

Experts on Eyewitness Identification: I Just Don't See It

LEE STUESSER *

I accept the inherent frailties of eyewitness identification and, at the same time, the persuasive impact of such testimony.¹ I accept that mistaken eyewitness identifications have contributed to wrongful convictions. I also accept that there exists an established legitimate body of studies on memory and the process of eyewitness identification; in other words, this is not junk science. What I do not accept is the need for such expert evidence. In my view, admitting this type of expert evidence, with its associated costs, is not necessary to ensure a fair trial. Simply put, we ought to leave the educating of the jury on eyewitness identification to the trial process and not to the experts. To be sure there may be exceptional cases where expert evidence may well assist, but they would be the rare exception.

The starting point for the admissibility of any evidence is relevancy, and this paper begins by examining the relevancy of expert testimony on eyewitness identification. Relevancy—minimum probative value—however is not enough; expert evidence must be worth hearing. A “cost-benefit” analysis is mandated, and I will weigh the probative value of such expert evidence against its potential prejudicial impact. Finally, expert evidence must be necessary. It is my position that expert evidence on eyewitness identification is not necessary and that the traditional trial safeguards of cross-examination, counsel submissions and jury instructions adequately inform juries as to the problems with eyewitness identification. What I do propose is that the expert studies on memory and eyewitness identification be used to improve our identification gathering practices—outside of the courtroom.

I. WHAT DO THE EXPERTS HAVE TO OFFER?

A fundamental prerequisite to the admissibility of any evidence is that it must be relevant. With respect to expert testimony on eyewitness identification the

* Lee Stuesser, Professor, Faculty of Law, University of Manitoba.

¹ See e.g. *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.).

evidence is being introduced essentially to assist the jury in properly weighing the testimony of eyewitnesses. In the words of one expert:

Well, the understanding of jurors, and how they perceive is what psychologists spend their lives doing. We hope to be able to assist the judge or the jury on the various levels and factors of what would lead to a good or a poor identification. It is not my job to decide whether or not that is the answer. All I can do is assist the trier in understanding, "Here are the reasons why it could be a good identification or a poor one."²

Note that the expert evidence is not going directly to a fact in issue, rather it is merely an interpretative aid to assist the triers of fact in assessing the accuracy of the eyewitness evidence.

*R. v. Sheppard*³ provides a useful starting point in terms of the typical information provided by such experts. In this case the accused was charged with trafficking in cocaine. The only issue was identity. A police officer, working undercover, had some dealings with a black man and purchased cocaine from him on two occasions. Two months later, the officer picked the accused's photograph out of a photo pack prepared by another officer. The accused sought to call a psychologist, who was an expert in the field of eyewitness identification. A full day *voir dire* was held to determine whether the expert would be allowed to testify. The expert's testimony in issue would include the following:

1. There are three phases of memory: the encoding phase, the storage phase and the retrieval phase.
2. Generally speaking, performance as it relates to memory deteriorates as the retention interval (the period of time that elapses between the time observation occurs and the time that the memory is tested) lengthens, but that the rate at which memory deteriorates slows down with the passage of time.
3. People are better able to identify people of their own race.
4. "Unconscious cuing" may occur where the person running the lineup knows that the suspect is in the lineup and unconsciously gives a cue to the person making the identification.
5. Confidence is not a good predictor of accuracy.
6. "Unconscious transfer" may occur. This is where confusion as between two different people arises when seen in different circumstances.
7. "Encoding activity", that is, a process that makes it more likely that memory will be accurate, assists in the identification process. Notes taken by a witness are one form of encoding activity.

² *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 at 391 (Ont. C.A.), leave to appeal to S.C.C. refused, 121 C.C.C. (3d) vi [*McIntosh*] (quoting from the expert's testimony).

³ *R. v. Sheppard* (2002), 164 C.C.C. (3d) 141 (Man. Q.B.) [*Sheppard*].

8. Changes in appearance of the subject will lower the performance of the viewer.
9. The probability of an accurate identification goes up with the increase in the number of opportunities the witness has to view the subject.
10. "Expectation" is another variable. If a viewer of a photo pack is not told that the suspect may or may not be included in the photos, the chance of someone depicted in the photos being picked by the viewer is higher.

Other factors include "detail salience", which is the fact that eyewitnesses tend to focus on unusual characteristics of people they observe.⁴ Experts may also testify as to the desirability of sequential photo lineups, where the witness is shown photos one at a time, as opposed to a simultaneous showing, where the witness is asked to pick from the group of photos shown all at once. The research shows that with simultaneous lineups, witnesses make "relative judgments" whereby the person who most closely resembles the perpetrator is selected; this increases the number of false-positive identifications.⁵

I suggest that much of what is provided by the experts is intuitive. We know it. All the expert is doing is confirming what reasonable people understand. The expert is not testifying to matters that are outside the normal experience of the trier of fact, but merely reminding the jury of the normal experience.⁶ Look at the evidence offered in *Sheppard* above. I suggest that there really is nothing there that reasonable people did not already know. They may not know the jargon, but they understand the concepts. The relevancy of the expert evidence increases where the expert informs as to matters that may be little known or counter-intuitive. For example, it is not well-known that accuracy increases when a witness is shown a photo array sequentially—one at a time—rather than being shown a group of photographs simultaneously.

In sum, the expert can identify, label and explain various influences on eyewitness identification to the trier of fact, the relevance being that with this information the trier of fact will be in a better position to accurately assess the eyewitness testimony and give it the proper weight. It is an educative aid. The amount of educating will necessarily vary with the facts and issues in each case. Let us accept this relevancy.

⁴ See *United States v. Smithers*, 212 F.3d 306 at 310 (6th Cir. 2000) [*Smithers*].

⁵ See e.g. Roderick Lindsay and Gary Wells, "Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentation" (1985) 70 *J. Applied Psychology* 556; Avraham Levi and Roderick Lindsay, "Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations" (2001) 7 *Psych. Pub. Pol. and L.* 776.

⁶ See *McIntosh*, *supra* note 2.

II. WHAT ARE THE COSTS?

R. v. Mohan is the leading case on the admissibility of expert evidence in Canada; in that decision, Justice Sopinka spoke of a “cost-benefit” analysis. In other words, it is not enough that the expert evidence is simply relevant. The court must go on to weigh the benefits of the evidence against its potential costs. Justice Sopinka explained:

Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.⁷

There are certain “fixed costs” to the receiving of any expert evidence. There is court time. There is expense. There is increased preparation time for both defence and Crown counsel. In addition, Justice Sopinka identified further special concerns:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.⁸

This is a valid concern especially for experts on eyewitness identification, because there will be a natural tendency for the jury to jump from the general to the specific, reasoning as follows:

- A) The expert has told us that in general there are a number of factors that make eyewitness identification unreliable;
- B) Some of those factors are present in this case;
- C) Therefore, the eyewitness testimony presented is not reliable.

For example, in *Sheppard* the trial judge asked the expert if the conclusion to be drawn from his evidence is that eyewitness identification evidence is manifestly unreliable. The expert replied, “Yes.”⁹ Case closed.

There may well be a tendency, to use an Alberta analogy, “to slaughter the whole herd as the only workable precaution.”¹⁰ Our experience is that notwith-

⁷ *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 at 411 (S.C.C.).

⁸ *Ibid.*

⁹ *Sheppard*, *supra* note 3 at para. 26.

¹⁰ *R. v. Zurovski* (2003), 44 M.V.R. (4th) 39 (Alta C.A.), McClung J.A., rev'd (2004), 10 M.V.R. (5th) 1 (S.C.C.).

standing the frailties of eyewitness testimony it is indispensable to our trial process and is often a reliable and accurate source. It is tempting to say, "What is the harm in admitting such evidence?" I accept that with respect to the defence calling evidence the cost-benefit analysis will be undertaken less rigorously than for prosecution evidence. Nevertheless, there is the countervailing prejudicial cost to the trial process, and in many situations where the expert is only offering general reminders about the common frailties of eyewitness identification—one must wonder whether the benefit is worth the cost.

It is said that a proper jury instruction will offset the concern that the jury will be unduly influenced by the eyewitness expert. Is this not ironic? We trust the judge to put the expert testimony in its proper context, but we do not at the same time have faith that the judge will properly instruct and educate the jury on eyewitness testimony. This leads us to the issue of necessity.

III. IS THE EXPERT EVIDENCE NECESSARY?

The call for experts runs counter to the prevailing judicial mood, which is to look more critically at the use and misuse of experts. The expert's power to mislead really sparked the call for judges to become the "gatekeepers of science". In the United States, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*,¹¹ and, in Canada, the Supreme Court's decision in *Mohan*, lead the way towards increased scrutiny of expert testimony.

The expert testimony on eyewitness identification and memory may be interesting, but I am not certain that it is necessary. In the Sophonow Inquiry Commissioner Cory recommended that judges favourably consider and readily admit properly qualified expert evidence pertaining to eyewitness identification. In his opinion, "The testimony of an expert in this field would be helpful to the triers of fact and assist in providing a fair trial."¹² With respect, this threshold of admissibility is too low. The admissibility of expert testimony requires that it be necessary. "Mere relevance" or "helpfulness" is not enough.¹³

The "necessity" requirement is intended both to prevent superfluous or redundant expert evidence being presented, and to ensure that the kinds of problems expert evidence can present for courts and triers of fact are not created needlessly. In *R. v. D.(D.)*, the Supreme Court of Canada adopted the following position:

¹¹ *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993).

¹² *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) (Commissioner: The Honourable Peter deCarteret Cory), *Eyewitness Identification Recommendations*, online: Manitoba Justice <<http://www.gov.mb.ca/justice/sophonow>>.

¹³ *R. v. D.(D.)* (2000), 148 C.C.C. (3d) 41 at para. 46 (S.C.C.) [*D.(D.)*].

[The *Mohan* test] exists in appreciation of the distracting and time consuming thing that expert testimony can become. It reflects the realization that simple humility and the desire to do what is right can tempt triers of fact to defer to what the expert says. It even addresses the fact that with expert testimony, lawyers may be hard-pressed to perform effectively their function of probing and testing and challenging evidence because its subject matter will often pull them beyond their competence, let alone their expertise. This leaves the trier of fact without sufficient information to assess its reliability adequately, increasing the risk that the expert opinion will simply be attorned to.¹⁴

The Court then went on to describe the necessity test:

When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert be helpful before we will be prepared to run these risks. That sets too low a standard. It must be necessary.¹⁵

The Ontario Court of Appeal, in *R. v. McIntosh*, refused to allow an expert to testify on the frailties of eyewitness identification.¹⁶ The basic tenor of this decision is found in Justice Finlayson's view that "courts are overly eager to abdicate their fact-finding responsibilities to 'experts' in the field of the behavioural sciences."¹⁷ More recently, this same view was reiterated in a *Report on the Prevention of Miscarriages of Justice* prepared by a working group of the federal, provincial and territorial ministers of justice. The Report concluded that such expert evidence "is redundant and usurps the function and role of the trier of fact. This is not information that is outside the regular knowledge of the jury and has the potential to distort the fact-finding process."¹⁸

In *Sheppard* the expert evidence also was not admitted. Ultimately, Associate Chief Justice Oliphant excluded the expert testimony because the doctor "did not provide me with information that was outside either my experience or knowledge as a trial judge." He alluded to the judicial education programs on eyewitness identification that he had received. Accordingly, he then went on to qualify his ruling by saying, "I want to make it clear that in my mind, at least, the issue as to the admissibility of this type of evidence remains open where the

¹⁴ *Ibid.* at para. 57.

¹⁵ *Ibid.*

¹⁶ *McIntosh*, *supra* note 2.

¹⁷ *Ibid.* at para. 14.

¹⁸ FTP Heads of Prosecutions Committee, *Report of the Working Group on the Prevention of Miscarriages of Justice* (2005), Eyewitness Identification and Testimony, online: Justice Canada <<http://canada.justice.gc.ca/en/dept/pub/hop>>.

trial of the accused is before a judge and jury.”¹⁹ With respect, I suggest that reasonable jurors also know of these things.

This is not to say that expert testimony on the frailties of eyewitness identification should never be allowed. Admissibility is to be determined on a case-by-case basis. For example, in *R. v. Sophonow (No. 2)* the Court of Appeal may well have allowed an expert on identification to testify as to “unconscious transference” where in that case a number of witnesses spoke with the same police artist in preparing a composite drawing of the murderer.²⁰

The fact that a trial judge can caution a jury about many of the frailties of eyewitness identification further speaks to why expert testimony on the point is unnecessary. Our judges are to provide detailed jury instructions on the weighing and dangers of eyewitness identification. In many instances a jury instruction is to be preferred. Justice Major observed in *R. v. D. (D.)*:

A jury instruction, in preference to expert opinion, where practicable, has advantages. It saves time and expense. But of greater importance, it is given by an impartial judicial officer, and any risk of superfluous or prejudicial content is eliminated.²¹

There is a difference between assisting jurors with information that is beyond their normal experience, or counter-intuitive to their experience, for which they *need* assistance and merely reminding jurors of matters within their normal experience. “Reminding” is helpful, but not necessary. Judges can remind just as well as experts. The danger is that the “gate” is then left too open for expert testimony.²²

IV. ARE OUR TRIAL SAFEGUARDS ENOUGH?

Fundamentally I believe that our existing trial safeguards are sufficient to caution jurors about eyewitness identification. Call me naive, but I believe that effective cross-examination, strong submissions and thorough jury instructions are the best means to prevent wrongful convictions.

I concede that studies in the United States say otherwise. For example, the Innocence Project in the United States, after reviewing 62 cases of wrongful conviction, found that mistaken eyewitnesses were a factor in 52, or 84 percent, of these convictions.²³ It seems apparent that the traditional trial safeguards are

¹⁹ *Sheppard*, *supra* note 3 at para. 48.

²⁰ *R. v. Sophonow (No. 2)* (1986), 25 C.C.C. (3d) 415 (Man. C.A.).

²¹ *D. (D.)*, *supra* note 13 at para. 67.

²² See the observations of Professor Mark Brodin, “Behavioral Science Evidence In The Age Of *Daubert*: Reflections Of A Skeptic” (2005) 73 U. Cin. L. Rev. 867.

²³ Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence* (Random House, 2000) at 246.

not good enough in the United States, and the attitude of the American courts to such evidence has gone from outright hostility to growing but reluctant acceptance.²⁴ In many jurisdictions, the matter is left to the discretion of the trial judge only to be overturned if an abuse of discretion is found.²⁵ Implicit in this approach is that trial judges may exclude such evidence in their discretion and that seems to be what happens in most cases.²⁶ I am not convinced, however, that the American trial experience is shared in Canada and that we need to follow the American example.

I do not believe that mistaken eyewitness identifications are as prevalent a cause of wrongful convictions in Canada as they are in the United States. When we look to the high profile Canadian cases of wrongful conviction, problems of faulty science, police tunnel vision and prosecutorial non-disclosure seem to be the more pervasive causes.²⁷ I do not for a moment suggest that Canadians are better able to see than their American counterparts, but I do suggest that there are important systemic differences between our trial processes, which raise questions as to the applicability of American studies.

First, the Innocent Project also found that of the 62 cases examined, in 17 or 27 percent the wrongfully convicted had "subpar or outright incompetent" counsel.²⁸ The authors of *Actual Innocence* devote an entire chapter to "Sleeping Lawyers". Good lawyering makes a difference. Good lawyers are able to cross-examine effectively on any of the frailties of eyewitness identification. They then raise these frailties in their submissions and see that proper jury instructions are given. Bad lawyers cannot or do not do these things. When one looks to our high profile wrongful conviction cases, such as Milgaard, Sophonow and Morin, one sees that these accused were represented by some of the best defence counsel in their respective provinces. Bad lawyering, therefore, is not as significant a factor in Canada.

²⁴ For a review of the admissibility of expert testimony on eyewitness identification see e.g. Michael Barnett, "Casenote: The Admissibility Determination of Expert Testimony on Eyewitness Identification: *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000)" (2000) 70 U. Cin. L. Rev. 751; Scott Woller, "Note: Rethinking the Role of Expert Testimony Regarding The Reliability of Eyewitness Identifications in New York" (2003/2004) 48 N.Y.L. Sch. L. Rev. 323.

²⁵ For a further discussion of discretion and abuse of discretion see *Smithers*, *supra* note 4.

²⁶ See *People v. Lee*, 96 N.Y.2d 157 (2001), and a note written by Heather Sonnenberg, "The Admissibility of Expert Identification Testimony In New York Courts According to *People v. Lee*" (2002) 12 Temp. Pol. & Civ. Rts. L. Rev. 231.

²⁷ Bruce MacFarlane in his detailed paper on wrongful convictions also noted that mistaken eyewitness identifications does not appear to be as major a cause in Australia. See Bruce MacFarlane, "Convicting the Innocent" in this issue of the Man. L.J. at 415.

²⁸ See Dwyer, Neufeld & Scheck, *supra* note 23 at 187.

The message here is clear, a justice system, in order to avoid miscarriages of justice, must ensure that all of its citizens have access to a strong defence bar. This costs money. It is not politically attractive, but it is the right thing to do. As Canadians, let us not be smug. We too have seen cutbacks to legal aid.

A second major difference between Canadian and American jury trials involves instructions to the jury. American judges instruct juries on the law. They make little reference to the facts. As a result the typical jury instruction on eyewitness identification speaks of general concerns that may be applicable on the evidence. Canadian judges instruct the jury on the applicable law and go further to apply the law to the evidence. The judges carefully review the evidence of the eyewitnesses. A perfect example of such a charge to the jury is found in *R. v. McIntosh*. The charge in that case was extremely detailed and the concerns about eyewitness identification were applied to the specific circumstances as found in that case.²⁹ In my view these specific instructions are much clearer and stronger for the jury. In the *Model Jury Instructions in Criminal Matters* prepared by the Canadian Judicial Council, a judge proceeds as follows:

1. Identification is an important issue in this case. The case against [Name of Accused] depends entirely, or to a large extent, on eyewitness testimony.
2. You must be very careful about relying on eyewitness testimony to find NOA guilty of any criminal offence. There have been cases where persons have been wrongfully convicted because eyewitnesses made mistakes. It is quite possible for an honest witness to make a mistake in identification. Even a number of witnesses can be honestly mistaken about identification.
3. You may wish to consider several factors that relate specifically to the eyewitness and his/her identification of NOA as the person who committed the offence charged:

[List of various factors.]

Review relevant evidence about circumstances.

Review description provided by witness.

*Review relevant evidence about circumstances of identification.*³⁰

This is a far more detailed and “evidence specific” examination than an American judge would ever undertake.³¹

²⁹ The jury instruction can be found at the Ontario Criminal Lawyers Association database CLAN in quicklaw. See Vol. 18, no. 3, June 1997 for commentary on the *McIntosh* case, the evidence presented at the trial, the judge’s ruling, instruction to the jury, excerpts from the defence and Crown factums and the decision of the Ontario Court of Appeal.

³⁰ Canadian Judicial Council, *Model Jury Instructions in Criminal Matters*, see section 11.24 “Eyewitness Identification Evidence”, online: CJC <<http://www.cjc-ccm.gc.ca>>. See also Gerry Ferguson and John Bouck, *Canadian Criminal Jury Instructions (CRIMJI)*, section 4.55.

My point is a simple one, we have stronger safeguards in our trial process than the United States, and so we need to be cautious before we accept that expert testimony is needed because traditional trial safeguards are inadequate.

V. WHAT TO DO WITH THE EXPERT INFORMATION ON EYEWITNESS IDENTIFICATION?

As I mentioned at the outset, there is much valuable psychological research on memory and the process of eyewitness identification. We would be remiss if we do not use and apply this information. For example, Professor Gary Wells has clarified that there exist “estimator variables” and “system variables” at work in determining the accuracy of eyewitness identifications.³² Estimator variables apply to the circumstances surrounding the initial observation. These factors include the eyewitness’s eyesight, opportunity to observe, and lighting. These things the legal system cannot control. On the other hand, system variables can be controlled. They apply to the identification process in which the identification is elicited from the witness, for example, police interviews with the witness and the creation and presentation of a lineup. Professor Wells and other psychologists provide useful studies to help the legal system fashion “best practices” for eliciting eyewitness identifications by the police.

In 1999 the United States Department of Justice prepared a guide on eyewitness identification.³³ It includes recommendations on the conduct of eyewitness interviews and lineups.³⁴ Similarly, our ministers of justice, in their *Report on Prevention of Miscarriages of Justice*, also make a number of useful recommendations on “best practices” that should be adopted by police investigators.

The problem that I see with these “exhortations” is that they do not have any teeth behind them. They are difficult for cross-examiners to use in any meaningful way in court. For example, the Canadian report notes that of ten police agencies contacted, four used sequential photo spreads, four are studying the practice, and presumably the other two continue to use simultaneous view-

³¹ For an example of an American jury instruction see Judge Ito’s Jury Instruction in the O.J. Simpson case. Online: Lectric Law Library <<http://www.lectlaw.com>>.

³² See e.g. Gary Wells, “Applied Eyewitness Testimony Research: System Variables and Estimator Variables” (1978) 36 J. Personality and Social Psychology 1546.

³³ United States Department of Justice, “Eyewitness Evidence: A Guide for Law Enforcement”, online: NCJRS <<http://www.ncjrs.org/pdffiles1/nij/178240.pdf>>. This guide was prepared through the National Institute of Justice and involved a multidisciplinary group of experts from the United States and Canada.

³⁴ For a critique of the recommendations, see Avraham Levi and Rod C.L. Lindsay, “Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations” (2001) 7 Psych. Pub. Pol. and L. 776.

ing. Where is the real commitment to “best practices”? The United States Guide actually contains the following caution:

This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

Opinions or points of view expressed in this document represent a consensus of the authors and do not necessarily reflect the official position of the U.S. Department of Justice.

Great! What good is it?

In the United Kingdom the government has legislated Codes of Practice under the *Police and Criminal Evidence Act 1984 (PACE)*. The Codes include detailed Annex protocols outlining the accepted practices for obtaining various types of evidence. Annex A deals with video identification and Annex E deals with showing photographs.³⁵ Under section 67(11) of *PACE* the Codes are admissible in evidence. In other words, wayward police officers who fail to follow correct procedures will be confronted with the legislation for all to see. More significantly, under section 78(1) of *PACE* a judge has the discretion to exclude such evidence in the interests of fairness. The British legislation goes a long way to ensure that the police follow correct procedures.

Our federal government could well introduce a “Code of Practice” in the Criminal Code. This would help to ensure a fairer identification process across the country. Such a Code could and should incorporate the useful psychological studies on how eyewitness identifications are inappropriately influenced. This is where the “science” on eyewitness identification has a place and not in the courtrooms of the land.

³⁵ An excellent summary of this legislation is found in Christopher Allen, *Practical Guide to Evidence*, 3rd ed. (London: Cavendish, 2004) at 192–98.

