Social Science and Witness Reliability: Reliable Science Begets Reliable Evidence

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> "The days of *ipse dixit* are gone. Today psychological and psychiatric evidence must be based on good science[1]."

> "The years ahead will be difficult ones for experts whose opinions rest on shaky empirical foundations[2]."

These quotes reflect the care with which social scientists interested in psychology and law scrutinize judicial decisions that affect the admissibility of expert opinion evidence. In *R v. Mohan*[3] the Supreme Court outlines the principles for evaluating admissibility in Canadian courts. In the U. S. (where the above quotes originated), *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[4] and two subsequent U. S. Supreme Court decisions (*General Electric Co. v. Joiner*[5]; *Kumho Tire Co. v. Carmichael*[6]) declared that the admissibility of expert opinion evidence should depend on the scientific quality of the evidence. Judges were, in effect, being asked to evaluate the reliability of the principles and methods underlying the proffered evidence. Instead of relying on assumptions of "general acceptance", the courts now needed to determine for themselves the scientific validity of the opinion. Because of the wide range of topics and methods employed in

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[1] Dixon, J., & Dixon, K. (2003). Gender specific clinical syndromes and their admissibility under the Federal Rules of Evidence. American Journal of Trial Advocacy, 27, 1-30.

[2] Faigman, D., & Monahan, J. (2005). Psychological evidence at the dawn of the law's scientific age. Annual Review of Psychology, 56, 631-659.

[3] *R. v. Mohan* (1994), 2 S.C.R. 9.

[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

[5] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

[6] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

psychology, the implications of these decisions for psychological science are huge, as the above quotes indicate.

In *R. v. J-L. J.*[7], the Supreme Court upheld the rejection of psychiatric expert testimony dealing with offender profiling. The tendered testimony purported to describe a general offender profile not shared by the accused. In finding the expert testimony wanting, the court relied on *Mohan* but also explicitly referenced *Daubert* as an important authority and incorporated many of the *Daubert* and U. S. Federal Rules of Evidence criteria in its appraisal of the admissibility of the expert evidence. In the U. S. much attention has been paid to whether or not *Daubert* and its progeny have actually improved the quality of expert opinion evidence. Some commentators[8] perceive only modest gains, at best. Groscup et al.[9] (2002) reported "no change in the overall rate of admission for all types of expert evidence". With respect to psychological syndrome and profile evidence, the impact of the *Daubert* guidelines is reported to have been "insignificant"[10]. To our knowledge, there has been no comparable Canadian research on the impact of *Mohan* or *J-LJ* on admissibility rates, however there can be no doubt that improving the scientific rigor of expert opinion evidence is desirable. If nothing else, it obliges experts to think carefully about the empirical basis of their opinion.

In this paper we present some recent findings from social science research that have been specifically selected because of their applicability to issues of witness reliability. Research findings and case law pertaining to children's testimony, hearsay reliability, and police interrogations will be described. These specific areas have been chosen for three reasons: (1) the findings readily pass muster according to the basic threshold tests of scientific validity spelled out in *Mohan*[11], *Daubert*[12] and *J-LJ*[13]; (2) they are legally relevant to issues that go to the heart of the court's truth-seeking function; and (3) they are not common knowledge; indeed in some instances the findings are counterintuitive.

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[7] *R. v. J.-L. J.* [2000] 2 S.C.R. 600.

[8] Gold, A. (2005). Increasing the "Science" in Forensic Science: Daubert Done Right. Paper presented at: Unlocking Innocence: An International Conference on Avoiding Wrongful Conviction, October 20 - 22, Winnipeg, Manitoba.

[9] Groscup, J., Penrod, S., Studebaker, C., Huss, M., & O'Neil, K. (2002). The Effects Of Daubert On The Admissibility of Expert Testimony in State and Federal Criminal Cases. Psychology, Public Policy, and Law, 8, 339-372.

[10] Dahir, et al. (2005). Judicial application of Daubert to psychological syndrome and profile evidence. Psychology, Public Policy & Law, 11, 62-82.

[11] supra, note 3

[12] supra note 4.

[13] supra note 7.

Children, Memory & Suggestibility

Beliefs or suspicions about child abuse may be based entirely and exclusively on statements of wrongdoing provided by the child complainant. In a criminal proceeding, because corroboration is no longer required the child's statements may constitute the sole evidence before the court. Consequently, the conditions under which the allegations came to light and the means by which they were subsequently investigated become very important. Such knowledge is crucial because children are vulnerable to suggestion, manipulation, and coercion. There is a danger that a judge or jury could confuse sincerity with veracity when appraising a witness' reliability.

During the Martensville, Saskatchewan sexual abuse scandal, many family members and several police officers were charged with engaging in various acts of child abuse, including oral and anal sex, locking a naked child in a cage, and anal penetration with an axe handle. One child testified to seeing a boy's nipple cut off and eaten. All but one of over a hundred charges were eventually dismissed. The Saskatchewan Court of Appeal in *R. v. Sterling*[14] observed that:

> **…the use of coercive or highly suggestive interrogation techniques can create a serious and significant risk that the interrogation will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.**

Similar and even more dramatic incidents have occurred in California (the McMartin[15] case), New Jersey (the Kelly Michaels[16] case), and elsewhere. Recent systematic analyses[17] of the interview transcripts from the former two cases have demonstrated the highly suggestive nature of those interviews.

Controlled laboratory studies have produced abundant evidence of the effects of suggestions on children's false reports of various events that involved touching, including genital and anal touching. For example, researchers have led young children to produce

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[14] (1995) S. J. No. 612 (C.A.) at paragraph 277.

[15] Garven, S., Wood, J. M., Malpass, R. S., & Shaw, J. S. (1998). More than suggestion: The effect of interviewing techniques from the McMartin Preschool Case. Journal of Applied Psychology, 83, 347-359.

[16] Rosenthal, R. (1995). State of New Jersey v. Margaret Kelly Michaels: An overview. Psychology, Public Policy, and Law, 2, 246-271.

[17] Schreiber, N., et al. (in press). Suggestive interviewing in the McMartin Preschool and Kelly Michaels daycare abuse cases: A case study. Social Influence.

false reports of events that could be construed as abuse ("Did Mr. Science put something yucky in your mouth?")[18]; "fantastic" claims (e.g., being taken on a helicopter ride)[19]; and explicitly sexual contact (e.g., removing children's clothes or kissing their friends on the lips)[20]. In addition, both children and adults often suffer from what is known as *source amnesia*—an inability to distinguish information acquired at the time of an experience from information that may be added later. Sometimes they confuse information that they heard about (or imagined[21]) with information obtained from actual experience. Consequently, non-suggestive interviews utilizing open-ended prompts can nevertheless elicit inaccurate information when children have been previously exposed to misinformation[22]. Furthermore, inaccurate accounts arising from suggestive exchanges are indistinguishable from accurate reports. There is no foolproof means of distinguishing a "true" report from one created by the use of repetitive, leading, and suggestive questions, or one that may arise as a result of imagination inflation or confabulation.

Because these processes are largely unconscious, when a witness produces an inaccurate account, they aren't lying, they're simply mistaken. A witness' confidence in their recollections is a poor guide to their reliability. An inaccurate witness can be quite confident. Their account can be as detailed and emotional and convincing as that of an accurate witness. Consequently, concerns about deliberate deception are probably both moot and beside the point. Because of young children's relatively undeveloped understanding of deception, intent, and truth, their accounts can sometimes be both sincere ***and*** incorrect. The last decade of research has demonstrated that the reliability of young children's reports has more to do with the skills of the interviewer than any inherent memory limitations. Because of the risks of false allegations[23], it is important that interviews of young children be conducted as objectively and neutrally as possible.

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[18] See Poole, D. A., & Lindsay, D. S. (1995). Interviewing preschoolers: Effects of nonsuggestive techniques, parental coaching, and leading questions on reports of nonexperienced events. Journal of Experimental Child Psychology, 60, 129-154.

[19] See Garven, S., Wood, J. M., & Malpass, R. S. (2000). Children's mundane and fantastic allegations of wrongdoing: The effect of social reinforcement. Journal of Applied Psychology, 85, 38-49.

[20] See Lepore, S. J., & Sesco, B. (1994). Distorting children's reports and interpretations of events through suggestion. Journal of Applied Psychology, 79, 108-120.

[21] Garry, M., & Polaschek, D. L. (2000). Imagination and memory. Current Directions in Psychological Science, 9, 6-10; Ceci, S., Huffman, M. L.C., Smith, E., & Loftus, E. F. (1994). Repeatedly thinking about a non-event: Source misattributions among preschoolers. Consciousness and Cognition, 3, 388-407.

[22] Poole, D. A., & Lindsay, D. S. (2001). Interviewing preschoolers: Effects of nonsuggestive techniques, parental coaching, and leading questions on reports of nonexperienced events. Journal of Experimental Child Psychology, 60, 129-154.

[23] supra, note 14.

There is a substantial scholarly literature on how best to elicit testimony from young children. Unless interviews with children are conducted carefully and thoughtfully, the quality of the information obtained may be compromised. Although proper interviewing skills are not in widespread use[24], standards of good practice exist that spell out the do's and don'ts of a proper forensic interview and there is strong international consensus regarding the structure and sequence of the appropriate interview steps.[25] We will not review these procedures here, but wish to note some findings that bear on the importance of this protocol.

One of the important steps in the protocol consists of alerting the child to the serious nature of the interview, and obtaining a verbal agreement to tell the "truth" or to tell, "only what happened". Recent research[26] has revealed that when a child respondent promises to tell the truth prior to being asked about a minor transgression, he or she is significantly less likely to lie. Consequently, the omission of the truth/lie ceremony is a breach of the interview protocol that has demonstrated consequences on the reliability of what follows. This finding is potentially important in the context of child witnesses because of recent decisions[27] alluding to the "marginal significance" of a missing oath in the appraisal of threshold reliability. In both *Trieu* and *Lyttle*, the Ontario Court of Appeal relaxed the standards for the admissibility of out-of-court statements by relying on other indicia of reliability that compensated for the absence of the oath. For example, in *Trieu* an appropriate substitute was deemed to be evidence supporting an inference that the declarant appreciated the seriousness of the occasion and the importance of telling the truth, notwithstanding the absence of a formal oath. Such evidence was held sufficient to make up for that portion of the reliability compromised by the missing oath. Thus, along

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[24] Powell, M., Fisher, R., & Wright, R. (2005). Investigative interviewing. In N. Brewer & K. Williams (Eds.). Psychology & law: An empirical perspective. New York: Guilford.

[25] Bernet, W. et al. (1997). Practice parameters for the forensic evaluation of children and adolescents who may have been physically or sexually abused. Journal of the American Academy of Child and Adolescent Psychiatry, 36, 10, supplement; Bigelow, B. J. (2000). On the assessment of children in suspected child sexual abuse in light of Daubert and Frye: Limitations of profiles and interviews as scientifically grounded evidence. Journal of Forensic Sciences, 45(3): 573-581; Ceci, S., & Bruck, M. (1995). Jeopardy in the courtroom. Washington, DC: American Psychological Association; Home Office. (2002). Achieving best evidence in criminal proceedings: Guidance for vulnerable or intimidated witnesses, including children. London: Home Office Communication Directorate; Kuehnle, K. (1996). Assessing allegations of child sexual abuse. Sarasota, FL: Professional Resource Press; Lamb, M. E., Sternberg, K. J., & Esplin, P. W. (1998). Conducting investigative interviews of alleged sexual abuse victims. Child Abuse & Neglect, 22, 813-823; Poole, D., & Lamb, M. (1998). Investigative interviews of children. Washington, DC: American Psychological Association. Yuille, J. C., Hunter, R., Joffe, R., & Zaparniuk, J. (1993). Interviewing children in sexual abuse cases. In G. Goodman & G. Bottoms (Eds.). Child victims, child witnesses: Understanding and improving testimony. N.Y.: Guilford.

[26] Talwar, V., Lee, K., Bala, N, & Lindsay, R. C. (2002). Children's conceptual knowledge of lying and its relation to their actual behaviors: Implications for court competence examinations. Law and Human Behavior, 26, 395-415; Talwar, V., Lee, K., Bala, N., & Lindsay, R. (2004). Children's lie-telling to conceal a parent's transgression: Legal implications. Law & Human Behavior, 28, 411 – 435.

[27] *R. v Trieu*, 2005 195 CCC. (3d) 195 (On C.A.); *R v Lyttle*, 2005 CanLII 37971 (On C.A.).

with (1) a complete videotape of the declarant's original statement, and (2) the opportunity to cross examine the declarant at trial, threshold reliability could be established *sans oath*. Arguably, in light of the above-noted research findings this substitute should be applied only with great caution to the very different situation of child declarants. The reliability of the child's prior statement may be seriously compromised by the lack of any truth-affirming inquiry at the outset of the child's interview. Further, its reliability may not be salvageable through cross-examination in the courtroom because, as research has shown, the child may erroneously come to believe in the truth of the prior statement or have no real memory of its content.

Another study[28] investigated the beliefs of jurors and jury-eligible college students about various aspects of children's memory and reactions to interrogations. While there was a general overall appreciation that children are suggestible, there was considerable disagreement among respondents on many issues. For example, almost half the sample believed that 8 year-old children can remember events that they experienced during infancy – a belief belied by a substantial amount of research evidence. Almost 40% of the participants incorrectly believed that children are no more susceptible to leading and suggestive questions than are adults. Only 46% endorsed the statement that children may sometimes come to believe they were abused, when in fact they were not. Even when the majority of respondents held accurate beliefs, much of the time a sizeable minority did not. These data would appear to indicate a need for expert opinion evidence designed to correct juror misperceptions. Indeed such evidence was heavily relied upon in *Sterling* noted above[29] as well as in various other cases[30]. In cases where the declarant is not available for cross-examination, it becomes important to consider the inherent problems in the evidence. It will be easy for the judicial gatekeeper to exclude the evidence where there is an established motive to lie but other factors are less well-established in law. Expert evidence is most helpful in determining the declarant's state of mind in relation to the factors outlined above. Where the declarant is available for cross-examination a determination of threshold reliability will still include an assessment of

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[28] Quas, J., Thompson, W., & Clarke-Stewart, K. (2005). Do jurors "know" what isn't so about child witnesses? Law & Human Behavior, 29, 425-456.

[29] Supra note 14.

[30] See for example: *R v R(A)* [2003] O.J. No. 1320 (OCJ) @ paragraphs 30-39; *R. v. C.C.* [1998] O.J. No. 1722 (OCJ); R. v. P.M.[2000] O.J. No. 1622 (OSCJ), but see *R .v. T.C.* (2004) 72 O.R. (3d) 623 (Ont. C. A.) where after hearing the evidence on a voir dire and alluding to it throughout her assessment of the reliability of the statements, the trial judge found it unnecessary pursuant to *Mohan*.

improper influence. Once again, expert evidence is helpful to explain these factors to the judicial gatekeeper[31].

In *R. v. Khelawon*[32], the crown led expert psychiatric evidence at the threshold reliability voir dire to establish the reliability of the elderly declarants. Not only did Rosenberg, J. A. state that it was properly admitted at the voir dire, he also encouraged its use on the question of ultimate reliability. If reliable psychiatric evidence is of "great assistance" then there can be no distinction made against reliable social science evidence.

Hearsay

Canadian jurisprudence is well established in the area of children's' hearsay evidence. Their out-of-court statements may be crucial for successful prosecutions and will be admitted provided they are necessary and reliable[33]. Our focus here is on reliability. Recent psychological research has contributed to our understanding of the factors that influence hearsay's reliability. A study by Lamb and colleagues[34] illustrates why electronic record keeping is crucial for the determination of the reliability of children's accounts. Their study examined the ability of experienced interviewers to provide accurate accounts of interviews with children. In this study, the interviews were of a forensic nature, and the interviewers took verbatim notes while the interview was being conducted. The notes, if introduced as evidence, would be hearsay. How faithfully did the notes reflect what actually went on during the interviews? To answer this question, the notes were compared to transcripts obtained from the electronic recordings. There was an under reporting of both the details provided by the children and the interviewers' utterances. Errors in the notes that contradicted the audio recording were rare, however the interview structure was inaccurately represented. Details provided by the children were systematically misattributed to more open-ended rather than focused questions. In other words, answers to leading questions were recorded as if they were unprompted responses[35].

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[31] Rosenthal, R. (2002). Suggestibility, reliability, and the legal process. Developmental Review, 22, 334-369.

[32] *R. v. Khelawon* (2005), 194 C.C.C. (3d)161 (Ont. C.A.).

[33] *R v Khan*, [1990] 2 S.C.R.531.

[34] Lamb, M., Orbach, Y., Sternberg, K., Hershkowitz, I., & Horowitz, D. (2000). Accuracy of investigators' verbatim notes of their forensic interviews with alleged child abuse victims. Law and Human Behavior, 24(6), 699-708.

[35] Mistakes in witnesses' ostensibly verbatim recordings of prior statements of other people are not restricted to errors of recall of the structure of interviews. For example, Peter Calamai conducted a study of the accuracy of direct quotes used by journalists covering the Colin Thatcher trial in 1984. Many journalists attended the trial and published daily accounts of the court proceedings in their respective newspapers The various newspaper accounts were compared to the court transcript. What were supposed to have been direct quotations of witnesses, counsel, and judge differed from journalist to journalist, and the discrepancies often revealed major distortions of meaning. (see P. Calamai (1985). "Discrepancies in news quotes from the Colin Thatcher trial". In: N. Russell (Ed.).

Experience interviewing children, and knowledge of the ramifications of hearsay, do not seem to facilitate interviewers' memory. Warren and Woodall[36] found that experienced professionals, who were aware of the importance of accurate recall of interviews, had patterns of memory strengths and weaknesses similar to those in the above-mentioned study. In this study, interviewers questioned preschool children about previously experienced, non-forensic events. Verbal recall was tested immediately following the interview, after which interviewers wrote down an account of the interview in transcript form. Results showed that hearsay accounts were degraded. There was an under reporting of the events mentioned by the child, as well as an under reporting of the exact structure of the interview. Most significant was the systematic misrepresentation of the question style used to elicit information. Interviewers reported using more open-ended questions and fewer specific and leading questions than had actually occurred[37].

Another study [38] looked at the accuracy of mothers' memories of exchanges that they had with their 4-year-old children. The results showed that recall of the content was much better than recall of the form of the interview. Mothers were asked to interview their children about the activities of a play session that they had not attended. Approximately three days later, the mothers were asked to recall the details of their earlier interview. Reports were incomplete with respect to the content, and especially the structure of the interview, but the details that were recalled were accurate. Mothers were better able to recall the gist of the interview than the exact wording. They had difficulty recalling how information was elicited, whether statements were prompted or spontaneous, and whether utterances were spoken by themselves or by their child. Forewarning of the memory component of the study did not improve memory performance.

Overall, these studies show that hearsay statements, whether from memory or from notes, are likely to mask the extent of interviewer contamination. Suggestive questioning practices are under reported. Consequently, tainted information is likely to

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Trials and tribulations. Monograph #1, School of Journalism and Communication, University of Regina.)

[36] Warren, A. R., & Woodall, C. E. (1999). The reliability of hearsay testimony: How well do interviewers recall their interviews with children? Psychology, Public Policy, & Law, 5, 355-371.

[37] Included in the crown disclosures (but not part of the trial record) in *R v. C.C* (supra note 30) was a copy of the notes of a police officer who had monitored the videotaped interview of the child complainant. The transcript from the electronic record shows the interviewer asking the child: "When grandpa came into your bedroom, was he wearing his red pajamas?" The child replied "Yes." [The child had not previously stated that grandpa had, in fact, entered her bedroom.] In the notes of the officer monitoring the interview is the entry: "Child stated that grandpa snuck into her bedroom wearing his red pajamas."

[38] Bruck, M., Ceci, S., & Francoeur, E. (1999) The accuracy of mothers' memories of conversations with their preschool children. Journal of Experimental Psychology: Applied, 5, 89-106.

be presented as accurate. Hearsay witnesses tend to forget the extent to which their own questions contained the information which is subsequently attributed to the respondent. As noted by Kuehnle[39], when sexual abuse of a young child is alleged, one of the possibilities that must be considered is that "the child is not a victim of sexual abuse but has been *unintentionally* contaminated by a concerned or hypervigilant caretaker or authority figure" (p. 4). Not only is the hearsay testimony less reliable than the hearsay witness realizes, mock jurors tend to perceive adult hearsay witnesses to be more accurate and truthful than the children whose statements the hearsay witness is reporting[40]. These findings are troubling because the hearsay, by its very nature, cannot be more reliable than the child's initial statements.

Sometimes hearsay is tendered by way of children's out-of-court statements. For example, section 715.1 of the Criminal Code of Canada allows for the admission of a videotape of the acts complained of, provided that the child adopts the contents of the tape at the trial. Adoption consists of having the child confirm that he or she was being truthful at the time the videotape was made. There is no requirement, however, that the witness actually remember the alleged events, thereby obviating any prospect of meaningful cross examination. In the face of such evidence, reliability is nevertheless preserved, according to Cory, J. in *R v F. (C.C.)*[41] because the trier of fact can watch the video and observe the child's demeanour, personality, and intelligence. Whether this exercise is sufficient for the establishment of reliability is debatable[42]. One of the problems is that children's false reports (elicited by means of leading questions) appear credible to trained professionals. Studies[43] that have addressed this question had judges, lawyers, and mental health workers view videotaped portions of interviews with children, some of whom had yielded to suggestions, and some of whom had not. Participants could not reliably distinguish between false reports and accurate ones. Consequently, if the events attested to on the video have been cultivated through the use of prior

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[39] Kuehnle, K. (1996). Assessing allegations of child sexual abuse. Sarasota, FL: Professional Resource Press.

[40] Myers, J., et al. (1999). Jurors' perceptions of hearsay in child sexual abuse cases. Psychology, Public Policy & Law, 5, 388-419; Warren, A., et al. (2002). The believability of children and their interviewers' hearsay: When less is more. Journal of Applied Psychology, 87, 846-857; Buck, J., Warren, A., & Brigham, J. (2004). When does quality count?: Perceptions of hearsay testimony about child sexual abuse interviews. Law & Human Behavior, 28, 599-621.

[41] (1997) 120 C.C.C. (3d) 225.

[42] Moore, T. E., & Green, M. (2000). Truth and the Reliability of Children's Evidence: Problems with Section 715.1 of the Criminal Code. Criminal Reports, Vol. 30, Part 1, April, (5th) 148-160.

[43] Ceci, S., Crotteau-Huffman, M., Smith, E., & Loftus, E. (1994a). Repeatedly thinking about non-events. Consciousness & Cognition, 3, 388-407; Ceci, S., Loftus, E., Leichtman, M., & Bruck, M. (1994b). The role of source misattributions in the creation of false beliefs among preschoolers. International Journal of Clinical & Experimental Hypnosis, 62, 304-320.

suggestive exchanges with caretakers, investigators, or mental health workers, a credible (but inaccurate) account may be displayed on the video and there is no obvious means available to the court for distinguishing a confabulated account from an authentic one[44]. The adoption exercise also contains the peculiar feature whereby the child is, at times, assumed to be capable of recollecting having been truthful at the time of the videotaping (which might have been made 20 months prior to the trial) but incapable of recollecting the events about which she remembers having been truthful.

Police Interrogations and False Confessions

In 1989 five teenagers were found guilty of rape in the "Central Park Jogger" rape case. Their convictions were vacated in December 2002 when DNA evidence implicated a different culprit who had acted alone. The original convictions had been based on their videotaped confessions[45]. In 1998, two young boys (aged 7 and 8) in Chicago confessed to the murder and sexual assault of an 11 year-old. The boys had been interviewed individually without a parent or lawyer present. The charges were later dropped when DNA evidence linked the assault to an adult with a record of sexual offences[46]. That same year in San Diego, 14 year-old Michael Crowe confessed to the murder of his sister after 11 hours of questioning. The confession was later ruled inadmissible and another man was indicted through the use of DNA evidence[47]. These examples are not unique[48].

False Confessions and Social Science Research

While eyewitness misidentifications have been implicated as a common source of error when wrongful convictions occur, it is also clear that many DNA-exonerated innocent defendants had confessed prior to their trials. Over the last 10 years a substantial body of research[49] on the psychology of confession evidence has been

[44] although see *R. v. T.H.* [2005] O.J. No. 4588 (Ont. S.C.J.) where Trafford, J. excluded the statements based on these kinds of considerations.

[45] *New York v. Wise et al*., Affirmation in Response to Motion to Vacate Judgment of Conviction, Indictment No. 4762/89 (December 5, 2002).

[46] A. Kotlowitz, "The Unprotected", *The New Yorker*, 2/8/99, 42-53.

[47] S. A. Drizin & B. A. Colgan, "Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects", in G. Daniel Lassiter (Ed.), Interrogations, confessions, and entrapment, (pp. 127-162). (New York: Plenum, 2004).

[48] Drizin, S. A., & Leo, R. A. (2004). The problem of false confessions in the post-DNA world. North Carolina Law Review,82, 891–1007.

[49] Kassin, S., & Gudjonsson, G. (2004). The psychology of confession evidence: A review of the literature and issues. Psychological Science in the Public Interest, 5, 33 – 67.

produced. Recent laboratory studies have revealed the disturbing finding that, depending on how they are interrogated, actual innocence may put innocent people at risk [50].

Typically the *interrogation* process, which can be highly confrontational, is preceded by a neutral, information-gathering pre-interrogation *interview* whose purpose is to determine if the suspect is guilty or innocent. Inbau, Reid, Buckley, and Jayne (2001)—authors of *Criminal Interrogations and Confessions* (4th ed.)[51], advise the use of various verbal and nonverbal cues (e.g., gaze aversion, anxiety) as markers of deception. This initial judgment is a watershed event because if deceit is "detected", the suspect is assumed guilty and the subsequent interrogation is designed to extract a confession. Unfortunately there is no compelling evidence that police (or anybody else) can detect deception with a high degree of accuracy[52]. According to Kassin[53] such judgments are "confidently made but biased and frequently in error." Consequently, the confession-oriented interrogation is conducted with a non-trivial number of innocent persons.

One might suppose that the procedural safeguard of the right to silence (ss. 7 and 10 of the *Charter*, *Miranda* in the U.S.) would confer protection on innocent suspects. Regrettably, the security afforded by remaining silent is rarely invoked[54]. Moreover, many young people either do not understand their rights, or they do not know how to apply them[55], nor do adults with mental retardation[56]. Kassin and Norwick[57] studied people's explanations for waiving their *Miranda* rights. A large majority expressed confidence that their innocence would 'protect' them, reasoning that since they were innocent, nothing they could say would be self-incriminating.

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[50] Kassin, S. (2005). On the psychology of confessions: Does *Innocence* put innocents at risk? American Psychologist, 60, 215-228.

[51] Inbau, F. E., Reid, J. E., Buckley, J. P., & Jayne, B. C. (2001). Criminal interrogation and confessions (4th ed.). Gaithersberg, MD: Aspen.

[52] Granhag, P., & Vrij, A. (2005). Deception detection. In N. Brewer & K. Williams (Eds.). Psychology & law: An empirical perspective. New York: Guilford.

[53] supra note 50 @ page 217.

[54] Leo, R. A. (1996). Inside the interrogation room. The Journal of Criminal Law and Criminology, 86, 266–303.

[55] Grisso, T. (1998). Forensic evaluation of juveniles. Sarasota, FL: Professional Resource Press.

[56] Fulero, S. M., & Everington, C. (2004). Mental retardation, competency to waive *Miranda* rights, and false confessions. In G. D. Lassiter (Ed.). Interrogations, confessions, and entrapment (pp. 163–179). New York: Kluwer Academic; O'Connell, M., Garmoe, W., & Goldstein, N. (2005). *Miranda* comprehension in adults with mental retardation and the effects of feedback style on suggestibility. Law & Human Behavior, 29, 359-369. Moore, T. E., & Green, M. (2004). Fetal Alcohol Spectrum Disorder (FASD): A need for closer examination by the criminal justice system. Criminal Reports, 19 C.R. 6th, 99-108.

[57] Kassin, S. M., & Norwick, R. J. (2004). Why suspects waive their *Miranda* rights: The power of innocence. Law and Human Behavior, 28, 211–221.

The so-called *Reid* technique[58] is the most influential of the various police interrogation procedures that are available. It consists of a structured nine-step process comprised of *confrontation* and *minimization* strategies. The former entail forceful accusations, the presentation of evidence (either real or manufactured), and interruptions whenever denials are attempted by the suspect. *Minimization* involves the sympathetic presentation of moral justifications or explanations for the crime, often accompanied by the implication that a confession will result in leniency. The guilt-presumptive nature of this exercise creates a slippery slope for innocent suspects because it may set in motion a sequence of reciprocal observations and reactions between the suspect and the interrogator that serve to confirm the interrogator's belief in the suspect's guilt. Increased distress on the part of the suspect may be interpreted as resistance, thereby motivating the interrogator to redouble his or her efforts to extract a confession. From the suspect's perspective, isolation, fatigue, and fear may produce a compliant (but false) confession from a person who merely wants to extricate himself from an aversive situation and/or who succumbs to implied threats of dire consequences or implicit promises of clemency.

Internalized false confessions are those in which the suspect actually comes to believe in their own culpability. They may even develop illusory memories of their criminal actions. The false beliefs can be cultivated by the interrogator's use of pseudo-technical explanations of how the crime could have occurred without the culprit's conscious awareness. For example, after three lengthy sessions during which incriminating (but false) evidence was presented to him, Michael Crowe actually conceded that he killed his sister and somehow blocked the event from his memory[59]. Research[60] attests to the power of false evidence in not only inducing false confessions but also in contributing to the internalization of blame and the confabulation of concocted supportive details. Needless to say, confessions are highly influential in court. After all, we expect people to behave in self-serving ways. Why on earth would an innocent person confess to something that they had not done?

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[58] supra note 51.

[59] Supra note 47.

[60] Kassin, S. M., & Kiechel, K. L. (1996). The social psychology of false confessions: Compliance, internalization, and confabulation. Psychological Science,7, 125–128.

In mock jury studies, it is clear that confessions are impactful[61]. What is worrisome is that even when mock jurors were made fully aware of the high-pressure tactics that produced nonvoluntary statements, confessions nevertheless boosted the conviction rate significantly[62]. How adept are the police at detecting false confessions? In a recent study[63] Kassin and his colleagues recruited prison inmates who were instructed to give (1) a full confession to their own crime, and (2) a manufactured confession of a crime committed by another inmate. College students and police investigators judged the videotaped confessions. The overall accuracy rate did not exceed chance, but the police were more confident in their judgments.

The preceding has been a brief overview of some of the insights that social psychologists have provided about the interrogation process. The accompanying references in these few paragraphs contain the sources necessary for a more elaborate description of the phenomenon. We see that the first step in the process consists of an initial judgment of guilt versus innocence, based at least in part on confidently held (but fallible) intuitions about how guilty persons can be distinguished from innocent ones. Because this first step is flawed, innocent people will be included in the subsequent interrogation exercise which is psychologically coercive, manipulative, and guilt presumptive. Consequently some innocent persons will succumb to these tactics, thereby producing false confessions and (possibly) false convictions. Much of the research described above is fairly recent however it is important to emphasize that the principles of social cognition that underlie the process have been well-established for decades. What is unique about this body of research is that it has put a spotlight on the forensic context in which false confessions occur.

We do not mean to imply that confirmation biases are restricted to police interrogators[64]. In 1959, 14 year-old Steven Truscott was charged, tried, convicted, and sentenced to hang for a rape and murder for which he has always maintained his innocence[65]. After his conviction, psychiatrists who interviewed him concluded that he

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[61] See note 49 for a review.

[62] Kassin, S. M., & Sukel, H. (1997). Coerced confessions and the jury: An experimental test of the "harmless error" rule. Law and Human Behavior, 21, 27–46.

[63] Kassin, S. M., Meissner, C. A., & Norwick, R. J. (2005). "I'd know a false confession if I saw one": A comparative study of college students and police investigators. Law and Human Behavior, 29, 211-227.

[64] Green, M. (2005). Crown culture and wrongful convictions: A beginning. Criminal Reports, 29, C.R. 6th, 262-273.

[65] Pursuant to section 696.1 of the Criminal Code, his conviction was reviewed by the Minister of Justice. The Minister, acknowledging that a wrongful conviction may have occurred, has recommended a new trial before the Ontario Court of Appeal.

was incapable of admitting his guilt. His "façade of innocence" and "iron curtain of denial" were manifestations of paranoia and psychopathology[66].

The ease with which false evidence can draw false confessions from innocent suspects (at least in controlled laboratory studies) suggests that it might be prudent to reconsider the court's tolerance of police use of fictitious 'evidence' during interrogations. Secondly, while direct threats of legal consequences (or explicit assurances of leniency) are likely to raise concerns about voluntariness, *implied* threats or promises may fall under the judicial radar, even though these tactics may be every bit as manipulative as the explicit inducements. For example, when innocent research participants were accused of cheating, the rate of false confessions was just as high when the experimenter made *minimizing* remarks (e.g., "I'm sure you didn't realize what a big deal it was") as it was when leniency was explicitly promised[67]. The affable tone of the experimenter may have caused the participants to infer leniency. While the courts may frown on explicit promises of leniency, ignoring the use of pragmatic implication to achieve the same end is cause for concern. Some jurists are sensitive to the danger[68].

Just as suggestive questioning of children can cultivate convincing (but inaccurate) accounts, so too do police-induced false confessions sound compellingly believable. False confessions contain more than self-incriminating statements; they may also contain expressions of remorse, apologies, and even explanations for the alleged crime. Kassin[69] (and many others) have recommended mandatory videotaping of the entire interview and interrogation exercise[70]. Taping would avert intractable squabbles about whether coercive tactics had been used and would provide an impartial and candid record of what transpired prior to the confession. Moreover, research[71] has demonstrated that viewers are more likely to take into consideration a wider range of situational

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[66] Sher, J. (2002). Until you are dead: Steven Truscott's long ride into history. Toronto: Random House.

[67] Russano, M., Meissner, C., Narchet, F., & Kassin, S. (2005). Investigating true and false confessions within a novel experimental paradigm. Psychological Science, 16, 481-486.

[68] Commenting on the repeated use of moral justifications offered by the interrogators in *R v. M.J.S* 2000 ABPC 44 @ para 16, Ketchum J stated: "[T]his technique has the same psychological effect as offering a direct promise of leniency based on unintentionality." Similarly, Duncan, J in *R v. C. K. (1)* 2005 ONCJ 462 @ para. 26 noted that *quid pro quo* offers of leniency "made impliedly or subtly carry exactly the same dangers as those made more directly."

[69] supra note 50.

[70] The reliability problems associated with interviewers' notes of their interviews with children (supra, note 34) would also apply to police interrogations of all suspects. Hence expert evidence could be very useful to illustrate how unrecorded written "verbatim accounts" of police interrogations can be unreliable.

[71] Lassiter, G. D., & Geers, A. L. (2004). Bias and accuracy in the evaluation of confession evidence. In G. D. Lassiter (Ed.), Interrogations, confessions, and entrapment (pp. 197–214). New York: Kluwer Academic.

circumstances when both the suspect *and* the interrogator are visible on camera, compared to a camera angle that centers exclusively on the suspect. Although the courts are clearly cognizant of the benefits of videotaping[72], the practice is not a mandated safeguard.

False confessions and the law

A confession has often been referred to as "the highest and most satisfactory proof of guilt"[73]. Wigmore[74] explains that this is because "[t]he confession of a crime is usually as much against a man's permanent interests as anything well can be . . . no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance."

As noted in the previous section, recent DNA exonerations have demonstrated that false confessions are a real phenomenon and may contribute to wrongful convictions. In response, the Federal Provincial Territorial Heads of Prosecutions Committee established a Working Group on the Prevention of Miscarriages of Justice. Their report[75] (released in January, 2005) included several recommendations to prosecutors and police investigators including these three with respect to confessions:

> **1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (e.g. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. The video recording should not be confined to a final statement made by the suspect, but should include the entire interview.**
>
> **2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the**

[72] Quoting Iaccobucci, J. in *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.) @ paragraph 47: "a recording … can greatly assist the trier of fact in assessing the confession".

[73] As quoted from Arbour, J.'s dissent in *R. v. Oickle* (supra, note 72) at paragraph 141.

[74] Wigmore on Evidence (Chadbourn rev. 1970), vol. 3, 820b at p. 303.

[75] Report on the Prevention of Miscarriages of Justice. Available in its entirety on the internet at: http://canada.justice.gc.ca/en/dept/pub/hop/

interview process and to accurately preserve the contents of the interview.

3. Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

The third recommendation acknowledges that training in the social sciences is necessary to ensure that police obtain only reliable confessions. It also acknowledges that crown prosecutors require such training to understand the existence and causes of police-induced false confessions. By implication, judges need to be similarly educated. Lawyers need to be vigilant in the defence of a client who advises that he/she has falsely confessed.

Not all defendants can be exonerated with DNA evidence; however other evidence may be capable of achieving the same end. Expert social science evidence can be called to explain how the techniques used by the police may have cultivated an unreliable confession. Eventually, police departments may become discouraged from using the *Reid* technique if the confessions that stem from *Reid*-like tactics are deemed unreliable and/or as civil law suits for wrongful accusations implode. The improper interrogations and charges of the two young boys in Chicago will have cost the taxpayer at least $11 million dollars by the time civil law suits are settled.[76]

There have been many decisions in the United States that have admitted expert opinion evidence to explain ostensibly false confessions[77]. There have also been cases disallowing such evidence[78] although in some states the reason for exclusion has to do

[76] The Toronto Star, Sunday, November 06, 2005, p A12.

[77] California: *People v. Page*, 2 Cal. Rptr 2d 898 (Cal. CT. App. 1991); Colorado: *People v. Lopez*, 946 P 2d 478 (Colo.Ct.App.1997); Florida: *Boyer v. State*, No. 1D00-3714 (Fla. Ct. App. 2002); Illinois: *U.S. v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997); Indiana: *Callis v. State*, 684 N.E.2d 233 (Ind. Ct. App. 1997); Texas: *Lenormand v. State*, No. 09-97-150-CR (Texas Ct. App. 1998).

[78] California: *People v. Son*, 93 Cal. Rptr.2d 871 (Cal. Ct. App. 2000); Kansas: *State v. Cobb*, 43 P.3d 855 (Kan. Ct. App. 2002); Maine: *State v. Tellier*, 526 A.2d941 (1987); Massachusetts: *Commonwealth v. Nerette*, 935 N.E.2d 1242 (2000); , 935 N.E.2d 1242 (2000); Minnesota: *State v. Ritt*, 599 N.W.2d 802 (1999); Missouri: *State v. Davis*, 32 S.W.3d 603 (Mo. Ct. App. 2000); New York: *People v. Philips*, 692 N.Y.S. 2d 915 (N.Y. Sup. Ct. 1999); *State v. Green*, 683 N.Y.S. 2d 597 (N.Y. App. Div. 1998); Wyoming: *Kolb v. State*, 930 P.2d 1238 (1996).

with the more restrictive *Frye* [79] (as opposed to *Daubert*) standard governing the admissibility of expert evidence. Most recently the Supreme Court of New York allowed the testimony of social psychologist, Dr. Saul Kassin to explain the psychological aspects of police interrogation techniques.[80] The judge, using a common sense approach, acknowledged that:

> **"... [J]urors might be expected to assume that an innocent person will not confess to a crime he did not commit. Therefore, a study based upon generally accepted social psychology principles, establishing that the phenomenon of false confessions does occur, should be admissible to explain behavior that might appear unusual to a lay juror not familiar with the phenomenon. … Dr. Kassin's psychological studies on the voluntariness of confessions generally and the phenomenon of eliciting false confessions will be admissible at trial. ... It will be for the jury to decide whether to accept Dr. Kassin's analysis and whether it is sufficiently reliable to be applied to the facts in this case."**

The judge went on to reiterate much of Dr. Kassin's trial testimony -- testimony based on the social science research described in the previous section. It is worth noting that the trial judge compared Kassin's evidence to that of a social scientist who explains delayed disclosure in sexual assault cases. In Canada, expert evidence on this phenomenon is not admissible as it is considered unnecessary. Trial judges are assumed to understand the reasons for delayed disclosure and are obliged to explain them to a jury if the issue of delay is raised in a trial.[81] Eventually expert opinion evidence explaining the phenomenon of false confessions may also be deemed unnecessary, but that day has not yet arrived.

In Canada, expert psychiatric opinion to explain the concept of false confession has been admitted as far back as 1970. In *R* v. *Dietrich*[82], the Ontario Court of Appeal upheld the trial judge's decision to admit evidence that the accused was a psychopathic liar but disagreed with the judge's restriction forbidding the admission of the basis for the

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[79] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923).*State (New Jersey) v. Free***,** [2002] NJ-QL 328 (NJCA).

[80] *People (New York) v. Kogut* ADGN/2005-935 2005 NY Slip Op 25409; 2005 N.Y. Misc. LEXIS 2126 September 15, 2005 see also *State v. Myers* 359 S.C. 40; 596 S.E.2d 488; 2004 S.C. LEXIS 111(SCSC).

[81] *R. v. D.D.* [2000] 2 S.C.R. 275.

[82] [1970] 3 O.R. 725-744.

opinions prior to the Crown making it an issue. The appellate court held that the psychiatrists ought to have been allowed to explain fully the bases upon which their opinions rested. Notably, even the Crown psychiatrist agreed that the accused had a propensity to falsely confess.

Evidence of false confessions was also admitted in *R* v. *Harley*[83]. There the defence was entitled to call psychiatric evidence to explain that the accused had a propensity to confess to arsons that he had not committed. *R.* v. *Oickle*[84] remains the leading authority in Canada for the proposition that an involuntary confession is one whose reliability has been compromised. In *Oickle*, the Supreme Court acknowledged that false confessions lead to miscarriages of justice and offered guidelines for the recognition of interrogation techniques that commonly produce false confessions.[85] Citing a number of social science studies, the court recognized that juries are unlikely to believe that people falsely confess to crimes[86]. Using this acknowledgement, it can be argued that expert evidence is helpful to explain the kinds of interrogation techniques that may have produced the false confession of a particular accused, especially when there may be concerns about the accused's cognitive capacities[87].

Professor Trotter, as he then was, expressed doubts in 2003 that expert evidence in the area of false confessions was ready for the courtroom[88]. He argued that the research did not adequately support the conclusion that we have a significant enough problem to warrant a review of the common law confessions rule. He also acknowledged however, that an expert in the area could be useful to the trier of fact as long as such evidence "resonates" with the facts of the particular case. Since then, further research has developed and DNA exonerations have proliferated in confession cases. Indeed, the Federal Provincial Territorial Heads of Prosecutions Committee as noted above has accepted this phenomenon as a significant problem for the Canadian criminal judicial system. Furthermore, in all cases where an expert is called to testify about false confessions, the facts of the particular confession in question must resonate with the

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[83] (1985) 16 W.C.B. 78 (Ont. Supreme Crt.) Potts J.

[84] (2000), 147 C.C.C. (3d) 321 (S.C.C.).

[85] supra at paragraph 32.

[86] supra at paragraphs 34-42.

[87] Sherrin, C. (2005). False confessions and admissions in Canadian law. Queen's Law Journal, 30, 601-659.

[88] Trotter, G. T. (2003). False confessions and wrongful convictions. Ottawa Law Review, 35, 3, 179-210;

research literature. If they did not, the evidence would be inadmissible on the grounds of relevancy to the particular trial. Expert opinion about the general phenomenon of false confessions, interrogation tactics, social influence etc. is amply supported "by a long history of basic psychology and a growing forensic research literature[89]".

Very recently, pending a ministerial review[90], the Court of Queen's Bench of Manitoba ordered released on bail a man convicted in 1992 for murder. Mr. Unger, the defendant, had provided a detailed confession (which he later testified was false) during the course of a police sting operation . It is now the only evidence upon which the crown can rely to support the conviction. The Conviction Review Group of the Federal Department of Justice conducting the investigation into Unger's application for ministerial review, have suggested that Unger's confession be reviewed by an international expert on false confessions.

Conclusion

The preceding discussions of the forensic utility of social science research have not addressed the issue of judicial gate-keeping. By restricting ourselves to commentary about scientific findings whose reliability is, in our opinion, indisputable, we have avoided addressing the issue of how the courts can admit what is helpful and deny entry to what is not. At a minimum, courts should be wary of "ipse dixit" opinions that cannot be backed up with appropriate references to peer-reviewed publications in respectable scientific journals. Five years ago Gary Wells and some colleagues published an article [91] in the American Psychologist entitled "From the lab to the police station: A successful application of eyewitness research." Their article chronicles the means by which research on eyewitness identification was eventually translated into policy. In the U.S., the state of New Jersey has adopted statewide lineup reforms; numerous other jurisdictions in the U. S. have followed suit. In Canada, the Cory report[92] (following the wrongful

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[89] Supra note 50 @ page 223; see also Fulero, S. M. (2004). Expert psychological testimony on the psychology of interrogations and confessions. In G. D. Lassiter (Ed.), Interrogations, confessions, and entrapment (pp. 247-263). New York: Kluwer Academic. See also: McMurtrie, J. (2005). The role of the social sciences in preventing wrongful convictions. American Criminal Law Review, 42, 1271-1287; Nadia, S. (2005). When the innocent speak: False confessions, constitutional safeguards, and the role of expert testimony. American Journal of Criminal Law, 32(2), 191 - 263.

[90] *R. v. Unger* 2005 MBQB 238, November 4, 2005; Ministerial Reviews are conducted pursuant to Section 696.1 of the Criminal Code of Canada. The two key pieces of corroborative evidence included a hair (said to be consistent with Unger's) found on the victim's sweater. Recent DNA testing has excluded Unger. The other piece of inculpatory evidence came from a jailhouse informant whose evidence the crown now concedes would not be admissible.

[91] Wells, G. L., et al. (2000). From the lab to the police station: A successful application of eyewitness research. American Psychologist, 55, 581-598. See also Wells, G. (2005). Helping experimental psychology affect legal policy. In N. Brewer & K. D. Williams (Eds.). Psychology and law: An empirical perspective (pp. 483-500). New York: Guilford.

[92] http://www.gov.mb.ca/justice/publications/sophonow/intro/index.html [2001]

conviction of Thomas Sophonow) has definitely had an impact on how police lineups in Ontario and other provinces are conducted. Ironically, having incorporated these advances in procedure the courts now ban defence expert testimony on eyewitness identification. Perhaps police interrogations will eventually be revised according to lessons learned from research on false confessions. Whether or not this is accomplished by means of expert opinion evidence, through judicial education, through inquiries into false convictions, or some combination of the three, the point is that reliable science can only enhance the truth-seeking function of the courts.

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