his choice, and admitted to using relative judgment. Other witnesses, although clearly using a relative judgment process, felt increasingly confident about their choice. For example, the witness in Case 7 stated at the end of the post-parade interview that she was sure she had "picked the right one", despite reporting earlier that she was unsure.

In all, ten witnesses who had chosen the suspect reported increased confidence in their choice between making it and completing the interview with me. As discussed earlier, it is likely that their confidence would increase further when they were informed that they had

⁶³ On the effects of giving cautionary or biased instructions, see Malpass, R.S., and Devine, P.G., "Eyewitness identification: Lineup instructions and the absence of the offender" (1981) 66 *Journal of Applied Psychology* 482.

⁶⁴ There are some practical problems in using sequential presentation: see chapter 3.

indeed chosen the suspect. The following example offers an insight into how a witness may progressively become more confident that they have made an accurate identification:

"I wasn't quite sure. I picked him...and afterwards I thought it wasn't him. I wasn't very sure. And then when I came in here I felt really confident that it was him." (Case 17)

Those witnesses who decline to make a choice (there were 14 who did so in this study) are often viewed by police officers as poor eyewitnesses. I observed policemen commenting that witnesses were particularly nervous, or that they had not expected them to make a choice from the outset. It appeared inconceivable to many of the police officers investigating a case that an eyewitness who fails to choose the suspect from a parade may be correct in doing so. In other words, there is an assumption that the suspect is the offender. This occurred most strikingly in the case of a sexual assault on a teenage girl (case 40). The girl did not choose the suspect, saying

"He wasn't sitting there. I know one of the people on there, I talk to him as a friend and stuff. He's number 4, but he was nothing to do with it."

The suspect was number 4. Police officers insisted that, because the girl was very nervous, she had failed to identify him. Yet she seemed adamant that she knew the suspect and that he was not the offender, a man with whom she had spent over an hour. So it was not the case that she did not recognise anyone because she was so nervous. In fact she recognised but discounted someone.

Because of the general assumption that witnesses who make no choice are merely failing to identify an offender who is present, it is worth examining the confidence levels of those witnesses both before and after the identification parade. The main question to be addressed here is: are witnesses who make no choice generally less confident than those who do?

Out of the 14 witnesses who declined to make a choice, four were unsure and six were very unsure before the identification parade took place. The concentration of unsure

witnesses in this group suggests that the witnesses were far more cautious from the outset. This may be due to a number of reasons. For example, it could be that the witnesses were simply aware that their memory was not very good. By contrast, it might be that they had thought about the importance of the procedure and were exercising caution for that reason. This is supported in some way by comments made after the identification procedure, where respondents spoke of thinking that a particular member of the parade was the offender, but declining to make a choice because they were unsure. Witnesses who make no choice are therefore more resistant to the relative judgment process than those who do make a choice. The point was illustrated by eight respondents, for example:

"I'm not 100 per cent confident that he wasn't there. There's still a doubt about the one, definitely, but I just think if you're not certain then you shouldn't say...I'm just open about it. It could have been him, but having said that, that wasn't the question I was asked. I was asked 'was it him'. If you can't say it 100 per cent, the answer's no, isn't it?" (Case 27)

"There were a couple who could have been the guy, but I couldn't be sure, and...unless I'm sure I won't pick anyone." (Case 47)

The witness in case 27 had obviously taken to heart the cautionary instruction given by the Identification Officer immediately before viewing the parade, which make it clear that if a witness cannot make a positive identification, then he or she should say so.⁶⁵

The caution of respondents like those quoted above is in sharp contrast to the witnesses who chose by a process of relative judgment. An important finding from the interviews with witnesses is that a decision not to choose should not be seen as a failure. Some of those respondents who did not make a choice were quite certain that the offender was not present. Respondents who could not be certain at least had the presence of mind not to choose when they were in fact unsure.⁶⁶

⁶⁵ Code D, Annex A:14.

⁶⁶ Despite being less prone to guessing, those witnesses who made no choice were no less resistant as a group to self-confirmation after the identification parade. Out of the 14 who made no choice, six felt more confident at the end of the interview that the offender had not been present on the parade than when they had decided to make no choice. Only one respondent, in case 4, became less confident.

Conclusion

Witnesses attending identification procedures are, on the whole, confident in their abilities to present accurate identification evidence. However, the majority of respondents in this sample were apprehensive about some aspect of the procedure. Some of their fear reflected the length of time it had taken for the identification procedure to take place. It was found that retention intervals were indeed quite lengthy. Greater efforts should be made to ensure that identification procedures go ahead as scheduled. Where this is impossible, postponements should be short.

Witnesses who had attended more than once for an identification procedure felt the greatest dissatisfaction, and complained especially about the amount of time taken up by the process. It was noteworthy that the vast majority of respondents, 83%, mentioned the length of time they were expected to wait before going to the identification suite. This difficulty was clearly compounded where the identification procedure was postponed or cancelled. Without the goodwill of witnesses, identifications simply could not go ahead. Shorter waiting periods, fewer cancellations, and more comfortable surroundings are clearly required to maintain that goodwill.

Where witnesses were nervous, a longer wait increased that nervousness. Many of the respondents' concerns could be attributed to a lack of knowledge about the identification procedure. Whilst some witness officers attempted to give guidance, many were at a loss to explain what would happen once the parade was underway. The most common concern was that the suspect would be able to see the witnesses. Adoption of video identification would eliminate much of the waiting time and anxiety involved for witnesses, because the procedures would be arranged before witnesses arrived at the police station, and there would be no need for them to see a live parade. In the meantime, if witnesses were

routinely given information before they entered the identification suite and could see the viewing corridor beforehand, some fears would be alleviated. When witnesses have to wait for a considerable time on the day of the procedure before viewing the parade, it is unfair to leave them feeling anxious. A comprehensive scheme of information would not be difficult to arrange. At the moment, it is a hit and miss affair, with many witnesses acquiring knowledge from television crime programmes.

Despite widespread nervousness, the generally high confidence of witnesses tended to increase after the procedure in almost half of all cases. Whilst this is not of concern in itself, when coupled with the finding that many respondents whose confidence increased had used relative judgment to identify the suspect, the picture becomes more problematic. It was encouraging to see that 28 per cent of witnesses made no choice, refusing to choose when they were unsure. These witnesses took the instructions given to them at the start of the procedure very seriously.

However, unsure witnesses were not confined to those who made no choice. For example, ten of the 27 witnesses who chose a suspect spoke of using some form of relative judgment in reaching that choice. A witness who has used relative judgment but then becomes confident in that choice offers unreliable but persuasive evidence. Further, the use of relative judgment was not confined to those witnesses who originally viewed the offender in difficult circumstances, such as in poor light. Because of this, not all which are made by use of the relative judgment process will later constitute evidence which will be viewed as poor quality under the *Turnbull* guidelines. The Code D protections from the use of relative judgment found in the instructions given to witnesses also appeared to be ineffectual for these witnesses, and it has to be concluded that the operation of current safeguards offer a far from water tight protection from misidentification for suspects. Where a relative judgment is made in spite of the Code D instructions, and the witness

made what would be viewed as a “good quality” identification under *Turnbull*, the protective principle is undermined in a subtle manner. Chapters seven and eight explore further how protection from misidentification can be increased by better information for the jury regarding memory processes. It is perhaps through better utilisation of psychological information, rather than through any reform of Code D, that the protective principle is likely to be promoted where a relative judgment process has taken place.

The witnesses in this study offer an insight into the dangers of reliance on eyewitness identification, because many remained confident after using a relative judgment process. Evidence from the ten witnesses who had chosen the suspect by using relative judgment lacks reliability. As they all presented as certain when they made their identification, the police record of a clear and seemingly confident choice could become the basis for decision making by prosecution and defence lawyers on the course of action to take and the line of questioning to use in their case. Furthermore, the jury in any later trial would have no idea that the eyewitness evidence was based on a “guess”. This creates considerable danger of wrongful conviction.

CHAPTER SIX

OBSERVATIONS OF IDENTIFICATION PROCEDURES

Introduction

At the time of the study on suspects in 1993, Birmingham had an identification suite which was part of an operational police station, and whose space was used as a general thoroughfare at times when a parade was in operation. Indeed, people would wander through the viewing corridor immediately before and after parades, which could undermine the fairness of the procedure. For example, in Case 47 of the sample of suspects, police left the corridor doors open after the suspect had chosen his place in the line. Lots of people were walking back and forth without being asked for identification. It was obvious who the suspect was, because he spoke to his legal representative a few times. The potential for breach of Annex A:12, whereby witnesses should not be allowed to see the suspect or receive any indication as to his or her identity, is increased where no effort is made to keep the suspect out of public view, as in Case 47.

By the time the study on witnesses was conducted in 1995, Birmingham identification suite had moved to a new site, with an increase in staff members assigned to it. The suite was purpose built, was in an annex of a police station, and offered a good degree of security. However, the cost of running a purpose built suite is high, as the space is dedicated to identification, more staff are involved and the facilities lie idle when there is no parade. In a climate where identification parades are conducted for every case involving an issue of identification (even where the witness and suspect know each other), the costs are too high to justify. Instead, alternative methods of identification should be considered, such as greater use of video identification libraries. Problems regarding cancellations and postponements could then be alleviated. Although the use of video identification is

increasing, along with evidence from CCTV cameras, it is still not the norm, and the Code continues to ensure (along with routinised practices) that a live parade is the first port of call.

In this chapter, observations from empirical studies of witnesses and suspects are used to illustrate the procedures used for identification and the experiences of officers running identification suites. The difficulties in running an identification suite are discussed, along with some options for reform of the system in place in Birmingham and a number of other major cities in England and Wales.¹ This involves an examination of the cost of running an identification suite, the system used to find volunteers, and the abundance of procedures which do not take place at the scheduled time.

How Identification Procedures Are Organised

(i) Methods of Identification

Under Code of Practice D2.1, the police may use four methods of identification in cases where a suspect is known to the police:² the identification parade, a group identification, a video film, or a confrontation.³ The parade is the preferred method of identification, because it is thought to produce the most reliable evidence, allowing witnesses to see the suspect in a live setting with others who are similar in appearance. Where the police cannot organise a parade due to the difficulty in assembling volunteers, they can have recourse to

¹ For example, Manchester also has a purpose built suite at Longsight Police Station, where staff and facilities are only used for identification procedures.

² For a discussion of when a suspect can be said to be “known” to the police, see Chapter 3 of this thesis and Code D, Note 2E.

³ Where a suspect is not known, police officers may use less formal methods of identification. Under Code D2.17, witnesses may be taken to a place to see whether they can identify the offender. Even though this is less formal than methods of identification used where the suspect is known, records of descriptions should still be kept before taking the witness to the neighbourhood or place. Under Code D2.18, photographs, photofit or identikit may be shown to witnesses where the suspect is not known to the police. Again, some formalities must be followed: see Code D, Annex D.

other methods of identification.⁴ A group identification in Birmingham usually takes place at the railway station, with the suspect being given a set amount of time to walk through the barriers. The railway station is chosen because it offers a good range of people to form a group. Where a suspect is in custody, group identifications have been held in the identification suite, with a number of people joining the suspect and moving around.⁵ Video identification was never used during the period of both Birmingham studies, although there were facilities available in the identification suite and despite the fact that video libraries are kept in some areas.⁶ Where a parade or group are not practicable, identification by confrontation is considered. This involves the witness seeing the suspect alone, and being asked “Is this the person?”. Confrontations are seen to produce less reliable evidence than other methods of identification, because there is less of a test for the witness when presented with the suspect in isolation rather than amongst a number of other people.

When combining the data from both the study on witnesses and that on suspects, the overwhelming majority of procedures were identification parades. Out of the 100 procedures in the samples which went ahead, 96 involved identification parades, one was a group identification, and three were confrontations. The police are successful in following the hierarchy of procedures as laid down in Code of Practice D2.1, but whether this is the most cost-effective approach is questionable. The cost of identification parades and whether they are so superior to other methods of identification that they warrant extra resources and expense is discussed later in this chapter.

⁴ See Code of Practice D2.4 and D2.6.

⁵ Volunteers who did not fit the requirement of sufficient similarity under Code D, Annex A:8 could be used in a group identification, as there is no requirement of similarity. The use of the identification suite for a group identification is a rarity, and the identification officer would normally move to identification by confrontation.

⁶ Most notably in Bradford. Video libraries tend to be used for those groups who are difficult to arrange parades for: such a Rastafarians and red-headed males.

(ii) *The Organisation of Identification Procedures in Birmingham*

During the study on suspects' perceptions conducted for this thesis, the Birmingham identification suite had two full time members of staff: an inspector (the identification officer) and a sergeant. Upon moving to the purpose built suite, two civilian members of staff were added, as well as a police trainee. The civilian staff then did some of the work formerly carried out by the sergeant, such as finding and looking after volunteers, and ensuring the smooth running of the identification suite. The sergeant booked parades and fielded all enquiries. He also took on the role of the Inspector during times of absence. The inspector had responsibility for talking to suspects and witnesses, delivering the Notice to the Suspect, and making decisions as to whether a procedure should go ahead. He also decided whether the police would try to arrange another parade if volunteers had been rejected by the suspect, and was responsible for making a written record of what was said by witnesses and presenting the responses as evidence in any later criminal proceedings. A good proportion of the inspector's time was spent in court giving evidence, and so the sergeant had to be well versed in all aspects of the inspector's duties.⁷

The Birmingham identification suite books up to four parades a day, and there is also limited provision for evening and Saturday morning parades. Group identifications and confrontations are not booked in the first instance, but rather come about because volunteers cannot be found for an identification parade. Where the identification officer feels that a parade could be run on another occasion, and where suspects are willing to provide some of the volunteers for their parade, a second attempt at arranging a parade may be mounted. Where the second try has failed, or where the suspect is singular in

⁷ Code D2.2 provides that: "The arrangement for, and conduct of, these types of identification shall be the responsibility of an officer in uniform not below the rank of inspector who is not involved with the investigation ('the identification officer')". In a minority of cases, inspectors from the police station conducting the investigation would step in for a parade when the identification suite inspector was on leave. Although this meant that a more senior member of staff was conducting the identification procedure, the sergeant was normally more able to carry out the role, due to his experience of identification and Code of

appearance, a group identification or confrontation may take place on the day. However, where the identification suite staff have spent a long time trying to arrange the parade, there may not be sufficient time before the next booking to go ahead with a group identification, and these may be scheduled for a later date. It can be seen that, for some suspects and witnesses, the identification procedure is time-consuming and may involve two or three visits to the identification suite.

Witnesses are asked to arrive at Dudley Road Police Station, across the city from the identification suite, at the allotted time of the parade. They wait there until the parade has been arranged and are then escorted to the identification suite by the witness officer, who is an officer from the police station investigating the offence.⁸ This ensures that they will have no opportunity to see the suspect or any volunteers until the parade had been arranged.⁹ Witnesses are taken to a witness waiting room in the identification suite, and are shown the parade one at a time. Other witnesses in the waiting room cannot hear or see what is happening. In all cases observed during the study on suspects' perceptions, witnesses were informed by the identification officer that they should view the parade twice and that the offender may or may not be present in the line. For the most part, witnesses during the study on suspects made their decision very quickly: the longest any witness spent viewing the parade before choosing a parade member was two minutes. This was much longer than any other witness had taken. Witnesses' responses are written down verbatim, and no hesitant responses were recorded as positive identifications during the time I observed parades in Birmingham. For example, if witnesses stated that "I think it's number three but I can't be 100 per cent sure", this would not be recorded as a positive identification. The identification officer at Birmingham identification suite was therefore

Practice D. In order to satisfy Code D2.2, the sergeant was referred to as an acting inspector during the regular inspector's absences.

⁸ Witness officers cannot be the investigating officer, who can play no part in the identification procedure: Code D2.2. There are some difficulties in having witness officers who are not routinely involved in identification procedures, as discussed below and in chapter 5.

scrupulous in recording accurately the responses of witnesses, and in doing so increased the protective measures of Code D whilst playing a part in the decision as to which cases were viewed as having positive identification evidence upon which a prosecution could proceed.¹⁰

Suspects are encouraged by identification suite staff to have a friend or relative present if they do not have legal representation. In my study on suspects, it was rare for a suspect to fail to take advantage of the availability of legal representation. Other studies on the frequency with which suspects avail themselves of the right to legal advice suggest that only 25 to 30 per cent of suspects request legal advice.¹¹ However, those studies were conducted at the stage where suspects were interviewed by police officers. Identification procedures are at a later point in the criminal process, when most suspects are aware that police interest in them has gone beyond a “routine” inquiry. Most will have been charged with an offence, and so the higher take-up of legal advice is unsurprising.

Upon arrival at the identification suite, suspects are taken to a waiting room where they are read the Notice to the Suspect, which outlines, amongst other things, the purpose of the identification procedure and the entitlement to free legal advice. Whilst this is happening, the pool of volunteers are brought into the identification suite. Suspects have a choice from this pool, and the extent of the choice varies according to the number of volunteers the police have managed to find. During the study on suspects, the smallest pool a suspect had to choose from was eleven. Identification suite staff try to offer a pool of sixteen volunteers

⁹ As required by Code D Annex A:12 (ii) and (iv).

¹⁰ However, some witnesses appeared to be positive when in fact they were unsure or had guessed: see chapter 5.

¹¹ See Brown, D., *Detention at the Police station under the Police and Criminal Evidence Act 1984* Home Office Research Study No.104 (1989 London:HMSO); Brown, D., Ellis, T., and Larcombe, K., *Changing the Code: Police Detention under the Revised PACE Codes of Practice* Home Office research Study No.129 (1992 London:HMSO); Sanders, A., Bridges, L., Mulvaney, A., and Crozier, G., *Advice and Assistance at Police Stations and the 24 hour Duty Solicitor Scheme* (1989 London: Lord Chancellor’s Department).

where possible. Suspects rarely reject volunteers, although identification suite staff may decide that they cannot assemble a satisfactory number for a parade to go ahead. Once suspects have chosen eight volunteers for the identification parade, they are taken back into the waiting room to sign the consent to take part in the identification parade. After this, they decide where to sit on the parade and they wait for the procedure to begin. A photograph is taken of the parade, which the suspect can have a copy of and which may be used as evidence in any later trial. The identification suites in both Birmingham and Manchester have a one-way screen, and suspects are informed that the parade is about to begin by way of intercom. In Birmingham, parade members sit behind a number on the floor, and the police do not allow witnesses' requests for them to stand up or speak.¹²

Breaches of Code of Practice D

Within the identification suite in Birmingham, no serious breaches of Code of Practice D were observed. However, the identification officer did read the Notice to the Suspect in a perfunctory and rushed fashion, which probably contributed to the finding that suspects had little knowledge about what would happen during the identification procedure and what their rights were.¹³ Identification officers can be compared to custody officers in that they are not involved in the investigation and are expected to ensure that the PACE Codes of Practice are followed. Some studies¹⁴ have questioned the ability of custody officers to

¹² In some other identification suites, this is allowed. For example, staff at the identification suite at Manchester Longsight Police Station spoke of parades where they had acceded to requests by witnesses that the parade members say certain words. Code of Practice D has provision for movement and speech, as Annex A:17 states: "If a witness wishes to hear any parade member speak, adopt any specified posture or see him move, the identification officer shall first ask whether he can identify any persons on the parade on the basis of appearance only. When the request is to hear members of the parade speak, the witness shall be reminded that the participants of the parade have been chosen on the basis of physical appearance only. Members of the parade may then be asked to comply with the witness' request to hear them speak, to see them move or to adopt any specified posture".

¹³ See the discussion in chapter 4.

¹⁴ McConville, M., Sanders, A., and Leng, R., *The Case for the Prosecution* (1991 London: Routledge); and McConville, M., and Hodgson, J., *Custodial Legal Advice and the Right to Silence* Royal Commission on Criminal Justice Research Study No.16 (1993 London: HMSO).

divorce themselves from the needs of the investigation, because they are too closely allied to policing values. There is, in essence, a conflict between the role of the custody officer in upholding PACE requirements and the wishes of investigating officers. In the studies for this thesis, identification officers and the sergeants within the identification suite were found to be very conscientious in following PACE requirements. They reminded officers of the provisions of Code of Practice D and were not observed swaying from those provisions through both studies. This finding reflects the views of Dixon,¹⁵ who argues that custody officers recognise the need to follow PACE rules and thus avoid exclusion of evidence. The officers working in Birmingham identification suite appeared to consciously set themselves apart from the investigation, striving for independent working procedures. They had a very good working knowledge of Code of Practice D and were diligent in their efforts to prevent breaches of the Code. Despite this, identification procedures became highly routinized, as illustrated by the hurried reading of the Notice to the Suspect and the use of regular volunteers even where they may not have been suitable. None of this amounted to a serious breach of the Code, but could nevertheless affect the fairness of the procedure.

Although the identification suite staff were knowledgeable about Code of Practice D, police errors occasionally occurred during the studies, and these could be so serious as to make any positive identification evidence inadmissible. Lack of supervision of witnesses once they have arrived at the police station is perhaps the most frequent problem. It is imperative under Code of Practice D¹⁶ that police officers ensure that there is no communication between witnesses regarding the offence and the appearance of the offender.¹⁷ During the

¹⁵ Dixon, D., "Legal regulation and policing practice", (1992) 1*Social and Legal Studies* 515.

¹⁶ Code of Practice D, Annex A, p.98, para 12(i).

¹⁷ See *R v Finlay* [1993] Crim. L.R. 50 for an example of police breach of Annex A paragraph 12 (i). In this case, the fact that a warning had not been given to the witnesses to the effect that they should not discuss the case whilst they were being kept together was only one of a number of breaches. However, it seems likely that this alone would be a sufficient breach to entitle the judge to exclude identification

period of the study, this occurred in a small number of cases because the police officers responsible for ensuring that there was no communication between witnesses prior to the parade failed to arrive at the time requested. If officers are late, there is an obvious danger that witnesses may be left alone together and discuss the case. The need for a warning as to communication about the incident is just as necessary where the witnesses already know each other. This is because it is the responsibility of the identification officer to ensure that, once at the police station to take part in the identification procedure, witnesses do not discuss the matter.¹⁸ This duty exists regardless of whether there has been an opportunity at some other time for communication between witnesses. It may be that confidence in the procedure would be increased were the officers responsible for ensuring adherence to Code D on the issue of communication between witnesses (known in some areas as "witness officers") to be assigned full time to working within the identification suite.¹⁹ In this way there would be no confusion as to their duty.

At present, officers given the task of looking after witnesses are recruited from the police station where the offence in question is being investigated. Although these officers are not involved in the case, they are taken away from their normal duties and may not be familiar with what is expected of them or with the provisions of Code D. Their late arrival may be caused by the burden of other duties, and officers may not be aware that this may jeopardise the admissibility of identification evidence.

evidence from the jury. This is so even though the witnesses claim not to have discussed the case. Therefore, the very opportunity for "cross-pollination", without any evidence that this actually occurred, may be sufficient suspicion of unfairness to exclude identification evidence.

¹⁸ Some psychological experimentation has been conducted on the issue of communication between witnesses: see, for example, Warnick, D.H., and Sanders, G.S., "The effects of group discussion on eyewitness accuracy" (1980) 10 *Journal of Applied Social Psychology* 249.

¹⁹ The Longsight Identification Suite in Manchester operates this system. The purpose built suite has full time staff to carry out every aspect of the identification process. The staff at Ladywood Police Station are hopeful that better staffing will accompany the provision of Birmingham's new identification suite.

The involvement of the investigating officer in an identification procedure, prohibited under Code of Practice D²⁰, can also result in exclusion of identification evidence. Cancellations of parades may result from such involvement, as identification officers are likely to abort any procedure where there is a clear breach of Code of Practice D. This is another example of an area where errors may be prevented by an increase in the number of staff assigned to work in the identification suite. Case law has emphasised the dangers of investigating officers' involvement in the conduct of identification parades²¹, and this appears to be an area where much care is now taken, certainly in the West Midlands area. As a result, cancellations did not, to the best of the researcher's knowledge, occur because of such a breach.

The breaches observed during the studies were overwhelmingly the result of actions by police officers who did not work full time in the identification suite. This was exacerbated on the few occasions where the identification officer was replaced by an inspector who was inexperienced in the procedures for running an identification parade. In one case in particular, the inspector was largely unaware of Code of Practice D requirements and failed to read the Notice to the Suspect.²² Where the identification officer is on leave or in court, replacements who are familiar with Code D should be found. Failing this, the identification suite sergeant should be able to act as identification officer for short periods of time.

Cancellations and Postponements

There are a number of problems with arranging and carrying out identification procedures which occur frequently, much to the frustration of everyone involved. Four parades per day are usually booked by the West Midlands Police Force in Birmingham, which, along

²⁰ Code of Practice D2.2

²¹ See especially cases such as *Ryan* [1992] Crim.L.R. 187 and *Gall* (1990) 90 Cr.App.R. 64.

with a suite in Wolverhampton, serves as the site for identification procedures for the whole of the West Midlands area. The waiting time for a parade to be booked is as much as seven weeks. This delay in itself creates problems as far as the validity of the eyewitness evidence is concerned, because longer retention intervals increase the probability that witnesses will have their memories distorted or will forget the appearance of the offender completely.²³

Holding four parades in a day is rarely achieved for a variety of reasons. Last minute cancellations are a particular problem and serve to decrease efficiency within the identification suite, and time and money are wasted as a result. Police officers often cancel parades a couple of days before they are due to go ahead. As volunteers are advertised for, such cancellations are usually at too late a stage to arrange another parade or to move forward one already booked. Such cancellations also mean that the completion of other identification procedures at an earlier time cannot be accomplished. Cancellations, therefore, have an effect not only on other investigations, due to unnecessary delays²⁴, but also on the general running of the identification suite.

A further difficulty facing officers who run the identification suite is that of human unreliability. The problems here are difficult to anticipate and they include suspect non-attendance, witness non-attendance, and non-attendance of the suspect's legal representative or appropriate adult. The first two of these problems could be reduced by a greater police effort to ensure attendance. However, there seems to be a general reluctance

²² Case 1 in the study on suspects. The suspect's legal representative made no complaint.

²³ See Shepherd, J.W., "Identification after long delays" in S. Lloyd-Bostock and Clifford, B.L. *Evaluating Witness Evidence* (1983 London: Wiley)

²⁴ Such delays may have a negative effect on the reliability of any positive identification resulting from the parade. Although it has not been conclusively shown that a longer retention interval before retrieval is attempted lowers the accuracy of an identification, what is clear is that the memory is malleable, and can therefore be manipulated. The longer the retention interval, the greater the likelihood that new information will distort recollection of the event: see Loftus, E.F., and Hoffman, H., "Misinformation and memory: The creation of new memories" (1989) 18 *Journal of Experimental Psychology: General* 100.

to do this, particularly where suspects are concerned. The police do not have a formal responsibility to ensure that suspects arrive at the police station for an identification parade, but it would certainly be in their interests to make certain that all participants in the procedure are present at the correct time. If successful, such efforts would eliminate the waste of police time, money²⁵, and identification suite resources, which could otherwise be in use. The goodwill of witnesses, who often take time off work to participate, would also be more readily secured. These advantages could be gained with little effort in most cases, and would, in time, become routine to the police officers involved.

There has been concern that identification parades have to be cancelled because suspects are changing their appearance between the time they are interviewed by police and the time the parade is due to take place.²⁶ Out of the 55 cases in the study on suspects, three suspects had changed their appearance in some way. This represents approximately five per cent of cases in the sample. In the first case, case 5, the parade went ahead, because the suspect had simply had his hair cut; in the second case, case 43, the change in appearance was more serious, resulting in volunteers arriving who were not at all similar in appearance to the suspect. The police opted for a confrontation in that case. In the third case, case 55, the suspect refused to shave off his beard and denied that there had been any change in appearance. As there had been no photograph of the suspect taken after arrest, the police proceeded cautiously and simply postponed the parade. Bucke and Brown²⁷ report that in their survey there had been an estimate that suspects changed their appearance in five per cent of cases, which reflects the findings of the study on suspects. They also report that, as in my study, not all changes in appearance result in the cancellation of an identification

²⁵ Money could be saved in terms of police wages as well as in payment of volunteers, which is still made in such a situation, albeit at a reduced rate.

²⁶ Bucke, T., and Brown, D., *In Police Custody: Police Powers and Suspects' Rights under the Revised PACE Codes of Practice* Home Office Research Study 174 (1997 London:HMSO). Witnesses also expressed concern about suspects' change of appearance in the study discussed in chapter 5 above.

²⁷ *Ibid.*, 50.

procedure. Instead, suspects may be asked to wear a hat, shave off a beard, or be subject to a confrontation.

Under Code of Practice D2.15 (vii)a,²⁸ suspects are informed that significant changes in appearance “between the taking of any photograph at the time of his arrest or after charge and any attempt to hold an identification procedure” may result in the change of appearance being given in evidence during any later trial, and would allow the identification officer to consider other forms of identification. Officers at the identification suite in Birmingham viewed the few cases of change of appearance as little more than an annoyance, but investigating officers were not questioned on the matter. It may be that if they had been, they would have concurred with the officers in Bucke and Brown’s study, which found that.²⁹

“[W]arning a suspect about the consequences of changing his or her appearance was not viewed as a deterrent, with some stating that the suspect had little to lose by making such alterations. In such cases establishing that a change of appearance had been made was viewed as a relatively weak piece of evidence compared to a positive identification by a witness. In short, suspects had more to gain than lose in changing their appearance, with some officers suggesting that stronger sanctions should exist, such as a presumption of guilt or adverse inferences.”

The cases where suspects change their appearance and an identification parade cannot go ahead are very few and, in the absence of a widespread problem, the need for stronger sanctions is doubtful. In order for a comment under Code D2.15(vii)a, or any stronger sanction, to be made, photographs of the suspect would have to be taken at the time of arrest or bail, and used to show the extent of the change in appearance by the time of the identification parade. Having photographs could also aid identification staff in their requests to suspects to shave off beards or revert back to their original appearance in some

²⁸ Code D4.1 also states that suspects should be told, when having their photograph taken at the time of arrest, that any change of appearance between that time and an identification procedure could result in evidence of it being given in court.

other way. The lack of any proof that the suspect in Case 55 had had stubble rather than a full beard was instrumental in his refusal to shave and in the need to postpone his parade.

The problems of cancellations and postponements are not confined to the Birmingham identification suite. In Manchester Longsight identification suite, there is an annual average of 41 per cent of parades which do not take place.³⁰ During 1993, 1994 and 1995 in Birmingham, the average rate of cancelled and postponed procedures stood between 50 and 60 per cent, illustrating that a startlingly high proportion of procedures are not taking place, but are still costing time and money. Even where cancellations occur before volunteers have been found and witnesses brought to the police station, staff time is taken to organise and then cancel the parade. If this happens in 40 to 60 per cent of cases, then the cumulative effect is considerable.³¹ As an illustration, the cost of running an identification procedure in Birmingham in 1994 was an average of 83 pounds. The average cost of the 633 procedures which did not go ahead was 33 pounds.³² These figures factor in only the costs in paying volunteers to attend, and not for staff time spent on procedures which do not take place.

²⁹ Bucke and Brown (1997), *op.cit.*, 50.

³⁰ For the years 1992, 1993, 1994 and 1995.

³¹ Figures from Birmingham and Manchester illustrate that the problem is more pronounced than estimated by officers in Bucke and Brown's 1997 study (*op.cit.*). In that study, officers thought that 20 to 30 per cent of procedures did not go ahead, largely because suspects and witnesses failed to turn up. This study shows that the problem is broader than mere non-attendance.

³² 1215 procedures were booked during 1994. Only 48 per cent went ahead. The cost of cancelled and postponed procedures was 14,114 pounds, and procedures which went ahead cost 52,315 pounds. These figures do not include general running costs for the identification suite, staff wages and so on, but focus purely on the cash handed over to parade volunteers.

The problems surrounding cancellations of parades could in some measure be addressed by the police officers themselves. There seems to be a widespread ignorance amongst police officers in the West Midlands Force about the mechanics of identification parades, and the identification officers in Birmingham are frequently frustrated by this. It is a problem that needs to be addressed urgently, either by education and training of police officers,³³ an increase in permanent sworn staff assigned to the suite, or a change in the methods of identification used.³⁴

Volunteers for Identification Parades

In cases where all parties attend, the main reason for postponement of parades is the lack of suitable volunteers. The identification suite in Birmingham places a notice outside of the building outlining the times of parades for the following week, and the main elements of the suspect's description. There are many regular volunteers who sit on three or four parades a week.³⁵ During the time of the study, volunteers were paid seven pounds per parade, which rose to ten pounds should the organisation of the parade take over two hours. Where volunteers appear in the pool offered to the suspect but are not selected to sit on the parade, they are paid five pounds. For unemployed young men who attend a number

³³ Some of the officers who were expected to ensure that Code D provisions were adhered to, by monitoring witnesses or looking after volunteers, had never even seen an identification procedure. Breaches of Code D are virtually inevitable when some of the officers involved in identification procedures are ignorant of what constitutes a breach and are unaware that their actions may jeopardise any subsequent trial. It is acknowledged that individual officers can never be familiar with every piece of legislation affecting the work of the police force as a whole, but it is surely not unreasonable to expect that officers who are involved in conducting an identification procedure at least know the basic law in the area.

³⁴ Superintendent John Scott, in an article in the *Birmingham Post*, complained about the high number of cancellations (up to 70 per cent) and the fact that only one in three witnesses made a positive identification. The long waiting periods for identification parades were also berated. West Midlands Police then made a move to increase the opening hours of the identification suite, rather than address education or the possibility of lobbying for the use of other methods of identification: "Identifying why poor results are on parade" *Birmingham Post* August 11, 1998, page 5.

³⁵ One volunteer in Nottingham stated that he was "doing between 50 and 60 identity parades a year": "Mr O ... Crime Fighter" *Nottingham Evening Post* June 23 1998, page 5. Another in West Yorkshire claimed that he had been a volunteer on up to eleven parades a week, but normally did four or five: "We name the innocent men" *The Evening Standard* October 9 1997, page 23.

of parades a week, the nominal amount per parade can build into a useful supplement to their state benefits.

The identification suite staff also have a list of contacts to call who are willing to gather together a group of people fitting the broad description of the suspect. This is particularly useful where the suspect is unusual in appearance. In a small number of cases, officers still go out in vans looking for volunteers in the city centre or at the University. In some cities, employment agencies are used, but this was not necessary in Birmingham. Although some other forces operate a more formal database of volunteers,³⁶ the network operating out of the identification suite in Birmingham was good, and it was only with suspects outside of a broad mainstream appearance,³⁷ or with juveniles, that the identification suite staff had problems in arranging a parade.

However, there are some drawbacks in using a regular pool of volunteers. For example, the routinized nature of identification procedures, as discussed above, can result in reliance on regular volunteers even where they do not result in a very good parade, because they are available and it is easy for police officers to organise them. Ease of organisation is very important to identification suite staff, so that where a contact has been used to get a number of volunteers together, they are paid even when they do not fit the description of the suspect enough to go into the initial pool. A further drawback in using regular volunteers is that they become very familiar with the process and can treat the identification suite as a

³⁶ For example, Nottinghamshire Police had a database of 1000 volunteers by mid-year 1998. They want to increase this further: "Mr O ... Crime Fighter", *ibid.* South Yorkshire Police have a database of around 3000 people: "We name the innocent men", *ibid.*

³⁷ In 1997, West Midlands Police felt compelled to advertise nationally for volunteers who look like a member of the pop group ZZ Top. They had consulted the Birmingham School of Speech and Drama, the Musicians' Union, and a talent agency in their bid to find volunteers: "We name the innocent men", *op.cit.*; "Hairy lookalikes would be a hit in police pop parade" *The Daily Telegraph*, 8 October 1997, page 3.

social club. This can present problems where a suspect is very nervous and therefore looks out of place, or where volunteers laugh and joke amongst themselves.³⁸

Where suspects had unusual hairstyles, scars or tattoos, the identification officer arranged for all members of the parade to wear hats, sticking plasters, or long-sleeved shirts. Hats were usually worn where suspects had short dreadlocks, shaven heads, or two-tone colouring on their hair.³⁹ The identification officer was fair in his assessment of what was a totally unsatisfactory parade, and would advise suspects that they should consider a group identification. In one case, where the suspect was very short and stocky, good volunteers could not be found. The identification officer, rather than the suspect's legal representative, took the decision that the parade would not be fair. However, the suspect opted to go ahead, and was not identified. In another case, the identification officer advised the suspect to take off his tie because otherwise the parade would be unfair. Provision of hats and sticking plasters meant that a fair parade could be run even though the suspect had one distinctive feature. The effort to hold a parade wherever possible, rather than resorting to other methods of identification, illustrates a commitment to following Code of Practice D. The officers in Birmingham usually⁴⁰ made sensible distinctions between suspects who had one unusual feature, which could be covered up and a parade run, and those who were singular in appearance. For example, where volunteers could not be found for a red headed male suspect with stubble, officers did not suggest a shave and the wearing of hats. Rather, they realised that skin tone, eyebrows and lashes were also distinctive and so organised a

³⁸ For a discussion of the behaviour of volunteers in the parades observed during the study on suspects, see chapter 4. The problem appears to be nation-wide. One West Yorkshire volunteer has been reported as saying "I was in Leeds once and everybody was dead serious standing in front of the spotlights. Then one of the lads farted just as the parade started. Everybody laughed apart from the suspect and he got picked.": "We name the innocent men", op.cit.

³⁹ Identification officers should ensure that they do not allow the use of hats, sticking plasters etc. to the point that it constitutes a disguise, or makes for unfairness against the suspect: see *R v Hutton* [1999] Crim L.R. 74, where parade members were given baseball caps and scarves, which covered half of their faces.

⁴⁰ Although a nationwide search for volunteers who look like members of ZZ Top may be less than sensible: "We name the innocent men", op.cit.

group identification. This is in stark contrast to the officers in Sheffield who, in their efforts to arrange an identification parade for a six foot three bald black suspect, put dark make-up on the faces of white volunteers.⁴¹

Reform Suggestions

The studies conducted for this thesis illustrated that the protections of Code of Practice D are generally working well within its own limits, at least in the West Midlands. However, the empirical studies with suspects and witnesses served to highlight the shortcomings and limitations of the Code in protecting suspects from misidentification where there was relative judgment used by witnesses, or where suspects failed to exercise their rights through a lack of knowledge.

The use of specialist staff increases the likelihood that the provisions of Code D will be observed once the suspect and witnesses are within the identification suite. Identification officers can be likened to custody officers in the sense that they are charged with ensuring that the rights of the suspect are upheld. Whilst there has been some doubt about the ability of police officers in specialised posts such as custody or identification to divorce themselves from the culture of the investigation and withstand the pressures from investigating officers, the identification officers in Birmingham were extremely diligent in their quest to ensure that Code D was followed. Where breaches of the Code did occur, they were at the hands of witness officers or temporary identification officers who had not had the benefit of recent training or experience. If the integrity of the process is to be

⁴¹ "Police defend 'blacked up' identity parade", *The Independent*, July 26 1997, page 7; "Star of the black and white identity parade", *The Times* July 25 1997, Home news. The judge in the case was quoted saying "It's a farce when the faces of white men are painted black for an identity parade. Ethnic origin is not only to do with colour, it is to do with other features" *The Independent*, op.cit, 7. Apparently Gloucester police made a similar decision, putting volunteers in wigs and make-up to make them look like the suspect, who was a Rastafarian. One white volunteer in West Yorkshire also claimed that he had once been asked to impersonate someone from Pakistan : "We name the innocent men", op.cit.

promoted, there is a need for specialised and well trained officers to perform all tasks associated with identification. Furthermore, specialised staff should be regularly monitored and kept up to date by educational training sessions. During the months spent conducting the studies on witnesses and suspects, routine performance of familiar tasks sometimes threatened the protection afforded to the suspect by Code D. For example, the identification officer read out the Notice to the Suspect very quickly, so that a suspect hearing it for the first time would be unlikely to digest much, if any, of its content.

Although Code D is generally well observed, it is questionable whether the expense of running a purpose built identification suite is justified: staff spend a good proportion of their time with little to do. When parades are cancelled or postponed, time and the facilities are left free, costing West Midlands Police considerable sums of money. Other methods of gathering identification evidence, which could streamline the process and involve fewer staff members, should be explored. The Runciman Report⁴² recommended that all major urban areas should have purpose built identification suites and millions of pounds have since been spent equipping police forces with them.⁴³ The purpose built suites represent greater ability to have specialised officers who can follow Code D, but they are based on a false premise: that the identification parade is by far the best method of identification.

It is the traditional view that a live parade offers the best form of identification test: it offers three dimensional, natural, moving parade members who can be viewed not only for facial features but also for build and, in some areas, gait. However, a recent study by Cutler, Berman. Penrod and Fisher has reviewed a number of studies and casts considerable doubt

⁴² The Royal Commission on Criminal Justice Report (1993 London:HMSO) Cmnd 2263, 11.

⁴³ For example, Burton-on Trent recently spent over one million pounds on a purpose built suite: "Suite will soon be on parade" *Derby Evening Telegraph* July 15 1999, 23. The quest for volunteers creates problems and is extremely costly. One area advertised for make-up artists to make volunteers fit the general description of the suspect. Hopefully, this will not progress to the "blacking-up" of volunteers which occurred in Sheffield in 1997: "Parade your talent for police" *Grimsby Evening Telegraph* May 31 1999, 5.

on the traditional view. Cutler et.al. believe that “it is not worth the trouble and expense to use live lineups”.⁴⁴ Therefore, cheaper and less time consuming methods could easily be employed without compromising the protections offered to suspects, nor the overall integrity of the criminal process.

Video identification libraries⁴⁵ could offer a moving image which is superior to photographs, and which shows the suspect in a real setting, as do live identification parades. Metropolitan Police have begun compilation of MetIdent, a video library which will be used throughout the Metropolitan area.⁴⁶ It is hoped that facial matching will follow, streamlining the system further. There is little reason why resources cannot be pooled, eventually allowing for a national video library. With the onset of technological advances, the gap between live and video identification has narrowed, and the studies on suspects and witnesses illustrate that a more efficient system is needed. Video libraries would decrease the cost and administrative effort involved in arranging live parades, and their development should be prioritised to avoid increasing problems with cancellations, postponements, time and cost when arranging live parades.

Volunteers could be employed to be filmed in front of the same background, sitting or performing the same task. A one-off payment increases cost-effectiveness instantly. The images could then be kept on a central database, linked to regions via a secure intranet system. If funding co-operation was not forthcoming, regional databases could be set up. Under either a national or regional system, specialist officers could be based in each region to access the database, look after witnesses and ensure that suspects are aware of, and can access, their rights. Once an investigating officer had requested a parade, a description of

⁴⁴ Cutler, B.L., Berman, G.L., Penrod, S., and Fisher, R.P., “Conceptual, practical and empirical issues associated with identification test media” in D.F. Ross, J.D. Read and M.P. Toglia *Adult Eyewitness Testimony: Current Trends and Developments* (1994: Cambridge University Press), 163, 181.

⁴⁵ Some areas in the UK, such as West Yorkshire, have (albeit limited) video libraries already.

the suspect, or the witness's description of the offender could be run through the computer to come up with a pool of volunteers from which the suspect could choose the video parade members. A combination of both the description and the suspect could be used for video parades, because the computer software could be programmed to look for common features, or concentrate on the salient features in the witness' description. The video could be entered as evidence in contested trials, to allow jury members to judge the quality of the parade for themselves. Procedures similar to those in use for video and live identification parades in Annexes A and B of Code D could be used, with little reform needed. Video identification offers a less stressful procedure for witnesses at a reduced cost to police, with no consequent infringement of suspects' rights.

Conclusion

The arrangement and conduct of identification procedures in the identification suite in Birmingham is a costly, time-consuming and inefficient process. Brief observation in Manchester Longsight identification suite revealed the same problems as in Birmingham and there is no reason to believe that other identification suites are dissimilar. Using live parades as the main means of gathering identification evidence results in a high number of cancellations, long waiting periods for witnesses, and great monetary cost. Whilst identification suite staff are knowledgeable and conscientious in their efforts to follow the provisions of Code of Practice D, procedures become routine and formulaic. For example, the use of regular volunteers has helped to increase the speed of the identification process, but sometimes this is at the expense of finding the most suitable volunteers. Police officers recruited to look after witnesses are not members of identification suite staff and often

⁴⁶ "Virtual identity parades may soon fit the bill", *The Times* August 20, 1997; "Hi-tech helpers keep police bang on target" *The Times*, February 4 1998.

breach Code D, highlighting the need for more education about the requirements of the Code.

Specialist officers should be used for all aspects of identification procedures, with provision for ongoing training and supervision. Furthermore, Code of Practice D should be reformed to allow the use of video identification as the primary method of identification in England and Wales. The negligible increase in reliability of identifications from live parades is not worth the high levels of cost and time involved in arranging them. Long term savings justify the substantial initial outlay needed to set up a database library, as does the potential increase in efficiency. Although Code D can never be a panacea to the problem of misidentification, its efficiency can be increased whilst improving the protection of suspects from misidentification. Greater efficiency would allow for shorter retention intervals, less anxiety for both suspects and witnesses, and a recordable procedure such as video identification offers further protection in any later trial. The integrity of the process would therefore be enhanced by the reforms suggested here, and the often frenzied search for volunteers and make-up artists could then come to an end.

PART TWO: PRESENTING EYEWITNESS EVIDENCE IN COURT

CHAPTER SEVEN

EXCLUSION OF EVIDENCE AND THE WARNING TO THE JURY

Introduction

Where eyewitness identification evidence has been collected by the police and the identification remains in dispute, the defendant is protected both by statute and by judicial practice from unreliable or improperly obtained evidence. The *Turnbull*¹ guidelines provide for a judge to withdraw a case from the jury where the prosecution relies upon identification evidence alone, and a breach of Code of Practice D may result in the exclusion of identification evidence under PACE s.78. This chapter examines the judicial approach to the exercise of s.78 discretion and the circumstances in which the direction in *Turnbull* will result in a case being withdrawn from the jury.

The *Turnbull* guidelines were largely a response to the Devlin Committee Report² in 1976, which recommended a warning to the jury in eyewitness identification cases. This chapter discusses the background to the guidelines and the rejection of some of the Devlin Committee recommendations in favour of a broader judicial discretion. The *Turnbull* guidelines have imposed a duty on judges to inform the jury of the dangers of eyewitness identification, the reasons for those dangers, and any specific weaknesses in the eyewitness evidence in that case. Judges have to make an assessment of the quality of the evidence, and also whether there is any evidence which is capable of supporting the identification. It is hoped that educating the jury about the dangers of mistaken identification will increase protection from wrongful conviction for those accused who have been misidentified. This chapter examines what factors determine whether evidence is deemed to be of “good” or

¹ [1976] 3 All ER 549

² Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976, London:HMSO).

“poor” quality, what evidence may support an identification, and when judges should withdraw a case from the jury. In doing so, the chapter will assess whether psychological findings are used to best effect in the *Turnbull* direction, and whether the protection it offers to suspects is adequate. The sufficiency of a judicial direction in eyewitness identification is explored further in chapter 8, where increased utilisation of psychological findings in the form of expert evidence is discussed.

Section 78 of the Police and Criminal Evidence Act 1984 offers judges a broader discretion to exclude evidence than that available at common law. The discretion affords some protection to defendants in identification cases, providing they plead not guilty and the case proceeds to trial. This chapter discusses the effectiveness of section 78 as a protection for defendants, the approach of the judiciary to the exercise of the section 78 discretion, and the impact this has had in identification cases.

The Turnbull Guidelines

The *Turnbull* warning to the jury outlines the responsibility of trial judges in eyewitness identification cases to advise the jury of the danger of convicting on evidence of identification alone:³

“Whenever a case...depends wholly or substantially on the correctness of one or more identifications of the accused...the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.”

Explanation of why the jury should be cautious about accepting evidence of identification was an important step forward and remains an integral part of the warning today.⁴ By

informing jurors of the reasons why a warning is necessary, the *Turnbull* direction seeks to further the protective principle by making the jury wary of accepting the evidence of eyewitnesses in cases where their evidence is very important to the success of the prosecution case.

(i) *Background*

The *Turnbull* warning was formulated by the judiciary, largely in response to the recommendations of the Devlin Report. It appears that the court sought to limit the Devlin Committee recommendations to allow for the retention of judicial discretion in eyewitness identification cases. The *Turnbull* guidelines themselves outlined the responsibility upon trial judges in eyewitness evidence cases to advise the juries of the dangers of convicting on evidence of identification alone.

Although the *Turnbull* judgment followed hot on the heels of the publication of the Devlin Report, a number of cases in England and Ireland had dealt with the issue of summing up in identification cases before that time. These cases constitute an important background to *Turnbull*, and they also provide support for the view that what the judiciary claimed was a willing implementation of the recommendations of the Devlin Report was rather an attempt to avoid the introduction of legislation on a special direction to the jury.

A general warning to the jury in all cases involving reliance on eyewitness identification was given in the Irish case of *The People v. Dominic Casey (no.2)*⁵, prompting the first

³ Op.cit., at 551-552. The *Turnbull* warning is also in use in a number of Commonwealth countries: for example Jamaica, Canada, Australia and Trinidad; and others have incorporated a similar warning into statute, for example s.344D of the New Zealand Crimes Act 1961.

⁴ See, for example, *R v Elliott* (Unreported) Court of Appeal 22 December 1997.

⁵ [1963] I.R. 33. Casey had been convicted at a retrial of assault and indecent assault on two five year old boys. The Court of Criminal Appeal refused leave to appeal but certified that its decision involved a point of law of "exceptional public importance" and the appeal was taken to the Supreme Court. As well as holding that a general warning on eyewitness identification evidence was desirable, the Court allowed the

serious discussion of the benefits of such a warning in England and Wales. In *Casey*, Kingsmill Moore J. stated that judicial experience had shown that,⁶

“[P]articular types of warnings are necessary in particular types of case...The category of circumstances and special types of case which call for special directions and warnings from the trial judge cannot be considered as closed. Increased judicial experience, and indeed further psychological research, may extend it.”

The view taken in *Casey* was that the judges may well be aware of both the fallibility of identification parades and the number of cases in which eyewitness identification had been later proved to be mistaken, but that the same could not be assumed of juries. The opinion that juries could not be expected to have such knowledge was a realistic one: juries did not (and still do not) have the same access as judges to information and there is a real danger that they will place too much reliance on identification evidence.⁷ The possibility of tempering blind acceptance of identification evidence with a judicial warning was seen as the easiest route to take.

The warning given in *Casey*⁸ formed the basis of that used 13 years later in *Turnbull*. The Supreme Court held that it was "desirable" that, where a case depended wholly or substantially on visual identification evidence, the attention of the jury should be drawn to the fact that in a number of such cases the evidence had later been proved false or mistaken (even where the honesty of the witness was not in question) and that caution should be exercised before the decision to convict was taken.⁹

appeal and ordered a retrial. Particularly interesting in the judgment is the consideration of a number of cases where the need for a direction to the jury to take care had been recognised. Notable amongst these is *The People v. Keffard* (unreported) where the conviction was set aside because the identification evidence was not accompanied by cautionary comment by the trial judge.

⁶ Ibid., at 37-38. The comment on psychological research here by Kingsmill Moore J. was particularly enlightened for the time.

⁷ Mock jury research on the utilization of eyewitness evidence and the difference a warning as to its unreliability can make are examined in the next chapter.

⁸ See the judgment of Kingsmill Moore J. in *Casey* op.cit., at 39-40

⁹ There was a crucial assertion by the court that the "corroboration" of one eyewitness by another did not necessarily rule out the possibility of mistaken identification. The judgment in *Turnbull* made heavy weather of distinctions between identification by "fleeting glimpse" and identification where observation was for longer period and in adequate lighting. The Court in *Casey* steered away from complicated

It appeared that the stage was set to introduce guidelines in England and Wales like those in *Casey*. However, resistance to a general warning could be seen up until the time of the Devlin Report. In *Arthurs v. Attorney-General for Northern Ireland*¹⁰, the House of Lords rejected the provision of a general warning, stating in the leading judgment of Lord Morris of Borth-y-Gest that "it would be undesirable to lay down as a rule of law that a warning in some specific form or partly defined terms must be given."¹¹ The House of Lords acknowledged that in identification cases a judge must direct the jury with care, but was of the opinion that the requirement to do so was usually executed without the implementation of a general warning. Although the issue was left open for "future consideration",¹² the House of Lords was against imposing any "stereotyped pattern"¹³ for summing-up in identification evidence cases. This was because¹⁴

"An incantation of certain words will be a poor substitute for or a useless addition to the discerning guidance which the features of a particular case may require."

The judgment in *Arthurs* was followed in a case heard by the Court of Appeal in 1973, *R v Long*¹⁵, in which the only prosecution evidence was that of identification by three witnesses, none of whom knew the appellant. The decision in *Arthurs* applied only to those cases where recognition was involved: there was no specific ruling on those cases where the witness did not know the offender prior to the incident in question. It was open to the Court of Appeal in *Long* to introduce a warning for cases involving the identification of a stranger. This they did not do. It was held that:¹⁶

distinctions such as those put forward in *Turnbull*, preferring instead to state that erroneous observations could still be made where the "opportunities for observation had been adequate": *Ibid.*, at 40.

¹⁰ (1971) Cr.App.R 161

¹¹ *Ibid.*, 170

¹² *Ibid.*, 169

¹³ *Ibid.*, 170

¹⁴ *Ibid.*

¹⁵ (1973) 57 Cr.App.R 871

¹⁶ In the leading judgment of Lawton L.J., at 877-878. The question of a warning in identification cases where the accused was unknown to witnesses who had had a limited time to identify the offender was

“In our judgment, the law does not require a judge in this kind of case to give a specific warning about the dangers of convicting on visual identification; still less does it require him to use any particular form of words...in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing-up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it...Above all the jury must be left in no doubt that before convicting they must be sure that the visual identification is correct...The trial judge is in the most advantageous position to decide what kind of direction is best suited for the case which he is trying.”

Although pointing out the circumstances in which the identification was made and any deficiencies in identification evidence were seen to be an important part of any summing-up, the courts were careful to resist any encroachment upon the discretion of trial judges.

In 1976, the Devlin Committee recommended the use of a warning to the jury, because eyewitness evidence was "impervious to the usual tests".¹⁷ In identification, the witness does not provide a narrative, from which a general picture can be gained: there is only one specific piece of evidence, that the accused is or is not the person seen by the witness at the scene of the crime. The “usual tests” of the witness’s story and demeanour therefore reveal little about the reliability of the evidence. The Committee acknowledged that:¹⁸

“A single mistake may be fatal, since in identification cases where there is no corroboration the verdict has to rest on a single point: the risk of error in observation or in comprehension is not spread as it is when a conclusion rests upon a number of observations.”

classed by the Court of Appeal in *Long* as being a point of law of general public importance, but leave to appeal to the House of Lords was refused. The House of Lords also refused leave to appeal.

¹⁷ Devlin Report, op.cit, at para. 4.25. The Criminal Law Revision Committee, in its Eleventh Report, recommended a judicial warning to the jury in eyewitness identification cases, but it was not implemented at that time: (1972, Cmnd.4991). Two years after the Devlin Report, the Bryden Committee reported in Scotland. They recognised the fallibility of eyewitness identification, but thought that Devlin Report over-emphasised the unreliability of evidence of identification. This was in part because of the requirement for corroboration in Scotland: *Identification Procedures Under Scottish Criminal Law* (1978) Cmnd. 7096, para. 1.03.

¹⁸ Devlin Report, op.cit.

The solution proposed by the Committee was implemented, in a modified form, by the Court of Appeal in *R v Turnbull*¹⁹ and is still in use in the courts today. Whilst informing the jury of the reasons behind the need to take special care in eyewitness identification cases (namely the difficulty in assessment), the Committee recommended²⁰

“That the trial judge should be required by statute:
(a) to direct the jury that it is not safe to convict upon eyewitness evidence unless the circumstances of the identification are exceptional or the eyewitness evidence is supported by substantial evidence of another sort; and
(b) to indicate to the jury the circumstances, if any, which they might regard as supporting the identification; and
(c) if he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty.”

On the issue of a warning to the jury of the danger of convicting on eyewitness evidence alone, the Devlin Committee was of the opinion that: ²¹

“the judicial introduction of a new principle into the common law is not now to be looked for...either the law must be left as it is or it must be changed by statute.”

The Committee reached its conclusion largely because of the Court of Appeal decision in the case of *Long*²², which had rejected the need for a warning. Leave to appeal to the House of Lords on the matter was then refused. The refusal of leave to appeal appeared to indicate that the judiciary either opposed the introduction of a mandatory warning to the jury in identification cases or did not want to rule on the issue.

¹⁹ [1976] 3 All E.R. 549. The significance of the fact that the Devlin Committee recommendation on this issue was implemented by the Court of Appeal rather than by legislation is discussed in the next chapter.

²⁰ Devlin Report, op.cit., para. 8.4. The Committee had in mind a general rule. However, it is clear that the rule was envisaged as flexible, as stated at 4.84: "It is the effect rather than the words that is to count." At para 4.59 the Committee concluded that trial judges should take time in summing up to address eyewitness identification evidence and outlined matters which could be relevant to this process. These examples included the witness (such as the possibility of stress resulting from the incident affecting the reliability of his or her identification); the conditions at the scene, such as lighting and length of observation; lapse of time between the incident and the identification; the procedure adopted at any identification parade which took place; and the presence or absence of any circumstantial evidence.

²¹ Ibid., at para. 4.78

²² (1973) 57 Cr App R 871

However, in July 1976 the Court of Appeal dealt with four appellants in cases involving disputed identification,²³ resulting in what have become known as the Turnbull Guidelines. Lord Widgery CJ acknowledged that eyewitness identification evidence carried a special risk of miscarriages of justice and that "the number of such cases...necessitates steps being taken by the courts, including this court, to reduce that number as far as possible."²⁴ The root of the warning was therefore protection of the accused from wrongful conviction where a n eyewitness was mistaken in his or her identification. The court largely followed the Devlin Report recommendations on the matter, with the exclusion of the phrase "exceptional circumstances". To avoid excessive case law on which circumstances were and were not to be considered exceptional, the court instead referred to the overall quality of the identification.

As noted above, the judiciary had, before this time, been reluctant to incorporate a warning to the jury into the summing up in cases of disputed identification. It is probable that the change of heart in *Turnbull* was a direct result of the recommendations put forward in the Devlin Report. The reasons for acting upon the recommendations are less certain: the Court of Appeal might have wished to see the recommendations implemented quickly. Alternatively, it may have sought damage limitation, avoiding a complete bar on discretion should the warning become statutory. Any legislation on the matter would certainly have taken a long time to be drafted and implemented, and by acting swiftly the Court of Appeal ensured that any requirement of a general warning in identification cases would be on their

²³ Three separate appeal hearings took place over two days, *R v Turnbull*, *R v Camelo* (who were jointly convicted of conspiracy to burgle) and *R v Roberts* and *R v Whitby* (convicted of unlawful wounding and robbery respectively). The appeals of Turnbull and Camelo were dismissed, due to other evidence supporting their identifications. The appeals of Roberts and Whitby were allowed and their convictions quashed because there was no supporting evidence.

²⁴ Lord Widgery CJ at 551. Other countries have similar jury directions to the one found in *Turnbull*. For instance, the first move was made for the inclusion of cautionary guidelines in U.S. courts with the decision in *United States v. Telfaire* 469 F.2d 552 (D.C Cir. 1972).

terms. In this way, the judiciary could pick and choose which of the Devlin Committee's recommendations to follow.

(ii) *When Should There Be A Turnbull Warning?*

The Court of Appeal in *Turnbull* stated that a warning should be given:²⁵

“Wherever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken.”

The protections afforded to the defendant by the warning are compromised by the rather selective nature of its use. In Zander and Henderson's Crown Court Study, barristers reported that a *Turnbull* warning was given in only the half of the contested cases where eyewitness identification was an important or fairly important issue.²⁶ This represents a clear erosion of the protective principle for a high proportion of suspects. In part this is a result of the nature of a judicial warning: it is left to the judge to decide whether a warning is necessary, rather than the defence being able to proactively educate jurors about the dangers of misidentification. One possible route to allow the defence to give information to the jury is to enable an expert witness to give evidence regarding the dangers of relying on eyewitness identification. However, there are also drawbacks to that option, as discussed in chapter eight.

It is clear that, as held in *Spencer*,²⁷ where the prosecution case relies on visual identification a full *Turnbull* direction is necessary. Although the Court in *Turnbull* was at

²⁵ *Turnbull*, op.cit., 551. It was stated in *Scott* [1989] A.C. 1242 that only in exceptional circumstances would a conviction based on uncorroborated identification evidence be sustained in the absence of a *Turnbull* warning (at 1261). It is clear that the *Turnbull* guidelines apply not only to jury trials, but also to cases heard in magistrates' courts. In such circumstances, the triers of fact must remind themselves of the dangers of convicting upon identification evidence. This principle can also be seen at work in *Gandy* [1990] Crim.L.R. 346, where the failure of a judge to direct himself along the lines of *Turnbull* during a Newton hearing was seen as sufficient grounds for allowing the appeal against sentence.

²⁶ Zander, M., and Henderson, P., *The Royal Commission on Criminal Justice Crown Court Study Research Study No.19* (1993 London:HMSO), 93. Eyewitness identification was deemed to be important or fairly important in one quarter of all contested cases.

²⁷ [1995] Crim.L.R. 235

pains to ensure that the guidelines should be tailored to the individual case, a direction which only speaks of the need for caution, without any elaboration, will be seen at any appeal as inadequate. In reality, therefore, there is something approaching an absolute formula, because if salient points are not mentioned by the trial judge, the direction will not amount to a full *Turnbull* warning.²⁸

Precisely when a *Turnbull* warning is required has been the subject of a significant amount of case law, much of which refers to fleeting glances and encounters. For example, in *Oakwell*²⁹, the Court of Appeal spoke of the function of *Turnbull* as off-setting the risks of fleeting encounters, as opposed to those cases which involved prolonged observation. Similarly, in *Curry and Keeble*³⁰, the Court stated that the sole use of *Turnbull* directions was for dealing with sightings of the fleeting glance type. A distinction has also been drawn between fleeting encounters and cases of recognition. This is surely not what the Court of Appeal in *Turnbull* envisaged when formulating the guidelines. The fleeting encounter was seen as an example of the type of identification which must be withdrawn from the jury when unaccompanied by supporting evidence, not as the only type of identification evidence requiring a general cautionary warning to the jury. The original judgment, as quoted above, suggests that other, "good" quality methods of identification may be left before the jury but they must still be accompanied by a *Turnbull* direction.

In this way, cases such as *Oakwell* and *Curry and Keeble* suggest that subsequent case law has narrowed the definition of the type of case requiring a *Turnbull* direction and has

²⁸ See *R v Hunjan* (1978) 68 Cr.App.R. 99; and *R v Breslin* (1985) 80 Cr.App.R. 226, where the Court emphasised that there was flexibility within the requirements of *Turnbull*, but that there was a general principle which should be followed. Where a judge disregards *Turnbull*, the Court of Appeal are damning: see *R v Whitehead* (8 May 1989) *The Times* 17 May 1989, where the judge was described as not even paying "lip-service" to the direction. The trial judge had been blatantly biased throughout the summing-up, stating, amongst other things, that the identification parade was "eight innocent members of the public and the defendant".

²⁹ [1978] 1 All E.R. 1223

³⁰ [1983] Crim.L.R. 737

therefore reduced the number of suspects who may rely on the protection of a judicial warning to the jury. However, both cases involved defendants who did not dispute all of the identification evidence against them. Whilst conceding presence at the scene of the crime, the role the defendants were alleged to have played was denied. When taking that element into account, it can be seen that the problem addressed by *Turnbull*, that of eyewitnesses mistakenly placing the accused at the scene of the crime, was not present. *Oakwell* and *Curry and Keeble* can surely be distinguished from recognition cases where the accused does dispute attendance at the scene of the offence. This factor has not, however, prevented confusion over the requirement for a *Turnbull* direction in recognition cases.

Indeed, a number of recent cases have raised the question of whether a *Turnbull* warning is necessary in cases of identification by recognition. In *Bowden*³¹, for instance, the appeal relied upon the trial judge's failure to follow the guidelines laid down in *Turnbull* when an identification, based on recognition, was made by a police officer. The trial judge made no reference to the fact that mistakes could still occur even where the witness knew the accused well. At the appeal, prosecution counsel relied upon the cases of *Oakwell* and *Curry and Keeble* when claiming that the *Turnbull* guidelines did not need to be used in full. The Court of Appeal in *Bowden* distinguished the cases, holding that the failure to give a *Turnbull* warning was a sufficient ground for setting aside the conviction. The decision is consistent with the wording of the *Turnbull* judgment itself, in which Lord Widgery CJ highlighted the problems inherent in reliance upon an identification by recognition.³²

³¹ [1993] Crim.L.R. 379

³² *Turnbull*, op.cit., p.552. The Court of Appeal in *Bentley* [1991] Crim. L.R. 620 also emphasised the importance of advising the jury of the possibility of mistake in recognition cases, even where the witness is convinced and convincing. The witness in *Bentley* had been under the influence of alcohol at the time he had observed what he took to be the defendant's arm coming towards his face. Although the two knew each other well, the witness did not identify Bentley precisely and the need for a *Turnbull* direction

That a *Turnbull* direction is necessary in recognition cases was confirmed in the robbery case of *Thomas*³³ where the duty of the judge to point out that the witnesses may recognise the appellant as a customer but be wrong in identifying him as the offender had not been executed. There is a concern in such cases that the jury may be under the impression that recognition is much more reliable than identification of a stranger. This would be especially problematic in a case such as *Thomas* where the witnesses did not know the appellant well, but simply as a customer of their shop. The danger of confusing different customers is obvious.

It is clear, however, that the lack of a *Turnbull* direction in recognition cases will not necessarily lead to the quashing of a conviction where other evidence points to the correctness of that conviction. In *Joseph*,³⁴ no warning was given to the jury about the dangers involved in mistaken recognition, yet because of other convincing circumstantial evidence as to identity, the Court of Appeal was satisfied that no miscarriage of justice had occurred. So, whilst the absence of a *Turnbull* direction is enough in itself to result in the Court of Appeal overturning a conviction, that will not be the inevitable result.³⁵ This accords with the approach of the courts to the discretion to exclude evidence found in section 78 of the Police and Criminal Evidence Act 1984. There, the courts utilise the protective principle in looking to the degree of unfairness caused to the accused by the breach of Code D. Where there has not been a judicial warning, courts will likewise look to

was even greater, as the identification evidence was based predominantly on assumptions made by the witness.

³³ [1994] Crim.L.R. 128. In this case, the judge also failed to give a proper direction on the dangers of dock identification. See also *R v Wait* [1998] Crim.L.R.67

³⁴ [1994] Crim.L.R. 48. This case also deals with the impracticability of holding an identification parade and how the judge should direct upon subsequent confrontation evidence in such cases.

³⁵ See, for example, the recent Privy Council Jamaican case of *Freemantle* [1994] Crim.L.R. 930 where good quality recognition evidence was held to make safe a murder conviction.

whether there has been unfairness in deciding whether the protective principle has been breached.

Exactly when the requirement that the prosecution case rests "wholly or substantially" on the issue of identification is fulfilled has also been the subject of much debate. *Andrews*³⁶ illustrates the difficulty that judges may encounter in assessing when a case involves an identification issue requiring a *Turnbull* warning. There was no eyewitness identification in the strict sense at all in *Andrews*, but the case against the accused rested upon his being the third man involved in an assault. The evidence was that there was a third man, seen by police officers witnessing the scene, who fitted the description of Andrews; that Andrews was found in a nearby street acting aggressively; and that his brother, with whom he had spent the evening, was a co-accused convicted by the jury. In the absence of a direct identification by an eyewitness, there appears to be no reason to give a *Turnbull* direction, because the prosecution was not relying upon the identification which the defence alleged to be mistaken. Despite this, the Court of Appeal held that it would have been prudent for a *Turnbull* direction to have been given, because the identity of the third man seen at the scene of the crime was a crucial issue.³⁷

Where the accused admits being present at the scene of the crime but disputes playing the part alleged, a *Turnbull* warning is not always necessary.³⁸ This is because the situation is not strictly seen as an identification case and a warning following the *Turnbull* guidelines

³⁶ [1993] Crim.L.R. 590

³⁷ The direction in the case had effectively withdrawn the issue in the case from the jury, with the trial judge's words "quite plainly that was John Andrews". Allowing the appeal on those grounds would have been one thing, but to fit the facts to *Turnbull* in order to hold that there had been a misdirection was quite another.

³⁸ See, for example, *Oakwell and Curry and Keeble*, op.cit., and *Reavy (acting as next friend for H) v DPP; R v Dunstable Youth Court Justices, ex parte H* CO/1865/98, CO/4483/97 Queen's Bench Division, Crown Office List. A *Turnbull* direction may be necessary in some cases, however, such as the situation seen in *Hope, Limburn and Bleasdale* [1994] Crim. L.R. 118; see also the commentary of *Slater* [1995] Crim.L.R. 244.

could serve to distract and confuse the jury. The issue in such cases would be "what role did the defendant play?" rather than "was the defendant the person seen at the incident?". This point was illustrated in *Slater*³⁹, where the Court of Appeal held that a *Turnbull* direction will not necessarily be needed when the issue is not the presence of the accused at the scene of the crime, but what they were doing there. This leaves open the possibility that, in some cases where the accused admits to being present at the scene, a warning will be needed. An example of such a case would be where there was a possibility of the witness mistaking one person for another, due to similarity of build or clothing. It appears that the general rule is that a *Turnbull* direction will not normally be needed, but that the individual circumstances of a case may necessitate it.⁴⁰

When a full *Turnbull* direction is not used, but where the witness had little time to view the offender at the scene of the crime, the judge may have a responsibility to draw the attention of the jury to the dangers of relying on identifications made in such circumstances. Examples can be found in affray cases such as *Oakwell*.⁴¹ The court allowed the appeal in the case of *Graham*,⁴² stating that the summing up at trial merely paid lip- service to *Turnbull*, with no reference being made to the poor lighting in which the identification was made. However, the tenor of cases such as *Oakwell* is that, if there is a duty to draw the

³⁹ [1995] Crim.L.R. 244. The case concerned an allegation of assault, in which the defendant admitted being in the nightclub concerned, but denied being involved in any disturbance.

⁴⁰ See, for example, *Thornton* *The Times*, June 2 1994. Although the courts do not see cases such as *Slater* and *Oakwell* as being identification cases in the strict sense, the psychological literature tends to show that a witness can often correctly place someone at the scene of the crime whilst being mistaken about the part played by that person. This poor encoding of memory may be due to the in-built expectations and biases of the witness and is sometimes termed "unconscious transference": see Read, J.D. "Understanding bystander misidentifications: The role of familiarity and contextual knowledge" in D.F. Ross, J.D. Read and M.P. Toglia, *Adult Eyewitness Testimony* (1994 New York: Cambridge University Press), 56. Such research suggests that the courts may be defining too narrowly what is an identification case and what is not. Whilst *Turnbull* may not be an appropriate warning in such cases, it could be dangerous to offer no words of caution at all. In such cases, it may be that expert evidence offers an alternative method of highlighting the dangers of mistaking a bystander for the perpetrator. The viability of expert evidence is discussed in chapter eight of this thesis.

⁴¹ [1978] 1 All E.R. 1223

⁴² [1994] Crim.L.R. 212

attention of the jury to matters such as poor lighting, it is not one which amounts to the requirement of a full *Turnbull* direction. This illustrates the confusion prevalent in cases where a defendant admits to being at the scene of a crime but denies involvement. It is difficult for trial judges to make a reliable decision on which circumstances warrant a *Turnbull* direction, when the Court of Appeal itself appears to be confused on the matter.

A *Turnbull* warning may also be needed where a third party is the subject of the eyewitness identification, although the defendant is not.⁴³ This situation does not strictly come within Lord Widgery C.J.'s formulation, which stated that a *Turnbull* direction was required where the case rested upon the disputed identification of the accused.⁴⁴ However, if a witness asserts that a known companion of the accused was alongside the offender at the scene of the crime, then there is an obvious inference that the accused was the offender. This amounts to a form of identification of the accused. If the defence disputes the identification of the third party, the need for a *Turnbull* direction is clear.⁴⁵

The warning is still required in cases where the eyewitness is a police officer,⁴⁶ although it is well established that evidence of identity given by police officers is regarded to be of a higher standard than that given by an ordinary member of the public.⁴⁷ The employment of a higher standard takes the form of directing the jury that a police officer may be correct

⁴³ See, for example, *R v. Bath* [1990] Crim.L.R. 716 and *Castle* [1989] Crim.L.R. 567. In the former, a child accompanying the appellant was identified. It was held that a *Turnbull* warning would probably have been needed had the defence raised the issue. The argument is strengthened by *Castle*, where the admittedly accurate identification of an accomplice could amount to supporting evidence of the identification of the accused.

⁴⁴ *Turnbull. op.cit.*, at 552.

⁴⁵ Whilst it appears that *Turnbull* may not only apply to identification of the accused, this principle does not extend beyond human beings. Identifications of inanimate objects are not subject to a *Turnbull* direction. (See *Browning* (1992) 94 Cr.App.R. 109, where the defence appealed on the grounds that an identification of a motor car should be subject to a direction analogous to *Turnbull*). The warning is only required where it is the identification of a human being which is in issue. Where animals or inanimate objects are the subject of identification, a careful summing-up, but not a full *Turnbull* direction, is required: *R v Huddart* (Unreported) Court of Appeal 24 November 1998.

⁴⁶ *Reid v R* [1990] 1 AC 363.

when a mere casual observer may not be, due to the training in observation received by police officers as a result of their profession. Police officers are also regarded as being less excitable when confronted with violent events and more able to appreciate the importance of identification than are members of the general public. The basis for the assumption that police officers make more reliable eyewitnesses is dubious in itself, as is illustrated by psychological research on the issue.⁴⁸ Whilst the warning is still necessary, a direction to the jury that identification evidence given by police officers is more reliable than that of other witnesses runs the risk of undermining the point of *Turnbull*, by presenting police officers as people apart from ordinary members of the public.

It can be seen that the application of the *Turnbull* guidelines has caused the judiciary some problems, but that there exists a general scheme of applicability: the warning is to be given in all cases resting wholly or substantially on the disputed identification of the accused. Whether or not the prosecution could be said to rely substantially upon identification evidence is a matter for the judge to determine in each individual case. A full *Turnbull* warning is, in some circumstances,⁴⁹ viewed as superfluous.⁵⁰ Recognition cases are no exception to the requirement of a *Turnbull* direction, although cases where the accused admits being present at the scene of the crime may be. In such cases the judge still has a general duty when summing up to draw the attention of the jury to the possibility of mistake and any flaws in the evidence. Where a judge gives a full *Turnbull* direction based

⁴⁷ See, for example, *Ramsden* [1991] Crim.L.R. 295 and *Tyler and others* [1993] Crim.L.R. 60

⁴⁸ On the subject of knowledge of the police regarding issues affecting the reliability of eyewitness identification, see Bennett, P., and Gibling, F., "Can we trust our eyes?" (1989) 5 *Policing* 313. The authors found that police officers were no more knowledgeable about identification issues than were members of the general public. The judicial assumption that, as professionals within the criminal justice system, police officers appreciate the importance of identification and therefore make better witnesses, must therefore be questioned. Police officers may acknowledge the importance of reliable identification evidence, but may not know what affects that reliability. As such, they will probably be no better than the average, observant member of the public.

⁴⁹ Such as where the defence is based on the contention that the witness is lying rather than mistaken.

⁵⁰ An example of this can be seen in *Courtneil* [1990] Crim.L.R. 115

upon the available research, it has the potential to advance the protective principle a great deal. Here is potential for the ultimate protection via *Turnbull* because it may result in the case being withdrawn from the jury. However, the level of protection actually offered to individual suspects is dependent not only on the provision of a warning but also on the decision of the judge as to the quality of the eyewitness evidence and whether it is supported by other evidence in the case.

(iii) *The Quality of the Evidence*

In its 1976 Report, the Devlin Committee recommended a requirement that “exceptional circumstances” should exist before eyewitness evidence could be accepted unaccompanied by supporting evidence. The meaning of the phrase “exceptional circumstances” was not clarified, because the Committee wanted to avoid a long list of exceptions.⁵¹ However, examples of circumstances which may be regarded as exceptional were given, such as familiarity with the accused, the suspect admitting presence at the scene of the incident, lack of alibi evidence and repeated or prolonged observation.⁵²

However, the idea of exceptional circumstances was rejected by the Court of Appeal in *Turnbull*.⁵³ Instead, the *Turnbull* guidelines require the judge to consider the quality of the evidence when deciding whether a case can be left before the jury. Where there is no supporting evidence and the identification evidence is of poor quality, the case should be withdrawn from the jury.⁵⁴ It is clear from *Turnbull* that the judge should assess the identification evidence both at the end of the prosecution’s case and at the end of the defence case.⁵⁵ It is also clear that the judge should consider whether the case should be

⁵¹ The concern was that if such a list was produced it would be seen as definitive and would restrict the discretion of the judiciary to add to the list at appropriate times.

⁵² Devlin Report, *op.cit.*, paras. 4.61-4.65

⁵³ *Turnbull*, *op.cit.*, at 552

⁵⁴ See *Reid v R* [1990] 1 AC 363.

⁵⁵ *Turnbull*, *op.cit.*, at 554.

withdrawn from the jury whether or not defence counsel requests it.⁵⁶ However, where the evidence is of good quality the case can be left before the jury notwithstanding the fact that there is no evidence capable of supporting the eyewitness testimony, providing a *Turnbull* warning is given.⁵⁷ In any case where eyewitness identification is an issue, the judge should direct the jury to assess the quality of the evidence by telling them to "examine closely the circumstances in which the identification by each witness came to be made."⁵⁸ The Court in *Turnbull* offered examples such as lighting and distance, Widgery LJ stating that:⁵⁹

"All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good...the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it...Were the courts to adjudge otherwise, affronts to justice would frequently occur."

In this passage, the court took the Devlin Committee's idea of "exceptional circumstances" and give it the rather vague label of "quality", in order to avoid case law on which circumstances could be classed as exceptional. Yet the use of the term "quality" leads to much the same dilemma without the guidance of having an established set of examples, resulting in reliance upon an individual judge's discretion in any given case. One judge may see an identification as "good quality" where another would not. This could mean that whether or not a case is withdrawn from a jury is a matter of chance, depending in borderline cases at least on the opinion about identification problems of the particular trial

⁵⁶ See *R v Fergus* (1993) 98 Cr.App.R. 313.

⁵⁷ In Jamaica, there was some resistance to applying *Turnbull* because of a belief that it compromised the decision in *R v Galbraith* [1981] 1 W.L.R. 1039, which lays down principles for judges to deal with submissions of no case to answer. However, in *Daley v R* [1993] 3 W.L.R. 666, the Privy Council emphasised that *Turnbull* and *Galbraith* could co-exist, because the former dealt with evidence "so slender that it is unreliable" (even where the witness is honest), whereas the latter dealt with judgments as to credit of witnesses. In *R v Fergus*, op.cit., the court of Appeal held that the "trial judge's duty to withdraw the case from the jury in an identification case is wider than the general duty of the trial judge in respect of a submission of no case to answer."

⁵⁸ *Turnbull*, op.cit., at 552

⁵⁹ Ibid. The reasoning in *Arthurs* was dealt with at 552, with Lord Widgery's statement that recognition still carried with it the possibility of mistake, a factor which should be conveyed to the jury in such cases. However, recognition was rightly seen as more reliable than identification by a stranger.

judge. A judge therefore has a responsibility to highlight any problems in an eyewitness's evidence, yet may not have the requisite knowledge of the issues to identify all of the flaws in the "quality" of such evidence. It is at this point that the integrity principle is in particular danger of breaking down, because judges are unable to offer protection through the provisions in the warning when they are themselves ignorant of the issues at hand. Judicial education regarding current psychological research is therefore vital if the protective and integrity principles are to be upheld by the use of a warning to the jury.

Any specific weaknesses in the identification evidence should be drawn to the attention of the jury, thereby reminding jurors of the problems inherent in reliance on such evidence. In *R v Fergus*,⁶⁰ a 13 year old schoolboy had been convicted of assault with intent to rob, solely on the basis of eyewitness identification evidence. He appealed, on the grounds that the case should have been withdrawn from the jury and that the weaknesses in the identification evidence were not dealt with adequately in the judge's summing-up. Steyn LJ, whilst acknowledging that no particular words must be used, went on to say that:⁶¹

“[I]n a case dependent on visual identification, and particularly where that is the only evidence, *Turnbull* makes it clear that it is incumbent on a trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury.”

This firmly places a duty on the trial judge to ensure that the jury take account of all the weaknesses in the identification evidence by making it clear that they are matters which the judge, rather than counsel, feels the jury should weigh carefully in their deliberations. This approach was applied in *R v Elliott*,⁶² where the court, in allowing an appeal against conviction for murder, were concerned that individual points of weakness may be

⁶⁰ Op.cit. Also *R v Whelan* unreported, Court of Appeal 31 July 1998.

⁶¹ Ibid., at 317.

⁶² Unreported, Court of Appeal 22 December 1997. See also *Brissett v R Privy Council* 29 November 1994.

overlooked should the judge discuss the weaknesses only in the course of recounting the arguments of defence and prosecution. However, there is no suggestion the judge is required to sum up in a particular way, or deal with the evidence at a particular time, merely that the weaknesses are coherently presented to jurors in a manner which allows them to appreciate the overall effect on the reliability of identification evidence in the case.⁶³

So, where the quality of the identification evidence is "good", the case will be left before the jury even where identification is the only evidence against the accused. However, where the evidence is deemed to be "poor", then, unless there is supporting evidence, the trial judge is obliged to withdraw the case from the jury and direct an acquittal. The fleeting glance is the classic example used to illustrate the meaning under *Turnbull* of a poor identification. Indeed, some commentators feel that the phrase "fleeting glance" became the definition of the difference between poor and good identification evidence for the purposes of a *Turnbull* direction. Walker and Brittain, for example, see *Turnbull* as "a judgment on a single issue, that is the duration of the witness's sighting."⁶⁴ Walker and Brittain's view is reflected in the case of *Hewett*, where the Court of Appeal stated that a general warning to the jury was not required in the case because:⁶⁵

“*Turnbull* was the product of considerable public anxiety about an identification case where the identifier had only a brief moment in which to identify his subject. This was not that sort of case at all.”

But the Court in *Turnbull* did recognise that, even where there had been prolonged observation in good lighting, the identification evidence may not be reliable. This unreliability is largely attributable to the differences between individuals in their ability to identify accurately. As documented by psychological research on the issue, some people

⁶³ See *R v Qadir* [1998] Crim.L.R. 828 and *R v Mussell and Dalton* [1995] Crim.L.R. 887 on this point.

⁶⁴ Walker, M., and Brittain, B., *Identification Evidence: Practices and Malpractices – A Report by JAIL* (1978) JAIL, 17

will simply be better than others at accurately identifying and recognising other people.⁶⁶ It is difficult to quantify what makes someone a better eyewitness. Although psychological findings can help in assessing general trends, such as the phenomenon of own-race bias, they cannot tell us whether an individual eyewitness is accurate in their identification. Even if a general warning by its very nature "offers little guidance on how to weigh the probative value of any particular identification",⁶⁷ equipping jurors with knowledge of general trends is likely to reduce the number of wrongful convictions in eyewitness identification cases by increasing the scepticism with which jurors view the eyewitness evidence before them, in much the same way that expert witnesses may be used to uphold the protective principle but with the advantage that it has the authority and potential neutrality of the court.

(iv) *Supporting Evidence*

In requiring supporting evidence in eyewitness identification cases, the *Turnbull* guidelines follow the recommendations of the Devlin Report, which whilst rejecting the possibility of a statutory requirement of corroboration, recommended that:⁶⁸

“As a rule evidence of visual identification standing by itself should not be allowed to raise the level of probability of guilt up to the standard of reasonable certainty that is required by the criminal law. We consider that a jury should be so directed.”

The requirement of supporting evidence offers the benefits of a corroboration requirement without the drawback that it may prove to be too rigid in application.⁶⁹ A corroboration

⁶⁵ June 16 1977 (unreported), see Grayson, E., “Identifying *Turnbull*” [1977] *Criminal Law Review*, 510 who offers a useful analysis of the reaction of the judiciary to *Turnbull* in the year following the judgment.

⁶⁶ Generally, see Loftus, E., *Eyewitness Testimony* (1979 Cambridge: Harvard) and Cutler, B.L. and Penrod, S.D., *Mistaken Identification* (1995 Cambridge University Press).

⁶⁷ Jackson, J.D., “The insufficiency of identification evidence based on personal impression” [1986] *Criminal Law Review* 207.

⁶⁸ Devlin Report, op.cit., para. 4.54.

⁶⁹ This has proved to be the case in other areas of law where a legal corroboration requirement has been in place. Section 34 of the Criminal Justice Act 1988 removed the corroboration requirement for the evidence of children, and s.32(1) of the Criminal Justice and Public Order Act 1994 abrogates the corroboration warning in cases involving sexual offences and the evidence of accomplices. The only

requirement could result in a situation where there is persuasive evidence, other than that of identification, against an accused which does not technically qualify as corroboration, causing the prosecution to fail. Examples considered by the Devlin Committee included situations where there were grave crimes involving prolonged observation of the offender by the attacker but little or no evidence of any other kind.⁷⁰ However, many of the celebrated miscarriages of justice, such as the Barn murder case involving George Ince, the murder for which James Hanratty was convicted, and indeed the Beck case, had involved just such a situation.

Further, the Devlin Committee pointed out that a corroboration requirement, such as where one eyewitness corroborates the evidence of another, would not necessarily operate to prevent miscarriages of justice.⁷¹ The point is well illustrated by highly publicised incidents of wrongful conviction resulting from misidentification, in the majority of which there was evidence from more than one eyewitness. Any requirement would therefore quite rightly have to stipulate that identification by another eyewitness would not constitute sufficient corroboration.

However, the absence of a corroboration requirement did not preclude the introduction of something very close to it. The general principle propounded by the Devlin Committee was that prosecutions should not be brought on identification evidence alone and that they would fail if this stipulation were ignored. The formula appears to be as close to a corroboration requirement as it is possible to get without actually using the word.⁷² The

warnings remaining are therefore those that do not take the form of a strict corroboration requirement, such as the *Turnbull* warning in identification cases.

⁷⁰ Devlin Report, op.cit., para. 4.38

⁷¹ Ibid., paras. 4.30 and 4.31

⁷² At para. 4.67 the Committee acknowledge that "ignoring the legal definition of corroboration there is no difference: corroboration is additional evidence and vice versa".

Committee members themselves described their recommendation as "corroboration in a wider sense".⁷³

Under *Turnbull*, supporting evidence was not envisaged as technical corroboration and the door was left wide open for a flexible interpretation by the courts. The Court of Appeal in *Turnbull* thought that "odd coincidences can, if unexplained, be supporting evidence".⁷⁴ It is the trial judge who is left to identify to the jury which pieces of evidence or "odd coincidences" can be capable of supporting any identification of the accused. The jury then decide whether the evidence does indeed support the identification.

Whilst there is no technical corroboration requirement for cases based on identification evidence, supporting evidence follows the same principles as a corroboration requirement without involving rigid legal rules. So, whilst supporting evidence may take the form of legal corroboration, it is more flexible. Case law illustrates that evidence which would not be classified as corroboration in a legal sense has been accepted as supporting evidence of identification. Because of this, fewer cases are withdrawn from the jury than if a traditional corroboration requirement were used, but protection from misidentification is offered to suspects without introducing a cumbersome and often unfairly rigid rule. Rigidity would not operate to uphold the integrity of the criminal justice process precisely because it may operate unfairly.

The absence of a legal corroboration requirement does not mean that judges have an unfettered discretion under the *Turnbull* formulation. Although there is provision for a fairly broad discretion, there is also a duty both to highlight evidence to the jury which is capable of supporting eyewitness testimony and to identify any evidence which the jury

⁷³ Devlin Report, op.cit., para. 4.65

⁷⁴ *Turnbull* op.cit., at 553

may think is supportive but which lacks that quality. In other words, the judge must ensure that the jury is aware of what is capable of being supporting evidence in the case and what is not.⁷⁵ Where the judge does highlight to the jury evidence which is capable of supporting eyewitness testimony, care must be taken to ensure that jurors are aware that it is for them to decide whether the additional evidence before them is indeed supportive of the identification evidence in the case.⁷⁶ Supporting evidence can take many forms and might be merely circumstantial,⁷⁷ such as evidence of the offender disappearing into what transpires to be the defendant's house. If no other explanation is offered on the point, the jury are entitled to view it as supporting the evidence of identification of the accused. In *Etienne*⁷⁸, where a bag-snatching inside a shop was witnessed by the shopkeepers, the Court of Appeal "were not at all sure"⁷⁹ that previous sightings of the suspect could act as supporting evidence for a fleeting glimpse identification.

If it is thought that the defendant is lying, then this may also support identification evidence of him or her. This is most likely where the defendant lies about evidence which is directly related to identification. The most common form of directly related evidence is the alibi. Alibi evidence is often seen as the other side of the identification coin. This is because defendants using an alibi are claiming that they could not be responsible for the offence as they were not present at the scene of the crime at the relevant time. Although it has been stated that a false alibi can only support identification evidence where the sole reason for the

⁷⁵ Ibid., per Lord Widgery C.J., 553

⁷⁶ The trial judge in *Akaidere* [1990] Crim. L.R. 808 directed the jury that the identification evidence was so poor that he would have stopped the case if it had stood alone. This may have led the jury to believe that the judge viewed the evidence as safe to act on. That was a jury issue and as such there had been a material misdirection.

⁷⁷ For example, see *Lippit v. Chief Constable of Staffordshire* 1986 (unreported: Vaughan, *Identification Evidence*, 1988 85(4) L.S.G. 18), where the accused's admissions that he was nearby at the relevant time, wearing clothing similar to that described by the eyewitness and left the (well lit) scene in the direction described by the witness were all supportive of the identification evidence against him. A case tried before the *Turnbull* judgement illustrates that a chain of coincidences have always been seen as capable of supporting identification evidence: *Long* (1973) 57 Cr.App.R. 871.

⁷⁸ (1990) 154 J.P. 162

alibi is to deceive the jury,⁸⁰ it is unclear quite how the distinction is realistically drawn between an alibi which has been formulated deliberately to deceive the jury and an alibi which is false because of poor witnesses, inadequate defence, or mistake. In all probability, a judge and jury would see the inadequacies in a defendant's alibi yet would not have the information upon which to make a decision regarding deliberate deception.

Disputed identification evidence may be supported by evidence that the witness correctly identified another participant in the crime who has pleaded or been found guilty. The Court of Appeal in *Castle*⁸¹ found that, if a defendant was found guilty, then it was established that any identification of the defendant was correct. This made it more likely that any identifications of other defendants by the same witness were also correct.⁸² Identification by different eyewitnesses of the same accused can also support each other,⁸³ even though many of the celebrated miscarriages of justice cases have involved multiple eyewitnesses.⁸⁴ However, where the evidence of different eyewitnesses is used to support their identification of the same defendant, the warning to the jury should make it clear that more than one eyewitness can be, and have been, mistaken.⁸⁵ What is clear is that supporting evidence does not have to be independent of identification evidence.⁸⁶

⁷⁹ Ibid., p.163

⁸⁰ *Keane* (1977) 65 Cr.App.R. 247, CA; see also *R v Elliott* op.cit.

⁸¹ [1989] Crim.L.R. 567. See also *R v Gummerson* [1999] Crim.L.R. 680; and *R v Wait* [1998] Crim.L.R. 67.

⁸² The commentator in *Castle* points out that this is only fair: if the witness had been proved wrong in the identification of the first defendant, this would enable the defence to attack the identification of the second defendant. This being the case, the opposite should also be allowed. Yet one correct identification does not ensure that another identification made at the same time will also be correct.

⁸³ For examples of this see *Shelton and Carter* [1981] Crim.L.R. 776 and *R v Weeder* (1980) 71 Cr.App.R. 228.

⁸⁴ One of the earliest cases, that of Adolf Beck, involved over twenty eyewitnesses.

⁸⁵ See *R v Weeder*, op.cit.; *R v Breslin* (1985) 80 Cr.App.R. 226; *R v Greer* Unreported, Court of Appeal 11 December 1997; and *Grant* [1996] 2 Cr.App.R. 272.

⁸⁶ For example, in *R v Marais* Unreported, Court of Appeal 16 May 1997, evidence of identity from a handwriting expert was called to support the eyewitness evidence in the case.

However, whether an identification about which the jury is not sure can support another identification about which it is also not sure has been the subject of debate. In *McGranaghan*⁸⁷ the court dealt with the issue of whether similar facts can be adduced to support identification evidence. The defendant was convicted of three aggravated burglaries involving assaults against women. At trial, the judge directed the jury that, because of similarities between the three offences, evidence relating to one offence could be probative of the defendant having committed the other offences. On appeal, it was held that the jury should have been directed to consider first whether, disregarding the similarity of the facts, the other evidence was enough to satisfy it that the defendant committed one of the offences. Only if it was satisfied of this should the similar fact evidence become relevant and admissible. Similar facts went to show that the same person committed the offences, not that the defendant was that person.

Subsequent case law dilutes the line taken in *McGranaghan*. The decision was subject to much criticism, with the 1995 edition of *Archbold* suggesting that “it may go too far”.⁸⁸ In *Downey*, Evans L.J. stated that:⁸⁹

“There are...two different aspects, at least, in this kind of situation...The first is whether in deciding whether the defendant committed offence A the jury can have regard to evidence that he also committed offence B. This involves proof, not only of similarity, but that the defendant did in fact commit offence B. The second is where there is evidence that both offences A and B were committed by the same man, but the evidence falls short of proving that that man was the defendant in either case, regarded alone. If there is evidence which entitles the jury to reach the conclusion that it was the same man, even though the evidence in either case does not enable them to be sure who the man was, then it follows that they can take account of evidence relating to both offences in deciding whether that man was the defendant.”

⁸⁷ (1991) 43 L.S.G. 44

⁸⁸ Archbold, J.F., *Pleading, Evidence and Practice in Criminal Cases* (1995 London, Sweet and Maxwell) Volume I, para. 13-36.

⁸⁹ [1995] 1 Cr.App.R. 547, at 552. The same conclusion was drawn in *Barnes* [1995] 2 Cr.App.R. 491; *R v Brown and Others* [1997] Crim.L.R. 502; and in *Grant* [1996] 2 Cr.App.R. 272.

The Court of Appeal confirmed the *Downey* approach in later decisions, signifying a concern that defendants who have committed offences bearing a “striking similarity” should not be able to avoid the law. The decisions also reveal a belief that a number of eyewitnesses to similar offences cannot be mistaken, something which undermines the tenor of the *Turnbull* direction to the contrary. Whilst the Court of Appeal have reasoned that:⁹⁰

“where a number of witnesses independently identify the same suspect, the chances of their all being mistaken are so remote that the jury would be entitled to conclude that all the identifications are accurate, and that in an appropriate case the judge is entitled to sum up on that basis”,

the history books contain numerous examples of cases where a number of eyewitnesses have been mistaken about offences which were all committed by the same person. These cases show that similar facts can be correct in that one person committed all of the offences, but that this on its own does not prove the defendant's identity. It is true that the protections offered to defendants in *McGranaghan* could result in acquittals of the guilty, and it may be fair to say that fewer innocent people will be convicted under *Downey* than guilty people acquitted under *McGranaghan*. The Court of Appeal have therefore “balanced” the risks and decided that there is a lower risk of innocent people being convicted using the *Downey* approach than the risk of guilty people being acquitted under the *McGranaghan* approach. However, the balance has no reference to the rights of victims and defendants, nor to what aims and principles the justice process should be attempting to advance.⁹¹

Similar fact evidence from previous convictions where the defendant pleaded guilty has also been used to support identification evidence. The general principle in such cases is to consider whether the probative value of the evidence outweighs its prejudicial effect, which is a question of degree.⁹² However, in identification cases the criteria for use of similar fact

⁹⁰ *Grant*, *ibid.*, per Laws J. at 278.

⁹¹ For a discussion on the “balancing” approach to criminal justice policy generally, see Ashworth, A., *The Criminal Process: An Evaluative Study* (1994; Clarendon, Oxford), 292-296.

⁹² As stated in *DPP v. P* [1991] 2 A.C. 447

evidence remains uncertain. Case law has in the past suggested that, in cases involving identification, the criteria for admissibility are higher. In *DPP v. P*,⁹³ Lord Mackay L.C. suggested that a special similarity leading to the conclusion that each incident bears the signature of the accused is required. According to this formulation, the judge should look at both the similarities and disparities when deciding whether evidence fulfils the special similarity criteria.⁹⁴

The recent decision of *Ruiz*⁹⁵, however, dismissed the idea that a different principle applied in identification cases. According to *Ruiz*, special direction on identity is not necessary, although the court also held that there should be regard to the features described in earlier cases as striking similarity or signature. Therefore, disputed identification cases appear to have been brought back within the general principle of probative value overcoming prejudicial effect. Striking similarity or signature is a method of determining if the general principle is satisfied, rather than a necessary component in the use of similar fact evidence. This conveniently brings uniformity into the law regarding similar fact evidence. But it is difficult to imagine a case where the similar fact evidence will be sufficiently strong without it being capable of satisfying the test of striking similarity or signature.

This examination of the *Turnbull* guidelines has illustrated that they provide for the withdrawal of a case from the jury where the identification evidence is of a "poor" quality, which is the ultimate protection which can be offered once a case gets to trial. However, the warning also seeks to advance the protective principle by informing jurors of the dangers of convicting on the basis of eyewitness identification even where it is considered

⁹³ Ibid.

⁹⁴ This was confirmed in *Johnson* [1995] Crim.L.R. 53, an attempted rape and buggery case, where it was held that the trial judge, in considering similar fact evidence from two previous cases, attached too much weight to the fact that all three women remarked upon the gentleness or light touch of the intruder whilst dismissing disparities as irrelevant. The case of *Boardman* [1975] A.C. 421 established the phrase "striking similarity" for similar fact cases.

to be of a high enough quality to remain before a jury. The warning offers considerable protections to the accused, but the sufficiency of its protection relies upon the information given being relevant and up to date. For this to occur, a system of judicial education needs to take place. Judicial warnings have the advantage of encompassing the authority of the court as opposed to coming from a single witness, especially where it is forcefully and fully delivered. The sufficiency of the *Turnbull* warning, whether expert witnesses would offer better protection, or if both experts and a judicial warning should be used in tandem, is discussed in chapter eight.

One of the main limits on the protection offered by the *Turnbull* warning, and one which leads to the conclusion that more could be done to uphold the integrity of the criminal justice process, is that it covers only a relatively small proportion of those whose cases rely to some degree on eyewitness evidence. The warning is not delivered in the most minor cases, and it only applies to those who decide to proceed to a contested trial. The Police and Criminal Evidence Act 1984,⁹⁶ which gives the trial judge a discretion to exclude identification evidence which has been obtained unfairly, suffers from similar limitations. We now turn to PACE s.78 and discuss the circumstances in which judges exclude unfair identification evidence.

⁹⁵ [1995] Crim.L.R. 151

⁹⁶ The Police and Criminal Evidence Act 1984 (PACE) requires that Codes of Practice be issued to regulate the powers of police officers. Code D refers to all aspects of police procedure regarding identification. The first edition of the Codes came into force on 1 January 1986 and the second on 1 April 1991. The Codes were recently revised, coming into force on 10 April 1995. Under s.66(11) of PACE, the Codes of Practice, where relevant, are admissible as evidence in all criminal and civil proceedings.

Code of Practice D and the Exclusion of Evidence under Section 78 PACE

Code of Practice D represents the move from mere guidelines to a coherent set of provisions with enforceable remedies. Police officers can be disciplined for breaches of the code and the discretion to exclude evidence is conferred by s.78 of the Police and Criminal Evidence Act (PACE), as follows:⁹⁷

“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

Any breach of Code D *may* result in the exclusion of evidence, but it does not follow that all breaches will have that effect. Tucker J made this point clear in *Grannell*⁹⁸, by stating that "simply because there was a breach, important though it is to observe the Codes of Practice, does not of itself mean that the evidence is inadmissible".⁹⁹

In practical terms, the burden of proof lies on the defence in showing that unfairness did arise from a breach of the rules. Although the courts have said that it is unclear where the burden of proof lies,¹⁰⁰ the defence have to show that there will be unfairness if the evidence in question is admitted. Generally, the court has to be persuaded that there was a significant breach of the rules which creates substantial unfairness. As the prosecution do not have to disprove unfairness, the practical burden lies with the defence.

Whether a breach of Code D is judged to be serious enough to warrant the exclusion of the identification evidence has been the subject of much debate. Although there is a variable approach to the exercise of the discretion under s.78, it is likely that there has to be a

⁹⁷ On section 78, see generally Gelowitz, M., "Section 78 of the Police and Criminal Evidence Act 1984" (1990) 106 *Law Quarterly Review* 327; and Allen, C.J.W., "Discretion and security: Excluding evidence under s.78(1) of the Police and Criminal Evidence Act 1984" (1990) 49 *Cambridge Law Journal* 80.

⁹⁸ (1990) 90 Cr App R 149

⁹⁹ *Ibid.*, at 153

consideration of the effect of the breach upon the validity of the identification evidence and therefore the prosecution case as a whole.

(i) *The General Approach of the Courts to Section 78*

PACE s.78 gave judges a broader discretion to exclude evidence than at common law, where the tradition was that all evidence was basically admissible. In *R v Sang*,¹⁰¹ the House of Lords held that judges had no general discretion to exclude evidence simply because of the improper way in which it was obtained.¹⁰² Although the common law provided for the exclusion of evidence where its prejudicial effect outweighed its probative value, s.78 allows an examination of fairness, a much broader concept.

Under a strict crime control approach, the question posed in exercising the discretion to exclude evidence under s78 would be much the same as that at common law: whether the breach had affected the reliability, or probative value, of the evidence. As the purpose of the trial is to determine guilt or innocence, mere technicalities should not stand in the way. A due process approach would result in the exclusion of evidence wherever the rules had been breached, in order to protect the moral integrity of the criminal process and prevent future breaches. The Royal Commission on Criminal Procedure in 1981 (“The Phillips Report”) questioned the usefulness of a due process based exclusionary rule,¹⁰³ because it could only operate in the small amount of cases where the defendant pleaded not guilty, months after the breach had occurred. An exclusionary rule would, under this view, be unable to curb police misconduct. Rather, effective monitoring and disciplinary procedures

¹⁰⁰ *R v Anderson* [1993] Crim.L.R. 447.

¹⁰¹ [1979] 2 All E.R. 1222.

¹⁰² Confession evidence was an exception to this general approach: see Zander, M., *The Police and Criminal Evidence Act 1984* (1995: London Sweet and Maxwell), 233.

¹⁰³ Royal Commission on Criminal Procedure, “Report”, Cmnd 8092 (1981 London: HMSO), paras. 4.123-4.128. In response to these arguments, see Ashworth, A., “Excluding evidence as protecting rights” [1977] *Criminal Law Review* 723; Stuntz, W.J., “The American exclusionary rule and defendants’ changing rights” [1989] *Criminal Law Review* 117; and Heydon, J.D., “Illegally obtained evidence” [1973] *Criminal Law Review* 690.

for police practice would enable the police to supervise themselves. Whilst compelling in its conclusion that effective protection of individual defendants will not be achieved by the exercise of an exclusionary rule, this argument does not account for the powerful messages sent out by judicial condemnation of police behaviour,¹⁰⁴ nor the problems of self-supervision. In reality, s.78, whilst based on due process principles, operates somewhere in the middle of pure due process and crime control approaches. As Sanders and Young comment:¹⁰⁵

“There are no systems in democratic societies which use absolute inclusionary or exclusionary rules. This means that rules and principles have to be developed which effect some kind of compromise...The exact compromise will depend on the priorities allocated to the competing claims of truth...and of moral integrity.”

The traditional common law approach reached a compromise which leaned towards crime control principles. Section 78 pulls the balance back to due process values, but the extent of the change is largely dependant on judicial interpretation of “unfairness”. The interpretation of “unfairness” in the context of s.78 varies greatly. It has been held¹⁰⁶ that any significant or substantial breach of Code of Practice D means prima facie unfairness. An examination of the case law on s.78 shows that this is a simplistic view, however. The prima facie unfairness may often be rebutted even where there is a substantial breach; and a minor breach may lead to the exclusion of evidence. Although this chapter attempts to identify the general principles employed by judges in exercising their discretion to exclude eyewitness evidence under s.78, it should be emphasised that there has not been a consistent approach or theoretical basis for the application of the section to date.¹⁰⁷

¹⁰⁴ Similar arguments were raised in New Zealand on the introduction of Bill of Rights legislation. However, Court of Appeal condemnation of police behaviour has established limits and rights which are, for the main part, observed. Anecdotal discussions with police officers suggest that radical changes in police practice occurred not as a result of the legislation, but as a result of judicial interpretation of that legislation. See also Zuckerman, A.A.S., “Illegally obtained evidence: Discretion as a guardian of legitimacy” [1987] 40 *Current Legal Problems* 55.

¹⁰⁵ Sanders, A., and Young, R., *Criminal Justice* (1994 London; Butterworths), 417.

¹⁰⁶ *Powell v. DPP* [1992] RTR 270, relying on *Walsh* (1990) 91 Cr App R 161.

¹⁰⁷ Zander, *op.cit.*, 237. There have been a number of theoretical principles suggested, but judges themselves do not claim to have any of the principles in mind when exercising their discretion. This may

“[S]ection 78 has become both established and accepted as a means for the courts to determine what breaches of the rules or improper conduct are acceptable on a case by case basis without any clearly articulated theory.”

The courts themselves are very clear that they should approach section 78 decisions on a case by case basis, because “circumstances vary infinitely”.¹⁰⁸ The result is that it is difficult to determine when improperly obtained evidence will result in exclusion of evidence, because “judges may well take different views in the proper exercise of their discretion even when the circumstances are similar”.¹⁰⁹ This in itself undermines the protective function of an exclusionary power. Mixed messages are sent to the police and suspects alike.

(ii) *The Protective Principle*

The underlying aim of Code of Practice D is the protection of the suspect from erroneous identification by ensuring that a fair identification procedure takes place. The courts have sometimes looked to the protective principle¹¹⁰ in exercising their discretion to exclude improperly obtained evidence, ensuring that the defendant does not suffer a disadvantage as a result of the breach of the Code. In using the protective approach, the motivations of the police and the level of seriousness of the breach are secondary to its effect on the defendant’s case. The problem with this approach is the subjective nature of an assessment of “prejudice” or “disadvantage”.

explain the complex and inconsistent approach evident in the case law: see Hunter, M., “Judicial discretion: Section 78 in practice” [1994] *Criminal Law Review* 558.

¹⁰⁸ *Samuel* (1988) Cr. App. R. 232, 245, per Hodgson J.

¹⁰⁹ *Jelen and Katz* (1990) 90 Cr.App.R. 456, 465 per Auld J. The exercise of discretion will not be interfered with by the Court of Appeal unless no trial judge could reasonably have reached that view: see *Middlebrook* Unreported February 19 1994, where a group identification instead of a parade was held. The Court of Appeal reasserted the *Wednesbury* principle that if a reasonable judge must have concluded that the evidence would produce unfairness, then a ruling going the other way would be set aside: *Associated Provincial Picture Houses Ltd. V Wednesbury Corporation* [1948] 1 K.B. 223.

¹¹⁰ See Ashworth [1977], op.cit.

In deciding whether the defendant's case has been prejudiced, the courts look at the purpose of the breached provision. For example, it was held in *R v Samms*¹¹¹ that confrontation evidence resulted from a breach of Code D which "partook of the dangers sought to be prevented by a parade". In other words, the purpose of Code D had been undermined. *Grannell* offers a further example of this approach. In that case, Tucker J held that:¹¹²

"there was nothing which prejudiced the appellant by the failure to carry out the terms of the Code. We emphasise that it is important that the Code should be followed, but what is equally important is to see whether any unfairness arose from the failure to do so."

In *Ryan*¹¹³ a witness was taken to the police station by an officer investigating the offence and was moved from one place to another by other investigating officers. The trial judge decided that there had been a major breach of the Code, but exercised his discretion under s.78 to admit the identification evidence. The Court of Appeal confirmed that the existence of a substantial breach did not oblige the judge to exclude evidence. The key factor was whether there had been prejudice caused to the defendant by the breach. To do this, there must be an assessment of the purpose of the relevant provision.¹¹⁴

However, there may be difficulties in assessing the real harm resulting from a breach of Code D. For example, it was concluded in *Ryan* that the breach caused no unjust prejudice to the defendant, but the witness was not questioned on the matter. The court simply took the police at their word when they stated that there had been no communication about the

¹¹¹ [1991] Crim.L.R. 197

¹¹² (1990) 90 Cr App R 149, 153. See also *R v Malashev* [1997] Crim.L.R. 587; *R v Graham* [1994] Crim.L.R. 210; *R v Macmath* [1997] Crim.L.R. 586; and *R v Hickin and others* [1996] Crim.L.R. 584.

¹¹³ [1992] Crim.L.R. 187. See also *R v Wright* [1994] Crim.L.R. 131; *R v Andrews* unreported Court of Appeal 21 March 1996; and *R v Quinn* [1990] Crim.L.R. 581.

¹¹⁴ See the case of *Jones (Terrence)* [1992] Crim.L.R.365, where the investigating officer escorted the suspect to the identification parade. The Court of Appeal held that there was either no breach, because escorting a suspect was not part of the procedure, or if there was a breach, it was not sufficiently substantial to warrant the exclusion of evidence. The purpose of D2.2 is to prevent the investigating officer from influencing the witness, and whilst escorting the suspect to the parade may technically be classed as a breach, it does not create the danger which the provision aims to prevent.

case, without seeking any corroboration from the witness. Even if the presence of the investigating officer merely made the witness more convinced that the offender was there, there will be damage done, especially in a confrontation case such as *Ryan*.¹¹⁵

The protective principle, while focusing on the rights of the defendant, is dependent upon subjective assessments of prejudice. It can also be difficult to ascertain exactly how much disadvantage has been caused to the defendant. The principle may, as Ashworth suggests,¹¹⁶ further the fairness of the process by allowing for evidence to be excluded where a breach was unintentional or “technical”, but it may also result in evidence being admitted where there was a substantial breach of the Code. It is doubtful whether this either upholds a concern for defendant’s rights or aids the process in its aspiration to be seen as “fair”.

(iii) *The Disciplinary Principle: Bad Faith and Significant Breaches*

The disciplinary principle rests on the idea that the courts should exclude evidence gained outside of proper procedures. By doing so, the police will be disciplined and may be deterred from breaching the rules in future. The success of the disciplinary principle rests in part on whether the police are affected by decisions where evidence is excluded and therefore change practices because of that effect. Like the protective principle, the disciplinary principle offers a dilemma for the courts should an absolute approach be taken: in cases where the evidence is highly probative of guilt and there is no real prejudice to the individual defendant, automatic exclusion of evidence for bad faith or significant breaches of the Code may result in acquittal of the guilty.

¹¹⁵ For a discussion of the influence police officers may (albeit unwittingly) have on witnesses, see Loftus (1979), *op.cit.*, 73

¹¹⁶ Ashworth, A., (1994) *op.cit.*, 123.

Where there is a significant breach of Code D, identification evidence may be excluded regardless of the effect of the breach on the defendant's case or the motivations of the police. An example can be seen in *Gall*,¹¹⁷ which was concerned with a breach of Code D2.2, which states that "...No officer involved with the investigation of the case against the suspect may take any part in [identification] procedures". The reasoning behind this provision is clearly the prevention of both deliberate and unintentional influence by the investigating officer on the witness. In *Gall*, an investigating officer had entered the room where the identification parade was being held and had spoken to the identification officer. It was held that the investigating officer had clearly taken part in the conduct of the parade, even though he had not played a part in its arrangement. Because of this, the court was of the view that :¹¹⁸

"a prisoner could well feel considerable suspicion of what might be going on if an investigating officer comes into the parade room, has a look at the parade, has the opportunity to talk to the witness, and then the witness is introduced into the parade".

Where officers deliberately breach the rules in "bad faith", the courts are generally willing to exclude evidence gained as a result. This is best illustrated in identification cases by the approach of the courts to staged confrontations, an example of which can be found in the case of *Nagah*¹¹⁹, where police practice was described by the Court as "a complete flouting

¹¹⁷ (1990) 90 Cr.App.R. 64. *Gall* had been tried with two counts of wounding and one of violent disorder. He was convicted of violent disorder, acquitted of one count of wounding and was retried on the last count, because the original jury had failed to agree on a verdict. At *Gall*'s first trial, the judge had excluded identification evidence, but this was admitted at the re-trial. Another example is *Hope, Limburn and Bleasdale* [1994] Crim.L.R. 118, where the witness was shown a photograph of Limburn before his actions at the scene of the offence had been described by the witness. As there was a dispute regarding the part played by Limburn in the incident, it was held that Code D applied. The witness was shown photographs of the three defendants only, breaching Annex D paragraph 3 and making a nonsense of several of the other provisions of Annex D.

¹¹⁸ *Ibid.*, McCowan J. at 69. See also *R v Khan* [1997] Crim.L.R. 584, where the investigating officer had spoken to the witnesses whilst he had a copy of the suspect's photograph in his pocket. This is potentially a very serious breach of Code D, although the witnesses stated that they had not been shown the photograph and the evidence was admitted. The action was enough to leave the defendant with "considerable suspicion" that the identification procedure was unfair. It is submitted that the Court of Appeal should have taken a stance in this situation, rather than dismissing the appeal.

¹¹⁹ (1991) 92 Cr App R 344

of the Code".¹²⁰ The suspect¹²¹ had agreed to attend an identification parade, but, as he left the police station after being interviewed, he was identified by the complainant, who had arrived in a police car. During Nagah's trial, the judge rejected a submission that the identification evidence of the complainant should be excluded under s.78 PACE as it breached Code D2.1. The relevant section of the Code, D2.1,¹²² clearly stated that

In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one. A parade may also be held if the officer in charge of the investigation considers that it would be useful.

As Nagah had been asked to consent to an identification parade, it was obviously viewed as practicable and necessary. That a parade was practicable was highlighted by the fact that another witness tentatively identified the suspect in a subsequent parade. However, the trial judge was of the opinion that, as the suspect was not at the police station at the time of the identification by the complainant, then D2.1 did not apply and the street identification was a valid one.

The Court of Appeal quashed Nagah's conviction on the grounds that there was a clear breach of the Code. That Nagah was leaving the police station at the time of the identification was not a satisfactory reason for submitting that there was no breach: if the Code did not apply in such circumstances, then it would be easy for the police to arrange a confrontation in every case. The Code would then offer no protection to suspects and its purpose would be invalidated.¹²³

¹²⁰ Ibid., at 349

¹²¹ Nagah had been interviewed for, but not charged with, the offence of attempted rape. The description of the offender given by the victim in this case was strikingly different from the appearance of the suspect.

¹²² The first edition of Code of Practice D was in use at the time of Nagah's identification and trial. The corresponding provision in the 1995 edition can be found at para. D2.3.

¹²³ Also see *Samms, Elliot and Bartley* [1991] Crim.L.R. 197

The use of an assessment of bad faith may, however, be unfair to defendants. In *Campbell*¹²⁴, the Court of Appeal held that a trial judge could decide that a breach was committed in good faith and admit the identification evidence. Yet if a breach is serious it could have an affect on the fairness of proceedings regardless of whether the motivation of the police was in good or bad faith. In addition, it may difficult to ascertain whether a breach was in fact committed in good faith or not. Not all breaches are as transparent as *Nagah*¹²⁵, where there was an obvious disregard for the provisions of Code D on the part of the police.

The bad faith principle noted in *Campbell* can be combined with an examination of the extent of the breach. This is approach was taken in *Finlay*¹²⁶, which dealt with the common problem of "cross-pollinisation" of evidence between witnesses. There is a danger that memory of the incident will change if witnesses discuss the offence or their description of the offender.¹²⁷ Code D attempts to avoid the contamination of witnesses' memories in this way by providing in Annex A:12 that:

“The identification officer is responsible for ensuring that, before they attend the parade, witnesses are not able to... communicate with each other about the case or overhear a witness who has already seen the parade...”

The court in *Finlay* came to the conclusion that, because so much had gone wrong and so many parts of the Code had been broken, most notably Annex A:12, it was difficult to believe that the police were merely guilty of inefficiency. Rather, they appeared to be deliberately flouting the Code.¹²⁸ In other words, the breaches of Code D were seen to have been committed in bad faith. The Court of Appeal went on to state that police action in the case meant that *Finlay* would be justified in having little confidence in his identification

¹²⁴ [1994] Crim.L.R. 357

¹²⁵ [1991] Crim.L.R. 55.

¹²⁶ [1993] Crim.L.R. 50

¹²⁷ See, for example, Warnick, D.H., and Sanders, G.S., “The effects of group discussion on eyewitness accuracy” (1980) 10 *Journal of Applied Social Psychology* 249.

¹²⁸ At [1993] Crim.L.R. 51

procedure. The warranted suspicion of the motives of the police led the court to the conclusion that it was "bound to appear that justice did not seem to have been done".¹²⁹ Allowing the appeal, it was held that the identification evidence in the case should have been excluded.

In other cases the courts have combined the protective and disciplinary principles to act as a deterrent measure on poor police practice, as in *Martin and Nicholls*¹³⁰ where, before an identification parade had been arranged, witnesses spontaneously identified the defendants outside court. The Court of Appeal may have upheld the conviction had the defendants been identified in conditions akin to a group identification, but this was clearly not the case. Nicholls was identified when standing alone and Martin was of an appearance which would stand out in the particular crowd outside the courtroom. The defendants were clearly unprotected by any of the safeguards of Code D. It can be seen that, in the circumstances of *Martin and Nicholls*, this is unfair: the prosecution in the case should have taken the time to arrange a formal identification procedure before the case got to court. This may sometimes be difficult, but had the Court of Appeal ruled differently, then the ensuing problems would have been twofold. Not only would there have been unfairness in the case at hand, but there would also have been the possibility of future evasion of the provisions of Code D. This evasion could be achieved by delaying formal identification procedures and hoping that the witness would identify the defendant informally outside court. Whilst the identification in *Martin and Nicholls* appeared to be one of genuine spontaneity, to allow

¹²⁹ Ibid.

¹³⁰ [1994] Crim. L.R. 218. In this case money was demanded from two young schoolboys. Two older boys fitting the description of the offenders were nearby and were arrested as suspects for the offence. The police decided not to hold an identification parade, but Crown counsel requested that one be conducted. The case came to court before an identification parade had been arranged and the schoolboys identified the defendants. The case illustrates the conflict of opinion which often arises between the police and the CPS regarding the use of identification procedures and the problems surrounding the long waiting lists apparent in most identification suites.

the evidence arising from that identification would risk contrived identifications occurring in similar circumstances.

(iv) Guidelines for the Exercise of s.78 Discretion

From the discussion above it can be seen that there is no logical and consistent approach to the exercise of discretion under s.78 of PACE.¹³¹ Whilst the protective and disciplinary principles offer a theoretical distinction, judges “mix and match” considerations of protection, bad faith and significance on a case by case basis. A more coherent approach to the considerations and their relative importance is required.

Upholding the integrity of the system requires both condemnation of rule-breakers and protection of the defendant’s interests,¹³² although not all breaches of the rules warrant the exclusion of evidence. I would advocate for exclusion wherever the rights of the defendant need to be protected, or where there is a substantial breach or bad faith on the part of the police. Judges would be required to enter into a three stage inquiry. Firstly, they should ask ‘did the defendant suffer prejudice?’. If the answer is affirmative, then the evidence should be excluded. If no disadvantage is found, the focus should shift from the protection of the individual defendant to the protection of the broader integrity of the criminal process by asking ‘was the breach substantial?’, and evidence gained from significant breaches of the Code should then be excluded. The third stage, ‘was the breach committed in bad faith?’, would then be relevant only in cases where a minor breach had caused little or no disadvantage to the defendant. To exclude evidence for bad faith would signal judicial condemnation of improper practices, which is central to the ideals of the integrity principle.

¹³¹ The Royal Commission on Criminal Justice Report (1993 London: HMSO Cmnd 2263) did not offer any evaluation of s.78, despite its status as a much-utilised and debated section of PACE.

¹³² This interpretation of “integrity” is broader than the view that the principle argues that “the integrity of the courts...would be compromised if it were to act on evidence that had been obtained as a result of departure from proper procedure”: Ashworth (1994), *op.cit.*, 302. This implies a strict disciplinary approach, whereas, in my view, integrity involves upholding both consequences for breaching proper procedure and protection for the defendant.

Where minor breaches caused in good faith created no prejudice to the defendant's case, the evidence would be safely admitted.

This three stage inquiry represents a more structured and logical approach to a combination of disciplinary and protective ideals than that present in case law to date. It offers guidelines to judges without unnecessarily fettering their discretion to respond to the facts of individual cases. It could be criticised for its dependence on subjective assessments of "minor", "good faith" and "prejudice", but any system of discretion will involve a measure of subjectivity, and the restriction on absolute judicial discretion would involve a higher degree of certainty than we have at present. It also requires a restrictive cut-off point, perhaps allowing for the acquittal of more guilty defendants, but this is warranted if we believe that it is only minor good faith transgressions which do not significantly undermine the integrity of our criminal justice process.

Conclusion

It has been seen that the *Turnbull* guidelines and Code of Practice D combine to give a safeguard to defendants who dispute identification evidence against them. The *Turnbull* guidelines, introduced largely in response to the Devlin Report in 1976, aim to inform the jury that a convincing witness can be a mistaken one and that wrongful convictions have arisen from unreliable eyewitness identification in the past. A *Turnbull* warning should be given whenever the case against the accused rests wholly or substantially on the disputed identification of the accused, including where the identification evidence is that of recognition. Where the identification evidence is of good quality, that is, made in favourable conditions, the judge is entitled to leave the case before the jury even though there is only evidence of identification against the accused, providing the warning has been given. However, where the identification evidence is deemed by the judge to be poor, the

case should be withdrawn from the jury in the absence of supporting evidence.¹³³ Supporting evidence may take the form of legal corroboration but need not do so and there is no bar to one identification supporting another.¹³⁴ In this way, one poor quality identification could be supported by evidence of another identification of the accused.

A *Turnbull* direction, therefore, aims to advance the protective principle by informing the jury of the dangers of eyewitness identification and of any evidence which may decrease these dangers in convicting a defendant. What impact the warning has on juries is not known,¹³⁵ but it is debatable to what extent a warning on the need for caution will affect the deliberations of a jury. The warning has the advantage of coming from an authoritative source, but the protection it offers is reduced by the lack of judicial education regarding mistaken identification and the rather limited number of cases in which a warning will be given. However, if the procedural rules governing police practice are broken, it is possible that the identification evidence, regardless of its quality under *Turnbull*, will not be left before the jury.

If the police breach any of the provisions of Code D, they risk the exclusion of evidence under PACE s.78, although the approach of the courts to the exercise of their discretion is far from consistent. Insofar as the protective and disciplinary principles co-exist, it is to be assumed that courts will exercise a preference for any one approach or a mixture of approaches on the basis of the facts of the case. Where there is an obvious flouting of the Code, it would be difficult for the prosecution to claim that the identification procedures were fair. However, there may be no bad faith evident, rather inefficiency or mistake, and

¹³³ *Turnbull* op.cit., 552-553.

¹³⁴ *Weeder* (1980) 71 Cr.App.R. 228

¹³⁵ Katzev, R.D., and Wishart, S.S. "The impact of judicial commentary concerning eyewitness identifications on jury decision making" (1985) 76 *Journal of Criminal Law and Criminology* 733 discovered that juries often find judicial commentary confusing and complex. They also found that giving

those cases necessitate an examination of the purpose of the breached provision, whether any actual prejudice to the defendant was the result and the seriousness of the breach. Currently, the choice of approach taken to the s.78 discretion depends on the context and content of any particular case.

Whilst *Turnbull* and Code D provide safeguards against unfair or unreliable identification evidence being considered by a jury, these mechanisms often do not work, and there is a continuing danger of miscarriages of justice in identification cases. It has been noted that the warning given to the jury may be insufficient if the aim is to inform jurors about the dangers of convicting on the basis of eyewitness evidence, and that it may be difficult for a court to evaluate the motive behind, or effect of, a breach of Code D. Furthermore, the exclusion of evidence will be considered in only a small percentage of cases, leaving the majority of defendants unprotected against breaches of Code D. Whether the results of psychological research can be utilised to offer protection through the introduction of expert witnesses is discussed in the following chapter.

instructions only at the end of the trial reduced the impact the instructions may have on jurors' decision-making, as the decision as to the defendant's guilt or innocence may already have been made.

CHAPTER EIGHT

EXPERT EVIDENCE IN EYEWITNESS IDENTIFICATION CASES

Introduction

In this chapter, the status of expert evidence in the English courts will be examined, drawing on concerns about and criticisms of expert evidence in general, and on the application of evidential rules in the courtroom. Given the inadequacies of the protections offered by current trial safeguards, as discussed in the previous chapter, the discussion in this chapter will determine the effect of rules on eyewitness experts, assess whether the results from psychological experimentation could be put to better use, and examine the efficacy of expert evidence in eyewitness identification cases.

The first section of this chapter addresses difficulties involved in the admission of expert evidence. The discussion then concentrates on the evidential rules surrounding the admission of expert testimony in the criminal courts in England and Wales. An examination of the general rules governing expert evidence highlights the problems faced by psychologists who aim to give their expert opinion on the reliability of eyewitnesses. The final section of this chapter explores the effect of evidential rules on the admissibility of expert evidence on eyewitness identification, and assesses whether the English courts should take the step of accepting such evidence.

Before any detailed review of the evidential rules relating to expert evidence is undertaken, it should be noted that among the questions raised by the use of expert evidence are the following:

(1) How do the courts decide whether or not to admit new methods? How is reliability assessed?

- (2) Are expert witnesses impartial?
- (3) Are expert witnesses competent?
- (4) How do the courts decide between conflicting testimony?

These questions will be considered in the discussion of expert opinion evidence in this chapter. The competency and reliability of experts and their evidence are addressed within the law relating to expert opinion evidence.

Criticisms of Expert Evidence

In order to place the evidential rules in context, it is necessary to consider the historical attitude of the courts and legal commentators to expert evidence in general. Although the courts began to admit expert evidence many years ago, a basic reluctance to allow experts to have too much influence is evident. Many of the criticisms have gained strength as scientific advances have increased the number of trials where expert evidence is admitted. The behavioural sciences, viewed as less reliable and rigorous than the pure sciences, bear the brunt of much criticism. In this section, some of the objections to expert evidence will be examined briefly, with particular emphasis on evidence relating to eyewitness testimony.

(i) Hired Guns and Battling Experts

Critics of the use of expert evidence in criminal trials point to the possibility that witnesses may not be impartial, especially where they are receiving payment from one of the parties for their services. Experts who compromise their independence through a desire to present a favourable case for their employer have been termed “hired guns”. Cutler and Penrod draw attention to the ethical dilemma this can create for expert witnesses, especially in the field of psychological research,¹

“It is not uncommon for expert psychologists to feel pressured to misrepresent the psychological literature – for example, by not discussing

¹ Cutler, B.L., and Penrod, S.D., *Mistaken Identification: The Eyewitness, Psychology and the Law*, (1995 Cambridge University Press), 243.

specific findings; by not acknowledging limitations of research...; or by not developing factors that might operate to increase the likelihood of a correct identification. These pressures emanate from attorneys who are attempting to put on the strongest case possible...Many psychologists and other experts feel uncomfortable being thrust into a role where they may not have an opportunity to present a fully balanced overview of research findings and theories.”

In the English system, an expert will usually be employed by the prosecution, and even with the possibility of legal aid, the defence team will often be unable to present their own witness. Expert evidence on eyewitness identification is one of the few exceptions to this general trend, because the evidence in general will revolve around the unreliability of memory, possibly undermining the identification evidence of prosecution witnesses. However, the problem remains that there may be pressure to present a case in favour of the hiring party, even where this may mean that contrary conclusions or research are downplayed.

However, the criticisms do not diminish even where the defence can present their own expert. That expert too is suspected of being a hired gun and what results, it is claimed, is a “battle of the experts”. The argument is that such battles are costly, time consuming and serve only to confuse the jury. There is also a danger that in highly publicised trials a battle of the experts will damage the reputation of both the law and psychology.² Proponents of expert evidence claim that experts will battle only on issues where there is no scientific consensus. Unfortunately, psychological evidence can be open to deep disagreement, as with the debate regarding repressed memory syndrome. That debate has split the psychological community in two, polarising views between those who believe that it is a valid phenomenon and those who assert that it is merely “false memory syndrome”.³

² Cutler and Penrod (ibid., at 245-6) cite the example of John Hinckley Jr., who was accused of attempting to assassinate President Reagan. Six prosecution experts concluded that Hinckley was legally sane at the time of the offence, whereas the same number of defence experts stated that he was legally insane.

³ See, for example Loftus, E., “The reality of repressed memories” (1993) 48 *American Psychologist* 518; Freckleton, I., “Repressed memory syndrome: Counterintuitive or counterproductive?”,

Although the experts might inform the jury of the debate, they are unlikely to do more than confuse jurors with opposing experimental results. There is a danger that the jury will believe the expert who was more credible on the witness stand. If the experts have comparable qualifications and experience, a credibility assessment would necessarily focus not only on which witness was clearer in giving evidence and more skilled in fielding cross-examination, but also on which witness was more likeable as a personality. This can hold true for all kinds of witnesses, but is magnified for expert witnesses who usually testify on crucial issues in the case and are presenting complex evidence. Decisions as to guilt or innocence could be made not on the basis of evidence but on the basis of which party has the most charismatic expert.⁴

A further issue in assessing the usefulness of expert evidence where opposing experts disagree is whether they will make any difference to the jury's assessment of the case. One possibility is that both experts' evidence will be discounted as confusing, but it is just as likely that, where one expert's evidence is in line with common sense, the jury will believe it because it does not challenge their intuitive assumptions. The argument that battling experts simply clog trials with extraneous issues becomes convincing where the effect is simply to confirm widely held views.⁵ Opposing this line of argument are the findings of

(1996) 20 *Criminal Law Journal* 7; van der Kolk, B. and Fisler, R., "Dissociation and the fragmentary nature of traumatic memories: Overview and exploratory study" (1995) 8 *Journal of Traumatic Stress* 505; and Loftus, E., and Ketcham, K., *The Myth of Repressed Memory* (1994 St. Martin's Press, New York).

⁴ The role of the charismatic expert is discussed further below. It is difficult to assess the reactions of the jury to expert evidence due to a lack of jury research. There are several studies with mock jurors. See, for example Wells, G., Lindsay, R.C.L., and Tousignant, J., "Effects of expert psychological advice on human performance in judging the validity of eyewitness testimony, (1980) 4 *Law and Human Behavior* 275. Research conducted with actual jurors recently in New Zealand suggests that the personality of both counsel and individual witnesses can affect the opinion of jurors, but that they are still conscientious in considering the evidence at hand (New Zealand Law Commission unpublished research: Young, W., Cameron, N., and Tinsley, Y., 1999).

⁵ See Norris, J. and Edwardh, M., "Myths, hidden facts and common sense: Expert opinion evidence and the assessment of credibility", [1995] 38 *Criminal Law Quarterly* 73, 88. Countering this argument, see Holdenson, O.P., "Admission of expert evidence of opinion", (1988) 16 *Melbourne University Law Review* 521, 537, who argues that the floodgates will not be opened in such circumstances and that the courts will not "grind to a standstill" because the judge can at any time prevent evidence being called. The fact that this may cause unfairness where one side has called an expert witness but the other is prevented from doing so is not dealt with by Holdenson.

an experiment conducted by Lindsay, MacDonald and McGarry⁶ designed to assess the attitudes of the general public, defence lawyers and prosecutors to different forms of expert evidence. In raising the subject of a battle of experts, they concluded that:⁷

“members of the public do not feel that a battle of the experts would confuse the jury, nor that such battles would discredit either the law or psychology. They also feel that psychologists...can convey information to the jury that is not a matter of commonsense.”

Although Lindsay et.al. are optimistic about expert evidence, there are some methodological issues which undermine the findings from their study. The most important of these is that the survey used 50 members of the general public, drawn from different social backgrounds. There is no indication of how many had had experience of the criminal process or how many had served on a jury where expert evidence was admitted. Without such experience, members of the public can only hypothesise as to the effect a battle of the experts would have on the deliberations of a jury. This makes the assertion that there would be no confusion meaningless.⁸

One solution to the perceived problems of battling experts is to allow the courts to appoint court experts, who would give impartial evidence to the tribunal of fact. This is possible in the US but is seldom used as an option by judges.⁹ It would counter concerns that expert witnesses are simply hired guns, but in areas of debate the jury would be offered only one viewpoint, and this could mean that biased information was still being heard. Lindsay et.al. found that¹⁰

“The court-appointed expert was seen as least biased in favor of the defence

⁶ Lindsay, R.C.L., MacDonald, P., and McGarry, S., “Perspectives on the role of the eyewitness expert”, (1990) 8 *Behavioural Sciences and the Law*, 457.

⁷ Ibid., 463.

⁸ The survey was based on a written questionnaire and so the questions may have been biased towards a certain response. (The questionnaire is not reproduced in the report of the experiment). There was also a difference in completion methods: some respondents completed the questionnaire in the presence of the researcher; others completed it later and posted it back. It would be interesting to know whether this produced any difference in results.

⁹ Cecil, J.S., and Willging, T.E., “The use of court-appointed experts in federal courts” (1994) 78 *Judicature* 41.

¹⁰ Op.cit., (1990), 460.

and most biased in favor of the prosecution. However, overall the court-appointed expert was viewed as neutral by most of the respondents. The court-appointed expert was perceived as most likely to educate the jury, most likely to be trying to reduce inappropriate convictions, and most likely to be trying to alter improper police procedures.”

Whilst the use of court-appointed experts appears to be a good solution to the problem of battling experts, there are some problems. For example, adversarial principles demand that opposing evidence be presented and challenged through cross-examination, a tool which would be severely limited in cases involving court-appointed experts. It could be impossible to find a number of eminently qualified psychologists who would be both willing to do the job and who could be said to represent a generally accepted viewpoint. There simply is no consensus in some areas of psychological research. Identifying an impartial and disinterested psychologist to act as court-appointed expert in such circumstances would be difficult. These points lead to the conclusion that the problem of battling experts cannot be solved completely by the introduction of a system of court-appointed experts. Moreover, concerns that expert witnesses invade the province of the jury and partake of “grandstanding” would be unlikely to disappear with the advent of court-appointed experts. If anything, experts would be more likely to usurp the role of the jury, as they would be seen to have the court’s explicit approval.

(ii) *Grandstanding and Undue Weight*

One of the main concerns regarding expert evidence is that it can grab the attention of the jury with more force than most other evidence. The witness is likely to be highly qualified and self-confident. This combination, it is feared, is enough to make jury members accept the evidence of the expert without considering its weight relative to other evidence in the case and without raising doubts about discrepancies. To do so would seriously undermine the integrity of the criminal justice process by allowing undue weight to be given to one witness, perhaps at the expense of others. This concern was illustrated by the comment in *R v French* that accepting expert evidence on the reliability of a witness’s evidence

could,¹¹

“open a Pandora’s box from which there could be no resiling, of confusion and usurpation of function...It is not “empty rhetoric” to speak of the “usurpation” of the function of the jury in these circumstances”

In theory the weight of evidence is its probative worth in relation to the facts in issue. It is largely a matter of common sense. How much weight is attached to a piece of evidence could be determined by the extent to which it supports or contradicts the other evidence produced, the credibility of the witness, and the reliability of the source. The weight to be attached to the evidence is a question of fact for the jury, so once the judge has determined that a piece of evidence is relevant and admissible, it is for the jurors to decide what weight if any to attach to it. In some circumstances, they are given advice by the judge, but they make the final decision.

Although the weight given to expert evidence is a matter for the tribunal of fact alone, when dealing with complex scientific data it may be difficult for a jury to do anything other than accept the evidence of an expert. This may run dangerously close to “usurping the role of the jury”, because where evidence is taken on trust there will be no independent conclusions drawn by the jury members and the expert could in effect take over their role. The importance of retaining the role was discussed by Lord President Cooper in *Davie v Edinburgh Magistrates*,¹²

"Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge...their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence."

¹¹ (1977) 37 CCC (2d) 201, 211. Wigmore stated in his text *Wigmore on Evidence* (Chadbourn rev.ed. 1978) that the language of usurpation of the jury’s function was “so misleading, as well as unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric.”

¹² 1953 SC 34, 40. See also the U.S. case of *Criglow v State* (1931) 183 Ark. 407, 36 S.W.2d 400 at 401, where it was stated that “[T]he question whether these witnesses were mistaken in this identification...was one for which the jury and not an expert witness should answer. This was a question upon which one man as well as another might form an opinion, and the function of passing upon the credibility and weight of testimony could not be taken from the jury.”

Some see both the “rhetoric” surrounding usurpation of the role of the jury and the imagery of the judge as protector of that role as rather absurd and outdated. One amusing example of this viewpoint raises questions regarding the over-protectiveness of the law and its attitude towards expert witnesses:¹³

“Empty rhetoric or not, courts still use this language as if it meant something...Unquestionably, the language does fire the imagination. When one confronts the Usurping Experts Argument with all of its colourful talk of usurpations and provinces being invaded, it might be well to remind oneself that we are in a courtroom, not in the midst of a campaign out of Caesar’s Gallic Wars. Even so...I picture the following scenario in my mind’s eye. I see an aggressive looking expert, complete with credentials and testimonials, push himself into the jury box, shove the cowering jury aside, plunk himself down, and testily declare: ‘I’m taking over here. Get out!’ Finally, however, the judge comes to the rescue, wagging a learned finger at the expert, scolding him as follows: ‘No, you cannot do that. You are usurping the jury’s function. You are invading the province of the jury.’ The dejected expert then departs.”

Although lighthearted, the author is making a valid point: the meaning and worth of judicial statements regarding expert witnesses invading the province of the jury are seldom questioned. It could be said that all expert witnesses will, strictly speaking, usurp the role of the jury because that is what we ask of them. They are called to speak on matters which the jury would either have difficulty in resolving alone or which involve counter-intuitive issues upon which an expert can offer enlightenment. The use of the usurpation argument as a reason for excluding expert evidence in areas of natural science has lost most of the validity it had in the past, because scientific advances have forced the courts to make a nonsense of its reasoning. The presentation of much scientific evidence, such as DNA evidence, is often conclusive and could be said to make up the mind of the jury on ultimate issues. But the admission of such evidence is only just, because scientific advances which have general acceptance should be utilised. However, it is difficult to justify non-operation of the argument regarding usurpation for some types of expert evidence but not for others. It appears that it is used for the behavioural or “soft” sciences, but not for the natural or

¹³ Murphy, J.P., “An evaluation of the arguments against the use of expert testimony on eyewitness identification”, (1987) 8 *University of Bridgeport Law Review* 21, 27.

“pure” sciences. The question has surely become one of validity of the scientific data and importance to the case. If validity and importance are the determining issues, then the courts should no longer use what indeed can amount to the “empty rhetoric” of invasion and usurpation.

In those cases where expert evidence is admitted, it is wrong to direct a jury that expert evidence should be accepted where it is not contradicted by other expert opinion evidence.¹⁴ Even where evidence is uncontradicted by other expert evidence, there may be circumstances or facts to consider in the case which lead the jury to attach less weight to the evidence of an expert. However, where there are no facts or circumstances contrary to the expert evidence, it would be a misdirection to tell the jury that they may disregard it.¹⁵ In *R v Bailey*,¹⁶ the Court of Appeal held that, whilst the jury are not bound to accept medical evidence, they cannot reject it where there is nothing offered to cast doubt on it. This suggests that where the expert evidence is truly undisputed, it can be determinative of the facts in issue. The consensus now appears to be that, where there are no other circumstances to consider, the jury should be directed to accept clear and uncontradicted expert opinion evidence. Where there are other circumstances to consider then the expert evidence should be assessed along with those circumstances.¹⁷ As with cases where the expert evidence is contradicted by another expert, the jury should consider such matters as the expert's qualifications and credibility when deciding on the weight to accord to her evidence. However, credibility and qualifications in themselves can be matters which would sway a jury to accept evidence which may be dubious. An illustration of the potential danger of blanket admission of expert evidence can be found in Norris and Edwardh's discussion of the replacement of old common sense theories with new

¹⁴ Ibid.

¹⁵ *R v Matheson* [1958] 1 WLR 474 (CA); *Anderson v R* [1972] AC 100 (PC); *R v Bailey* (1978) 66 Cr App R 31 (CA).

¹⁶ Ibid.

scientifically based ones,¹⁸

“As more and more ‘expert’ opinions are offered for consideration by the triers of fact, there is a real risk that old myths will simply be replaced by new ones that are even more insidious because of their appearance as scientific truths.”

Accompanying this danger is a complication: in an adversarial system counsel is enjoined to do everything possible within evidential rules to achieve victory. This could include using expert witnesses even where their evidence can be a minor part of the case. The imagery of “grandstanding” is brought to mind here, where a star performer is employed with the task of capturing the attention of the audience, diverting it away from the other, less exciting, actors. They will then leave the show satisfied, even though none of the performers other than the star remains etched in their minds. A poor case could therefore be boosted by the “star” expert witness. If the jury give her evidence undue weight, flaws in the rest of the case become less important. Indeed, the fear of some commentators is that expert evidence could be used where there is a lack of convincing evidence in the case, and counsel rely on their “star-turn” to dazzle the jury with science. The evidence may not be solid, but the qualifications of an expert give her an authority which leads to unquestioning belief,¹⁹

“[Y]ou must ask yourselves whether your help is really needed, or whether you are merely engaged as magicians to perform an intriguing side-show so that spectators will not notice the crisis in the center ring.”

Whilst concerns about “grandstanding” highlight the problems with the adversarial process,²⁰ it is not an adequate argument against the admission of expert evidence as a blanket rule. For example, such concern is not upheld where we have a situation which is just as vehemently criticised: the battle of the experts. Both experts may be confident,

¹⁷ *R v Sanders* (1991) 93 Cr App R 245 (CA).

¹⁸ Norris, J. and Edwardh, M., (1995) op.cit., p.75.

¹⁹ Judge Bazelon in an address to US psychologists, cited by Tapp, J.L., and Levine, F.J., “Reflections and Redirections” in J.L. Tapp and F.J. Levine, *Law, Justice and the Individual in Society* (1977).

²⁰ For further discussion of the adversarial process, see Leigh, L.H., and Zedner, L., *A Report on the Administration of Criminal Justice in the Pre-Trial Phase in England and Germany*, Royal Commission on Criminal Justice, Research Study No.1 (HMSO, 1992); and McEwan, J., *Evidence and the Adversarial Process* (1998 Oxford: Blackwell).

persuasive and highly qualified. Blind acceptance is then impossible.²¹

Even where expert evidence is used to hide flaws in a case, the danger of wrongful conviction arises only where the evidence does not relate to the main issue, or lacks validity, or is open to contradiction which the jury does not hear. The evidence may be perfectly valid, and be properly accepted by a jury. The danger therefore lies in those cases where the expert evidence does not reach such a high standard, yet it is delivered confidently by a highly qualified expert. There is then the risk that the jury will place undue weight on what the expert tells them and in effect allows the expert to decide on the issues in the case.

It must be noted, however, that arguments regarding the danger of unquestioning acceptance of expert evidence may also underestimate the intelligence of juries. Too little is known of their decision-making process for conclusive statements to be made, but Holdenson asserts that to rule expert evidence inadmissible because the jury may accord too much weight to it is to rely²²

“upon the false premise that juries are not true to their sworn duties...jurors can be cautioned that such evidence is only one piece of evidence to be taken into account, and to look for sound scientific data supporting the proffered opinions.”

It is logical to assume that blanket acceptance will occur in only a small percentage of cases, because other persuasive evidence will be presented in the majority of trials. However, risk of undue weight in some cases highlights the necessity of criteria being met before an expert is allowed to give evidence. The solution to this problem lies in the power of the judge to exclude expert evidence where appropriate. To be effective the power should be

²¹ Similarly, the problem does not arise where expert evidence is the only evidence in the case. There is adequate authority that a jury in such a case would be correct in accepting the expert evidence: *Bailey*, op.cit.

²² Holdenson, (1988) op.cit., 537.

accompanied by judicial education to allow informed decisions to be made.²³

Although there are flaws in the argument that expert evidence results in poor advocacy and a reliance on an expert's performance to secure a victory, less dramatic effects could certainly occur. For example, jurors may weigh up evidence conscientiously but accord the expert evidence more weight than anything else simply by virtue of its source. This process may take place subconsciously, and in cases where it is proper and necessary to admit the expert evidence. The real danger of usurpation is therefore likely to be at a lower level than blanket acceptance, and there may be no acceptable solution. To exclude useful and necessary evidence is not a valid option. It may be that we will have to accept that the price of expert evidence is that greater weight will automatically be placed upon it. And in most cases this will be right and proper, provided that only appropriate and reliable evidence is admitted. The question posed later in this chapter is whether expert evidence on eyewitness testimony is appropriate and reliable.

The rules governing the admission of expert evidence at trial

Any consideration of the introduction of expert evidence from a particular scientific field must include a review of the evidential rules which apply to such evidence.²⁴ In general terms, the law of evidence regulates the way in which facts may be proved in courts of law. The historically founded nature of the law of evidence begs the question of whether it could ever allow the criminal justice process to keep pace with major scientific advances. Reform of evidential rules has been slow.²⁵ Perhaps more than any other area of the law of

²³ Some argue that the decision as to admission or exclusion of expert evidence should not be made by a judge alone, because they are not scientists. Rather, they should consult with a panel of experts in the field. This restricts judicial discretion, and may include the risk of biased advice, but would ensure that judges were better informed of scientific advances and general acceptance issues.

²⁴ Good general texts on evidence include Keane, A., *The Modern Law of Evidence* (1994 London: Butterworths); Tapper, C., *Cross on Evidence* (1995 London: Butterworths); and Zuckerman, A., *The Principles of Criminal Evidence* (1989 OUP).

²⁵ But it has not been non-existent: for example, strict corroboration requirements are no longer seen to be useful. For a discussion of corroboration see Keane (1994) *op.cit.*, chapter 7.

evidence, the rules relating to expert opinion evidence illustrate the dilemmas involved in balancing the interests of legal certainty with the desire to harness new scientific techniques.

(i) *Evidence of opinion*

Expert evidence is a form of opinion evidence. Although opinion evidence may be relevant, it is not testimony as to a fact deriving from the witness's personal experience or perception. Rather, it is an inference drawn from facts.²⁶ Any opinion, belief or inference regarding facts in issue has traditionally been regarded as inadmissible. The basis of inadmissibility lies in the obvious problems of establishing reliability where evidence is based on opinion²⁷ and also in the danger that the fact-finding role of the court could be usurped. It is for the tribunal of fact to decide inferences from facts in issue, not for witnesses.

There are, however, two exceptions to the general rule of inadmissibility for opinion evidence. The first exception is that a qualified expert may give her opinion on a matter requiring expertise.²⁸ Courts have long been willing to allow evidence from scientific

²⁶ An example of a personally perceived fact would be eyewitnesses testifying that they saw the offender at a certain time and place. An example of an inference drawn from those facts is that the witness identifies the accused as the offender. Rather than giving a description and letting tribunal of fact decide if it fits the accused, the witness is stating her opinion that the offender and the accused are one and the same.

²⁷ Where reliability of evidence cannot be established, it also loses relevance. So a fact which can be proved is relevant, but opinion generally is not. See *Hollington v Hewthorn and Co Ltd*. [1943] KB 587, 595.

²⁸ s30 of the Criminal Justice Act 1988 provided for the admissibility of expert reports in criminal cases. This is not automatic admissibility: the leave of the court must be given if it is not proposed that the expert gives oral evidence as well. In deciding whether to admit an expert report, the court will consider its content, why there is no oral evidence proposed, and whether the admissibility or exclusion will create unfairness for the accused. Overall, the admissibility of expert reports in criminal proceedings is a positive move. Where oral evidence is given, a written report will serve to clarify and reinforce any difficult points. Where there is no dispute about evidence, for example where a specimen of blood has been tested and both sides agree on the result, attendance of the expert in person seems superfluous. The report can present her findings without her presence. However, there are potential dangers. Where evidence *is* disputed, absence of any opportunity to cross-examine the expert regarding her evidence could lead to unfairness. Evidence may be all the more persuasive because it is in written form.

experts, as the sixteenth century case of *Buckley v Rice Thomas* illustrates²⁹,

"...if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation."

Secondly, in certain limited circumstances a non-expert may state her opinion as a way to convey facts she personally perceived.³⁰

Although expert opinion evidence is an exception to the main rule, this does not mean that all expert evidence will be judged to be admissible. It is recognised, for example, that there is a great risk that the tribunal of fact will simply accept evidence from an expert in a specialised field, without taking the time to question such evidence. This risk is increased where the expert is highly qualified and appears confident and authoritative on the witness stand. When coupled with the suspicion that experts are 'hired guns' who amend their opinion according to which party is paying them, it is unsurprising that the courts have shown some reluctance in admitting expert evidence. In focussing on expert opinion evidence, the remainder of this section further explores the issues of competency, reliability and impartiality.

(ii) *The field of expertise*

Although the courts have exercised caution in relation to expert evidence, they have recognised that some subjects require the aid of expert opinion and that, without it, the jury would be unable to reach an informed decision. Before the court allows expert testimony the matter must call for expertise, and the expert must be someone who is seen to be

²⁹ (1554) Plowd 118, 124

³⁰ This is sometimes termed the "compendious mode" of conveying facts. For example, a witness who saw the accused stumbling and slurring her words is allowed to state that she was drunk, provided reasons are given for the conclusion. The exception covering non-expert opinion evidence in part illustrates a recognition that it is often difficult for witnesses to separate fact and opinion in their testimony. Personal perception inevitably involves some inference and opinion, influenced by the beliefs of the witness. There is criticism of the distinction made between fact and opinion on the grounds that it is artificial.

qualified to give an opinion on it.

The matters which call for expertise are constantly expanding, and the courts in England and Wales have admitted expert evidence on a huge range of issues, covering medical, scientific, technological and psychiatric fields.³¹ The courts have to decide whether to admit evidence covering a novel discipline by determining whether the evidence is sufficiently reliable and respectable to aid the tribunal of fact in making its decision. For example, evidence that the accused had committed an offence because it was his destiny, as shown by a tarot card reading, would not be viewed as reliable and respectable.

In England and Wales, the judge determines the appropriateness of scientific disciplines by using the 'field of expertise' test. The boundaries of the field of expertise shift as scientific advances are made, with matters which have become commonplace knowledge being excluded and new discoveries and complex scientific theories being included. As a general rule of thumb, it could be said that matters within the field of expertise sit between those issues which are within the common knowledge of the population and those which are conjectural and uncertain.³² As matters which are within the grasp of most people grow in number, so the number of speculative matters diminish,³³

"Only a few years ago it would have been necessary to take expert evidence on issues with respect to the operation of motor cars, aeroplanes or radio which are now so completely inside the domain of popular understanding that such evidence would be regarded as superfluous."

The general approach to a new form of expert evidence is to admit it and allow the jury to decide on its weight in the light of other evidence heard during the case. An illustration of

³¹ For a list of specific examples of matters within the field of expertise, see Keane, (1994) op.cit., p399.

³² For example areas of nature or science which are not yet understood, and matters involving astrology, tarot and the like.

³³ Maguire, J., *Evidence, Common Sense and Common Law*, (1947, Chicago, Foundation Press), 30

this approach is *R v Robb*³⁴, where an expert was allowed to give evidence on voice identification. The evidence was admitted notwithstanding the fact that the method of voice analysis used was not one endorsed by a majority of experts in the field and was rather unscientific.³⁵ The obvious drawback of the general approach used in English courts is that unreliable methods may be introduced. Although the jury will then assess the weight of the evidence, some unreliable evidence is likely to be accepted, increasing the chances of a false conviction.³⁶ A further drawback of using a more permissive rule is that the “floodgates” will be opened:³⁷

“Such a rule broadens the range of cases in which expert testimony is admissible. This sets the stage for two collateral effects. First, defence attorneys, realising that attempts to introduce such testimony will meet with greater success, might increase their recruitment and use of experts. Second, more psychologists may represent themselves as qualified and available to testify in this capacity. Consequently, there could well be more offers of eyewitness-expert testimony, leading to an increased burden on the courts.”

However, as the discussion below will illustrate, English courts temper a generally permissive rule of admissibility with other rules of evidence, so that expert testimony is limited in scope for all forms of psychological evidence.

It can be seen that there are difficult issues for the courts to address when deciding on the admissibility of evidence from a particular discipline. A balance needs to be struck between two opposing objectives: the need to guard against hasty acceptance of ultimately unreliable evidence and the desirability of admitting useful evidence as quickly as possible. This is an almost impossible balance to strike, especially where the court may lack the scientific expertise to use its judgment appropriately. Even where the discipline itself is deemed

³⁴ (1991) 93 Cr App R 161 (CA).

³⁵ The expert witness in *Robb* was an academic who simply listened to the two tapes available and paid close attention, without measuring resonance and frequency. The method was held to be sound. The expert was also viewed as skilled in the field of voice analysis, and so competent to give evidence.

³⁶ For example, one of the main pieces of evidence against the Birmingham Six was the “Greiss” test results, which purportedly showed that the accused had been in contact with explosives. At a later stage, it was revealed that a positive result could also be obtained where there had been contact with playing cards or cigarette packets: see Ashworth, A., *The Criminal Process* (1994 Oxford: Clarendon), 12.

admissible, the expert evidence may still be rejected on the grounds that the witness proposed is not sufficiently skilled for the task.

(iii) *Competence of expert witnesses*

Where the discipline is admissible, it is left to the judge to determine whether the expert is competent to testify.³⁸ This involves an examination of the witness's expertise. A witness may be qualified in her chosen discipline through formal study or through experience.³⁹ In *R v Silverlock*⁴⁰, the witness was a solicitor who had studied handwriting as a hobby for a number of years. He was permitted to give evidence that an advertisement was in the handwriting of the accused. In explaining the approach of the court to competency of expert witnesses, Lord Russell stated that:

"the expert must be peritus but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled?"

In contrast to *Silverlock* is *R v Inch*,⁴¹ where a medical orderly who had extensive experience in the treatment of cuts was held to be insufficiently qualified to give his opinion as to whether a cut had been caused by a weapon or a head butt. It is difficult to see why the solicitor in *Silverlock* was considered to be peritus whereas the orderly in *Inch* was not.⁴² What is clear is that formal qualification is an aid to a decision of competency, but

³⁷ Walters, C.M., "Admission of expert testimony on eyewitness identification", (1985) 73 *California Law Review* 1402, 1419.

³⁸ Where an expert is deemed to be competent, she will also be compellable. See *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380 (CA), where an expert witness advised both prosecution and defence. On realising this, he declined to aid the defence further. It was held that he was compellable, and that his contract with the prosecution did not prevent him from giving evidence on the instructions of defence counsel also.

³⁹ Although statute may require specific qualifications, see for example the Criminal Procedure (Insanity and Unfitness to Plead Act 1991, s1, regarding medical practitioners. This limits the court's discretion as to what constitutes expertise.

⁴⁰ [1894] 2 QB 766.

⁴¹ (1989) 91 Cr App R 51

⁴² Although it could be argued that the cases are an illustration of the differences in approach endemic in the exercise of judicial discretion, *Inch* was heard over a century later than *Silverlock*. However, it is also possible that the relative social class of the "experts" played a part in the decisions. See also *R v Robb*, op.cit., *Folkes v Chadd* (1782) 3 Doug KB 157, *R v Oakley* (1979) 70 Cr App R 7 (CA), *R v Murphy* [1980] QB 434 (CA).

that informal qualifications may suffice.

If the expert is deemed to be competent in an accepted field of expertise, she must then ensure that her evidence does not breach any evidential rules. Her testimony must be useful to the tribunal of fact, avoid deciding on ultimate issues in the case, and must be based on proven (or assumed) facts.

(iv) *Expert evidence and the rule against hearsay in criminal cases*

Where an expert relies upon a fact in expressing her opinion, that fact must be capable of proof by admissible evidence.⁴³ In order for the tribunal of fact to decide the weight to be accorded to her evidence, the expert should always state the (assumed) facts upon which her opinion is based at the time of examination-in-chief. This allows an assessment of credibility, as was recognised in *R v Turner*, where Lawton LJ stated that:⁴⁴

"If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless."

In many cases, expert witnesses will rely upon findings from research conducted by others in the field, and will not have first-hand knowledge of the facts used to form the opinion given in court. They will not be able to prove facts where they have no personal knowledge of them because this would breach the rule against hearsay.⁴⁵ Therefore, in such cases experts will discuss the research findings as *assumed* facts and counsel will ask hypothetical questions. Expert witnesses are allowed to rely on assumed facts in forming their opinion without breaching the rule against hearsay, whereas non-experts are not.

Similarly, in forming a opinion in a case, experts can rely upon material within their field of

⁴³ See Pattenden, R., "Expert opinion based on hearsay" [1982] *Criminal Law Review* 85.

⁴⁴ [1975] QB 834, at 840.

expertise written by other people. In eyewitness identification cases, this means that an expert witness can rely upon the results of experiments which she had read about but had not performed herself, provided that they represented the established body of knowledge for the discipline.⁴⁶

"If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper."

In *R v Abadom*⁴⁷, where the expert witness relied on statistics produced by the Home Office to show how common a particular type of glass was, the defence appealed on the grounds that the evidence was hearsay because the expert had no knowledge of the method used by the Home Office in collecting the statistics or of how reliable that method was. The Court confirmed that experts are allowed to rely on the work of others in forming their opinions:⁴⁸

"Once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusion. However, where they have done so, they should refer to this material in their evidence so that the cogency and probative value of their conclusion can be tested and evaluated by reference to it."

To rule otherwise would have made it very difficult for the courts to find suitable experts in any field, as the experts would only be able to rely on experimental work they themselves had conducted.

It appears that, with regard to hearsay at least, expert witnesses may testify on the results of

⁴⁵ For discussion of the rule against hearsay, see for example Keane, (1994) op.cit.; Uglow, S., *Evidence: Text and Materials* (1997 London: Sweet and Maxwell); and Murphy P., *Murphy on Evidence* (1997 London: Blackstone Press).

⁴⁶ per Bingham J in *H v Schering Chemicals Ltd.* [1983] 1 All ER 849, 853.

⁴⁷ [1983] 1 All ER 364. The offence charged was robbery. During the course of the robbery a window was broken. The prosecution case was that glass found in the accused's shoe was from the broken window.

⁴⁸ *Ibid.*, at 368. See also the US Federal Rules of Evidence, r. 703:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in

eyewitness identification experiments conducted by third parties. However, other evidential rules have traditionally precluded expert testimony on eyewitness identification, most notably the “ultimate issue” and “common knowledge” rules.

(v) *Expert Evidence on Ultimate Issues*

Ultimate issues are those which the court has to ascertain in each particular case. The rule is designed, along with the common knowledge rule, to prevent witnesses from usurping the role of the jury:⁴⁹

"It is not competent in any action for witnesses to express their opinions upon any of the issues, whether of law or fact, which the court or jury has to determine."

One of the main criticisms of the rule is that it appears to disregard the very reason why expert witnesses are called: to draw inferences from the facts in cases where the jury does not possess the expertise to do so.⁵⁰ It does not take into account the fact that expert evidence may conflict, leaving jurors to weigh up the evidence and decide on the ultimate issue in the case.⁵¹ These criticisms would warrant further discussion but for the simple fact that the rule has been eroded to the point where it is ineffective. The expert simply has to think of a different way to express her conclusion on the ultimate issue than that used by the courts, and the rule will not be infringed. This is so even though the expert is, in substance, giving direction on the ultimate issue in the case. The letter of the rule is followed but not its spirit, it being " a matter of form rather than substance."⁵² The

forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

⁴⁹ Per Neville J in *Joseph Crosfield and Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378 at 379.

⁵⁰ Of particular interest on the ultimate issue rule is Jackson, R.D., " The ultimate issue rule: One rule too many" [1984] *Criminal Law Review* 75.

⁵¹ Where one witness lacks credibility, this argument loses its force. On the other hand, the jury could be left in a rather confused state where the two experts are both impressive on the stand. See the discussion earlier in this chapter on usurping the role of the jury.

⁵² Per Lord Taylor CJ in *R v Stockwell* (1993) 77 Cr App R 260, at 265. See also *DPP v A & BC Chewing Gum Ltd* [1968] 1 QB 159. The Criminal Law Revision Committee believe that the rule no longer exists (11th Report Cmnd 4991. Its recommendation that the rule be abolished was not

common knowledge rule, however, has proved considerably more problematic for experts who seek to give evidence on psychological matters.

(vi) *Matters within the common knowledge of the jury*

Courts require that expert witnesses must have as their field of expertise concepts which are difficult for the jury to understand without an expert's help. Lawton LJ explained the rule in the leading case of *R v Turner*.⁵³

“An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the ordinary knowledge and experience of a judge and jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of jurors themselves but there is danger that they may think it does.”

The rule in criminal cases has followed Lawton LJ's formulation, so that evidence is inadmissible where it concerns an issue within the knowledge and experience of the jury or where it concerns an issue of human nature and behaviour within the bounds of normality.⁵⁴ The rule is designed to prevent an expert taking the place of jury, Lawton LJ stating that “[w]e do not find that prospect attractive.”⁵⁵ Where the average person can understand and draw conclusions on certain issues, the jury should be left to do so without

implemented. The ultimate issue rule is now confined to use in criminal cases: see s3 Civil Evidence Act 1972, as amended by the Civil Evidence Act 1995, Sched.2.

⁵³ [1975] QB 834, at 841. C.f. *Lowery v R* [1974] AC 85. See also *R v Chard* (1971) 56 Cr App R 268 (CA), where the judge and jury were seen to be as competent as an expert when forming an opinion about the intention of a normal man; *R v Wood* [1990] Crim LR 264 (CA); *R v Anderson* [1972] 1 QB 304; *R v Stamford* [1972] 2 QB 391 c.f. *DPP v A & B C Chewing Gum Ltd.* [1968] 1 QB 159.

⁵⁴ The idea in *Turner* that an expert should testify only where the testimony comprises evidence about “abnormality” (for example where the state of mind of the defendant could be said to be unbalanced to the point of legal insanity) has severely limited psychological evidence on issues such as eyewitness accuracy. This is because what the expert aims to testify about is the workings of a “normal” memory. The common knowledge rule has formed the basis of decisions excluding expert evidence on the effect of pornography: *DPP v Jordan* [1977] AC 699, where the sentiment expressed in *Transport Publishing Co. Pty Ltd v Literature Board of Review* (1956) 99 CLR 111,119 that “ordinary human nature, that of people at large, is not a subject of proof by evidence, whether supposedly expert or not” was approved. The rule was used in Australia to exclude expert testimony on eyewitness evidence: *R v Smith* [1987] VR 907.

evidence from experts in the field because “the fact-finding tribunal, be it the judge or jury, is assumed by the law to have ordinary powers of intellect and a certain reservoir of general knowledge.”⁵⁶

The view taken in *Turner* was that in cases where the material is within the common knowledge of the jury, then any expert testimony could serve to confuse jurors and make them doubtful of relying upon their own experience. In other words, they could compromise their own views by accepting the seemingly superior knowledge of the expert witness.

On the surface, then, the rule regarding common knowledge appears to be clear, logical and well thought through. However, there are a number of problems with the practical application of the rule. Firstly, it is the judge who will decide which matters are within the common knowledge of the jury, perhaps with the guidance of precedent. It must be questioned how aware judges are of what constitutes “common knowledge”.⁵⁷ The rule has been seen to operate against allowing evidence relating to psychological matters because issues of normal human behaviour are seen to be within the province of the jury. However, what areas lie outside the understanding of a jury is open to interpretation and the requirement has caused much debate regarding a number of disciplines, including that of eyewitness identification. In *Turner*, psychological evidence as to the state of mind of the defendant was excluded, signalling that evidence gained from psychological experiments may well be considered as within the common knowledge of the “ordinary” person. Zuckerman defends the approach on the basis that the courts are following society’s lead:⁵⁸

“ A judge deciding whether expert opinion should be accepted as an arbiter of a certain matter has to consider the state of public opinion on the point. If

⁵⁵ *Turner*, op.cit.

⁵⁶ Freckleton, I.R., *The Trial of the Expert* (1987 Sydney Butterworths), 38.

⁵⁷ The judiciary is part of an elite group in society, and is better educated than many jurors, see Griffith, J.A.G., *The Politics of the Judiciary* (1991 London Fontana Press), 30-38.

⁵⁸ Zuckerman, A.A.S., *The Principles of Criminal Evidence* (1989 Oxford: Clarendon), 67.

the community has come to defer to professional standards on the matters in question, the courts will normally follow suit. Medical evidence is admissible on matters of health because we accept the authority of the medical profession in this regard. Psychiatry has not yet obtained a like acceptance.”

This argument does not take account of the differing natures of scientific disciplines. It is obvious to most of us that we are less knowledgeable about medical matters than an expert, because whenever we feel ill or have an accident we consult a doctor. However, many members of the public will have given no thought to how a normal mind operates or what the boundaries of normality are, and comparatively few will have come into contact with psychiatrists or psychologists. Yet many common sense assumptions regarding human behaviour have been found to be incorrect.⁵⁹ This implies that some areas of normal human nature are outside common knowledge. Zuckerman’s argument has something about it of the chicken and egg: if the public do not “defer to professional standards on the matters in question”, then the courts will not allow expert evidence; but if the courts do not allow evidence of experts on some matters, then juries will continue to use flawed knowledge and will never defer.⁶⁰

It is widely thought that the problems involved in accurately remembering a face are within everyone’s experience. After all, almost everyone has been in a position where they have tested their powers of recognition, and sometimes have been incorrect. Yet it is doubtful that the average person is fully aware of the dangers inherent in eyewitness testimony. The interpretation of “common knowledge” here appears to be rather outdated.⁶¹ The danger in relying on the common knowledge rule is simply that valuable evidence may be excluded.⁶²

⁵⁹ See, for example, Brigham, J.C., and Bothwell, R.K., “The ability of prospective jurors to estimate the accuracy of eyewitness identifications”, (1983) 7 *Law and Human Behavior* 19.

⁶⁰ The role of the courts is an important issue here: should they merely reflect public opinion or, when in possession of additional knowledge, should they lead public opinion?

⁶¹ Whether the assumption of common knowledge is justified will be examined later in the chapter, with reference to some common beliefs which have been repudiated by psychological experimentation.

⁶² See Mackay, R.D., and Colman, A., “Excluding expert evidence; A tale of ordinary folk and common experience” [1991] *Criminal Law Review* 800, for an attractive compromise. They argue for relaxation of the rule to allow evidence on states of mind brought about by situational forces, which are

The advocates of expert evidence in eyewitness identification cases vehemently dispute that the human memory processes involved are within common knowledge. Holdenson encapsulates this viewpoint:⁶³

“...the content of such evidence does not fall within the category of ordinary human nature: it is outside the knowledge and understanding, and generally beyond the experience, of ordinary persons. Furthermore, witnesses giving evidence of visual identification form a requisite special class of persons, which in turn forms a subject of special knowledge, rendering expert evidence as to their mental processes admissible.”

Holdenson stretches matters in claiming that eyewitnesses are a special class of persons. It is difficult to see how they are more ‘special’ than any other witness. It is simply that their evidence is not easily tested by cross-examination or assessments of demeanour.

A second problem with the operation of the common knowledge rule is that the rule has been seen to operate unfairly with regard to issues “within the bounds of normality”, excluding expert evidence where it could clearly assist the jury in its task. A particularly striking example can be seen in *R v Masih*,⁶⁴ where the appellant had an IQ of 72. In appealing against his conviction for rape, he argued that expert evidence should have been admitted as to his ability to know or be reckless as to lack of consent. The Court of Appeal upheld the decision to exclude the expert evidence, because Masih’s IQ was above that of a “mental defective”. Had his IQ been 3 points lower, expert evidence could have been called because any abnormal characteristics would be outside the jury’s experience. This implies

abnormal but not mental disorders in the medical sense. Also useful are Mackay, R.D., and Colman, A., “Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense” (1996) *Criminal Law Review* 88; and Sheldon, D., and MacLeod, M., “From Normative to Positive Data: Expert Psychological Evidence Re-examined” [1991] *Criminal Law Review* 811.

⁶³ Holdenson, (1988) op.cit., 532. Holdenson’s claim that memory processes are outside the common knowledge of ordinary people is explored later in this chapter in a discussion of lay knowledge about eyewitness identification.

⁶⁴ [1986] Crim L.R. 395 (CA). See also *R v Weightman* [1991] Crim LR 204, where evidence was not admitted regarding the accused’s abnormal and histrionic personality because it did not amount to mental illness. It was therefore seen to be within the bounds of normality. It can be seen that this limb of the rule was relaxed with regard to provocation cases, where evidence has been called as to personality disorders which comprise a ‘characteristic’: for example *Humphreys* [1995] 4 All ER 1008. Whether this will continue in England and Wales may be doubtful after *Luc Thiet Thuan* [1997] AC 131, but it is still the case in Canada and New Zealand.

that common knowledge ceases at the magic IQ level of 69. It was conceded in a later case that “to draw a strict line at 69/70 does seem somewhat artificial.”⁶⁵ It is certainly difficult to see how three IQ points would make a significant difference to cognitive ability and intelligence in an individual case.

Pattenden offers a persuasive argument when she states that the common knowledge rule rests on three fallacies.⁶⁶ First that (as demonstrated by *Masih*) we can clearly draw a line where normality ends and abnormality begins. Secondly, that the common sense of the jury is the best basis on which to judge a ‘normal’ person’s behaviour,⁶⁷

“[T]he law... places its confidence in the common sense of the ordinary person for decisions about whether evidence is accurate or not. Psychology... cannot replace common sense judgment of the particular issue.”

Yet we often react counter-intuitively, whether due to internal or external pressures. Jury members are likely to underestimate the extent of such pressures on themselves, and in doing so underestimate their effect on the accused.⁶⁸ In this way, juries could apply unforgiving and unrealistic boundaries to understandable behaviour. It is human nature to see ourselves as morally stronger than we actually are, and apply those (unrealistic) standards to others. According to Pattenden, the third fallacy is that experts confine their study to the abnormal rather than the normal. This assumption raises the question of how scientists can understand the abnormal without first examining the normal. The evidential rules in England and Wales do nothing to answer these concerns. However, other Commonwealth countries have addressed the issue of expert evidence, including the role of the common knowledge rule. Their solutions and suggestions may open the way for expert evidence on psychiatric and psychological matters, including those relating to eyewitness

⁶⁵ Per Hodgson J in *R v Silcott* [1987] Crim. L.R. 765.

⁶⁶ Pattenden, R., “Conflicting approaches to psychiatric evidence in criminal trials: England, Canada and Australia” [1986] *Criminal Law Review* 92, 100.

⁶⁷ Stone, M., *Proof of Fact in Criminal Trials* (1984 W. Green Edinburgh)

⁶⁸ See Mackay and Colman, [1991] *op.cit.*

and voice identification.

In several Commonwealth cases, the rule in *Turner* has been adapted and relaxed, resulting in a broadening of the range of admissible expert evidence. This especially affects the so-called “soft” sciences of non-clinical psychology and psychiatry. The courts in New Zealand have been moving away from the common knowledge rule throughout the 1990s.⁶⁹ One highly publicised example was that of *R v Bain (No 6)*,⁷⁰ where expert evidence as to premonitions, repressed memories and trance-like states was admitted in the High Court. In explaining his decision, Williamson J stated that whilst the Court would continue to ensure that evidence remained relevant, the degree to which psychiatrists are able to give evidence had been extended by recent High Court decisions.⁷¹ The Court was of the opinion that expert evidence may help the jury in understanding the phenomena in the particular case, which did not constitute mental illness but may generate misconceptions regarding its nature.

In Australia, also, there has been some move away from the strict common knowledge test. In *R v Wright*, the Full Court of the Supreme Court of Victoria asked whether the jury would receive help from the expert, and whether “without the assistance of opinion evidence, the jury would have been unlikely to form a proper judgment on the evidence.”⁷² Similar reasoning can be seen in the Queensland Court of Criminal Appeal case of *R v*

⁶⁹ Although the New Zealand Court of Appeal has not ruled on the point directly, there has been some use of the common knowledge test in the Court of Appeal fairly recently (for example *R v B* [1987] 1 NZLR 362; *R v Christian* Unreported, Court of Appeal, CA 351/95). However, the High Court has been moving to a more flexible rule since the early 1990s, and the Law Commission Unpublished Draft Evidence Code proposes a similar approach.

⁷⁰ Unreported, 23 May 1995, High Court, Dunedin Registry, T1/95. The case involved the murder trial of the only surviving member of a family, David Bain. He had returned from his morning paper round and found the family dead. There is ongoing debate as to his guilt, with a number of books appearing supporting or questioning his conviction: see Karam, J., *David and Goliath: The Bain Family Murders* (1997 Auckland Reed Publishing).

⁷¹ For example *R v Osborne* Unreported, 13 February 1992, High Court, Christchurch, T64/91 and *R v Hohana* (1992) 10 CRNZ 92. The role proposed is similar to that of the “gatekeeper” judge of *Daubert v Merrell Dow*, op.cit.

Ronald Condren,⁷³ where it was held that, although factors influencing speech-style were normally within the common knowledge of the jury, expert evidence may point out more precisely how such factors affected choice of language.

These cases seem to illustrate that the courts are operating a test which is simply the other side of the common knowledge coin: would the evidence help the jury? It could be argued that, if the evidence is within the common knowledge of jury members then will it be of little help to them. On this analysis, it appears that a requirement that the evidence be of help to the jury is little more than a reformulation of the old common knowledge rule. However, a “helpfulness” test may make a difference in those cases where the condition is within the common knowledge of the jury, but where that common knowledge is based, in part at least, on fallacy; or where the jury will not be able to fully comprehend the intricacies of the condition. Expert witnesses could then be of help in dispelling common myths about the condition in question, or in explaining the finer details. Proponents of expert evidence on eyewitness identification would claim that a test of ‘substantial helpfulness’ applies particularly well to evidence of identification, because psychologists claim to have found that common sense assumptions are often false. Whether expert evidence on eyewitness identification does indeed warrant admission in criminal cases is discussed later in this chapter.

It can be seen therefore that there are definitional problems in pronouncing what lies inside common knowledge, or what constitutes abnormality. They are not fixed concepts, a difficulty illustrated by English cases such as *Masih*.⁷⁴ The judiciary or legislature in England and Wales now need to respond with greater flexibility, acknowledging the problems of applying a rigid common knowledge rule in an ever-changing scientific

⁷² [1980] VR 593, 608 per Young C.J.

⁷³ Unreported, *Law Report* 15 June 1987, judgment of Macrossan J.

climate. As was stated in the New Zealand case of *R v Decha-Iamsakun*:⁷⁵:

“Matters which to a considerable extent are within the experience of a judge...or jury can arise, yet expert evidence may help materially in coming to a conclusion. The ordinary experience test need not be interpreted so as to exclude such evidence...Scientific knowledge is constantly advancing...the law would be reactionary if as a general rule it rejected the help of modern scientific insights into human behaviour and cognition.”

A serious consideration of allowing greater flexibility in evidential rules regarding expert testimony should be undertaken in England and Wales. Strict adherence to a rule which operates unfairly to exclude relevant and helpful evidence impedes the attainment of a fair trial.

Expert Evidence on Eyewitness Identification Issues

“The goal of expert testimony on eyewitness matters is to decrease the likelihood that jurors will believe false eyewitness testimony and increase the likelihood that they will believe accurate eyewitness testimony. The very fact that there are studies directed at examining the effects of expert testimony on eyewitness evidence indicates a level of concern, caution, and responsibility in psychology that is unparalleled in other disciplines that give expert testimony.”⁷⁶

Within both the legal and psychological communities, there is disagreement about the appropriateness of expert evidence on eyewitness identification. Some psychologists have expressed the feeling that giving evidence in an area where there is little certainty and where experimental results are not easily applied to real cases is detrimental to psychology’s reputation as a scientific discipline.⁷⁷ Others argue that the experimental results have much

⁷⁴ [1986] Crim.L.R. 395.

⁷⁵ [1992] 1 NZLR 141, per Cooke P at 146 (NZCA).

⁷⁶ Well, G.L., “A reanalysis of the expert testimony issue”, in G.L. Wells and E.F. Loftus *Eyewitness Testimony: Psychological Perspectives* (1984 New York: Cambridge University Press), at 314.

⁷⁷ McKenna, J., Treadway, M., and McCloskey, M., “Expert psychological testimony on eyewitness reliability: Selling psychology before its time”, in Suedfeld and Tetlock *Psychology and Social Policy* (1992, New York: Hemisphere), 283-293; McCloskey, M., and Egeth, H., “Eyewitness identification: What can a psychologist tell a jury?” (1983) 38 *American Psychologist* 550; Konecni, V., and Ebbesen, E., “Courtroom testimony by psychologists on eyewitness identification issues: Critical notes and reflections” (1986) 10 *Law and Human Behavior* 117.

to offer jurors in their assessment of the case.⁷⁸ This section examines the main bar to expert evidence on eyewitness identification: the common knowledge rule, and questions whether psychologists are able to give evidence which is substantially useful to the jury. As identification cases are subject to the *Turnbull*⁷⁹ judicial warning, the usefulness of expert evidence in furthering the integrity principle by offering protection to the accused may be reduced. Jurors are, by virtue of the *Turnbull* warning, alerted to the dangers of accepting eyewitness evidence. This section concludes with an assessment of the role expert witnesses could play in individual cases and in the formulation of policy on identification procedures.

(i) *Ultimate Issue and Common Knowledge*

The ultimate issue rule is easily circumvented: expert evidence in eyewitness identification cases would focus on the factors affecting eyewitness accuracy, with evidence tailored to fit the facts of the case. However, expert witnesses would not assess the evidence of individual eyewitnesses and give a conclusion on their reliability. For example, the expert could comment on the effect of stress, weapon focus or cross-race identification, but could not than say, "Witness X is white and the offender was black, therefore she is likely to be inaccurate". Although the distinction is fine, in this way experts would avoid the ultimate issue rule and would leave jurors to draw their own conclusions.

Although we rely on our memory to recognise people and objects every day, a number of studies have found that common knowledge about the factors which contribute to unreliable eyewitness evidence is limited.⁸⁰ According to these studies, our intuitive assumptions

⁷⁸ Most notably Elizabeth Loftus. See also Holdenson (1988), *op.cit*; and Leippe, M. "The case for expert testimony about eyewitness memory" (1995) 1 *Psychology, Law and Public Policy* 909

⁷⁹ [1976] 3 All E.R. 549

⁸⁰ For example, see Noon, E., and Hollin, C., "Lay knowledge of eyewitness behaviour: A British survey" (1987) 1 *Applied Cognitive Psychology* 143, who found that knowledge was not related to age, and that previous experience as an eyewitness was not related to knowledge of eyewitness behaviour; Deffenbacher, K., and Loftus, E., "Do jurors share a common understanding concerning eyewitness

about eyewitness identification are often different from psychological research findings. For example, Yarmey and Tresillian Jones⁸¹ found that people did not know that eyewitnesses had a tendency to over-estimate the length of time they had to view the offender, or why identification from photographs may compromise a later live identification. The main justification offered for expert evidence in eyewitness identification cases is that jurors are too accepting of eyewitness evidence and cannot tell accurate and inaccurate eyewitnesses apart, because they are unaware of what factors may affect identification accuracy.⁸² For example, Brigham and Bothwell, after questioning 100 people picked at random from the telephone directory about eyewitness identification issues, concluded that:⁸³

“Not only do jury members overestimate the accuracy of eyewitness identifications...they also appear unaware, to some extent, of the sources of error associated with this type of evidence.”

On this view, expert evidence would offer information which is outside the common knowledge and would substantially aid the jury in assessing which factors are likely to produce inaccurate identifications.

The courts in some US states⁸⁴ have accepted expert evidence on the basis of these

behavior?” (1982) 6 *Law and Human Behavior* 15; McConkey, K., and Roche, S., “Knowledge of eyewitness memory” (1989) 24 *Australian Psychologist* 377; Cutler, B.L., Penrod, S.D., and Stuve, T.E., “Juror decision making in eyewitness identification cases” (1988) 12 *Law and Human Behavior* 41; and Cutler, B.L., and Penrod, S.D., “Lay knowledge about sources of eyewitness reliability”; “The ability of jurors to differentiate between accurate and inaccurate eyewitnesses”; and “Jury sensitivity to factors that influence eyewitness reliability” in B.L. Cutler and S.D. Penrod *Mistaken Identification: The Eyewitness, Psychology and the Law* (1995: Cambridge University Press), 171- 209.

⁸¹ Yarmey, A., and Tresillian Jones, H., “Is the study of eyewitness identification a matter of common sense?” in S. Lloyd-Bostock and B. R. Clifford (eds.) *Evaluating Witness Evidence* (1983, London: Wiley), 13.

⁸² Examples of this are Loftus, E., *Eyewitness Testimony* (1979, Cambridge: Harvard University Press), 197; Loftus, E., and Monaghan, J., “Trial by data: Psychological research as legal evidence” (1980) 35 *American Psychologist* 270; and Lindsay, R.C.L., Wells, G.L., and Rumpel, C.M., “Can people detect eyewitness identification accuracy within and across situations?” (1981) 66 *Journal of Applied Psychology* 79.

⁸³ Brigham, J.C., and Bothwell, R.K., “The ability of prospective jurors to estimate the accuracy of eyewitness identifications” (1983) 7 *Law and Human Behavior* 19, 29.

⁸⁴ See, for example, the famous case of *State v Chapple* 135 Ariz. 281, 660 P.2d 1208, where the Arizona Supreme Court ruled that expert evidence on eyewitness identification should have been allowed in that case. This was closely followed by the Californian decision in *People v MacDonald* 37 Cal. 3d 351,

arguments. However, Commonwealth courts have been reluctant to admit expert evidence on eyewitness identification issues, on the basis that the subject matter is within the common knowledge of the jury, and that any help the jury might need is contained in a judicial warning. Whilst there has been no ruling on the matter in England and Wales, the Australian case of *R v Smith*⁸⁵ offers an indication of what the approach of the English courts could be. The accused in *Smith* was on trial for murder and the central issue was that of identification. In response to an application to allow expert evidence on factors which may make eyewitness identification inaccurate, Vincent J. held that:⁸⁶

“A sophisticated analysis of the process of human recall of information may involve reference to a range of scientific and social scientific disciplines about which most members of the community must be anticipated to possess little, if any, knowledge. What is centrally important in dealing with practical problems, however... is whether reliance may be placed upon such statements of recollection of visual observation, conversation, or identification of persons or objects. Generally speaking, adult human beings may be said to possess considerable practical experience as a function of ordinary day to day activity within the community in making assessments of this type.”

In excluding the expert evidence on the basis that it was within the common knowledge of jurors,⁸⁷ the Vincent J. stated that both U.S. and English case law suggested that such evidence should not be admitted.⁸⁸ It is likely that, should the question of expert testimony on eyewitness identification arise in most other Commonwealth countries, the result would be the same as in *R v Smith*.

690 P.2d 709. But see also *State v Galloway* 275 N.W.2d 736 (Iowa 1979), where the court used the common knowledge rule to exclude expert testimony, because “jurors daily experience the fragility of their own memories”, per Reynoldson, C.J., at 741, and *United States v Amaral* 488 F.2d 1148 (9th Cir. 1973).

⁸⁵ [1987] VR 907

⁸⁶ Ibid., at 909.

⁸⁷ This was upheld on appeal, where the Hampel J. stated that the evidence was on matters “within the range of human experience”: *R v Mark Anthony Smith* (Unreported) Victorian Court of Criminal Appeal, 11 December 1987).

⁸⁸ The judge relied upon *R v Turner* [1975] Q.B. 834 and a number of US decisions to state that, not only was the evidence within the common knowledge of the jury, but that to admit it may confuse the jury and simply make their task harder. Unfortunately, Vincent J. did not appear to be aware of the numerous lower court (and, with one exception, some Supreme Court) US cases where expert evidence on eyewitness testimony had been admitted. The judge also drew no analogy to the cases of voice identification where expert evidence on voice identification had been admitted: *R v Gilmore* [1977] 2 NSWLR 935 and *R v McHardie and Danielson* [1983] 2 NSWLR 733. For a criticism of the judgement, see Holdenson, O.P., (1988) op.cit., at 543-4.

The view of the court in *Smith* has been criticised for its assumption that because something is a normal everyday process, then it is something which people understand.⁸⁹ Certainly, there is an abundance of psychological studies suggesting that aspects of eyewitness identification are not understood, although not all psychologists adhere to the view that jurors need help to appreciate the problems of eyewitness evidence. Some also doubt that psychologists can offer any guidance that is needed. For example, Lindsay, whilst agreeing that mock jurors did not have a high level of knowledge about eyewitness identification issues, also found that “expert testimony did not help (and possibly hurt)”⁹⁰ when reviewing a number of psychological studies.

Egeth and McCloskey are amongst the strongest opponents of the use of expert evidence on eyewitness identification.⁹¹ They state that:⁹²

“there appears... to be no reason to assume a priori that people are unaware of the problems with eyewitness testimony. Cases of misidentification are often widely publicized... and wrongful conviction on the basis of mistaken or perjured eyewitness testimony is a rather common theme in fiction.”

Even if jurors’ knowledge about the unreliability of eyewitness identification is poor, expert evidence may not offer much more than one psychologist’s interpretation of limited data. The experimental method, designed to isolate individual factors for examination,

⁸⁹ Sheldon, D.H., and MacLeod, M.D., “From normative to positive data: expert psychological evidence re-examined” [1991] *Criminal Law Review* 811, 817.

⁹⁰ Lindsay, R.C.L., “Expectations of eyewitness performance: Jurors’ verdicts do not follow from their beliefs” in D.F. Ross, J.D. Read, and M.P. Toglia *Adult Eyewitness Testimony: Current Trends and Developments* (1994: Cambridge University Press), 362, at p.378.

⁹¹ Egeth has since tempered this view and is more satisfied with the quality and quantity of eyewitness research in the 1990s: Egeth, H.E. “What do we not know about eyewitness identification” (1993) 48 *American Psychologist* 577. However, others remain sceptical: Lindsay, op.cit., and Elliott, R., “Expert testimony about eyewitness identification : A critique” (1993) 17 *Law and Human Behavior* 423.

⁹² Egeth, H., and McCloskey, M., “Expert testimony about eyewitness behavior: Is it safe and effective?” in G.L. Wells and E.F. Loftus *Eyewitness Testimony: Psychological Perspectives* (1984: Cambridge University Press), 283. See also McCloskey, M., and Egeth, H. (1983), op.cit.; and Konecni, V.J., and Ebbesen, E.B., “Courtroom testimony by psychologists on eyewitness identification issues: Critical notes and reflections” (1986) 10 *Law and Human Behavior* 39.

offers limited information in complex criminal cases.⁹³ Psychologists can say that, in laboratory or field experiments, witnesses had a tendency to experience weapon focus, but cannot say for certain that it would affect all witnesses, or even most witnesses in all circumstances. In other words, an expert witness would offer a slice of knowledge which may or may not apply to the case being heard in court. Because of the lack of realism in many psychological experiments, the research can only tell us what happens in experimental conditions. The reliability of eyewitnesses could well be affected by weapon focus, violence and own race bias, but psychologists cannot tell us which witnesses will be affected in which circumstances. As Friedman states in relation to psychological expert evidence in general, expert witnesses offer “propositions about marginal behaviour. They do not pretend to tell us how a certain Mr Jones or Mrs Smith will act”.⁹⁴ Moreover, psychologists will be reluctant to present their findings as facts, but rather acknowledge that human behaviour allows for few certainties, as Haward explains:⁹⁵

“The fact that a hundred people found it impossible to see X in conditions Y does not prove that it was impossible for police constable Z. It may be highly improbable, but the impossibility of a scientific event is beyond scientific proof... when the forensic psychologist is asked ‘Could this policeman possibly have done it?’, he, as a scientist, has to reply, ‘Yes, it is possible’, however unlikely the event.”

It could be argued that all scientific expert evidence suffers from a lack of legal certainty because of the requirements of science and the experimental method, which isolates individual factors and works on notions of probability. To reject expert evidence simply on the basis that science cannot offer the law a definite answer to its questions would be to reject almost all scientific evidence, some of which will be helpful to the jury in reaching their decision. The distinction made between the natural and behavioural sciences is rather unfair in this regard: natural sciences are seen to offer certainty, whereas behavioural

⁹³ This point is discussed in greater detail in chapter 2. See King, M., *Psychology In and Out of Court* (1986 London: Pergamon) for a detailed and forceful argument against the use of the experimental method, and psychology’s usefulness in a legal setting.

⁹⁴ Friedman, L.M., *The Legal System: A Social Science Perspective* (1975 New York: Sage), at p.73.

sciences are perceived to offer mere propositions and theories. Expert evidence on scientific techniques such as DNA profiling have been welcomed with open arms. Its proponents claim for it all those characteristics thought to be most desirable about the scientific method. It is, they claim, an objective, neutral, and virtually 100% reliable method of identification. The court accepted DNA evidence in criminal cases without hesitation. Expert witnesses produced statistics showing that there was only 1 chance in millions or even billions that they had identified the wrong person. Not until the evidence had been used to convict hundreds of people worldwide were questions raised about its reliability. It is only now that successful challenges to the evidence are being made, and the realisation that the evidence is based upon probability is being accepted.

Egeth and McCloskey argue that expert testimony on eyewitness identification would not be of help to a jury because what is outside the scope of common knowledge has either been poorly documented or has not reached a sufficient standard of 'general acceptance' within the field of eyewitness research.⁹⁶ Yarmey and Jones, whilst concluding that many eyewitness identification issues are outside the scope of common knowledge, admit that their results also "reflect a major problem of research in this area – that is, experts may disagree on what is actually the correct answer".⁹⁷ In fact, the 'experts' consulted in their study had less than 70 per cent agreement on almost half of the questions posed, suggesting that many issues in eyewitness identification research, such as the effect of long and short retention intervals and the effect of age and gender, have not reached a standard of general acceptance in the field. Whilst there is debate in the areas experts could be asked to testify on, it could be difficult to assess whether common sense assumptions are incorrect and whether their evidence could be helpful to the jury.

⁹⁵ Haward, L., "The psychologist as expert witness", in D. Farrington, K. Hawkins, and S. Lloyd-Bostock, *Psychology, Law and Legal Processes* (1979 London: Macmillan), 44-53, at p.48.

⁹⁶ Egeth, H., and McCloskey, M., (1984), *op.cit.*, 295-298.

One example of a ‘poorly documented’ issue is the effect of stress on eyewitness accuracy. Some experimental research has found that there is an adverse effect on eyewitness accuracy in stressful situations, whereas others have reported an increase in accuracy. There is a good level of acceptance amongst psychologists of Deffenbacher’s theory that stress fits the Yerkes-Dodson inverted U shaped curve, so that low levels of stress can increase accuracy, but that high levels can decrease it.⁹⁸ However, it is unclear where criminal offences would fit on the curve. For example, how violent does an offence have to be before it detrimentally affects eyewitness accuracy? And how does the individual fortitude of witnesses affect the theory? There is a paucity of experimental research explaining exactly what the effect of stress is; how much stress is needed to adversely affect the likelihood that an eyewitness would be accurate; and how the effects of stress interact with other variables such as cross racial identification. This one example raises valid questions about how helpful expert witnesses on eyewitness identification could be to a jury, although the court in the Californian case of *People v MacDonald* observed that:⁹⁹

“it appears that the principal complaint of Egeth and McCloskey is...that it is too soon to admit [expert testimony on eyewitness identification]...this is a frequent conclusion of academic authors...Appellate judges do not have the luxury of waiting until their colleagues in the sciences unanimously agree that on a particular issue no more research is necessary. Given the nature of scientific endeavour, that day may never come.”

Although the court ultimately has to make the decision as to whether the evidence will be reliable and is within the field of expertise, allowing one expert’s view of an area where research findings are subject to debate could dangerously skew the evidence in favour of one party.¹⁰⁰ Allowing experts to speak for both sides could result in a ‘battle of the

⁹⁷ Yarmey, A., and Jones, H., op.cit., 37.

⁹⁸ See the discussion in chapter 2 of this thesis and Deffenbacher, K., “The influence of arousal on reliability of testimony”, in B.R. Clifford and S. Lloyd-Bostock op.cit.,(1983).

⁹⁹ (1984) op.cit., at 369.

¹⁰⁰ For a review of US case law and an argument that expert testimony did mislead judges in some cases, see McKenna, J., Treadway, M., and McCloskey, M., op.cit. The authors respond (at p.291) to the court’s comment in *People v MacDonald* by stating that

“[W]e are not suggesting that all the i’s must be dotted and the t’s must be crossed before psychologists should agree to testify as experts. Rather, our contention is that the field of

experts', with confusion rather than enlightenment of the jury being the outcome. Therefore, even if we do conclude that eyewitness identification issues are outside the scope of common knowledge, it does not necessarily follow that expert evidence is the best method to impart information about the dangers of eyewitness identification. The lack of consensus and information in some areas of eyewitness research will reduce the level of assistance an expert witness could give, and what is within common knowledge is unlikely to be significantly enhanced.

(ii) *Would an Expert Witness Help Jurors to Assess the Reliability of Eyewitness Evidence?*

The general unreliability of memory is beyond doubt, but many mistaken identifications will not get as far as a trial in court: in making prosecutorial decisions, the police and the Crown Prosecution Service will assess the reliability of an eyewitness identification, whether the supporting evidence is sufficient, and whether any alibi evidence has been disclosed. The *Turnbull* warning to the jury, the discretion to exclude eyewitness evidence and cross-examination of eyewitnesses are all mechanisms used by the criminal process in an attempt to ensure that eyewitness evidence is accepted only where it is reliable. This thesis has shown that the protections in place have shortcomings, and celebrated cases also suggest that those mechanisms do not work in every case, although the real occurrence of wrongful conviction as a result of mistaken identification is unknown. This section examines whether expert evidence would prove to be of help to the jury in distinguishing between accurate and inaccurate eyewitnesses.

eyewitness psychology is nowhere near the point of needing only to dot the i's and cross the t's"

(a) The Use of Cross-examination and the Requirement for Supporting Evidence

Cross-examination can alert jurors to factors which may reduce eyewitness accuracy in each individual case. For example, counsel could question witnesses about lighting, retention interval, the amount of time they had to view the offender, and so on. This could inform jurors of factors affecting reliability where they are outside the common knowledge, or draw jurors' attention to issues within the common knowledge which they may not have recognised on their own. However, cross-examination can only inform jurors on issues counsel are educated about. Lawyers have not been found to be much more knowledgeable about eyewitness identification than jurors themselves.¹⁰¹ A study by Lindsay et.al.¹⁰² also found that cross-examination, even where counsel were very skilled and experienced, failed to discredit inaccurate eyewitness identification. This was illustrated by the fact that mock jurors were just as likely to believe inaccurate eyewitnesses as they were accurate eyewitnesses, whether cross-examination was performed by experienced or inexperienced counsel. The results could be due to the nature of cross-examination: issues affecting the reliability of eyewitness identification could be raised in cross-examination, but there is little scope for counsel to fully explain the relevancy or effect of those issues.

Whilst there is no strict corroboration requirement for eyewitness evidence, cases will often be withdrawn from the jury when they are based on identification evidence alone. Many studies proceed on the basis that eyewitness evidence is dangerous where it is the only evidence in the case,¹⁰³ as did the Committee of Inquiry into the case of Adolf Beck, which concluded that eyewitness identification evidence is an unsafe and insufficient basis for conviction unless it is supported by other facts.¹⁰⁴ It is therefore logical to assume that,

¹⁰¹ See, for example, Brigham, J.C., and Wolfskiel, M.P., "Opinions of attorneys and law enforcement personnel on the accuracy of eyewitness identification" (1983) 7 *Law and Human Behavior* 337.

¹⁰² Lindsay, R.C.L., Wells, G.L. and O'Connor, F.J., "Mock-juror belief of accurate and inaccurate eyewitnesses: A replication and extension" (1989) 13 *Law and Human Behavior* 333.

¹⁰³ Lindsay, Wells and O'Connor are an example: *ibid.*

¹⁰⁴ Cmnd. 2315, vii, 250.

when coupled with a judicial direction to the jury, supporting evidence could considerably reduce the risk of wrongful conviction based on mistaken identification, because cases where the sole evidence is that of identification will be withdrawn from the jury.¹⁰⁵ However, the success of the requirement of supporting evidence will largely depend on judicial awareness of issues affecting the accuracy of eyewitness identification. This is because in deciding whether the case can proceed, the judge will consider whether the circumstances of the original offence were “good”. The assessment will undoubtedly cover visibility and the duration of the offence, but may include little else. The *Turnbull* warning itself may offer further protection to the jury in the cases where the judge allows a case based on eyewitness evidence alone to proceed, or where there is supporting evidence but the identification evidence is weak.

(b) The Sufficiency of the *Turnbull* Warning

The Supreme Court of Victoria, in excluding expert evidence on eyewitness identification in *R v Smith* stated that a judicial direction offered jurors enough warning about the dangers of mistaken identification:¹⁰⁶

“It is doubtful in the extreme that expert evidence concerned with eyewitness identification generally will assist a jury in determining whether or not it would be safe to act upon the evidence of any particular eyewitness to any substantially greater extent than that which could be achieved by a full and accurate instruction by a trial judge.”

Where common knowledge about eyewitness identification is lacking, the *Turnbull* warning to the jury should make jurors aware that eyewitnesses are often mistaken. Psychologists may argue that the warning is not detailed enough: there is no requirement that a particular set of words are used, and the judicial direction suggested in *R v*

¹⁰⁵ Gross offers an interesting argument that although there is an attempt to filter out unreliable eyewitnesses before a case reaches court and then by normal evidential rules, exoneration of an innocent suspect can be largely a matter of luck. He sees the original reason for suspicion as important: where the police suspect someone on the basis of appearance, there can be little else tying them to the offence: Gross, S., “Loss of innocence: Eyewitness identification and proof of guilt” (1987) 16 *Journal of Legal Studies* 395. On suspect driven searches, see Wagenaar, W., van Koppen, P., and Crombag, H., *Anchored Narratives* (1993 Hertfordshire: Harvester Wheatsheaf), 84-88.

*Turnbull*¹⁰⁷ outlines a limited set of issues to consider. Although these include the duration of the offence, the distance between the witness and the offender, the visibility at the time of the offence, and the retention interval between the offence and the identification, an expert witness would present evidence on issues such as stress and confidence as well.

Advocates of expert evidence could argue that the *Turnbull* direction, although alerting jurors to the fact that honest witnesses may nevertheless be mistaken, is less persuasive than expert evidence from a psychologist. Firstly, the direction is given as part of the judge's summing-up, and so comes at the conclusion of the case. This may result in the jury paying it less attention than evidence within the body of a case, because it would be given with many other pieces of information and at a point where individual jurors may already have decided their view on the credibility and reliability of witnesses.¹⁰⁸ Second, the success of the direction is dependent, to some degree at least, on the attitude accompanying its delivery: some judges may accord the warning more importance than others. Expert witnesses would at least deliver their evidence with conviction.

However, there is little evidence that these potential drawbacks create unfairness in eyewitness identification cases. Each criticism can be refuted because of the lack of solid evidence. For example, the abundance of case law on the *Turnbull* direction¹⁰⁹ illustrates the seriousness accorded to it: in all cases where identification is an issue, there should be a *Turnbull* direction to the jury; and although the issues discussed in the judgment in

¹⁰⁶ Op.cit., at 910.

¹⁰⁷ [1976] 3 All ER 549

¹⁰⁸ Katzev, R.D., and Wishart, S.S. "The impact of judicial commentary concerning eyewitness identifications on jury decision-making" (1985) 76 *The Journal of Criminal Law and Criminology* 733, 735. See also Woocher, F.D., "Did your eyes deceive you? Expert psychological testimony on the unreliability of eyewitness identification" (1977) 29 *Stanford Law Review* 969.

¹⁰⁹ See chapter seven for a more detailed discussion of the *Turnbull* warning and its application by the courts.

Turnbull itself are of limited scope,¹¹⁰ judges can tailor the direction to the facts of the case (provided they are aware of eyewitness identification research). The argument that giving a direction within a summing-up diminishes the force of the warning could be countered by the fact that the judge is seen by jurors to be an authoritative and impartial figure.¹¹¹ A warning given by the judge at any stage may therefore be more influential than the evidence of an expert witness.

Greene¹¹² undertook a study of the *Telfaire* instruction, a more limited U.S. equivalent of the *Turnbull* direction,¹¹³ by showing mock-jurors video-tapes of a reenacted trial and giving half of them a cautionary instruction. She found that, on the basis of questionnaire responses given after deliberations, jurors who received the cautionary instruction were no better informed about the factors affecting the reliability of eyewitness evidence than were the jurors who received no cautionary instruction. However, when Greene revised the instruction to include more detail on factors affecting eyewitness accuracy, the jurors receiving it were more aware of those factors than were the jurors who received the original instruction, or no instruction at all.¹¹⁴ Similar results were gained in Katzev and Wishart's experiment,¹¹⁵ where three different methods of delivering the judicial warning were used: in the first condition, the judge delivered a basic instruction; in the second, a summary of

¹¹⁰ For an argument that judges are not equipped to give psychological information on eyewitness issues to the jury, see Holdenson (1988), op.cit., 528.

¹¹¹ As noted by Young, W., Cameron, N., and Tinsley, Y., *Juries in Criminal Trials Part Two: A Summary of Research Findings* (New Zealand Law Commission PP38, Wellington, 1999). The study found that, although jurors may have difficulty in comprehending legal instructions, this was often due to the manner in which it was delivered as opposed to lack of competence. The finding accords with the New South Wales Law reform Commission, who recommend that standard form judicial instructions are used in order to aid comprehension: *The Jury in a Criminal Trial* (1986 No.48) para. 6.30. Despite deploring the paucity of available research, the Law Commission in England and Wales also concluded that jurors should be able to comprehend judicial warnings, in *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Report 245), at paras. 3.21, 3.22 and 3.37.

¹¹² Greene, E., "Eyewitness testimony and the use of cautionary instructions" (1987) 8 *University of Bridgeport Law Review* (Symposium on Eyewitness Identification Testimony) 15. See also Greene, E., "Judge's instruction on eyewitness testimony: Evaluation and revision" (1988) 18 *Journal of Applied Social Psychology* 252.

¹¹³ *United States v Telfaire* 469 F.2d 552 (D.C. Cir 1972)

¹¹⁴ Although the awareness may have been accompanied by some defence-bias: Greene, op.cit., 19.

¹¹⁵ Katzev and Wishart (1985), op.cit.

identification issues was added to the instruction; and in the third commentary on psychological findings was included. Fewer pre-deliberation guilty verdicts and shorter deliberation times resulted from the inclusion of both the summary and the commentary, meaning that jurors were less likely to believe eyewitness evidence.¹¹⁶ From experiments conducted to date, it is unclear whether jurors are simply made more sceptical about eyewitness evidence generally, or whether they are helped in their assessment of eyewitness reliability. Although more research is required to determine whether a judicial instruction can help witnesses to distinguish between accurate and inaccurate eyewitnesses, studies suggest that the use of a cautionary instruction can be effective in conveying information on the factors affecting the reliability of eyewitness identification, provided that it contains full and relevant information. As seen in chapter seven, the problem for the criminal justice process is that the current warning does not always contain full information, and there is little judicial education to enable a more consistent and informed approach at the present time. Until that happens, the integrity of the process and the protection offered to the accused are under threat of compromise.

(c) The Effect of Expert Evidence on Jury Decision-Making

The impact of expert evidence on any issue will vary according to the strength of other evidence in the case, the demeanour of the expert witness, and the individual beliefs of jurors. Nevertheless, a number of psychological studies have made some assessment of the effect of expert evidence on juror decision-making. In her 1980 study, Loftus¹¹⁷ found that

¹¹⁶ Unfortunately, the research did not show whether the scepticism was accompanied by greater knowledge about identification issues, or if it simply meant that jurors were less likely to accept any eyewitness evidence, regardless of witnessing or identification issues. However, Cutler, Dexter and Penrod found that a cautionary instruction has little effect on juror sensitivity and knowledge about identification issues: Cutler, B.L., Dexter, H.R., and Penrod, S.D., "Nonadversarial methods for improving juror sensitivity to eyewitness evidence" (1990) 20 *Journal of Applied Social Psychology* 1197.

¹¹⁷ Loftus, E.F., "Impact of expert psychological testimony on the unreliability of eyewitness identification" (1980) 65 *Journal of Applied Psychology* 9. A number of other studies found that expert evidence had an effect on verdict and deliberation time: see, for example, Weinberg, H.I., and Baron, R.S., "The discreditable eyewitness" (1982) 8 *Personality and Social Psychology Bulletin* 60. For more cautious conclusions, see Saunders, D.M., Vidmar, N., and Hewitt, E.C., "Eyewitness testimony and the

mock jurors who received expert evidence spent longer in deliberations and were more likely to give a not guilty verdict than mock jurors who had not been given expert evidence. The results must be approached with caution because the study gave the mock-jurors a written summary of evidence, which limits its applicability to real court cases where the evidence is usually presented orally.

Wells et.al.¹¹⁸ presented video-taped evidence to their mock jurors and also found that those who had seen the expert evidence were less likely to believe the eyewitness. This offers a better indication of the effect of expert evidence on jurors than does the written evidence in the Loftus experiment, because video-taped evidence allows mock-jurors to assess the demeanour of witnesses as well as the content of their testimony. However, the evidence was seen in isolation rather than mock-jurors being presented with a video-tape of a complete trial, so that they were not asked to decide on the eyewitness evidence in light of all other evidence in a trial. It can therefore tell us what may happen where the only evidence in a case is that of an eyewitness, but not about the effects of expert evidence in more complex cases. As most real cases are more complex, the study is limited in its applicability, and is illustrative of the confines of the experimental method, a point highlighted by Egeth and McCloskey in their arguments against the use of expert evidence in eyewitness identification cases:¹¹⁹

“As with all simulations of jury decision making, problems of external validity make it difficult to extrapolate the results of these studies to the verdicts of real juries.”

The study shows that, in common with judicial warnings, expert testimony may increase juror scepticism about the accuracy of eyewitness evidence generally. However, the study offered no indication that it helps jurors to decide which eyewitnesses are accurate and

discrediting effect” in S.M.A. Lloyd-Bostock and B.R. Clifford *Evaluating Witness Evidence* (1983: John Wiley), 57.

¹¹⁸ Wells, G.L., Lindsay, R.C.L., and Tousignant, J.P., “Effects of expert psychological advice on human performance in judging the validity of eyewitness testimony” (1980) 4 *Law and Human Behavior* 275.

which are mistaken.

One of the few studies which found that jurors' knowledge about identification issues is improved by the inclusion of expert evidence is that by Cutler, Dexter and Penrod,¹²⁰ who used a video-taped presentation of opening statements, the evidence of four witnesses, the evidence of an expert witness in some cases, closing addresses and the judge's summing-up. This was therefore the most realistic of the studies, and although the evidence was not live, it did include character evidence and the evidence of the defendant himself. Jurors who heard expert evidence gave less weight to witness confidence and more weight to identification issues such as stress and violence than those who had not heard expert evidence. However, in an earlier study where a whole video-taped trial was also used, it was found that expert evidence produced less spectacular results than in other studies: all juries acquitted the defendant and had comparable views on the credibility of the individual eyewitness in the case, although those who saw the expert evidence did not think eyewitness identification in general was as accurate or reliable as those who saw no expert evidence.¹²¹

The studies on expert evidence suggest that it does make a difference to jury deliberations, by increasing the likelihood that jurors will question the reliability of eyewitness evidence. However, the studies are limited in their applicability to real trials, and even if the results are accepted at face value it is unclear whether expert evidence will enhance juror decision-making or simply make the task more complex. Longer deliberation periods and fewer guilty verdicts do not necessarily mean that expert evidence is a useful tool to employ in criminal trials. In fact, the results of studies such as that conducted by Loftus could be

¹¹⁹ Egeth and McCloskey, (1984), *op.cit.*, 293.

¹²⁰ Cutler, B.L., Dexter, H.R., and Penrod, S.D., "Expert testimony and juror decision making: An empirical analysis" (1989) 7 *Behavioral Sciences and the Law* 215.

¹²¹ Hosch, H.M., Beck, E.L., and McIntyre, P., "Influence of expert testimony regarding eyewitness accuracy on jury decisions" (1980) 4 *Law and Human Behavior* 287, 294.

interpreted to mean that expert evidence may confuse jurors, distract them from other issues, or be given disproportionate weight from other evidence. It appears that expert evidence, rather than making jurors question which eyewitnesses may be mistaken in what circumstances, could simply increase their scepticism about eyewitness identification generally. Fewer convictions are only useful where the accused is in fact innocent. It is therefore questionable whether the finding that mock-jurors spend more time thinking about eyewitness evidence and are less likely to convict when an expert testifies is an argument in favour of admitting expert evidence in eyewitness identification cases.¹²² Indeed, Lindsay, in reviewing eleven experiments he had been involved in, and after commenting that expert testimony not only failed to help but possibly hurt, went on to conclude that:¹²³

“the best way to reduce the tragedy of wrongful convictions based on eyewitness errors is to prevent those errors from occurring. Once the case is before the courts, it is probably too late!”

Whilst psychological research indicates that common knowledge on eyewitness identification issues is limited, the studies do not show that jurors will be helped to discriminate between accurate and inaccurate eyewitnesses should expert evidence be admitted. Indeed, expert evidence would seem to add little to juror knowledge: studies are unclear whether both the *Turnbull* warning and expert evidence increase integration of knowledge about accurate and inaccurate eyewitnesses or whether they simply make jurors less likely to believe eyewitness evidence generally, regardless of its reliability. There may come a time where research shows more conclusively that expert evidence is helpful to the jury, but experiments to date reveal only that jurors are made more sceptical when an expert testifies. This is no advance on the effect of a judicial direction to the jury, so to admit expert evidence may serve to confuse, not aid, jurors in their deliberations.

¹²² Loftus also cites a real court case, where two brothers were tried together, but with different juries. One brother called expert evidence on the eyewitness identification evidence, and the other brother's jury stayed in the jury room while the evidence was given. The brother who called expert evidence was acquitted, whilst the other was convicted. Loftus claims that, apart from the expert evidence, evidence in the case was “virtually identical”: Loftus, E.F., “Expert testimony on the eyewitness” in G.L. Wells and E.F. Loftus *Eyewitness Testimony: Psychological Perspectives* (1984: Cambridge), 281.

¹²³ Lindsay, R.C.L., (1994) *op.cit.*, 382.

The *Turnbull* warning is a cheaper and less time consuming method of imparting information to the jury than expert evidence, and it appears to offer the accused some protection from unreliable evidence. When combined with the need for supporting evidence, the discretion to exclude unreliable evidence and the use of cross-examination, evidence gained where there were poor identifying circumstances or irregular procedures will be excluded or challenged. Where the procedures were routine and the identification was made in good witnessing conditions, then expert evidence would be able to do little more than offer general warnings about the low reliability of memory for faces, something which the *Turnbull* warning can already do. One proviso should be added to this recommendation: the success of the combination of cross-examination, discretion and the *Turnbull* direction relies on judicial education about the issues affecting eyewitness accuracy. The current range of issues commonly covered by the *Turnbull* warning should be expanded and regularly updated to ensure that adequate protection from mistaken identification is given to the accused.

Conclusion: Alternative Uses of Psychological Knowledge

Although expert evidence on eyewitness identification should not be admissible, psychologists offer valuable insights into memory processes, and could educate police, lawyers and judges about the factors affecting eyewitness accuracy. For example, psychologists could have input into police procedures used to gather eyewitness evidence. The research on system variables would be especially useful in reform of Code of Practice D, especially because experiments conducted on procedural matters suffer less from the drawbacks of the experimental method. This is because they are able to be manipulated by people, whereas estimator variables such as stress and cross-race identification are not. Psychologists can also offer help to Royal Commissions, Committees of Inquiry and

advise on governmental policy generally.¹²⁴ In the area of eyewitness research, psychologists have had input into the Devlin Committee Report, which in turn influenced police practice and the manner in which the warning to the jury was delivered by judges.

As well as policy reform, experts in eyewitness identification could offer education to both judges and lawyers. The number of cases where a *Turnbull* warning is appropriate but is not used illustrates the need for judicial education on mistaken identification.¹²⁵ Judges should be informed about current issues in eyewitness identification research when exercising their discretion to exclude eyewitness evidence which has been obtained unfairly, or when deciding whether to withdraw a case from the jury because of a lack of supporting evidence. Particularly important is knowledge about what factors should be highlighted to the jury when they are given the *Turnbull* warning. If we are to rely upon the mechanisms of exclusion and judicial direction to protect defendants from mistaken identification evidence, then judges should have regular, ongoing training about the factors affecting identification accuracy. In delivering the education, psychologists should take care to inform judges about issues which are still the subject of debate in the field.

By educating lawyers, psychologists could improve cross-examination of eyewitnesses. This could take the form of general education seminars, or could be tailored to particular cases, with psychologists delivering a report to defence lawyers outlining the potential areas of unreliability. Counsel could then draw upon the report when deciding on what approach to take and which issue to highlight during cross-examination. As Lloyd-Bostock

¹²⁴ Kohnken, Wolpass and Wogalter advocate for this approach: Kohnken, G., Malpass, R.S., Wolgater, M.S., "Forensic applications of lineup research" in S.L. Sporer, R.S. Malpass and G.Kohnken *Psychological Issues in Eyewitness Identification* (1996: Lawrence Erlbaum), 204.

¹²⁵ See Zander, M., and Henderson, P., Royal Commission on Criminal Justice *Crown Court Study* Research Study No.19 (1993 London:HMSO), 93, where it was reported that judges gave a *Turnbull* warning in just over half of all cases where the eyewitness evidence was an important or fairly important part of the case.

has stated.¹²⁶

“Psychology often cannot provide a clear ‘scientific’ solution to a practical legal problem. But it can very often make other, less ambitious and more legitimate contributions to law in practice.”

As illustrated in this chapter, psychological experimentation has much to contribute to the furtherance of the protective principle in eyewitness identification cases. The potential is largely untapped and could be utilised easily. By educating parties involved in the practice of law, psychologists would be making a significant contribution to upholding the integrity of the criminal justice process.

¹²⁶ Lloyd-Bostock, S.M.A., *Law in Practice* (1988: The British Psychological Society and Routledge), 168.

CHAPTER NINE

CONCLUSION

IDENTIFICATION PARADES: UPHOLDING THE INTEGRITY OF THE CRIMINAL PROCESS?

Wrongful conviction based on eyewitness misidentification has been a source of concern for almost one hundred years. The memory is a fragile instrument, susceptible to fading and distortion. It is unknown exactly how the stress of witnessing a criminal offence affects memory, but psychological research is clear that memory processes can be damaged at the stage of perception, retention or retrieval. While there is nothing the criminal process can do about how well an offence is perceived, steps can be taken to limit problems in accurately retaining and retrieving information. Indeed, the criminal process has taken some of those steps already: witnesses are informed that the person they saw may or may not be on the parade; there are provisions to prevent discussion between witnesses; and the investigating officer is not allowed to take part in the identification procedure. These steps protect the rights of the suspect to a fair identification procedure and a fair trial, by ensuring that unnecessary prejudice is eliminated. Even so, the danger in relying on eyewitness evidence is considerable, as illustrated by the number of witnesses in the study for this thesis who used relative judgment when making a choice. Where the problem is so grave and the stakes so high, adequate protection for the suspect should be paramount. It is only where the safeguards in place offer adequate protection that the process can be said to be truly upholding its integrity.

Procedural and Evidential Safeguards: Furthering the Protective Principle?

This thesis has explored how law, psychology and legal practice can combine to further the integrity principle, and has found that more could be done to ensure that all suspects and

accused persons are given access to consistently applied safeguards which take full advantage of the psychological knowledge available. Ashworth, in stating that psychological evidence suggests that procedural fairness is more important to many people than the outcomes of the procedures, reflects the adage that “fairness should be done and should be seen to be done”. He goes on to state that:

“Much more important is the principled proposition that fairness forms part of the integrity of the system, as well as being supported by the classical ‘rule of law’ virtues such as impartiality, equal treatment, and consistent application of the rules laid down”

It is therefore of prime importance that identification procedures are fair, are applied consistently and (as far as possible) are reliable, because a positive identification influences the pre-trial decisions by the police and CPS. As few cases result in contested (Crown Court) trials, only a minority of defendants are afforded the protections of *Turnbull* and s.78 PACE, leaving Code D as the only safeguard for the vast majority of defendants.

Code of Practice D could be said to be a model of the protective principle in its insistence on identification parades and its detailed procedural guidelines. The studies conducted for this thesis found that, in general, Code D is working well within its own limits: it gives a high level of protection to the suspect by way of routine procedures, and these are largely followed by the specialised staff in the identification suite. However, two main problems arise with regard to identification procedures conducted under Code D: firstly, non-specialised staff commit breaches of the Code through a lack of training; and secondly, the Code itself is based on the mistaken premise that the costly and unwieldy identification parade is by far the best method of identification.

The first problem is easily addressed: all staff involved in the conduct of identification procedures should be well trained. Preferably officers involved at any stage of the procedure should be specialists in eyewitness identification, but regular training of non-

specialists is the bare minimum. This brings us to the second problem. The traditional perception of the identification parade is that it offers a level of reliability beyond that of other identification test methods, because it involves the use of a higher number of cues and presents the suspect in a live setting. Current psychological research suggests that the identification parade actually offers negligible benefits over video or photographs, removing the justification for a time-consuming and costly approach to the collection of eyewitness evidence. Video technology allows for good quality moving images to be placed on a database which could be centrally managed and accessible for the police nationwide. Further advances may allow the use of virtual imaging, so that three dimensional representations of the suspect and volunteers can be viewed by the witness. Safeguards protecting the suspect, such as the right to have a solicitor present at the viewing, would mean that there would have to be no attendant derogation from the integrity principle.

Indeed, the principle of integrity could be furthered by a move to video identification, by reducing delay, postponement and cancellation. The average waiting period for a parade is in the region of six weeks. By contrast, video identifications could be arranged within a matter of days and volunteers would already be available and organised. Suspects could choose from a pool of volunteers on video and confirm that they are satisfied with the final parade before it is shown to the witness. The suspect's legal representative would then be allowed to view the video with the witness to ensure that fair procedures were observed. Where the suspect does not have a friend or legal representative, the procedure could be videoed, as recommended by the current Code D Annex B, and shown to the suspect later.

At present, video identification is usually undertaken only where a parade or group identification cannot be arranged. There are few facilities available for video identification: for example, only a minority of areas have video libraries and these are, for the most part,

limited to groups who are difficult to arrange an identification parade for, such as Rastafarians. Reform to allow greater use of video identification would result in easily arranged procedures which take less time and cost less money. As video identification would also limit delays, suspects would be protected from prolonged pre-trial decision-making and would also be offered more protection from misidentification, because the witness's memory will have had less time to fade.

Even where a case is contested, Code D retains its importance because the mechanisms of expert evidence and judicial warnings offer dubious protection to innocent defendants. The *Turnbull* warning is not delivered in almost half the cases where it is of relevance¹ and yet, in cases where there has been no breach of Code D, it is the only safeguard against the acceptance of mistaken identification evidence because "identifications are all too easily anchored onto the belief that confident witnesses, or a group of witnesses, cannot be mistaken".² The direction in *Turnbull* is designed to equip the jury with the knowledge that eyewitness identification can be mistaken, regardless of how many witnesses there are or how honest the evidence is. The warning should also inform the jury about any weaknesses in the eyewitness evidence and bring to their attention any other evidence which is capable of supporting it. If judges do not give the direction at all, jurors may accept eyewitness identification without reference to the danger involved in doing so. Rather than failing to give the direction, judges should be increasing its content in order to allow jurors to have full information about the dangers of eyewitness identification. This could be tailored to the individual case.

As well as highlighting weaknesses in an identification case, judges have to evaluate the quality of unsupported eyewitness evidence in deciding whether a case can safely be left

¹ Zander, M., and Henderson, P., Royal Commission on Criminal Justice *Crown Court Study* Research Study No.19 (1993 London:HMSO), 93.

before a jury. However, it is unlikely that most judges will have access to regular information about psychological research findings on memory. Without psychological input, their decisions as to quality will not be fully informed. It is for this reason that judicial education is a necessary pre-requisite of giving a fuller *Turnbull* direction.

The final safeguard against mistaken identification is the power of the judge to exclude unfair evidence under s.78 PACE 1984. It has been shown in Chapter 7 that there is no consistent approach to the exercise of the s.78 discretion. It is therefore suggested that guidelines are given to judges which serve to prioritise protective and disciplinary principles without removing the ability to make decisions based on the individual facts of a case. These guidelines, in routinely excluding improperly obtained identification evidence except where the breach is minor, good faith and lacks prejudice to the defendant's case, afford high levels of protection against unreliable eyewitness testimony. It is especially important to do so in eyewitness identification cases because of the inherently unreliable nature of the evidence.

The current approach under s.78 has an eye to the “balancing” of conviction of the guilty, acquittal of the innocent and cost efficiency. Because of this, fairness (and therefore the integrity principle) may be compromised, focused as balancing is on ensuring that each competing interest is looked to. It is unclear which interest takes priority when the balancing process is underway. For this reason, this thesis advocates a principled approach to the operation of procedural and evidential safeguards in eyewitness identification cases. Under the principled approach, the right of the accused to be protected from wrongful conviction as a result of misidentification is paramount. This right should be circumvented only in extreme cases, for example where a procedural breach was minor, without malice

² Wagenaar, W., Koppen, P., and Crombag, H., *Anchored Narratives: The Psychology of Criminal Evidence* (1993 Hertfordshire: Harvester Wheatsheaf), 138.

and does not cause actual unfairness to the defence case. It is only where the principled approach is followed that the criminal justice process will have the integrity it seeks in the difficult realm of eyewitness identification,

Can Psychology Further the Quest to Uphold the Integrity of the Criminal Justice Process?

Psychology has already played an important role in improving the fairness and protection present in both pre-trial and trial safeguards for those subject to eyewitness identification. It has been shown in this thesis that the law and legal practice has been shaped in part by key psychological findings regarding the malleability of memory and the methodology of gaining the most reliable evidence possible from eyewitnesses. In short, there is already a considerable debt to pay. If the protective principle is to be carried further, there is a need for criminal justice professionals to take heed of developments in memory research and act on them where appropriate. The interplay between psychology, law and legal practice has already shown that psychology can inform both formal procedures and legislation, as with Code of Practice D, and can also affect legal practice in less formal ways, such as education of legal counsel.

Although it questions the usefulness of psychological expert evidence in eyewitness identification cases at the present time, the discussion in this thesis indicates that the law is not using psychological knowledge to the best effect. For example, the protection offered by *Turnbull* is dependent for its effectiveness on the ability of the judge to assess the merits of the eyewitness evidence in the case. The integrity principle demands that the safeguard is used fairly, impartially and fully. Where judges are unable to draw on all of the knowledge available, fairness cannot hope to be achieved. Provision of psychological knowledge could greatly increase the evidential safeguards in place and in doing so, the process would be one step further towards real integrity. The quality and quantity of psychological

memory research is increasing rapidly, and the law needs to grasp the relationship with psychology more enthusiastically as technological advances and rapidly increasing knowledge create the challenge for legal practice of keeping pace .

Forward into the Twenty-First Century

This thesis suggests that the principle of integrity can be upheld in eyewitness identification cases only if specialised police staff are employed to avoid breaches of Code of Practice D, judges are better educated in the importance of giving a full *Turnbull* warning, and guidelines are issued regarding the exercise of discretion under s.78 PACE. Furthermore, delays in conducting identification procedures could be minimised by the reform of Code D, to allow for video identification as the primary method of identification. The reform needs to be accompanied by provision of suitable computer software and training of identification suite staff. In increasing the efficiency of the process without decreasing the reliability of the identification method, the interests of both suspects and witnesses will be promoted.

Although the discussion in this thesis has focused on the live identification parade, the future promises some exciting moves forward and some new challenges in the area of eyewitness identification. Video libraries are beginning to be utilised further, and there is adequate technological provision in many dedicated identification suites for video parades. Memory researchers are pushing the boundaries in an effort to find a more reliable identification procedure which offers benefits for witnesses and ease of use for the police. For example, virtual imaging is being tested by academics in New Zealand, in conjunction with the New Zealand Police.

At the same time as technology has the potential to advance the law in its provision of protective safeguards for suspects, it also offers challenges. With the increased use of

CCTV in main centres and with the use of virtual imaging, new issues of protection become apparent. For example, technology allows for manipulation of images which may address witness complaints that the suspect has changed his or her appearance. However, the same manipulation of images may threaten the protection of the suspect from misidentification because subtle changes in appearance or the provision of changes in gait and position go beyond the boundaries of what is acceptable under Code D today.

As the criminal justice process faces the twenty-first century, the integrity principle with its focus on fairness should be the principal consideration in order to ensure that advances in psychological knowledge and technology are fostered while at the same time the suspect is protected as far as possible from erroneous identifications.

APPENDIX A

QUESTIONNAIRE FOR SUSPECTS

Interviews followed a semi-structured qualitative format:

Before the Identification Procedure

1. How do you feel about taking part in the parade?
2. Have you got any worries?
3. Can you explain to me what will happen when you are on the parade?
4. Do you understand the procedures?
5. Who, if anyone, helped you to understand?

After the Identification Procedure

1. Many people have argued about whether the police should get evidence by using identification parades. What is your view?
2. What is your view about arrangements here for parades?
3. Do you think that your parade was conducted fairly?
4. Are you satisfied with the way your parade was conducted?
5. The other people on the parade are supposed to be similar in general appearance to yourself. How did this work in your situation?
6. Did you object to having particular people on the parade?
 - 7a. If so, why?
 - 7b. If not, why not?Was there any point at which you wanted to but didn't?
8. Have you got any general comments or complaints?

APPENDIX B

SUPPLEMENTARY RESULTS FROM INTERVIEWS WITH SUSPECTS

Table A: Suspects' Primary Responses to Taking Part in an Identification Parade

	Number
Proof of innocence	18
Positive (other than innocence)	5
Nervous	8
No Choice (other than innocence)	12
Don't Care	2
Non-committal/ No response	5
	50

Table B: Suspects' Opinions as to Whether Parades Should be Used as a Tool to Obtain Evidence

	Number
Should be Used	21
Should Not be Used/ Are of No Value	17
Not Sure	3
Don't Know/ Don't Care	4
No Response	5
	50

Responses were given after the parade had taken place

Table C: The Outcome of Parades and Respondents' Views on Their Usefulness

	Identified	Not Identified	Parade Aborted	Total
Should be Used	10	9	2	21
Should not be Used	8	9		17
Not Sure	2	1		3
Don't Know/Don't Care	3	1		4
No Response	3	1	1	5
Total	26	21	3	50

The 26 suspects classed as "identified" were identified by at least one witness, even where one or more witnesses did not make a positive identification in multiple witness cases.

Opinions about using the identification parade as a tool for gaining evidence were therefore fairly evenly divided between those who were identified and those who were not.

APPENDIX C
QUESTIONNAIRES FOR WITNESSES

Interviews followed a semi-structured format:

Before the Identification Procedure

1. How do you feel about taking part in this procedure?
2. How many people will be sitting on the identification parade?
3. What do you expect will happen?
4. Did anyone help you to understand what will happen?
5. How confident are you that, if the offender is present on the parade, you will be able to pick him/her out?
6. In what sort of circumstances did you see the offender? (e.g length of time, lighting etc.)

After an Identification Parade: Where a Choice is Made

1. Did the person you chose stand out from other members on the parade to you?
2. The people on the parade are all supposed to be similar in general appearance. Was this the case?
3. How similar to your initial description was the person you chose?
4. There is concern that witnesses sometimes feel pressure to choose someone. Did you feel under any pressure?
5. Many people have argued about whether the police should get evidence by using identification parades. What is your view?
6. You chose number How confident are you that you have chosen the person who committed the offence you witnessed?
7. Has this level of confidence changed in the few minutes since you made your choice?
8. Was there anyone else on the parade who you felt might have been the offender?
9. Have you got any other comments?

After an Identification Parade: Where No Choice is Made

1. Was there anyone on the parade who you felt could possibly have been the offender?
2. The people on the parade are all supposed to be similar in general appearance. Was this the case today?
3. How similar to your initial description were the people on the parade?
4. There is concern that witnesses feel pressure to choose someone. Did you feel under any pressure?
5. Many people have argued about whether the police should get evidence by using identification parades. What is your view?
6. How confident are you that the offender was not present on the parade?
7. Has this level of confidence changed in the few minutes since you decided to make no choice?
8. Have you got any other comments?

Before a Group Identification

1. How do you feel about taking part in this procedure?
2. Can you explain to me how a group identification differs from an identification parade?
3. Did anyone help you to understand what will happen?
4. How confident are you that, if the offender walks past, you will be able to pick him/ her out?
5. In what circumstances did you see the offender?

After a Group identification: Where a Choice is Made

1. Did you feel more uneasy taking part in a group identification than you would have done taking part in an identification parade?
2. How similar to your initial description was the person you chose?
3. There is concern that witnesses sometimes feel under pressure to choose someone. Did you feel under any pressure?
4. Many people have argued about whether the police should get evidence by using identification procedures. What is your view?
5. How confident are you that you have chosen the person who committed the offence you witnessed?
6. Has this level of confidence changed in the few minutes since you made your choice?
7. Did you see anyone else here today who you felt might have been the offender?
8. Have you got any other comments?

After a Group identification: Where No Choice is Made

1. Did you feel more uneasy taking part in a group identification than you would have done taking part in an identification parade?
2. There is concern that witnesses sometimes feel under pressure to choose someone. Did you feel under any pressure?
3. Many people have argued about whether the police should get evidence by using identification procedures. What is your view?
4. How confident are you that the offender did not walk past?
5. Has this level of confidence changed in the few minutes since you made no choice?

6. Did you see anyone here today who you felt might have been the offender?

7. Have you got any other comments?

Before A Confrontation

1. How do you feel about taking part in this procedure?
2. Can you explain to me how a confrontation differs from other forms of identification procedure?
3. Did anyone help you to understand what will happen?
4. How confident are you that, if the offender is present, you will be able to confirm that he/she is the person you witnessed committing the crime?
5. In what sort of circumstances did you see the offender?

After the Confrontation

1. Did you feel more uneasy taking part in a confrontation than you would have done in other identification procedures?
2. How similar to your initial description was the person?
3. There is concern that witnesses sometimes feel under pressure to choose someone. Did you feel under any pressure?
4. Many people have argued about whether the police should get evidence by using identification procedures. What is your view?
- 5a. (confirmation that the suspect is the offender): How confident are you that you have chosen the person who committed the offence you witnessed?
- 5b. (suspect not thought by the witness to be the offender): How confident are you that the person who committed the offence you witnessed was not here today?
6. Has this level of confidence changed in the few minutes since you made your choice?
7. Have you got any other comments?

APPENDIX D

SUPPLEMENTARY RESULTS FROM INTERVIEWS WITH WITNESSES

Table A: Offences Witnessed By the Sample

	Main Sample	PPI Sample	Total
Robbery	9	3	12
Attempted Robbery	1	5	6
Armed Robbery	5	1	6
Deception	6		6
Theft	2	1	3
Burglary	1	1	2
Aggravated Burglary	5		5
Criminal Damage	3		3
Assault	4	6	10
Wounding	4	2	6
Sexual Assault	2		2
Agg. Vehicle Take	6		6
Driving Offences	2		2
			69

Table B: The Confidence of Witnesses Who Chose the Suspect (Main Sample)

Case No.	Before Parade	At the Time the Choice was Made	Minutes After the Parade
2	Very Confident	Very Confident	Very Confident
3	Very Confident	Unsure	Unsure
5	Very Confident	Very Confident	Very Confident
6	Very Confident	Very Confident	More Confident
7	Very Unsure	Unsure	More Confident
8	Very Confident	"101%"	More Confident
11	Confident	Very Confident	Very Confident
12	Very Unsure	Very Confident	Very Confident
14	Very Confident	Unsure	Unsure
16	Unsure	100%	100%
17	Very Confident	Very Confident	More Confident
18	Very Confident	Confident	Confident
19	Confident	"Quite Confident"	More Confident
20	Very Confident	Very Confident	Very Confident
21	Very Confident	Very Confident	Very Confident
22	Very Confident	Very Confident	More Confident
24	Unsure	Very Unsure	Less Confident
25	Very Confident	Very Confident	Very Confident
28	Unsure	Confident	More Confident
31	Confident	Unsure	More Confident
33	Confident	Confident	Confident
38	Very Confident	100%	More Confident
41	Very Confident	Very Confident	Very Confident
42	Unsure	Confident	Confident
43	Confident	99%	99%
46	Very Unsure	"6/10"	"6/10"
50	Very Confident	Very Confident	More Confident

Table C: The Confidence of Witnesses Who Made No Choice (Main Sample)

Case No.	Before Parade	At the Time No Choice was Made	Minutes After the Parade
4	Very Unsure	"Just didn't stand out"	Unsure
23	Very Confident	Very Unsure	Less Confident
27	Unsure	Not 100%	Not 100%
29	Very Unsure	50:50	50:50
30	Very Unsure	75%	More Confident
35	Unsure	90%	More Confident
36	Unsure	Very Confident	Very Confident
37	Very Confident	Very Confident	More Confident
39	Very Confident	Very Sure/ Confident	Very Confident
40	Very Confident	Very Confident	Very Confident
44	Very Unsure	Very Unsure	Very Unsure
45	Very Unsure	Unsure	More Confident
47	Unsure	Unsure	More Confident
48	Very Unsure	Very Unsure	Very Unsure

The confidence levels of witnesses who chose a volunteer are represented in Table 4 of Chapter Five, at page 176.

Table D: Retention Lengths Between the Offence and the Identification Procedure for Witnesses who Chose a Volunteer

Case No.	Retention Interval
1	4 months
9	3 months
10	3 months
13	3 months
15	3 months
26	9 months
32	10 weeks
34	10 weeks
49	3 months

Table E: Retention Lengths Between the Offence and the Identification Procedure for Witnesses who Chose the Suspect

Case No.	Retention Interval
2	4 months
3	6 months
5	3 months
6	3 months
7	3 months
8	15 months
11	2 months
12	5 months
14	3 months
16	3 months
17	19 months
18	19 months
19	19 months
20	2 months
21	2 months
22	2 months
24	2 months
25	2 months
28	2 months
31	2 months
33	10 weeks
38	3 months
41	7 weeks
42	6 weeks
43	6 weeks
46	2 months
50	3 months

Table F: Retention Lengths Between the Offence and the Identification Procedure for Witnesses who Made No Choice

Case No.	Retention Interval
4	6 months
23	5 months
27	9 months
29	2 months
30	2 months
35	10 weeks
36	10 weeks
37	3 months
39	6 weeks
40	6 weeks
44	3 months
45	3 months
47	3 months
48	3 months

APPENDIX E

THE NOTICE TO THE SUSPECT AND FORMS FOR
CONTEMPORANEOUS NOTES



MK 29
(Amended 4.95)

IDENTIFICATION
PARADE

CONTEMPORANEOUS NOTES

<p>FOR COURT USE ONLY</p> <p>Regina -v-</p> <p>.....</p> <p>Exhibit No</p> <p>Signed</p> <p>Justice of the Peace/Clerk to</p> <p>Date</p>	<p>C.J. Act 1967 s.9 MC ACT 1980, S.102 MC Rules 1981, r.70</p> <p>I identify the exhibit described</p> <p>..... as that referred to in the statement made and signed by me</p> <table border="1" style="width: 100%;"> <tr> <th style="width: 70%;">Signature</th> <th style="width: 30%;">Date</th> </tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> <tr><td>.....</td><td>.....</td></tr> </table>	Signature	Date
Signature	Date																
.....																
.....																
.....																
.....																
.....																
.....																
.....																
<p>FOR POLICE USE ONLY</p> <p>Police Force West Midlands</p> <p>Division</p> <p>Description of Item</p> <p>Identification Parade</p> <p>Original Notes</p> <p>Suspect</p>	<table border="1" style="width: 100%; height: 40px;"> <tr> <td style="text-align: center; vertical-align: middle;">INSPECTOR</td> </tr> </table>	INSPECTOR															
INSPECTOR																	

THIS IDENTIFICATION PROCEDURE HAS BEEN VIDEO RECORDED

THE TAPE MUST BE WIPED CLEAN AT THE CONCLUSION OF PROCEEDINGS UNLESS THE PERSON CONCERNED IS CONVICTED OF THE OFFENCE OR ADMITS IT AND IS CAUTIONED FOR IT. (P.A.C.E. Codes of Practice D. Annex A 19. 20.)

If you require the tape to be wiped clean complete the below tear off section and return it to the Identification Suite where the procedure took place.

Ref. Suspect _____ Date _____ Time _____

I require that the video recording of the above procedure be wiped clean.

Name _____ Rank _____ No. _____ Date _____

Signature _____ Station _____

West Midlands Police

REPORT OF IDENTIFICATION PARADE (2.19)

(All references are to Code 'D' of the Codes of Practice, except those preceded by a letter which refers to the Annexes of Code'D')

Station: Place Held:

Date Held: Screen used? YES [] NO []

Name of Suspect
Address

Legal Representative
Firm Telephone No

Offence with which charged/suspected:

Officer in case
Location during identification procedure
Witness Officer (unconnected with case)
Location (prior to parade)
Security Officer (unconnected with case)
Volunteers Officer (unconnected with case)

Reason for not holding an Identification Parade (2.3 to 2.13)

Reason for not holding a Group Identification (as above)

Reason for not holding Video Identification (as above)

FORM OF REFUSAL TO IDENTIFICATION

Name:
Address:

I am aged 17 years of over I am under 17 years of age Tick one box

I have read the Notice to Suspect on Identification Procedures.

- I am NOT willing to take part in an identification parade
- I am NOT willing to take part in a group identification
- I am NOT willing to take part in a video identification

My reasons for not wishing to take part are:- (NOTE: *You do not have to give any reasons for your decision but if you do these reasons may be given in evidence in any subsequent proceedings*).

Signed:	Dated:

SOLICITOR (Name)	Signature:
------------------	------------

Parent or guardian (for juveniles)/appropriate adult (for mentally disordered or handicapped)

Name:	Age:
Address:	
Status to suspect:	
Signed:	Dated:

I certify that I have explained the content and served a copy of 'Notice to Suspect' on Identification Procedure

Signed (IDENTIFICATION OFFICER)	Date/Time
---------------------------------	-----------



NOTICE TO SUSPECT ON IDENTIFICATION PROCEDURES

The purpose of an identification procedure is to test the ability of a witness to pick out from a group, if he is present, a person whom the witness has said that they have seen before with regard to the following incident(s).

Incident(s)/date(s)
.....
.....
.....

"You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence."

The arrangements for and conduct of an identification procedure are the responsibility of a police officer in uniform of the rank of inspector or above who is not involved in the investigation. This officer is called the "identification officer". Details relating to identification procedures are recorded in this notice. You will be provided with a copy. I will ask you to sign my copy, which I retain. Identification procedures are provided by the "Code of Practice for the Identification of Persons by Police Officers", which you may consult.

You are entitled to free legal advice before making any decisions regarding the identification procedures proposed. This includes the right to speak to a solicitor on the telephone.

If you significantly alter your appearance between the taking of any photograph at the time of your arrest or after charge and any attempt to hold an identification procedure, this may be given in evidence if the case comes to trial. The identification officer may consider other forms of identification.

A brief description of you at this present time is
.....
.....

A video or photograph may be taken of you when you attend for any identification procedure but will always be taken of a parade. A copy of the photograph or video shall be supplied on request to the suspect or his solicitor within a reasonable time.

If you change your appearance before a parade, it may not be practicable to arrange one on the day in question or subsequently and, because of your change of appearance, the identification officer may then consider alternative methods of identification.

If you refuse or, having agreed, fail to attend an identification parade or the holding of a parade is impracticable, arrangements will, if practicable, be made to allow the witness an opportunity of seeing you in a group identification, a video identification or a confrontation. A group identification may also be arranged if the officer in charge of the investigation considers that it is, in the circumstances, more satisfactory than a parade or the Identification Officer considers that by reason of your unusual appearance or other reason it would not be practicable to assemble sufficient suitable people to make the parade fair.

You or your solicitor will be provided with details of the description as first given by any witnesses who are to attend the parade, group identification, video identification or confrontation. You will also be informed whether a witness has been shown any photographs, photofit, identikit or similar pictures by the police.

You or your solicitor will be allowed, provided it is practicable to do so, and would not unreasonably delay the investigation, to view any material released to the media by the police for the purpose of recognizing or tracing a suspect in connection with the matters under investigation.

At the conclusion of any procedure, you may make any comments you wish and these will be recorded.

IDENTIFICATION PROCEDURES

Identification Parade

An identification parade may take place either in a normal room or in one equipped with a screen permitting witnesses to see its members without being seen. The procedures for the composition and conduct of an identification parade are the same whether or not a screen is used but a screen may be used only if your solicitor, friend or appropriate adult is present or a video recording is made.

The parade shall consist of people who so far as possible resemble the suspect in age, height, general appearance and position in life. You may choose any position in the line.

You may object to anyone else on the parade or to the arrangement made. Such objection should be directed to the identification officer.

The parade will be inspected by the witness. If there is more than one witness, each witness will be brought in separately.

You will be allowed to change your position in the line after each witness has left. The witness will not be told who is the suspect.

Group Identification

A group identification should be held in a place other than a police station, but may be held in a police station when the identification officer considers it is not practicable to hold it elsewhere.

The arrangements for a group identification are the responsibility of the identification officer, who in this case need not be in uniform.

The identification officer will determine the location of a group identification and the method by which it will be carried out. He will consider the general appearance and numbers of people likely to be present at a location and reasonably expect that a witness will see others who are broadly similar in appearance to you.

Video Identification

The video film must include you and at least eight other people who as far as possible resemble you in age, height, general appearance and position in life.

Both you and other persons shall as far as possible be filmed in the same positions or carrying out the same activities and under identical conditions.

You and your solicitor will be given a reasonable opportunity to view the complete film before it is shown to witnesses. Any reasonable objection to the film will be taken into consideration and if practicable, steps will be taken to remove the grounds for objection.

You and your solicitor will, if practicable, be given reasonable notification of the time and place that the film will be shown to witnesses. Whilst you yourself may not be present, your solicitor or other representative may, and in the absence of your representative the showing of the film to witnesses will itself be recorded on video. Only one witness will see the film at a time, and the witness will not be told who is the suspect.

All copies of the video film held by the police and made under these provisions must be destroyed if you are prosecuted for the offence and cleared or if not prosecuted (unless you admit the offence and are cautioned for it). You may witness this destruction if you so request within five days of being cleared or informed that you will not be prosecuted.

Confrontation

If neither a parade, a group identification nor a video identification procedure is arranged the suspect may be confronted by the witness. Such a confrontation does not require the suspect's consent, but may not take place unless none of the other procedures are practicable.

The identification officer is responsible for the conduct of any confrontation of a suspect by a witness.

The suspect shall be confronted independently by each witness.

Confrontation must take place in the presence of the suspect's solicitor, interpreter or friend, unless this would cause unreasonable delay.

The confrontation should normally take place in the police station, either in a normal room or in one equipped with a screen permitting a witness to see the suspect without being seen. In both cases the procedures are the same except that a room equipped with a screen may be used only when the suspect's solicitor, friend or appropriate adult is present or the confrontation is recorded on video.

Solicitors, appropriate adults or other representatives

You will be given a reasonable opportunity to have a solicitor and an appropriate adult or friend present, and the Identification Officer will ask you to indicate on this Notice to Suspect whether or not you so wish.

Any procedure involving the participation of a person (whether as a suspect or witness) who is mentally disordered, mentally handicapped or a juvenile must take place in the presence of the appropriate adult; but the adult must not be allowed to prompt any identification of a suspect by a witness.

Consent

You do not have to take part in a parade, or co-operate in a group identification, or with the making of a video film and, if it is proposed to hold a group identification or video identification, you are entitled to a parade if this can practicably be arranged.

If you do not consent to take part in a parade or co-operation in a group identification or with the making of a video film, your refusal may be given in evidence in any subsequent trial and police may proceed covertly without your consent or make arrangements to test whether a witness identifies you.

You are asked to sign this form to indicate whether you are willing to take part in a parade or group identification or co-operate with the making of a video film. If you refuse to consent or co-operate you are not obliged to give your reasons.

Opportunity given to suspect/solicitor to view films/photographs released to media for broadcast

Suspect

Material released by the police to media for the purpose of recognising or tracing suspect:-

Yes No (tick one box)

If "yes" complete (i) or (ii) as appropriate;

* (i) Material shown to *suspect/solicitor on (date) by

* (ii) Material NOT viewed by suspect/solicitor because (tick all reasons which apply and/or complete other):-

suitable facilities/equipment were not available

unreasonable delay would be caused to the investigation

suspect/solicitor declined the opportunity to view material

other (describe)

Details of first description of the suspect given by each witness

Witness 1
.....
.....

Witness 2
.....
.....

Witness 3
.....
.....

Witness 4
.....
.....

Witness 5
.....
.....

Witness 6
.....
.....

Witness 7
.....
.....

Witness 8
.....
.....

I am willing/not willing to take part in an *Identification Parade/Group Identification/Video Identification.	
*I wish/do not wish to have a *solicitor/friend present	<i>*DELETE AS APPROPRIATE</i>
I have been told that before this parade was arranged witness(es) who are taking part have been shown photographs, photofit, indentikit, compusketch or similar pictures by the police.	
I have received a copy of this notice.	
Signed	Date

Appropriate Adult (suspect apparently under 17 or suspected of having mental problems)	
Name	Status
Signed	Date

I certify that I have explained the content and served a copy of this notice.		
Signed	Date	Time

Time parade began: Hrs

Question to Suspect:-
"Do you object to any of the persons paraded?" (A10)
 Answer

.....

.....

.....

.....

State any arrangements made in consequence of any objection:-

.....

.....

.....

.....

.....

Name of all police officers and other persons present during the parade showing the reason for their presence. (A6)

Name Reason

Name Reason

Name Reason

Name Reason

Name Reason

Question to Suspect:-
"Do you object to any of the other persons being present who are not on the parade or to any of the arrangements for the parade?" (A10)
 Answer

.....

.....

.....

.....

Steps taken to comply with any objection:

.....

.....

.....

.....

.....

TO BE COMPLETED FOR EACH WITNESS VIEWING THE PARADE:

Name of Witness

Shown photographs/compusketch? YES NO (Notes 2B)

Explain to suspect before witness appears:

"You may select any place you like among the persons paraded"

Show opposite, as if facing parade, the position of members of the parade, marking suspect as X and giving the other participants the number they have on form WC314 Record of Persons Forming Identification Parade or Group Identification.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15

Signed _____
IDENTIFICATION OFFICER

Time Hrs

INSTRUCTIONS TO WITNESS BY IDENTIFICATION OFFICER

MK29

How was witness ushered in

"Mr/Mrs/Miss/Ms

**You have been asked here today to see if you can identify the person you saw
on**

(describe incident)
.....
.....

**The person you saw may or may not be on the parade: If you cannot make a positive
identification you should say so but do not make a decision before looking at each member
of the parade at least twice. Look at each member of the parade at least twice taking as
much care and time as you wish." (A14)**

DESCRIBE WHAT THE WITNESS DOES AND SAYS
.....
.....
.....
.....
.....

**WHEN THE IDENTIFICATION OFFICER IS SATISFIED THAT THE WITNESS HAS LOOKED
PROPERLY AT EACH MEMBER OF THE PARADE HE SHALL ASK:**

"Is the person you saw on the previous occasion on the parade?"

Reply
.....
.....
.....
.....

"What Number?"
.....
.....

Was the suspect identified? YES NO

.....
.....
.....

After the last witness has finished:

Question to Suspect:

"Do you wish to make any comments on the conduct of the parade/group identification/video identification/confrontation." (A18)

Answer

Time Procedure Finished: Hrs

Remarks on any point not already covered:-

.....

I certify that the above procedure took place in accordance with the Codes of Practice. I am not involved with the investigation of the case.

Signature of Identification Officer

Name Rank (1.8, 1.9)

Date signed Time. Hrs

APPENDIX F

FIGURES FROM BIRMINGHAM AND MANCHESTER IDENTIFICATION SUITES

IDENTIFICATION PROCEDURES,

1994	
1. Numbers of ID Procedures Booked	1215
2. Number of ID Procedures Carried out	582
3. Number of ID Procedures Collapsed:	
(a) Less than 2 days	<u>416</u>
(b) More than 2 days	<u>217</u>
4. Number of Procedures Booked for Birmingham Divisions	1046
5. Number of Procedures Booked for other West Midlands Divisions	87
6. Number of Procedures Booked for other Forces	82
7. Cost of West Midlands Procedures carried out	£52,315 / £83 av.
8. Cost of Collapsed West Midlands Procedures (where costs were incurred)	£14,114 / £33 av.
9. Number of Witnesses in procedures carried out (Primary Incidents)	1426
10. Number of Witnesses making Positive Identifications	490
11. Witnesses (Percentage Positive)	34%
12. Breakdown of Offences:	
(a) Murder	<u>14</u>
(b) Assault (Section 47, 20 and 18)	<u>200</u>
(c) Robbery	<u>418</u>
(d) Burglary	<u>167</u>
(e) Sexual Offences	<u>37</u>
(f) Auto Crime	<u>76</u>
(g) Theft other	<u>78</u>
(h) Deceptions	<u>67</u>
(i) Damage	<u>41</u>
(j) None Crime Matters	<u>25</u>
(k) Other Crime (specify overleaf)	<u>92</u>
Income generated from outside forces/bodies ...£7,800.....	

IDENTIFICATION PROCEDURES, MONTH 1995

1. Numbers of ID Procedures Booked	1232
2. Number of ID Procedures Carried out	506
3. Number of ID Procedures Collapsed: (a) Less than 2 days	<u>417</u>
(b) More than 2 days	<u>309</u>
4. Number of Procedures Booked for Birmingham Divisions	1097
5. Number of Procedures Booked for other West Midlands Divisions	49
6. Number of Procedures Booked for other Forces	86
7. Average Cost of West Midlands Procedures carried out	57134 / £102.00
8. Average Cost of Collapsed West Midlands Procedures (where costs were incurred)	20162 / £23.00
9. Number of Witnesses in procedures carried out (Primary Incidents)	1211
10. Number of Witnesses making Positive Identifications	480
11. Witnesses (Percentage Positive)	40%

Sub - Divisional Police Headquarters

St Joseph's Building
Stockport Road
Longsight
Manchester M13 0LE
Telephone: 0161 856 4107
Fax: 0161 856 4106

1992

Combined Total -1392

Positive	475	34%
Negative	374	26%
Not Run	543	39%

1993

Combined Total 1444

Positive	457	31%
Negative	393	27%
Not Run	594	41%

1994

Combined total 1441

Positive	442	30%
Negative	393	27%
Not Run	606	42%

1995

Combined Total 1218

Positive	402	33%
Negative	292	23%
Not Run	524	43%

TABLE OF CASES

Abadom [1983] 1 All ER 364

Akaidere [1990] Crim.L.R. 808

Allen [1995] Crim.L.R. 643

Anastasiou [1998] Crim.L.R. 67

Anderson v R [1972] AC 100 (PC)

Anderson [1993] Crim.L.R. 447

Andrews unreported Court of Appeal 21 March 1996

Andrews [1993] Crim.L.R. 590

Arthurs v Attorney-General for Northern Ireland (1971) Cr.App.R 161

Associated Provincial Picture houses Ltd. V Wednesbury Corporation [1948] 1 K.B. 223

B [1987] 1 NZLR 362

Bailey (1978) 66 Cr App R 31

Bain (No.6) Unreported, 23 May 1995, High Court, Dunedin Registry, T1/95, New Zealand

Barnes [1995] 2 Cr.App.R. 491

Barnes v DPP *The Times* May 6 1997

Bath [1990] Crim.L.R. 716

Beckford and others v R [1993] Crim.L.R.944

Bell [1998] Crim.L.R. 879

Bentley [1991] Crim. L.R. 620

Bleakley [1993] Crim.L.R. 203

Boardman [1975] A.C. 421

Bowden [1993] Crim.L.R. 379

Bradshaw (1985) 82 Cr App R 79

Breslin (1985) 80 Cr.App.R. 226

Brissett v R Privy Council 29 November 1994

Britton and Richards [1989] Crim.L.R. 144
Brown [1991] Crim L.R. 368
Brown and Others [1997] Crim.L.R. 502
Browning (1992) 94 Cr.App.R. 109
Buckley v Rice Thomas (1554) Plowd 118
Bush Unreported, 27 January 1998
Campbell and another [1993] Crim.L.R. 47
Campbell [1994] Crim.L.R. 357
Castle [1989] Crim.L.R. 567
Chance [1988] 3 All E.R. 225
Chard (1971) 56 Cr App R 268
Christian Unreported, Court of Appeal, CA 351/95 , New Zealand
Constantinou [1989] Crim.L.R. 571
Conway [1990] Crim. L.R. 402
Cook (1989) 84 Cr.App.R. 369
Courtnell [1990] Crim.L.R. 115
Criglow v State (1931) 183 Ark. 407, 36 S.W.2d 400
CS (1993) 11 CRNZ 45
Curry and Keeble [1983] Crim.L.R. 737
Daley v R [1993] 3 W.L.R. 666
Daubert v Merrell Dow (1993) 509 US 579
Davie v Edinburgh Magistrates 1953 SC 34
Decha-Iamsakan [1992] 1 NZLR 141
Downey [1995] 1 Cr.App.R. 547
DPP v A & BC Chewing Gum Ltd [1968] 1 QB 159
DPP v Jordan [1977] AC 699
DPP v Kilbourne [1973] AC 729

DPP v. P [1991] 2 A.C. 447
Elliott (Unreported) Court of Appeal 22 December 1997
El-Hannachi, Cooney, Ward and Tanswell [1998] 2 Cr.App.R 226
Etienne (1990) 154 J.P. 162
Fergus (1993) 98 Cr.App.R. 313
Finlay [1993] Crim. L.R. 50
Folkes v Chadd (1782) 3 Doug KB 157
Forbes [1992] Crim.L.R. 593
Forbes The Times, May 5 1999
Francis [1991] 1 All E.R. 225
Freemantle [1994] Crim.L.R. 930
French (1977) 37 CCC (2d) 201
Frye v United States 293 F.1013 (DC Cir 1923)
Galbraith [1981] 1 W.L.R. 1039
Gall (1990) 90 Cr.App.R. 64
Gandy [1990] Crim.L.R. 346
Gaynor [1988] Crim.L.R. 242
Gilmore [1977] 2 NSWLR 935
Graham [1994] Crim.L.R. 212
Grannell (1990) 90 Cr App R 149
Grant [1996] 2 Cr.App.R. 272
Grant [1996] 2 Cr.App.R. 272.
Greer Unreported, Court of Appeal 11 December 1997
Gummerson and Steadman [1999] Crim.L.R. 680
H v Schering Chemicals Ltd. [1983] 1 All ER 849
Harmony Shipping Co SA v Saudi Europe Line Ltd [1979] 1 WLR 1380
Hewett June 16 1977 (unreported)

Hickin and others [1996] Crim.L.R. 584
Hohana (1992) 10 CRNZ 92
Hollington v Hewthorn and Co Ltd. [1943] KB 587
Hope, Limburn and Bleasdale [1994] Crim.L.R. 118
Hersey [1998] Crim.L.R. 281
Huddart (Unreported) Court of Appeal 24 November 1998
Humphreys [1995] 4 All ER 1008
Hunjan (1978) 68 Cr.App.R. 99
Hutton [1999] Crim L.R. 74
Inch (1989) 91 Cr App R 51
Jamel [1993] Crim. L.R. 52
Jelen and Katz (1990) 90 Cr.App.R. 456
Johnson [1995] Crim.L.R. 53
Jones (Terrence) [1992] Crim.L.R.365
Joseph Crosfield and Sons Ltd v Techno-Chemical Laboratories Ltd (1913) 29 TLR 378
Joseph [1994] Crim L.R. 48
Keane (1977) 65 Cr.App.R. 247
Kelly [1992] Crim.L.R. 181
Kensett (1993) J.P. 620
Khan [1997] Crim.L.R. 584
Knowles [1994] Crim.L.R. 217
Ladlow, Moss, Greene and Jackson [1989] Crim.L.R. 218
Lippit v. Chief Constable of Staffordshire 1986 (unreported: see 1988 85(4) L.S.G. 18)
Long (1973) 57 Cr.App.R 871
Long [1991] Crim.L.R. 453
Lowery v R [1974] AC 85
Luc Thiet Thuan [1997] AC 131

McCay [1991] 1 All E.R. 232
McGranaghan (1991) 43 L.S.G. 44
McHardie and Danielson [1983] 2 NSWLR 733
Macmath [1997] Crim.L.R. 586
Malashev [1997] Crim.L.R. 587
Marais Unreported, Court of Appeal 16 May 1997
Mark Anthony Smith (Unreported) Victorian Court of Criminal Appeal, 11 December 1987
Martin and Nicholls [1994] Crim. L.R. 218
Masih [1986] Crim L.R. 395
Matheson [1958] 1 WLR 474 (CCA)
Middlebrook Unreported February 19 1994
Murphy [1980] QB 434
Mussell and Dalton [1995] Crim.L.R. 887
Nagah [1991] Crim.L.R. 55
Oakley (1979) 70 Cr App R 7
Oakwell [1978] 1 All ER 1223
O'Leary [1988] Crim.L.R. 827
Osborne Unreported, 13 February 1992, High Court, Christchurch, T64/91 New Zealand
Oscar [1991] Crim.L.R. 778
Penny (1992) 94 Cr.App.R. 345
People v Leahy 882 P2d.321 1997, State of California
People v MacDonald 37 Cal. 3d 351, 690 P.2d 709
Popat [1998] 2 Cr.App.R. 208
Powell v. DPP [1992] RTR 270
Qadir [1998] Crim.L.R. 828
Quinn [1990] Crim.L.R. 581
Quirke v Oake (1993) 20 Manx Law Bulletin 63

Ramsden [1991] Crim.L.R. 295

Reavy (acting as next friend for H) v DPP; R v Dunstable Youth Court Justices, ex parte H CO/1865/98, CO/4483/97 Queen's Bench Division, Crown Office List

Reid v R [1990] 1 AC 363

Robb (1991) 93 Cr App R 161

Rogers [1993] Crim.L.R. 386

Ronald Condren Unreported, *Law Report* 15 June 1987, Queensland, Australia

Ruiz [1995] Crim.L.R. 151

Ryan [1992] Crim.L.R. 187

Samms, Elliott and Bartley [1991] Crim.L.R. 197

Samuel (1988) Cr. App. R. 232

Sanders (1991) 93 Cr App R 245

Sang [1979] 2 All E.R. 1222

Scott [1989] A.C. 1242

Shelton and Carter [1981] Crim.L.R. 776

Silcott [1987] Crim. L.R. 765

Silverlock [1894] 2 QB 766

Slater [1995] Crim.L.R. 244

Smith [1987] VR 907

Spencer [1995] Crim.L.R. 235

Stamford [1972] 2 QB 391

State v Chapple 135 Ariz. 281, 660 P.2d 1208

State v Galloway 275 N.W.2d 736 (Iowa 1979)

Stockwell (1993) 77 Cr App R 260

The People v Dominic Casey [1963] I.R. 33

Thomas [1994] Crim.L.R. 128

Thorne [1981] Crim.L.R. 702

Thornton The Times, June 2 1994

Tomkinson v DPP [1995] Crim.L.R. 60

Transport Publishing Co. Pty Ltd v Literature Board of Review (1956) 99 CLR 111

Turnbull and others [1976] 3 All E.R. 549

Turner [1975] QB 834, at 840.

Tyler and others [1993] Crim.L.R. 60

United States v Amaral 488 F.2d 1148 (9th Cir. 1973)

United States v. Telfaire 469 F.2d 552 (D.C Cir. 1972)

Wait [1998] Crim.L.R. 67

Walsh (1990) 91 Cr App R 161

Weeder (1980) 71 Cr.App.R. 228

Weightman [1991] Crim LR 204

Whelan (Unreported 31 July 1998)

Whitehead (8 May 1989) The Times 17 May 1989

Wood [1990] Crim LR 264

Wright [1980] VR 593

Wright [1994] Crim.L.R. 131

BIBLIOGRAPHY

Reports and Circulars

Committee of Inquiry into the case of Mr. Adolf Beck Cmnd 2315, (1904)

Criminal Law Revision Committee Eleventh Report, Evidence (General), 1972. Cmnd 4991

“Identification Parades”, 1969, Home Office Circular 9/1969

"Identification Parades and the Use of Photographs for Identification", 1978, Home Office Circular 109/1978

Identification Procedures Under Scottish Criminal Law (1978) Cmnd. 7096. “The Bryden Report”

Law Commission *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1996 Report 245)

New South Wales Law Reform Commission *The Jury in a Criminal Trial* (1986 Report No.48)

New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence*, Preliminary Paper No 18 (Wellington, 1991)

Report of the Tribunal of Inquiry on the Arrest of Major R.O. Sheppard DSO, RAOC (Cmnd 2497) 1925.

Report of the Royal Commission on Police Powers and Procedures, Cmnd 3297 (1929)

Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976 London:HMSO)

Royal Commission on Criminal Procedure, “Report”, Cmnd 8092 (1981 London: HMSO)

Royal Commission on Criminal Justice Report (“The Runciman Report”) (1993 London:HMSO) Cmnd 2263

Second Report on Criminal Procedure in Scotland 1975 (Cmnd 6218), "The Thomson Report"

Young, W., Cameron, N., and Tinsley, Y., *Juries in Criminal Trials Part Two: A Summary of Research Findings* (New Zealand Law Commission PP38, Wellington, 1999)

Books and Articles

Alldrige, P., “Recognising novel scientific techniques: DNA as a test case”, [1992] *Criminal Law Review* 687

- Allan, T., "A parade of problems: Hearsay in the Court of Appeal" (1990) *New Law Journal* 1723
- Allen, C.J.W., "Discretion and security: Excluding evidence under s.78(1) of the Police and Criminal Evidence Act 1984" (1990) 49 *Cambridge Law Journal* 80
- Allport, G., and Postman, L., *The Psychology of Rumor* (1947, New York: Henry Holt and Co.)
- Anthony, T., Cooper, C., and Mullen, B., "Cross-racial facial identification: A social cognitive intergration" (1992) 18 *Personality and Social Psychology Bulletin* 296
- Archbold, J.F., *Pleading, Evidence and Practice in Criminal Cases* (1995 London, Sweet and Maxwell)
- Ashworth, A., "Excluding evidence as protecting rights" [1977] *Criminal Law Review* 723.
- Ashworth, A., *The Criminal Process: An Evaluative Study* (1994 Oxford: Clarendon), 32
- Baldwin, J., *The Role of Legal Representatives at Police Stations* Royal Commission on Criminal Justice Research Study No.3 (1992 London: HMSO)
- Baldwin, J., and Bottomley, A.K., *Criminal Justice: Selected Readings* (1978 London: Martin Robertson)
- Barkowitz, P., and Brigham, J.C., "Recognition of faces: Own-race bias, incentive and time delay" (1982) 12 *Journal of Applied Psychology* 255
- Bates, F., "Evidence of identification: The implications of some recent Australian cases" (1983) *Anglo-American Law Review* 248
- Bekerian, D.A., and Bowers, J.M., "Eyewitness testimony: Were we misled?" (1983) 9 *Journal of Experimental Psychology: Learning, Memory and Cognition* 139
- Bennett, P., and Gibling, F., "Can we trust our eyes?" (1989) 5 *Policing* 313
- Berkun, M.M., Bialek, H.M., Kern, R.P., and Yagi, K., "Experimental studies of psychological stress in man" (1962) 76 *Psychological Monographs* 534
- Bessner, R., "Eyewitness identification in Canada" (1983) 25 *Criminal Law Quarterly* 313
- Billig, M., and Milner, D., "A spade is a spade in the eyes of the law" (1976) 2 *Psychology Today* 13
- Blau, T.H., *The Psychologist as Expert Witness* (1984: Wiley)
- Bonto, M.A., and Payne, D.G., "Role of environmental context in eyewitness memory" (1991) 104 *American Journal of Psychology* 117
- Bothwell, R.K., Brigham, J.C., and Malpass, R.S., "Cross-racial identification" (1989) 15 *Personality and Social Psychology Bulletin*, 19

- Bothwell, R.K., Deffenbacher, K.A., and Brigham, J.C., "Correlation of eyewitness accuracy and confidence: Optimality hypothesis revisited" (1987) 72 *Journal of Applied Psychology* 691
- Brandon, R., and Davies, C., *Wrongful Imprisonment* (1973 London: Allen and Unwin)
- Brigham, J., "Perspectives on the impact of lineup composition, race and witness confidence on identification accuracy" (1980) 4 *Law and Human Behavior* 315
- Brigham, J.C., "Psychological factors in eyewitness identifications" (1983) 11 *Journal of Criminal Justice* 47
- Brigham, J.C., and Barkowitz, P., "Do 'they all look alike'? The effect of race, sex, experience and attitudes on the ability to recognise faces" (1978) 8 *Journal of Applied Psychology* 306
- Brigham, J.C., and Bothwell, R.K., "The ability of prospective jurors to estimate the accuracy of eyewitness identifications", (1983) 7 *Law and Human Behavior* 19
- Brigham, J.C., and Cairns, D.L., "The effect of mugshot inspections on eyewitness identification accuracy" (1988) 18 *Journal of Applied Social Psychology* 1394-1410
- Brigham, J.C., Maass, A., Snyder, L.D., and Spaulding, K., "Accuracy of eyewitness identifications in a field setting" (1982) 42 *Journal of personality and Social Psychology* 673
- Brigham, J.C., and Malpass, R.S., "The role of experience and contact in the recognition of own and other faces" (1985) 41 *Journal of Social Issues* 139
- Brigham, J.C., and Pfeifer, J.E., "Evaluating the fairness of lineups" (1994) in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 201
- Brigham, J.C., and Ready, D.J., "Own-race bias in lineup construction" (1985) 9 *Law and Human Behavior* 415
- Brigham, J.C., and Wolfskiel, M.P., "Opinions of attorneys and law enforcement personnel on the accuracy of eyewitness identification" (1983) 7 *Law and Human Behavior* 337
- Brown, D., *Detention at the Police station under the Police and Criminal Evidence Act 1984* Home Office Research Study No.104 (1989 London:HMSO)
- Brown, D., *PACE Ten Years On: A Review of the Research* Home Office Research Study 155 (1997) (London: Home Office)
- Brown, D., Ellis, T., and Larcombe, K., *Changing the Code: Police detention under the Revised PACE Codes of Practice* Home Office Research Study No.129 (1992, London:HMSO)
- Brown, E., Deffenbacher, K., and Sturgill, W., "Memory for faces and the circumstances of the encounter" (1977) 62 *Journal of Applied Psychology* 311

- Brown, J., "Some tests of the decay theory of immediate memory" (1958) 10 *Quarterly Journal of Experimental Psychology* 12
- Bruce, V., "Changing faces: Visual and non-visual coding processes in face recognition" (1982) 73 *British Journal of Psychology* 105
- Bucke, T., and Brown, D., *In Police Custody: Police Powers and Suspects' Rights Under the Revised PACE Codes of Practice* Home Office Research Study 174 (1997 London:HMSO)
- Buckhout, R., "Eyewitness testimony" (1974), 231 *Scientific American* , 23
- Buckhout, R., "Eyewitness Testimony" in Neisser, U., *Memory Observed* (1982, San Fransisco:W.H.Freeman)
- Buckhout, R., Alper, A., Chern, S., Silverberg, G., and Slomovits, M., "Determinants of eyewitness performance on a lineup" (1974) 4 *Bulletin of the Psychonomic Society* 191
- Buckhout, R., Figueroa, D., and Hoff, E., "Eyewitness identification: Effects of suggestion and bias in identification from photographs" (1975) 6 *Bulletin of the Psychonomic Society* 71
- Buckhout, R., Rabinowitz, M., Alfonso, V., Kanellis, D., and Anderson, J., "Empirical assessment of lineups: Getting down to cases" (1988) 12 *Law and Human Behavior* 323
- Bull, R., "The influence of stereotypes on person identification" in Farrington, D.P., Hawkins, K., and Lloyd-Bostock, S.M., (eds) *Psychology, Law and Legal Processes* (1979 London: Macmillan) 184.
- Bull, R., and Clifford, B., "Eyewitness memory" in Gruneberg, M.M., and Morris, P.E., *Applied Problems in Memory* (1979, London: Academic Press) 155
- Bytheway, W.M., and Clarke, M., "The conduct and uses of identification parades" (1981) 40 *Journal of Criminal Law* 198
- Campbell, I., "Identification and Hearsay" (1987) 11 *Criminal Law Journal* 345
- Cape, E., *Defending Suspects at Police Stations* (1993 Legal Action Group)
- Cecil, J.S., and Willging, T.E., "The use of court-appointed experts in federal courts" (1994) 78 *Judicature* 41
- Chance, J., Goldstein, A., and McBride, L., "Differential experience and recognition memory for faces" (1975) 97 *Journal of Social Psychology* 243
- Choo, A., *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993, Oxford: Clarendon)
- Christiaanson, S., "Emotional stress and eyewitness memory: A critical review" (1992), 112 *Psychological Bulletin*. 284
- Clare, I.C.H., and Gudjonsson, G., "Devising and piloting an experimental version of the 'Notice to Detained Persons'" Royal Commission on Criminal Justice Research Study Number 7 (1992) (London:HMSO)

- Clifford, B.L., "The case of mistaken identities" 1 *Psychology Today* 14
- Clifford, B., "The relevance of psychological investigation to legal issues in testimony and identification" (1979) *Criminal Law Review* 153
- Clifford, B., "Eyewitness Testimony: The Bridging of a Credibility Gap", in D.P. Farrington, K. Hawkins and S.M. Lloyd-Bostock (eds.) *Psychology, Law and Legal Processes* (1979, Macmillan, London), 167
- Clifford, B.R., and Bull, R., *The Psychology of Person Identification* (1978, Boston: Routledge and Kegan)
- Clifford, B.R., and Hollin, C.R., "Effects of the type of incident and the number of perpetrators on eyewitness memory" (1981) 66 *Journal of Applied Psychology* 364
- Clifford, B.R., and Scott, J., "Individual and situational factors in eyewitness testimony" (1978) 63 *Journal of Applied Psychology* 352
- Cole, P., and Pringle, P., *Can You Positively Identify This Man?* (1974, London: Deutsch)
- Cross, J., Cross, J., and Daly, J., "Sex, race, age and beauty as factors in recognition of faces" (1971) 10 *Perceptual Psychophysics* 393
- Crowder, R.G., *Principles of Learning and Memory* (1976, New Jersey: Erlbaum).
- Cutler, B.L., Berman, G.L., Penrod, S., and Fisher, R.P., "Conceptual, practical and empirical issues associated with eyewitness identification test media" in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 163
- Cutler, B.L., Dexter, H.R., and Penrod, S.D., "Expert testimony and juror decision making: An empirical analysis" (1989) 7 *Behavioral Sciences and the Law* 215
- Cutler, B.L., Dexter, H.R., and Penrod, S.D., "Nonadversarial methods for improving juror sensitivity to eyewitness evidence" (1990) 20 *Journal of Applied Social Psychology* 1197
- Cutler, B.L., and Fisher, R.P., "Live lineups, video-taped lineups, and phot arrays" (1990) 3 *Forensic Reports* 439
- Cutler, B.L., Fisher, R.P., and Chicvara, C.L., "Eyewitness identification from live versus videotaped lineups" (1989) 2 *Forensic Reports* 93
- Cutler, B.L., and Penrod, S., "Context reinstatement and eyewitness identification" in Davies, G., and Thompson, D., (eds) *Memory in Context, Context in Memory* (1988, Chichester: Wiley)
- Cutler, B.L., and Penrod, S.D., "Improving the reliability of eyewitness identification: Lineup construction and presentation" (1988) 73 *Journal of Applied Psychology* 281
- Cutler, B.L., and Penrod, S.D., "Forensically relevant moderators of the relation between identification accuracy and confidence" (1989) 74 *Journal of Applied Psychology* 650

- Cutler, B.L., and Penrod, S.D., *Mistaken Identification* (1995, Cambridge University Press)
- Cutler, B.L., Penrod, S.D., and Dexter, H.D., "Juror sensitivity to eyewitness identification evidence" (1990) 14 *Law and Human Behavior* 185
- Cutler, B.L., Penrod, S.D., and Martens, T.K., "The reliability of eyewitness identifications: The role of system and estimator variables." (1987a), 11 *Law and Human Behavior*, 223
- Cutler, B.L., Penrod, S.D., and Martens, T.K., "Improving the reliability of eyewitness identifications: Putting context into context" (1987b) 72 *Journal of Applied Psychology* 629
- Cutler, B.L., Penrod, S.D., O'Rourke, T.E., and Martens, T.K., "Unconfounding the effects of contextual cues on eyewitness identification accuracy" (1986) 1 *Social Behaviour* 113
- Cutler, B.L., Penrod, S.D., and Stuve, T.E., "Juror decision-making in eyewitness identification cases" (1988) 12 *Law and Human Behavior* 41
- Davies, G.M., "Forensic face recall: The role of visual and verbal information" in Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley and Sons), 103
- Davies, G.M., Ellis, H.D., and Shepherd, J., "Face recognition accuracy as a function of mode of representation" (1978) 63 *Journal of Applied Psychology* 180
- Davies, G., Ellis, H.D., and Shepherd, J., (eds) *Perceiving and Remembering Faces* (1981, London: Academic Press)
- Davies, G., and Milne, A., "Recognizing faces in and out of context" (1982) 2 *Current Psychological Research* 235
- Davies, G., and Thompson, D., (eds) *Memory in Context, Context in Memory* (1988, Chichester: Wiley)
- Deese, J., *Psychology as Science and Art* (1972, Harcourt Brace Jovanovich, New York)
- Deffenbacher, K.A., "Eyewitness accuracy and confidence: Can we infer anything about their relationship?" (1980) 4 *Law and Human Behavior* 243
- Deffenbacher, K.A., "The influence of arousal on reliability of testimony", in Lloyd-Bostock and Clifford (eds) *Evaluating Witness Evidence* (1983, London: Wiley) 235
- Deffenbacher, K.A., "A maturing of research on the behavior of eyewitnesses" (1991) 5 *Applied Cognitive Psychology* 377
- Deffenbacher, K.A., Brown, E.L., and Sturgill, W., "Some predictors of eyewitness memory accuracy" in Gruneberg, M.M., Morris, P.E., and Sykes, R.N., (eds) *Practical Aspects of Memory* (1978, Academic Press), 219

- Deffenbacher, K., Carr, T.H., and Leu, J., "Memory for words, pictures and faces: Retroactive interference, forgetting and reminiscence" (1981), 7 *Journal of Experimental Psychology: Human Learning and Memory* 299
- Deffenbacher, K., and Loftus, E., "Do jurors share a common understanding concerning eyewitness behavior?" (1982) 6 *Law and Human Behavior* 15
- Dent, H., "Stress as a factor influencing person recognition in identification parades" (1977) 30 *Bulletin of the British Psychological Society* 339
- Dent, H., and Gray, F., "Identification on Parade" (1975) 1 *New Behaviour* 366
- Dixon, D., "Legal regulation and policing practice", (1992) 1 *Social and Legal Studies* 515
- Dodd, D.H., and Bradshaw, J.M., "Leading questions and memory: Pragmatic constraints" (1980) 19 *Journal of Verbal Learning and Verbal Behavior* 695
- Doob, A.N., and Kirschenbaum, H.M., "Bias in police lineups: Partial remembering" (1973) 1 *Journal of Police Science and Administration* 287
- Easterbrook, J.A., "The effect of emotion on cue utilization and the organisation of behaviour" (1959), 66 *Psychology Review* 183
- Ebbinghaus, H.E., *Memory: A Contribution to Experimental Psychology* (1964 New York, Dover)
- Egan, D., Pittner, M., and Goldstein, A., "Eyewitness identification: Photographs v. live models" (1977) 1 *Law and Human Behavior* 199
- Egeth, H.E. "What do we not know about eyewitness identification" (1993) 48 *American Psychologist* 577.
- Egeth, H., and McCloskey, M., "Expert testimony about eyewitness behavior: Is it safe and effective?" in G.L. Wells and E.F. Loftus *Eyewitness Testimony: Psychological Perspectives* (1984: Cambridge University Press), 283
- Elliott, R., "Expert testimony about eyewitness identification : A critique" (1993) 17 *Law and Human Behavior* 423
- Elliott, E., Wills, E., and Goldstein, A., "The effect of discrimination training on the recognition of white and oriental faces (1973) 2 *Bulletin of the Psychonomic Society* 71
- Ellis, H.D., "Recognizing Faces" (1975) 66 *British Journal of Psychology* 409
- Ellis, H.D., Shepherd, J., and Davies, G., "An investigation of the use of the photo-fit technique for recalling faces" (1975) 66 *British Journal of Psychology* 29
- Ellison, K.W., and Buckhout, R., *Psychology and Criminal Justice* (1981: London: Harper and Row)
- Evans, R., and Wilkinson, C., "Variations in police cautioning policy and practice in England and Wales" (1990) 29 *Howard Journal of Criminal Justice* 155

- Farrington, D.P., Hawkins, K., and Lloyd-Bostock, S.M. (eds.) *Psychology, Law and Legal Processes* (1979, Macmillan, London)
- Feingold, G., "The influence of environment on identification of persons and things" (1914) 5 *Journal of Criminal Law and Criminology* 39
- Fisher, R.P., and Geiselman, R.E. *Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* (1992, Springfield: Thomas)
- Fisher, R.P., Geiselman, R.E., Raymond, D.S., Jurkevich, L.M., and Warhaftig, M.L., "Enhancing enhanced eyewitness memory: Refining the cognitive interview" (1987) 15 *Journal of Police Science and Administration* 291
- Fisher, R.P., McCauley, M.R., and Geiselman, R.E., "Improving eyewitness testimony with the cognitive interview" in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press) 245
- Foot, P., *Who Killed Hanratty?* (1971, London: Jonathan Cape)
- Freckleton, I.R., *The Trial of the Expert* (1987 Sydney Butterworths)
- Freckleton, I., "Repressed memory syndrome: Counterintuitive or counterproductive?" (1996) 20 *Criminal Law Journal* 7
- Friedman, L.M., *The Legal System: A Social Science Perspective* (1975 New York: Sage)
- Gardner, D., "The perception and memory of witnesses" (1933) 18 *Cornell Law Quarterly*, 391
- Geiselman, R.E., and Fisher, R.P., "The cognitive interview technique for victims and witnesses of crime" in Raskin, D.C. (ed) *Psychological Methods in Criminal Investigation* (1989, New York: Springer), 191
- Gelowitz, M., "Section 78 of the Police and criminal Evidence Act 1984" (1990) 106 *Law Quarterly Review* 327
- Gibling, F., and Davies, G., "Reinstatement of context following exposure to post-event information" (1988) 79 *British Journal of Psychology*
- Gilchrist, S., "When the parade passes by" (1992) 136 *Solicitor's Journal* 889
- Goodman, J., and Loftus, E.F., "Judgment and memory: The Role of Expert Psychological Testimony on Eyewitness Accuracy", in Suedfeld and Tatlock *Psychology and Social Policy* (1992, Hemisphere), 267
- Goldstein, A.G., "The fallibility of the evidence: Psychological evidence" in D.B. Sales *Psychology in the Legal Process* (1977, New York: Spectrum), 233
- Goldstein, A.G., Chance, J.E., and Schneller, G.R., "Frequency of eyewitness identification in criminal cases: A survey of prosecutors" (1989) 27 *Bulletin of the Psychonomic Society* 71
- Gorenstein, G.W., and Ellsworth, P., "Effect of choosing an incorrect photograph on a later identification by an eyewitness" (1980) 65 *Journal of Applied Psychology* 616

- Grayson, E., "Identifying Turnbull" [1977] *Criminal Law Review*, 510
- Greene, E., "Eyewitness testimony and the use of cautionary instructions" (1987) 8 *University of Bridgeport Law Review* (Symposium on Eyewitness Identification Testimony) 15
- Greene, E., "Judge's instruction on eyewitness testimony: Evaluation and revision" (1988) 18 *Journal of Applied Social Psychology* 252
- Greene, E., Flynn, M.S., and Loftus, E.F., "Inducing resistance to misleading information" (1982) 21 *Journal of Verbal Learning and Verbal Behavior* 207
- Greer, D.S., "Anything but the truth" in Baldwin, J., and Bottomley, A.K., *Criminal Justice: Selected Readings* (1978 London: Martin Robertson), 164.
- Griffith, J.A.G., *The Politics of the Judiciary* (1991 London Fontana Press)
- Gross, S.R., "Loss of innocence: Eyewitness identification and proof of guilt" (1987) 16 *Journal of Legal Studies* 395
- Gruneberg, M.M., and Morris, P.E., *Applied Problems in Memory* (1979, London: Academic Press)
- Gudjonsson, G., *The Psychology of Interrogations, Confessions and Testimony* (1996 Chichester: Wiley)
- Gudjonsson, G., Clare, I.C., Rutter, S., and Pearse, J., "Persons at risk during interviews in police custody: The identification of vulnerabilities", Royal Commission on Criminal Justice, Research Study No.12 (1993) (London:HMSO)
- Gummerman, K., and Gray, C.R., "An Uncommon Case of Visual Memory" in U. Neisser *Memory Observed* (1982, San Fransisco: W.H. Freeman)405
- Hain, P., *Mistaken Identity* (1976 London: Quartet)
- Hall, D.F., Loftus, E.F., and Tousignant, J.P., "Postevent information and changes in recollection for a natural event", in Wells, G., and Loftus, E.F., (eds) *Eyewitness Testimony: Psychological Perspectives* (1984, Cambridge University Press)
- Hamilton, B., "Expert testimony on the reliability of eyewitness identifications: A critical analysis of its admissibility" (1989) 54 *Melbourne Law Review* 733
- Harris, M.J., and Rosenthal, R., "Mediation of interpersonal expectancy effects: 31 meta-analyses" (1985) 97 *Psychological Bulletin* 363
- Haward, L., "The psychologist as expert witness", in D. Farrington, K. Hawkins, and S. Lloyd-Bostock, *Psychology, Law and Legal Processes* (1979 London: Macmillan) 44
- Heaton-Armstrong, A., "Identification: Descriptions of suspects" (1986) *Criminal Law Review* 215
- Heaton-Armstrong, A., Shepherd, E., and Wolchover, D., (eds.) *Analysing Witness Testimony* (1999 Blackstone, London)

- Heaton-Armstrong, A., and Wolchover, D., "Exorcising Dougherty's Ghost" (1991) *New Law Journal* 137
- Hebb, D.O., "Drives and the conceptual nervous system" (1955) 62 *Psychology Review* 243
- Henderson, J., "A Question of Identity" (1989) *Journal of the Law Society of Scotland*, 292.
- Heydon, J.D., "Illegally obtained evidence" [1973] *Criminal Law Review* 690
- Hilgendorf, E.F., and Irving, B.L., "False positive identification" (1978) 18 *Medicine, Science and the Law* 255
- Hoffheimer, M.H., "Effect of particularized instructions on evaluation of eyewitness identification evidence" (1989) 13 *Law and Psychology Review* 43
- Holdenson, O.P., "Admission of expert evidence of opinion", (1988) 16 *Melbourne University Law Review* 521
- Hollin, C.R., and Clifford, B.R., "Eyewitness testimony: The effects of discussion on recall accuracy and agreement" (1983) 13 *Journal of Applied Social Psychology* 234
- Holt, C.M., "Expert testimony on eyewitness identification: Invading the province of the jury?" (1984) 26 *Arizona Law Review* 399
- Hosch, H.M., Beck, E.L., and McIntyre, P., "Influence of expert testimony regarding eyewitness accuracy on jury decisions" (1980) 4 *Law and Human Behavior* 287
- Hosch, H.M., and Cooper, S.D., "Victimization as a determinant of eyewitness accuracy" (1982) 67 *Journal of Applied Psychology* , 649
- Hosch, H.M., Leippe, M.R., Marchioni, P.M., and Cooper, D.S., "Victimization, self-monitoring, and eyewitness identification" (1984) 69 *Journal of Applied Psychology* 280
- Hosch, H.M., and Platz, S.J., "Self-monitoring and eyewitness accuracy" (1984) 10 *Personality and Social Psychology Bulletin* 289
- Hunter, M., "Judicial discretion: Section 78 in practice" [1994] *Criminal Law Review* 558
- Hutchins, R., and Slesinger, D., "Some observations on the law of evidence: spontaneous exclamations" (1928) 28 *Columbia Law Review* 432
- Jackson, J.D., "The insufficiency of identification evidence based on personal impression" [1986] *Criminal Law Review* 207
- Jackson, R.D., "The ultimate issue rule: One rule too many" [1984] *Criminal Law Review* 75
- Jerrard, R.R., "Identification officers' guide to recent judicial decisions" (1993) 66 *Police Journal* 147

- Johnson, C.L., "Cross-racial identification errors in criminal cases" (1984) 69 *Cornell Law Review* 934
- Jones, D.M., "Stress and Memory" in Gruneberg, M.M., and Morris, P.E., *Applied Problems in Memory* (1979, London: Academic Press) 185
- Kapardis, A., *Psychology and the Law: A Critical Introduction* (1997 Cambridge University Press, Cambridge)
- Karam, J., *David and Goliath: The Bain Family Murders* (1997 Auckland Reed Publishing)
- Kassin, S.M., "Eyewitness identification: Victims versus bystanders" (1984) 14 *Journal of Applied Social Psychology* 519
- Katzev, R.D., and Wishart, S.S. "The impact of judicial commentary concerning eyewitness identifications on jury decision making" (1985) 76 *Journal of Criminal Law and Criminology* 733
- Keane, A., *The Modern Law of Evidence* (1994 London: Butterworths)
- Kennedy, L., *A Presumption of Innocence: The Amazing Case of Patrick Meehan* (1976 London: Gollancz)
- Kennedy, L., *Wicked Beyond Belief* (1980 Granada)
- Kerr, N.L. and Bray, R.M., (eds) *The Psychology of the Courtroom* (1982, New York: Academic Press)
- King, M., *Psychology In and Out of Court* (1986, Oxford: Pergamon)
- Klingsberg, E., "The admissibility of eyewitness expert testimony" (1989) 25 *Criminal Law Bulletin* 219
- Koehnken, G., and Maass, A., "Eyewitness testimony: False alarms on biased instructions?" (1988) 73 *Journal of Applied Psychology* 363
- Koehnken, G., Malpass, R.S., and Wogalter, M.S., "Forensic application of lineup research" in Sporer, S.L., Malpass, R.S., and Koehnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum), 205
- van der Kolk, B. and Fisler, R., "Dissociation and the fragmentary nature of traumatic memories: Overview and exploratory study" (1995) 8 *Journal of Traumatic Stress* 505
- Konecni, V.J., and Ebbesen, E.B., "Courtroom Testimony by Psychologists on Eyewitness Identification Issues: Critical Notes and Reflections", (1986) 10 *Law and Human Behavior* 117
- Krafka, C., and Penrod, S., "Reinstatement of context in a field experiment on eyewitness identification" (1985) 49 *Journal of Personality and Social Psychology* 58
- Kramer, T.H., Buckhout, R., and Eugenio, P., "Weapon focus, arousal, and eyewitness memory: Attention must be paid" (1990), 14 *Law and Human Behavior* 167

- Kroll, N.E., Ogawa, K.H., and Nieters, J.E., "Eyewitness memory and the importance of sequential information" (1988) 26 *Bulletin of the Psychonomic Society* 395
- Lacey, N., Wells, C., and Meure, D., *Reconstructing Criminal Law* (1990 London: Wiedenfield and Nicolson)
- Lane, M., "Should psychologists be permitted to address the jury?" (1984) 75 *Journal of Criminal Law and Criminology* 1321
- Laughery, K.R., Alexander, J.F., and Lane, A.B., "Recognition of human faces: Effects of target exposure time, target position and type of photograph." (1971) 59 *Journal of Applied Psychology*, 490
- Lefcourt, G., "The blank lineup: An aid to the defense" (1978) 14 *Criminal Law Bulletin* 428
- Leigh, L.H., and Zedner, L., *A Report on the Administration of Criminal Justice in the Pre-Trial Phase in England and Germany*, Royal Commission on Criminal Justice, Research Study No.1 (HMSO, 1992)
- Leinbach, R.D., "Novel scientific evidence after *Reese v Stroh* : The Washington Supreme Court's love affair with *Frye* ", (1996) 71 *Washington Law Review* 1127
- Leippe, M.R., "Effects of integrative memorial and cognitive processes in the correspondence of eyewitness accuracy and confidence" (1980) 4 *Law and Human Behavior* 261
- Leippe, M.R. "The case for expert testimony about eyewitness memory" (1995) 1 *Psychology, Law and Public Policy* 909
- Leippe, M.R., Wells, G.L., and Ostrom, T.M., "Crime seriousness as a determinant of accuracy in eyewitness identification" (1978) 63 *Journal of Applied Psychology*, 345
- Lindsay, R.C.L., "Biased lineups: Where do they come from?" in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 182
- Lindsay, R.C.L., "Confidence and accuracy of eyewitness identification from lineups" (1986) 10 *Law and Human Behavior* 229
- Lindsay, R.C.L., "Expectations of eyewitness performance: Jurors' verdicts do not follow from their beliefs" in D.F.Ross, J.D. Read, and M.P. Toglia *Adult Eyewitness Testimony: Current Trends and Developments* (1994: Cambridge University Press), 362
- Lindsay, R.C.L., Lea, J.A., and Fulford, J.A., "Sequential lineup presentation: Technique matters" (1991) 76 *Journal of Applied Psychology* 741
- Lindsay, R.C.L., Lea, J.A., Nosworthy, G.J., Fulford, J.A., Hector, J., LeVan, V., and Seabrook, C., "Biased lineups: Sequential presentation reduces the problem" (1991) *Journal of Applied Psychology* 796
- Lindsay, R.C.L., MacDonald, P., and McGarry, S., "Perspectives on the role of the eyewitness expert", (1990) 8 *Behavioural Sciences and the Law*, 457

- Lindsay, R.C.L., and Wells, G.L., "What price justice? Exploring the relationship of lineup fairness to identification accuracy." (1980) 4 *Law and Human Behavior* 303
- Lindsay, R.C.L., and Wells, G.L., "What do we really know about cross-race identification?" in Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley) 219
- Lindsay, R.C.L., and Wells, G.L., "Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentation" (1985) 70 *Journal of Applied Psychology* 556
- Lindsay, R.C.L., Wells, G.L. and O'Connor, F.J., "Mock-juror belief of accurate and inaccurate eyewitnesses: A replication and extension" (1989) 13 *Law and Human Behavior* 333
- Lindsay, R.C.L., Wells, G.L., and Rumpel, C.M., "Can people detect eyewitness accuracy within and across situations?" (1981) 66 *Journal of Applied Psychology* 79
- Lindsay, S., and Read, J., "Psychotherapy and memories of childhood sexual abuse: A cognitive perspective" (1994) 8 *Applied Cognitive Psychology* 281
- Lipton, J., "On the psychology of eyewitness testimony" (1977) 62 *Journal of Applied psychology* 90
- Lloyd-Bostock, S.M., *Psychology in Legal Contexts* (1981, London: Macmillan)
- Lloyd-Bostock, S.M., "Psychology and the law: A critical review of research and practice" (1981) 8 *British Journal of Law and Society* 1
- Lloyd-Bostock, S.M., *Law in Practice* (1992, London: British Psychological Society and Routledge)
- Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley and Sons)
- Loftus, E.F., "Leading questions and the eyewitness report" (1975) 7 *Cognitive Psychology* 560
- Loftus, E.F., "Unconscious transference" (1976) 2 *Law and Psychology Review* 93
- Loftus, E.F., "Shifting human color memory" (1977) 5 *Memory and Cognition* 696
- Loftus, E.F., *Eyewitness Testimony* (1979, 1996 Cambridge: Harvard University Press)
- Loftus, E.F. "Psychologist in the Eyewitness World" (1993) 48 *American Psychologist* 550
- Loftus, E.F., "Impact of expert psychological testimony on the unreliability of eyewitness identification" (1980) 65 *Journal of Applied Psychology* 9
- Loftus, E.F., "Expert testimony on the eyewitness" in G.L. Wells and E.F. Loftus *Eyewitness Testimony: Psychological Perspectives* (1984: Cambridge), 281
- Loftus, E.F., "The reality of repressed memories" (1993) 48 *American Psychologist* 518

- Loftus, E.F., and Greene, E., "Warning: Even memory for faces can be contagious" (1980) 4 *Law and Human Behavior* 323
- Loftus, E.F., and Hoffman, H., "Misinformation and memory: The creation of new memories" (1989) 118 *Journal of Experimental Psychology: General* 100
- Loftus, E.F., and Ketcham, K., "The Malleability of Eyewitness Accounts" in, Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley and Sons)159
- Loftus, E., and Ketcham, K., *Witness for the defense – The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial* (1991 St. Martin's Press, New York).
- Loftus, E., and Ketcham, K., *The Myth of Repressed Memory* (1994 St. Martin's Press, New York)
- Loftus, E.F., Loftus, G.R., and Messo, J., "Some facts about "weapon focus" (1987) 11 *Law and Human Behavior*, 55
- Loftus , E.F., Miller, D.G., and Burns, H.J., "Semantic integration of verbal information into a visual memory" (1978) 4 *Journal of Experimental Psychology: Human Learning and Memory* 19
- Loftus, E., and Monaghan, J., "Trial by data: Psychological research as legal evidence" (1980) 35 *American Psychologist* 270
- Loftus, E.F., and Palmer, J., "Reconstruction of an automobile destruction: An example of the interaction between language and memory" (1974) 13 *Journal of Verbal Learning and Verbal Behavior* 585
- Loftus, E.F., and Zanni, G., "Eyewitness testimony: The influence of the wording of a question" (1975) 5 *Bulletin of the Psychonomic Society* 86
- Luce, T., "Blacks, whites and yellows: they all look alike to me" (1974) 8 *Psychology Today* 107
- Luria, A.R., "The Mind of a Mnemonist" in U.Neisser *Memory Observed* (1982, San Fransisco: W.H. Freeman)382
- Luus, E., and Wells, G., "Eyewitness identification and the selection of distractors for lineups" (1991) 15 *Law and Human Behavior* 43.
- Luus, C.A.E., and Wells, G.L., "Eyewitness identification confidence" in Ross, D.F., Read, J.D., and Toggia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 348
- Luus, C.A.E., and Wells, G.L., "The malleability of eyewitness confidence: Co-witness and perseverance effects" (1994) 79 *Journal of Applied Psychology* 714
- McAllister, H.A., and Bregman, N.J., "Juror underutilization of eyewitness nonidentifications: A test of the disconfirmed expectancy explanation" (1989) 19 *Journal of Applied Social Psychology* 20

- McCloskey, M., and Egeth, H., "Eyewitness identification: What can a psychologist tell a jury?" (1983) 38 *American Psychologist* 550
- McCloskey, M., Egeth, H., and McKenna, J., "The experimental psychologist in court: The ethics of expert testimony" (1986) 10 *Law and Human Behavior* 1
- McCloskey, M., and Zaragoza, M., "Misleading post-event information and memory for events: Arguments and evidence against memory impairment hypotheses" (1985) 114 *Journal of experimental Psychology: General* 1
- McConkey, K., and Roche, S., "Knowledge of eyewitness memory" (1989) 24 *Australian Psychologist* 377
- McConville, M., "Videotaping interrogations: Police behaviour on and off camera" (1992) *Criminal Law Review* 532
- McConville, M., and Hodgson, J., *Custodial Legal Advice and the Right to Silence* Royal Commission on Criminal Justice Research Study No.16 (1993 London: HMSO)
- McConville, M., Hodgson, J., Bridges, L., and Pavlovic, A., *Standing Accused* (1994, Oxford University Press)
- McConville, M., Sanders, A., and Leng, R., *The Case for the Prosecution* (1991 London: Routledge)
- McEwan, J., *Evidence and the Adversarial Process* (1998 Oxford: Blackwell)
- McKenna, J., Treadway, M., and McCloskey, M., "Expert psychological testimony on eyewitness reliability: Selling psychology before its time", in Suedfeld and Tetlock *Psychology and Social Policy* (1992, New York: Hemisphere), 283
- McKenzie, I., "Psychology and legal practice: Fairness and accuracy in identification parades" (1995) *Criminal Law Review* 200
- Maass, A., and Kohnken, G., "Eyewitness Identification: Simulating the "weapon effect"." (1989) 13 *Law and Human Behavior* 397
- Mackay, R.D., and Colman, A., "Excluding expert evidence; A tale of ordinary folk and common experience" [1991] *Criminal Law Review* 800
- Mackay, R.D., and Colman, A., "Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense" (1996) *Criminal Law Review* 88
- Maguire, J., *Evidence, Common Sense and Common Law*, (1947, Chicago, Foundation Press)
- Malpass, R.S., "Enhancing eyewitness memory", in Sporer, S.L., Malpass, R.S., and Kohnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum), 177
- Malpass, R.S., and Devine, P.G., "Measuring the fairness of eyewitness identification lineups" in Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley and Sons), 81

- Malpass R.S., and Devine, P.G., "Eyewitness Identification: Lineup instructions and the absence of the offender" (1981a), 66 *Journal of Applied Psychology* 482
- Malpass, R.S., and Devine, P.G., "Guided memory in eyewitness identification" (1981b) 66 *Journal of Applied Psychology* 343
- Malpass, R.S., and Devine, P.G., "Realism and Eyewitness Identification Research", (1981c) 4 *Law and Human Behavior* , 347
- Malpass, R.S., and Kravitz, J., "Recognition for faces of own and other race" (1969) 13 *Journal of Personality and Social Psychology* 330
- Malpass, R.S., Lavigueur, H., and Weldon, D., "Verbal and visual training in face recognition" (1973) 14 *Perception and Psychophysics* 285
- Mandler, J., and Parker, R., "Memory for descriptive and spatial information in complex pictures" (1976) 2 *Journal of Experimental Psychology: Human Learning and Memory* 38
- Marshall, J., *Law and Psychology in Conflict* (1966, New York: Anchor Books).
- Mayer, C., "Due Process Challenges to Eyewitness Identification Based on Pre-trial Photographic Arrays", (1994) 13 *Pace Law Review* 815
- Mawby, R., and Walklate, S., *Critical Victimology* (1995 London: Sage)
- Melara, R.D., DeWitt-Rickards, T.S., and O'Brien, T.P., "Enhancing lineup identification accuracy: Two codes are better than one" (1989) 74 *Journal of Applied Psychology* 706
- Milner, B., "Visual recognition and recall after right temporal lobe excision in man" (1968) 6 *Neuropsychologia* 191
- Morris, V., and Morris, P.E., "The influence of question order on eyewitness accuracy" (1985) 76 *British Journal of Psychology* 365
- Murphy, J.P., "An evaluation of the arguments against the use of expert testimony on eyewitness identification", (1987) 8 *University of Bridgeport Law Review* 21
- Murphy P., *Murphy on Evidence* (1997 London: Blackstone Press)
- Narby, D.J., Cutler, B.L., and Penrod, S.D., "The effects of witness, target and situational factors on eyewitness identifications" in Sporer, S.L., Malpass, R.S., and Kohnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum), 23
- Navon, D., "How critical is the accuracy of an eyewitness memory? Another look at the issue of lineup diagnosticity" (1990) 75 *Journal of Applied Psychology* 506
- Neisser, U., *Memory Observed* (1982, San Fransisco:W.H.Freeman)
- Noon, E., and Hollin, C., "Lay knowledge of eyewitness behaviour: A British survey" (1987) 1 *Applied Cognitive Psychology* 143
- Norris, J. and Edwardh, M., "Myths, hidden facts and common sense: Expert opinion evidence and the assessment of credibility", [1995] 38 *Criminal Law Quarterly* 73

Nosworthy, G.J., and Lindsay, R.C.L., "Does nominal lineup size matter?" (1990) 75 *Journal of Applied Psychology* 358

Okamoto, S., and Sugahara, Y., "Effects of post-event information on eyewitness testimony" (1986) 28 *Japanese Psychological Research* 196

Orne, M.T., Soskis, D.A., Dinges, D.F., and Orne, E.C., "Hypnotically induced testimony" in Wells, G.L., and Loftus, E.F., *Eyewitness Testimony: Psychological Perspectives* (1984 Cambridge University Press), 171

O'Rourke, T.E., Cutler, B.L., Penrod, S.D., and Stuve, T.E., "The external validity of eyewitness identification research: Generalizing across subject populations" (1989) 13 *Law and Human Behavior* 385

Paley, B., and Geiselman, R.E., "The effects of alternative photospread instructions on suspect identification performance" (1989) 7 *American Journal of Forensic Psychology* 3

Pattenden, R., "Expert opinion based on hearsay" [1982] *Criminal Law Review* 85

Pattenden, R., "Conflicting approaches to psychiatric evidence in criminal trials: England, Canada and Australia" [1986] *Criminal Law Review* 92

Penrod, S., Loftus, E.F., and Winkler, J., "The reliability of eyewitness testimony: A psychological perspective", in Kerr, N.L. and Bray, R.M., (eds) *The Psychology of the Courtroom* (1982, New York: Academic Press), 119

Poole, D., and White, L., "Effects of question repetition on the eyewitness testimony of children and adults" (1991) 27 *Developmental Psychology* 975

Postman, L., "A pragmatic view of organisation theory", in Tulving, E., and Donaldson, W., (eds) *Organisation of Memory* (1972, New York: Academic Press)

Rabbitt, P., "Applying Human Experimental Psychology to Legal Questions about Evidence", in S. Lloyd-Bostock, *Psychology in Legal Contexts* (1981, London: Macmillan), chapter 1.

Raskin, D.C. (ed) *Psychological Methods in Criminal Investigation* (1989, New York: Springer)

Rattner, A., "Convicted but innocent: Wrongful conviction and the criminal justice system" (1988) 12 *Law and Human Behavior* 283.

Re, L., "Eyewitness identification: Why so many mistakes?" (1984) 58 *Australian Law Journal* 509

Read, J.D., "Understanding bystander misidentifications: The role of familiarity and contextual knowledge" in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 56

Read, J.D., Tollestrup, P., Hammersley, R., McFadzen, E., and Christensen, A., "The unconscious transference effect: Are innocent bystanders ever misidentified?" (1990) 4 *Applied Cognitive Psychology* 3

"Rich Pickings", *Police Review* 18/09/92, 1725

Rosenthal, R., *Meta-analytic procedures for social research* (1991, Beverley Hills: Sage).

Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press)

Ross, D.F., Ceci, S.J., Dunning, D., and Toglia, M.P., "Unconscious transference and lineup identification: Toward a memory blending approach" in Ross, Read and Toglia (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press), 80

Roughead, W. (ed.), *The Trial of Oscar Slater* (1950, Edinburgh: William Hodge)

Ryan, R.H., and Geiselman, R.E., "Effects of biased information on the relationship between eyewitness confidence and accuracy" (1991) 29 *Bulletin of the Psychonomic Society* 7

Sales, D.B., *Psychology in the Legal Process* (1977, New York: Spectrum)

Sanders, A., Bridges, L., Mulvaney, A., and Crozier, G., *Advice and assistance at police stations and the 24 hour duty solicitor scheme* (1989 London: Lord Chancellor's Department)

Sanders, A., and Young, R., *Criminal Justice* (1994 London: Butterworths), 417

Sanders, G.S., "Effects of context cues on eyewitness identification responses" (1984) 14 *Journal of Applied Social Psychology* 386

Sanders, G.S., and Warnick, D.H., "Some conditions maximising eyewitness accuracy: A learning memory model" (1980) 8 *Journal of Criminal Justice* 395

Sanders, G.S., and Warnick, D.H., "Evaluating identification evidence from multiple eyewitnesses" (1982) 12 *Journal of Applied Social Psychology* 182

Shapiro, P.N., and Penrod, S.D., "Meta-analysis of facial identification studies" (1986) 100 *Psychological Bulletin* 139

Saunders, D.M., Vidmar, N., and Hewitt, E.C., "Eyewitness testimony and the discrediting effect" in S.M.A. Lloyd-Bostock and B.R. Clifford *Evaluating Witness Evidence* (1983: John Wiley), 57

Sheldon, D., and MacLeod, M., "From Normative to Positive Data: Expert Psychological Evidence Re-examined" [1991] *Criminal Law Review* 811

Shepherd, J.W., "Identification after long delays" in Lloyd-Bostock, S., and Clifford, B., *Evaluating Witness Evidence* (1983, London: Wiley and Sons)

Shepherd, J.W., Davies, G.M., and Ellis, H.D., "Identification parades: How important is delay?" (1981) *Home Office Research Bulletin* Number 11, 14

Shepherd, J., and Ellis, H.D., "The effect of attractiveness on recognition memory for faces" (1973) 86 *American Journal of Psychology* 627

Shepherd, J.W., and Ellis, H.D., "Face recall: Methods and Problems", in Sporer, S.L., Malpass, R.S., and Kohnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum), 87

Shepherd, J.W., Ellis, H.D., and Davies, G.M., *Identification evidence: A psychological evaluation* (1982 Aberdeen University Press)

Shepard, R.N., "Recognition memory for words, sentences and pictures" (1967) 6 *Journal of Verbal Learning and Verbal Behavior* 156

Shoemaker, D.J., South, D.R., and Lowe, J., "Facial stereotypes of deviants and judgments of guilt or innocence" (1973), 51 *Social Forces* 427

Siegel, J.M., and Loftus, E.F., "Impact of anxiety and life stress upon eyewitness testimony" (1978) 12 *Bulletin of the Psychonomic Society* 479

Smith, J., Pleban, R., and Schaffer, D., "Effects of interrogator bias and a police trait questionnaire on the accuracy of eyewitness identification" (1982) 116 *Journal of Social Psychology* 19

Smith, V.L., and Ellsworth, P.C., "The social psychology of eyewitness accuracy: Misleading questions and communicator expertise" (1987) 72 *Journal of Applied Psychology* 292

Sporer, S.L., "Psychological aspects of person descriptions" in Sporer, S.L., Malpass, R.S., and Kohnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum), 53

Sporer, S.L., Malpass, R.S., and Kohnken, G., (eds) *Psychological Issues in Eyewitness Identification* (1996 Lawrence Erlbaum)

Stebly, N.M., "A meta-analytic review of the weapon focus effect" (1992) 16 *Law and Human Behavior* 413

Stephenson, G.M., *The Psychology of Criminal Justice* (1992, Oxford: Blackwell)

Stone, M., *Proof of Fact in Criminal Trials* (1984, Edinburgh: W.Green)

Stuntz, W.J., "The American exclusionary rule and defendants' changing rights" [1989] *Criminal Law Review* 117

Suedfeld and Tatlock *Psychology and Social Policy* (1992, Hemisphere)

Sussman, E.D., and Sugarman, R.C., "The effect of certain distractions on identification by witnesses", in Zavala, A., Paley, J.J., and Gallati, R.R.J., (eds) *Personal Appearance Identification* (1972, Illinois: Charles Thomas)

Tapp, J.L., and Levine, F.J., *Law, Justice and the Individual in Society* (1977).

Tapper, C., *Cross on Evidence* (1995 London: Butterworths)

Thorndyke, P., "The role of inferences in discourse comprehension" (1976) 15 *Journal of Verbal Learning and Verbal Behaviour* 437

- Tooley, V., Brigham, J.C., Maass, A., and Bothwell, R.K., "Facial recognition: Weapon effect and attentional focus" (1987) 17 *Journal of Applied Social Psychology* 845
- Trankell, A., *Reconstructing the Past: The Role of Psychologists in Criminal Trials* (1982: Stockholm Norstedt)
- Tulving, E., and Donaldson, W., (eds) *Organisation of Memory* (1972, New York: Academic Press)
- Twining, W., "Identification and misidentification in legal processes: Redefining the problem" in Lloyd-Bostock, S.M., and Clifford, B.L., (eds) *Evaluating Witness Evidence* (1983, Wiley), 255
- Tyler, T.R., *Why People Obey the Law* (1990 New Haven: Yale University Press)
- Ugnow, S., *Evidence: Text and Materials* (1997 London: Sweet and Maxwell)
- Wagenaar, W., *Identifying Ivan* (1988, Hertfordshire: Harvester Wheatsheaf)
- Wagenaar, W., van Koppen, P., and Crombag, H., *Anchored Narratives: The Psychology of Criminal Evidence* (1993, Hertfordshire: Harvester Wheatsheaf)
- Wagenaar, W., and Loftus, E.F., "Ten cases of eyewitness identification: Logical and procedural problems" (1990) 18 *Journal of Criminal Justice* 291
- Walker, M., and Brittain, B., *Identification Evidence – Practices and Malpractices – A Report by JAIL*, (1978, London: JAIL)
- Wall, P.M., *Eyewitness Identification in Criminal Cases* (1965, Illinois: Charles C. Thomas)
- Wallace, G., Coltheart, M., and Forster, K., "Reminiscence in recognition memory for faces" (1970) 18 *Psychonomic Science* 335
- Walters, C.M., "Admission of expert testimony on eyewitness identification", (1985) 73 *California Law Review* 1402
- Warnick, D.H., and Sanders, G.S., "The effects of group discussion on eyewitness accuracy" (1980) 10 *Journal of Applied Social Psychology* 249
- Warnick, D.H., and Sanders, G.S., "Why do eyewitnesses make so many mistakes?" (1980) 10 *Journal of Applied Social Psychology* 362
- Watson, E.R., *Adolf Beck* (1924 Edinburgh: W.Hodge)
- Weinberg, H.I., and Baron, R.S., "The discreditable eyewitness" (1982) 8 *Personality and Social Psychology Bulletin* 60
- Wells, G.L., "Applied eyewitness testimony research: System variables and estimator variables" (1978) 36 *Journal of Personality and Social Psychology* 1546
- Well, G.L., "A reanalysis of the expert testimony issue", in G.L. Wells and E.F. Loftus *Eyewitness Testimony: Psychological Perspectives* (1984 New York: Cambridge University Press), 314.

Wells, G.L., "The psychology of lineup identifications" (1984) 14 *Journal of Applied Social Psychology* 89

Wells, G.L., *Eyewitness Identification* (1988 Toronto Carswell)

Wells, G.L., "What do we know about eyewitness identification?" (1993) 48 *American Psychologist* 553

Wells, G.L., and Bradfield, A.L., "Good, you identified the suspect: Feedback to eyewitnesses distorts their reports of the witnessing experience" (1998) 83 *Journal of Applied Psychology* 360

Wells, G.L., Ferguson, T.J., and Lindsay, R.C.L., "The tractability of eyewitness confidence and its implications for triers of fact" (1981) 66 *Journal of Applied Psychology* 688

Wells, G., and Leippe, M.R., "How do triers of fact infer the accuracy of eyewitness identifications? Using memory for peripheral detail can be misleading." (1981) 66 *Journal of Applied Psychology* 682

Wells, G.L., Leippe, M.R., and Ostrom, T.M., "Guidelines for empirically assessing the fairness of a lineup" (1979) 3 *Law and Human Behavior* 285

Wells, G.L., and Lindsay, R.C.L., "On Estimating the Diagnosticity of Eyewitness Non-identifications", (1980) 88 *Psychological Bulletin* 776

Wells, G.L., and Lindsay, R.C.L., "Methodological notes on the accuracy-confidence relation in eyewitness identifications" (1985) 70 *Journal of Applied Psychology* 413

Wells, G.L., Lindsay, R.C.L., and Ferguson, T.J., "Accuracy, confidence and juror perceptions in eyewitness identification" (1979) 64 *Journal of Applied Psychology* 440

Wells, G., Lindsay, R.C.L., and Tousignant, J., "Effects of expert psychological advice on human performance in judging the validity of eyewitness testimony, (1980) 4 *Law and Human Behavior* 275

Wells, G.L., and Loftus, E.F., (eds) *Eyewitness Testimony: Psychological Perspectives* (1984, Cambridge University Press)

Wells, G.L., and Luus, C.A.E., "Police lineups as experiments: Social methodology as a framework for properly conducted lineups" (1990) 16 *Personality and Social Psychology Bulletin* 106

Wells, G.L., and Luus, C.A.E., "The diagnosticity of a lineup should not be confused with the diagnostic value of non lineup evidence" (1990) 75 *Journal of Applied Psychology* 511

Wells, G.L., and Murray, D.M., "Eyewitness confidence", in Wells, G., and Loftus, E.F., (eds) *Eyewitness Testimony: Psychological Perspectives* (1984, Cambridge University Press) 155

Wells, G.L., and Seelau, E.P., "Eyewitness identification: Psychological research and legal policy on lineups" (1995) 1 *Psychology, Public Policy and Law* 765

Wells, G.L., Seelau, E.P., Rydell, S.M., and Luus, C.A.E., "Recommendations for properly conducted eyewitness identification tasks", in Ross, D.F., Read, J.D., and Toglia, M.P., (eds) *Adult Eyewitness Testimony* (1994 Cambridge University Press) 223

Woocher, F.D., "Did your eyes deceive you? Expert psychological testimony on the unreliability of eyewitness identification" (1977) 29 *Stanford Law Review* 969

Yarmey, A.D., *The Psychology of Eyewitness Testimony* (1979, New York: Free Press)

Yarmey, A., and Tresillian Jones, H., "Is the study of eyewitness identification a matter of common sense?" in S. Lloyd-Bostock and B. R. Clifford (eds.) *Evaluating Witness Evidence* (1983, London: Wiley), 13

Yarmey, A.D., and Yarmey, A.L., "Relaxation-hypnotic enhanced memory and photographic lineup identification" (1993) 2 *Expert Evidence* 115

Yerkes, R.M., and Dodson, J.D., "The relation of strength of stimulus to rapidity of habit formation" (1908) 18 *Journal of Comparative and Neurological Psychology* 459

Yuille, J.C., and Cutshall, J.L., "A Case Study of Eyewitness Memory of a Crime", (1986) 71 *Journal of Applied Psychology* 291

Zalman, M., and Siegel, L.J., "The psychology of perception, eyewitness identification and the lineup" (1991) 27 *Criminal Law Bulletin* 159

Zander, M., *The Police and Criminal Evidence Act 1984* (1995: London Sweet and Maxwell)

Zander, M., and Henderson, P., *The Royal Commission on Criminal Justice Crown Court Study Research Study No.19* (1993 London:HMSO)

Zuckerman, A.A.S., "Illegally obtained evidence: Discretion as a guardian of legitimacy" [1987] 40 *Current Legal Problems* 55

Zuckerman, A.A.S., *The Principles of Criminal Evidence* (1989, Oxford: Clarendon)

Newspaper Articles

"Bus-stop sex attacker is jailed for fifteen years" *Birmingham Post* February 27 1999, 5

"Case raises issue of vulnerability" *The Guardian* November 12 1993, 25

"Five minute talk in police car doomed Stephen Lawrence murder trial" *Sunday Mirror* March 22 1998, 9

"Hairy lookalikes would be a hit in police pop parade" *The Daily Telegraph* , 8 October 1997, 3

"Hanratty evidence hidden by police" *The Independent* March 30 1999, 7; "Innocent as charged" *The Daily Telegraph* November 15 1997, 3.

“Hi-tech helpers keep police bang on target” *The Times*, February 4 1998

“Identifying why poor results are on parade” *Birmingham Post* August 11, 1998, 5

“Injustice for all” *The Guardian* January 4 1999, 8

“Man cleared of five attacks” *Birmingham Evening Mail* November 28 1998, 20

“Mr O ... Crime Fighter” *Nottingham Evening Post* June 23 1998, 5

“Parade your talent for police” *Grimsby Evening Telegraph* May 31 1999, 5

“Police defend blacked up identity parade” *The Independent* July 26 1997, 7;

“Star of the black and white identity parade” *The Times* July 25 1997.

“Suite will soon be on parade” *Derby Evening Telegraph* July 15 1999, 23

“Virtual identity parades may soon fit the bill”, *The Times* August 20, 1997

“We name the innocent men” *The Evening Standard* October 9 1997, 23