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Ontario Justice Education Network

IN BRIEF

STUDENT HANDOUT

EYEWITNESS EVIDENCE

INTRODUCTION TO EYEWITNESS IDENTIFICATION

There are two sides in a criminal trial: the defence and the prosecution. The role of the defence lawyer is to defend the person who has been accused of a crime. In Canada, we call the prosecution the "Crown". In every criminal case, the Crown lawyer must prove that the accused committed the crime charged. One way in which the Crown might do this is with a witness who was at the scene of the crime. Section 6.1 of the *Canada Evidence Act* allows a witness to give eyewitness evidence:

> *For greater certainty, a witness may give evidence as to the identity of an accused whom the witness is able to identify visually or in any other sensory manner.*

While eyewitness testimony can serve as compelling evidence in a criminal trial, social science research has proven that eyewitness identification is often unreliable because it is a test of the witness' memory. Eyewitness error can also occur because of unreliable procedures by which eyewitness testimony is gathered. Eyewitness testimony and identification can, however, be reliable evidence if handled properly.

VARIABLES AFFECTING EYEWITNESS TESTIMONY

A witness' ability to provide eyewitness testimony depends on their ability to perceive, encode and retrieve information. The human brain does not operate like a video recorder. Perception and memory are processes which are affected by a person's abilities, background, environment, attitudes, motives and beliefs. Over time, the representation of an event in memory changes. Some details are added, altered or deleted unconsciously to make the original memory match with new information about an event. As such, eyewitness identification is subject to a number of inherent frailties, both physiological and psychological.

In a decision from the Court of Appeal for Ontario called *R v Miaponoose*[1], Justice Charron described the inherent frailties of eyewitness identification evidence. The variables that affect eyewitness identification can be categorized according to those that concern the event and those that concern the witness.

[1] *R v Miaponoose (A)* (1996), 93 OAC 115

EVENT-RELATED VARIABLES

1. Perceptual Selectivity

Due to the limitations of the human brain, people can perceive and remember only a limited number of simultaneous stimuli in the environment. The number of the stimuli perceived that can be encoded in memory is even smaller. Therefore, we do not register everything around us.

2. Insignificance of the Events Observed

Witnesses are often placed at or near the scene of a crime at a time when they are not attaching importance to the event. As such, the witness is unprepared to pay attention to the important features of the event and the accused.

3. Shortness of the Period of Observation

The shortness of the period of observation reduces the number of features that a person can perceive and remember. The crime may be fast moving and the witness might have difficulty getting a good look at the accused.

4. Poor Observation Conditions

Factors that affect the attention process include distance, poor or rapidly changing lighting conditions, fast movements, the presence of a crowd and distracting noises. Witnesses may be limited in what they observed because it was dark, their view was blocked or the crime scene was far away.

WITNESS-RELATED VARIABLES

5. Stress

A human's ability to perceive and remember decreases significantly when the observer is in a fearful or anxiety-provoking situation, like a crime scene. People under stress pay more attention to their own well-being and safety than to non-essential details of their surroundings.

6. Physical Condition of the Observer

The human senses function less efficiently when the body has become fatigued or injured, when the person is advanced in age, or when the person is under the influence of alcohol or depressant, stimulant or hallucinogenic drugs.

7. Prior Experience

In order to compensate for the perceptual selectivity made necessary by the brain's limitations, people will form conclusions about what has been perceived based on their previous experiences. If witnesses do not observe the crime perfectly, they may unconsciously assume that what happened was like something they observed in the past or something they saw on television.

8. Personal Needs and Biases

Witnesses tend to see what they want to see and therefore their perceptions may be distorted.

9. Cross-Racial Identifications

Studies show that people have more difficulty identifying members of another race than of their own.

EYEWITNESS IDENTIFICATION PROCEDURES

The accuracy of eyewitness identification is also influenced by the way police conduct eyewitness identification. Two methods for eyewitness identification are photographs and line-ups.

Photographs

The police will show a witness a series of photographs and the witness will be asked whether any of the people in the photographs match the person they observed at the crime scene. The police may show the witness a group of photos, or may show the witness photos one at a time to avoid comparative analysis of the photos.

Line-ups

The police will place a suspect with a number of other persons in a line-up for the purpose of having a witness identify the suspect as the person the witness saw committing the crime. The proper practice is to ensure that the suspect is not markedly different from the other persons in the line-up with respect to both physical appearance and age. For example, if the witness remembered that the suspect was a teenage white male and there was only one teenage white male in the line-up, then the witness might assume this person was the suspect even if the witness was not sure this was the right person.

Physical line-ups of suspects are now rare. More commonly, witnesses take a look at a photo pack or a series of photographs. Counsel can examine the choice of photographs and the way in which the police presented them to the witness to ensure fairness.

Potential Problems

There are a number of problems that may arise with the procedure used to identify the accused. For example, it is highly improper for the police to suggest to the witness in any way as to who is the suspect in the photos or line-up. However, either intentionally or subconsciously, an investigator may give a witness subtle cues regarding who the "right" suspect is. For example, if a witness identifies a suspect who does not match the police theory, the police officer may ask the witness to check again to be certain – and the police can continue this process until the witness selects the individual who matches their theory. Another example relates to the construction of the photographs and line-ups. If the photographs and line-ups contain potential suspects that vary greatly in their characteristics, the witness is likely to choose the suspect who most closely matches the memory they have of the perpetrator's characteristics.

EYEWITNESS EVIDENCE IN A CRIMINAL TRIAL

The positive identification of an accused is an essential element of any offence and a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence is likely the most significant evidence of the prosecution.

In a criminal trial involving eyewitness identification evidence, both counsel and the trial judge must be alert to the well-recognized dangers in such evidence. Crown and defence counsel must take steps to ensure that the unreliability of eyewitness identification evidence is brought to the attention of the judge and/or jury. Specifically, the failure to follow proper identification procedures before the trial is a significant factor in assessing the weight of the identification evidence and what it can be used for. If the procedures are not properly followed, the judge may not allow the evidence to be admitted. The Crown lawyer has a special duty to ensure that all of the relevant circumstances concerning pre-trial identification are disclosed, and may have a duty to introduce the evidence in the appropriate case.

It is well-established that trial judges must instruct themselves and juries on the inherent problems with eyewitness identification evidence in a case. For example, where a case rests mainly on visual identification, there is a need for a careful and complete direction to the jury with respect to such evidence. Where the visual identification of the accused involves specific weaknesses, the trial judge must point out the weaknesses to the jury.

One of the primary dangers of relying on eyewitness identification evidence is the fact that witnesses do make honest mistakes. The trial judge and jury must remember that just because a witness says they are absolutely certain who committed a crime, does not mean that this witness is actually right. The judge and jury must evaluate the witness' testimony to ensure it is reliable. The judge should instruct the jury of the "dubious relationship" between the certainty of eyewitness identification and the accuracy of that identification.

EYEWITNESS MISIDENTIFICATION

There is no denying the powerful impact at trial of a witness for the prosecution stating with confidence and conviction that the accused was the person observed committing the crime. However, experience has shown that erroneous and mistaken identifications have and do occur, resulting in the wrongful convictions of the factually innocent. The most well-meaning, honest and genuine eyewitness can, and has been, wrong.

The Innocence Project in New York City reports that in the first 130 post-conviction exonerations based on new DNA evidence, 101 (78%) involved mistaken identification - by far the leading factor. The danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. If the means used to obtain evidence of identification involve any acts that might reasonably prejudice the accused, the resulting contamination will be virtually impossible to cleanse and the value of the evidence may be partially or wholly destroyed.

VARIABLES AFFECTING EYEWITNESS TESTIMONY

Identify the variables that may affect the eyewitness testimony in the following scenario. With reference to the handout *Introduction to Eyewitness Identification*, explain why these variables might affect the eyewitness testimony. Check whether the variable concerns the event or the witness.

Scenario 1 - It was New Years' Eve and Neha was hosting a party at her house. She and her friends had been drinking that evening. As the clock struck midnight, everyone raised their champagne glasses to ring in the New Year. At that time, Neha heard a loud noise outside. She raced out the door and saw a man lying injured on the road in front of her house. She saw a person running toward a parked car up the street and speed off in the vehicle. Neha does not remember what the car looked like but is sure the person who jumped into it was a woman because she saw the suspect's long hair tied up in a ponytail.

Variable and Explanation	Event	Witness

VARIABLES AFFECTING EYEWITNESS TESTIMONY

Identify the variables that may affect the eyewitness testimony in the following scenario. With reference to the handout *Introduction to Eyewitness Identification*, explain why these variables might affect the eyewitness testimony. Check whether the variable concerns the event or the witness.

Scenario 2 - Fred was swimming in the lake near his cottage. He heard voices far away speaking a foreign language. He looked up and saw three Chinese people in a boat with fishing rods. They were across the lake in a no-fishing zone. Fred knew that everyone on the lake was white, himself included, except for one Chinese family, the Wongs. Fred believed that Jack Wong, the father of the family, would never do this and that it must be the teenage son, Paul, and his friends. He shouted at the boat, "Paul, is that you?" Suddenly, the people in the boat started up the motor and looked like they were about to take off. Fred swam back to the dock to get his glasses to get a better look at the boat and the people. They were gone before he was able to get a second look. He is sure that it was Paul and his friends who were fishing illegally.

Variable and Explanation	Event	Witness

VARIABLES AFFECTING EYEWITNESS TESTIMONY

Identify the variables that may affect the eyewitness testimony in the following scenario. With reference to the handout *Introduction to Eyewitness Identification*, explain why these variables might affect the eyewitness testimony. Check whether the variable concerns the event or the witness.

Scenario 3 - Jacqueline and Renée are first year university students. They were at the library studying for their chemistry exam, which was the next day. They had been at the library for 10 hours and were stuck on a problem. They were disagreeing about how to solve it when one of their classmates, Joshua, asked them to watch his laptop computer while he went to the bathroom. They agreed and continued to work on the problem. When Joshua returned, the laptop was gone. Jacqueline did not understand how this happened because she said she and Renée were the only people in this part of the library. Renée disagreed. She said she saw the janitor in the room and was sure that he had stolen the laptop. Joshua said that when he was walking toward the bathroom, he saw a group of four other students leaving the library.

Variable and Explanation	Event	Witness

CASE STUDY: THOMAS SOPHONOW[1]

Facts

Barbara Stoppel was just 16 years old when she was strangled to death in her workplace, the Ideal Donut Shop in Winnipeg, Manitoba on December 23, 1981. Around the time of Barbara's death, Thomas Sophonow arrived in Winnipeg from his home in Vancouver to visit his two-year-old daughter. When he was not able to reach an agreement with his ex-wife, Mr. Sophonow left a gift for his daughter and took care of other errands, including having his car repaired, calling his mother and giving out stockings at a local hospital. A number of eyewitnesses had observed a man who looked something like Mr. Sophonow sitting in the donut shop and later locking the door and retreating toward the back of the store. These eyewitnesses incorrectly picked Mr. Sophonow out of photo and in-person line-ups. Police interviewed Mr. Sophonow twice; unfortunately, the officers did not record the interviews or take verbatim notes, making it difficult to determine exactly what happened. During his second interview, Mr. Sophonow was subjected to very aggressive and traumatizing interview techniques that would not be acceptable today, including a strip search and cavity search. This interrogation was so traumatizing that even Mr. Sophonow became convinced that he had murdered Barbara, despite the fact he could not possibly have done so.

The Crown's most important witness, John Doerksen, had observed the killer run away from the crime scene and throw something in the river. Police later retrieved a piece of twine that had fibres from Barbara's sweater embedded in it. The twine could have come from one of two companies, Powers Twines or Berkeley. Both companies examined the twine; Powers Twines concluded that it was theirs while Berkeley concluded that it was not. Importantly, Berkeley added a tracer element to all of their twine and a $100 test could have been performed to find out whether or not the twine contained this distinctive tracer. Inexplicably, this test was not carried out. Berkeley manufactured their twine near Winnipeg, whereas Powers Twines' plant was in Washington and easily accessible at various British Columbia construction sites. Since the police believed that the twine in question came from Powers Twines, and they knew that Mr. Sophonow was living in Vancouver, they concluded that Mr. Sophonow was the person who had used the twine to kill Barbara. We now know that a simple, inexpensive test could have revealed the truth that the twine was actually from Berkeley's Winnipeg plant.

[1] This summary has been adapted from a version produced by the Association in Defence of the Wrongly Convicted (AIDWYC), available here: http://www.aidwyc.org/cases/historical/thomas-sophonow/

Trials and Appeals

Mr. Sophonow was put on trial three times for a crime that he did not commit. His first trial began on October 18, 1982. There was no physical evidence besides the wrongly identified twine to connect Mr. Sophonow to the murder. At the end of the first trial, the jury could not reach a unanimous verdict and so a mistrial was declared.

Mr. Sophonow's second trial began on February 21, 1983 and he was convicted of Barbara's murder on March 17, 1983. He appealed the conviction to the Manitoba Court of Appeal, arguing that the trial judge had not presented his position to the jury in an adequate and fair manner. The Court of Appeal agreed that the trial judge had failed to fulfill his obligation to present the defence's theory of the case to the jury, fully and without bias. As a result, the Court of Appeal overturned Mr. Sophonow's conviction and ordered that a third trial be held instead.

Mr. Sophonow's third and final trial began on February 4, 1985 and again, the jury found him guilty. Mr. Sophonow appealed and argued that as in his second trial, the third trial judge had not presented his theory of the case to the jury in a full and fair manner. Again, the Manitoba Court of Appeal agreed and on December 12, 1985 ruled that Mr. Sophonow's third trial had been unfair as well. The Court concluded that since he had already gone through three trials and spent 45 months in custody, justice would be best served by acquitting Mr. Sophonow rather than subjecting him to another trial. On December 12, 1985, Mr. Sophonow was acquitted.

A Miscarriage of Justice

Thomas Sophonow devoted a number of subsequent years to securing an official exoneration. On June 8, 2000 the Winnipeg Police Service finally announced that Mr. Sophonow was not responsible for Barbara's murder. The Attorney General of Manitoba apologized to Mr. Sophonow and a Commission of Inquiry headed by retired Supreme Court of Canada (SCC) justice Peter Cory was formed to determine what had caused the wrongful conviction and how these problems could be prevented in future cases. The Sophonow Inquiry report was released on November 5, 2001 and it identified an incredible array of errors that led to Mr. Sophonow's wrongful conviction. The chief causes of this miscarriage of justice are set out below.

Causes of the Wrongful Conviction

1) Tunnel Vision

One cause of Mr. Sophonow's wrongful conviction was a phenomenon known as tunnel vision, which is the overly narrow focus on a particular investigation or prosecutorial theory. It is easy for police and prosecutors to fall into tunnel vision, particularly if they are under pressure to solve a case. The Inquiry into Mr. Sophonow's wrongful conviction determined that the police succumbed to tunnel vision at an early stage of the investigation into Barbara's murder, causing them to focus on Mr. Sophonow as the killer to the exclusion of all others, and fail to accept any evidence or explanation that was contrary to their theory.

2) Unreliable Eyewitness Evidence

In addition to the general frailties of eyewitness testimony, the police investigating Barbara's murder used problematic techniques in their attempt to elicit evidence from the witnesses. During the investigation, Mr. Doerksen underwent a session with a hypnotist during which he gave a somewhat different description of the murderer from the version that he had given previously. As the SCC observed in *R v Trochym*[2], hypnosis increases the chance of remembering things that never happened and is therefore a dangerous technique for enhancing memory that has no place in a criminal prosecution.

Moreover, when Mr. Doerksen first attended a line-up that included Mr. Sophonow, he did not identify anyone as the killer whom he had pursued. Two days later, however, Mr. Doerksen coincidentally saw Mr. Sophonow while they were both in the Public Safety Building. By that time, Mr. Doerksen had read a newspaper that contained Mr. Sophonow's picture. He came to believe that Mr. Sophonow actually was the person he had seen fleeing the donut shop, even though his appearance was essentially the same as it had been during the line-up. At the Inquiry, eyewitness evidence expert Dr. Elizabeth Loftus explained that as time passes, people not only forget information but also become more susceptible to forming false recollections as a result of new information that they learned after the event. In addition, Mr. Doerksen was not able to see well at night or in poor lighting conditions.

Two of the Crown's witnesses identified Mr. Sophonow after being shown a photo line-up in which his picture stood out dramatically from the others. As Justice Cory noted in the Inquiry report, "The differences in Thomas Sophonow's picture are such that it might just as well have carried a notation saying, 'here I am.'" Two of the witnesses who testified at trial that Mr. Sophonow was the killer had not been able to identify him during the live line-up that they observed. Both witnesses merely thought that he was the best match compared to the other people in the line-up. The line-up was further compromised when the officer conducting it informed the witness that he had picked the current suspect, thereby strengthening his confidence in his incorrect identification.

3) Jailhouse Informants

Three jailhouse informants falsely testified against Mr. Sophonow at trial, claiming that he had confessed to them in prison that he murdered Barbara. The first informant testified under duress, as two police officers had told him that if he did not testify voluntarily against Mr. Sophonow the Crown would expose him as a police informant and put his life in danger. The second informant was facing 26 counts of fraud and had the charges dropped after agreeing to testify against Mr. Sophonow. The third informant was a regular jailhouse informant, reducing his credibility.

The Sophonow Inquiry concluded that jailhouse informants should generally be prohibited from testifying in court since their

[2] *R v Trochym* [2007] 1 SCR 239

testimony is notoriously unreliable. Today, Crown Prosecutors are required to view jailhouse informers' purported evidence in a much more skeptical and vigilant light.

4) Lack of Disclosure

The Crown failed to disclose an astonishing array of information to the defence that could have prevented this miscarriage of justice. For example, Mr. Sophonow's lawyers never learned that the $100 test to determine the origin of the twine that was used to strangle Barbara had actually never been performed. Similarly, Mr. Sophonow's lawyers never received important information about the jailhouse informants and their motives for testifying that would have cast grave doubt on their reliability. They were also kept in the dark about various problems with the key eyewitness' evidence. The SCC made it clear in *R v Stinchcombe*[3] that the Crown must disclose any and all potentially relevant documents to the defence (except for a few types of privileged materials).

Wounds That Cannot Heal

Mr. Sophonow spent almost 4 years in some of the worst prisons in Canada for a crime that he did not commit. He now suffers from post-traumatic stress disorder and will likely continue to do so for the rest of his life. Just as Mr. Sophonow's mental state has been forever changed by this series of events, so too has his reputation. Mr. Sophonow experienced many difficulties at work and in his community, including having his house firebombed and threats made against his life. As Justice Cory noted in the Sophonow Inquiry, "to wrongfully convict someone of a crime, particularly that of murder, is to forever damage the reputation of that person." Mr. Sophonow received $2.3 million in compensation for the miscarriage of justice and the resulting trauma that he suffered; however this does little to compensate for the psychological scarring caused by a wrongful conviction.

[3] *R v Stinchcombe* [1991] 3 SCR 326

On Memory: Eyewitness Errors Costly

Shannon Kari, National Post

IN THIS FIVE-PART SERIES, THE NATIONAL POST EXPLORES THE MYSTERIES OF MEMORY, HOW IT WORKS AND HOW IT FAILS. THIS IS THE THIRD INSTALMENT, ON MEMORY AND THE LAW.

The 1982 police lineup in which Ivan Henry was restrained in a police headlock was so obviously unfair that it would appear amusing were it not for the fact it was part of the evidence used to convict him of a series of rapes in Vancouver. One victim testified that she was "pretty sure" that he was the person she remembered as her attacker.

He spent more than 26 years in prison before he was released on bail this year, following the release of information that pointed to another suspect as the actual perpetrator.

While his tainted lineup was an extreme, false identifications by well-meaning witnesses are not isolated occurrences. More than 75% of convictions in the United States later overturned through DNA testing were a result of faulty eyewitness identification, according to data compiled by The Innocence Project, at the Cardozo School of Law in New York.

Just last week, James Bain was freed after 35 years in prison in Florida, convicted of a rape that he did not commit. The conviction was based on a mistaken identification by the victim and Bain spent from age 19 to 54 in prison, until he was cleared by DNA evidence.

In Canada, one of the best known instances of eyewitness evidence leading to a wrongful conviction was the case of Thomas Sophonow, who spent four years in prison before he was released and later cleared. The Sophonow Inquiry conducted by Justice Peter Cory, included a number of recommendations in 2001 about how to conduct police lineups to reduce the chance of eyewitness error.

Gradually, police departments across Canada are implementing those recommendations and starting to embrace more than two decades of research about witnesses and the frailties of memory.

Widely accepted research shows that the memory of witnesses to a crime is never like a video camera and there are many ways the already faulty recollections can be further tainted. Suggestions by police, or simply a desire to be a good citizen, can lead to an identification of someone who looks like the suspect, rather than the actual perpetrator.

The use of hypnosis or recovered memory therapies, which not so long ago were widely used in court, have now largely been discredited, after research found that the suggestive

techniques were just as likely to create false recollections as to enhance a person's ability to remember a past event.

Memory is a "rough code" in someone's head of a past event, said John Turtle, a psychology professor at Ryerson University in Toronto, who frequently advises police on eyewitness identification issues. "There is no good research to say memory varies that much. Instead, it is situational. It depends on the circumstances. It is almost a crapshoot."

What psychologists like Prof. Turtle and his colleagues have attempted to do for the past several years is come up with techniques to reduce eyewitness error.

When assessing the accuracy of eyewitness testimony, it is important "to look for core details that do not seem to be changing," he said.

Presenting witnesses with mug shot photos sequentially instead of an array of six or 12, is now more common, to reduce the chance of a witness picking the person who looks most like the suspect they remember.

Police are also now more aware that people are better at picking out suspects of their own race, that people considered attractive or unattractive tend to be more memorable and that both very young children and the elderly are more prone to mistaken identification.

Without proper procedures, the potential damage to the criminal justice system is significant, said Rod Lindsay, a psychology professor at Queen's University in Kingston, and prominent researcher in this area.

There are on average about 8000 photo lineups conducted by police in Canada each year. If even one per cent resulted in false identifications, that would impact 80 criminal cases annually, he noted.

The confidence of a witness, rather than the accuracy of the identification, was found to have a greater impact on mock juries, in a 1988 study conducted by Prof. Lindsay and other researchers. The seminal study also suggested that the level of experience of the prosecutor and defence lawyer in a case did not counter the impact of a confident witness.

This tool in a prosecutor's arsenal may be why Prof. Lindsay said he has encountered more resistance from Crown attorneys than police when advocating for changes in the way eyewitness information is collected and how it is used in court. "I tell them, if you have other evidence, why introduce garbage evidence," he said.

Even eyewitness testimony from police officers is often no more detailed or, ultimately, reliable, than that of civilians.

"You are human first. Your brain does not change," said Prof. Turtle.

In the Boxing Day 2005 shootout in downtown Toronto that claimed the life of Jane Creba, an off-duty officer was only a few metres from the gunfight; neither the officer nor anyone else on the crowded shopping thoroughfare that day was able to positively identify any of the suspects.

Similarly, none of the 17 customers who were packed into the tiny Just Desserts restaurant in Toronto in 1994 when a customer was fatally shot were able to positively identify any of the three men who were tried for the crime.

In both cases, the stress of the incidents had a huge impact on the observations and memory of the witnesses.

"Stress is very complicated. It narrows attention. People will remember certain things very well," said Prof. Lindsay. Other things have much less clarity; a concept called "weapon focus," refers to the fact that witnesses often give more detailed descriptions of weapons than suspects when caught in the middle of a violent crime.

Despite the frailties of memory and eyewitness observations, Prof. Lindsay said it is still a valuable source of evidence in a lot of cases.

"Memory is fallible, so you can only reduce error, you can't eliminate it," he said.

In attempting to reduce these errors, the Vancouver Police Department is a world away from the days of the tainted lineup that helped convict Ivan Henry, and is now a leader in eyewitness identification procedures, said Deputy Chief Doug LePard.

Vancouver police have embraced the recommendations of the Sophonow Inquiry. As a result, sequential lineups, a script for the person conducting the lineup so there are no improper suggestions and having an officer who does not know the identity of the suspect, are all standard procedure. The memory of a witness, without corroborating evidence, will almost never be enough to charge someone with a crime, stressed Deputy Chief LePard.

Since the new practices were implemented in 2005, there seems to be fewer identifications overall by witnesses, according to the information the deputy chief is receiving from his detectives. "That is a price we pay. But we know the price in being wrong."

National Post