

Psychologists in the witness box

Graham M. Davies and Gisli H. Gudjonsson run through a brief history

The provision of expert testimony by psychologists in legal proceedings can be traced back to the very beginnings of experimental psychology and its founder Wilhelm Wundt and his students. In 1896 Baron Albert von Schrenck-Notzing (1862–1929), a German psychiatrist who had trained with Wundt, gave evidence in a sensational trial involving the murder of three women. Drawing on his research on suggestion, the Baron argued that the witnesses could be suffering from what he termed ‘retroactive memory falsification’: confusing the vivid accounts they had read in the newspapers with what they had actually seen (Bartol & Bartol, 1987). For the first time, but certainly not the last, the court rejected his evidence and found the defendant guilty. Subsequently, Schrenck-Notzing abandoned expert testimony for psychical research, although the phenomenon to which he drew attention is well-known to today’s forensic psychologists as ‘post-event misinformation’ (Loftus, 2005).

Another of Wundt’s pupils, the American James M. Cattell (1860–1944) was among the first to demonstrate the unreliability of memory for events from the recent past and the tenuous link between witness confidence and accuracy (Cattell, 1895). Cattell’s findings excited the interest of the French psychologist Alfred Binet (1857–1911) who conducted a series of systematic investigations into suggestibility in children, which he summarised in his monograph *La*

Suggestibilité (1900). Binet demonstrated the impact of leading questions on children’s responding and was the first to distinguish between false answers based purely on social pressures and cognitive changes in children’s underlying memory. Although qualified as a lawyer, Binet was never permitted to testify in the French courts. By contrast, the Belgian psychologist, Julien Varendonck (1879–1924), testified on the findings of his own research on children’s suggestibility in a murder trial in 1911, where children’s evidence was critical to the prosecution case. In contrast to Binet’s nuanced approach, Varendonck’s research confounded social and cognitive suggestibility, but it contributed to the defendant being found not guilty (Davies, 2003). Germany, too, embraced the new *Psychologie der Aussage* (the psychology of verbal reports) led by William Stern (1871–1938), who started the first scientific journal devoted to testimony research (Lamiell, 2010). A close working relationship between psychology and the law exists in Germany: since 1955, the Supreme Court has required psychologists to

conduct a preliminary assessment of all child abuse complainants in contested cases, including an analysis of the content of their testimony – ‘statement validity assessment’ – and to give evidence on their findings to the court (Vrij, 2008).

In the United States, another of Wundt’s protégés, Hugo Münsterberg (1863–1916), wrote the first book published in English on psychology and law, entitled *On the Witness Stand* (Münsterberg, 1908). Apart from eyewitness accuracy, the book discussed the role of psychology in the detection of deception; false confessions; the impact of leading questions in court and the development of effective interviewing procedures for witnesses. The book was a popular success, but its bombastic tone alienated lawyers (dismissed as



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references

- Bartol, C.R. & Bartol, A.M. (1987). History of forensic psychology. In L.B. Weiner and A.K. Hess (Eds.) *Handbook of forensic psychology* (pp.3–21). New York: Wiley.
- Binet, A. (1900). *La suggestibilité*. Paris: Schleicher frères.
- Cattell, J.M. (1895). Measurements of the accuracy of recollection. *Science*, 2, 761–766.
- Davies, G.M. (2003). Psychology in the courtroom: In the footsteps of Varendonck. In L. Kools, G. Vervaeke, M. Vanderhallen & Goethals, J. (Eds.) *De waarheid en niets dan de waarheid* (pp.2–17). Leuven: die Keure.
- Elliott, R. (1993). Expert testimony about eyewitness identification: A critique. *Law and Human Behavior*, 17, 423–437.
- Gudjonsson, G.H. (2003). *The psychology of interrogations and confessions: A handbook*. Chichester: Wiley.
- Gudjonsson, G.H. (2008). Psychologists as expert witnesses: The 2007 BPS Survey. *Forensic Update*, 92, 23–29.
- Gudjonsson, G.H. (2010). Invited article. Psychological vulnerabilities during police interviews. Why are they important? *Legal and Criminological Psychology*, 15, 161–175.
- Gudjonsson, G.H. (2012). False confessions and correcting injustices. *New England Law Review*, 46, 689–709.
- Gudjonsson, G.H., & Haward, L.R.C. (1998). *Forensic psychology: A guide to practice*. London: Routledge
- Hale, M. (1980) *Human science and social order: Hugo Münsterberg and the origins of applied psychology*. Philadelphia: Temple University Press.
- Haward, L.R.C. (1965). Hearsay and psychological reports. *Bulletin of the British Psychological Society*, 18, 21–26.

'obdurate'). Münsterberg's own attempts to give expert testimony in the American courts were unsuccessful, and with his death much of the research interest in psychology and law in the USA died with him (Hale, 1980).

Interest only revived when cognitive psychology became the dominant paradigm in the 1970s, with its emphasis upon a greater engagement with 'real-world' issues. Research such as that conducted by Elizabeth Loftus and Robert Buckhout (1935–1990) highlighted again the vulnerabilities of witness testimony and this time, some US courts were prepared to listen (Loftus, 1986). Psychologists began to testify for the defence in high-profile cases that hinged on disputed identifications or witness testimony, though the degree to which it was legitimate to extrapolate from laboratory findings to the realities of criminal investigations remained controversial (Elliot, 1993; McCloskey & Eggeth, 1983).

In the 1990s the dispute between psychologists over the status of 'recovered memories' spilled over from the lecture theatre into the courtroom, leading to 'battles of experts'. In the Franklin murder trial in 1990, Loftus for the defence faced psychiatrist Lenore Terr for the prosecution. The prosecution's case was that Franklin's daughter had witnessed her father murdering a school friend nearly 30 years previously, but had only recently recovered the memory. Terr argued that such recovered memories were commonplace in therapeutic work, while Loftus argued that old memories become less, rather than more reliable over time and that there was no scientific evidence to support the concept of repressed memories. The jury found Franklin guilty, but the verdict was later reversed on appeal (MacLean, 1993).

For many years, the opportunities for British psychologists to testify as experts in court were constrained by the legal rule that only medically qualified persons could testify on matters to do with the mental functioning of witnesses or

defendants. In reality, the findings of clinical and educational psychologists were regularly incorporated into expert medical reports, but psychologists were not permitted to give evidence in their own right (Gudjonsson & Haward, 1998). A campaign to recognise the status of psychologists in law, led by Lionel R.C. Haward (1920–1998), was eventually successful, on the grounds that the exclusion of psychologists testifying about their own findings violated the hearsay and 'Best Evidence' rules (Haward, 1965). Haward went on to regularly testify in a range of high-profile cases, including that of the multiple murderer Donald Neilson (1976) and the Oz obscenity trials (1971).

In the Confait case in 1972 the English legal system had been shaken by a miscarriage of justice based on false confessions, another topic originally highlighted by Münsterberg. This case led to the setting up of the Royal Commission on Criminal Procedure and the introduction in 1986 of the Police and Criminal Evidence Act, which resulted in mandatory electronic recording of police interviews and the use of 'appropriate adults' for juveniles and mentally vulnerable suspects. Following further miscarriages of justice, notably the Guildford Four and the Birmingham Six, the Royal Commission on Criminal Justice was set up in 1991. A number of research projects were commissioned, including one investigating the psychological vulnerabilities of persons detained for police interviews (Gudjonsson, 2003). Expert psychological evidence relating to confession evidence was first accepted in the Court of Appeal in 1991, and since that time it has been accepted and influential in a number of other high-profile appeal cases, with the main reason for overturning the conviction being evidence of psychological vulnerabilities (Gudjonsson, 2010).

Expert psychological and psychiatric evidence is more readily admitted in the UK courts than the US courts, and the

focus in the UK is on fairness and reliability, rather than voluntariness and coercion (Gudjonsson, 2012). Importantly, a detailed analysis of real-life cases, including DNA exonerations, has furthered the scientific understanding of the key pathways into false confession and wrongful convictions and the kinds of remedies that are needed internationally (Gudjonsson, 2012). The remedies recommended include improved police interview training, mandatory electronic recording of all suspect interviews, and improved identification of psychological vulnerabilities and safeguards.

A survey among British psychologists (Gudjonsson, 2008) illustrated the wide variety of topics on which psychologists prepared reports for the criminal and civil courts, including personal injury, child custody disputes, fitness to plead and stand trial, disputed confessions, reliability of witness statements, and recommendations about disposal (including treatment). In civil cases, the great majority of cases were settled out of court, whereas in criminal cases, tribunals and family proceedings often required the psychologist to give oral evidence. The UK courts called upon a variety of different specialisms within psychology, including forensic, educational and occupational psychologists, but clinical psychologists formed the largest single group of expert witnesses.

In conclusion, expert testimony by psychologists in court has come a long way since the days of Schrenck-Notzing. However, many of the same issues that preoccupied the pioneers still persist. Tensions continue between lawyers and psychologists as to what is 'specialist knowledge' and what is 'common sense', for which no expert input is required. Recently, the English courts, unlike the USA, have reaffirmed their general opposition to the admission of expert testimony on eyewitness matters, on the grounds that the vagaries of memory are something familiar to all jurors (see *R v. Anderson* [2012] EWCA Crim 1785). It is up to the new generation of forensic researchers to produce more robust and reliable findings which demonstrates the value of their science to law and justice.

Lamiell, J.T. (2010). *William Stern (1871–1938): A brief introduction to his life and works*. Berlin: Pabst Science.

Loftus, E.F. (1986). Ten years in the life of an expert witness. *Law and Human Behavior*, 10, 241–263.

Loftus, E.F. (2005) Planting misinformation in the human mind. *Learning and Memory*, 12, 361–366.

MacLean, H.N. (1993). *Once upon a time: A true story of memory, murder, and the*

law. New York: HarperCollins.

McCloskey, M. & Eggeth, H.E. (1983). Eyewitness identification: What can a psychologist tell a jury? *American Psychologist*, 38, 550–563.

Münsterberg, H. (1908). *On the witness stand*. New York: Doubleday, Page & Company.

Vrij, A. (2008). *Detecting lies and deceit: Pitfalls and opportunities*. Chichester: Wiley.