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Miscarriages of justice: What can we learn?

Sam Poyser and John D. Grieve

Introduction

"…you've had your whole life ripped to shreds and you have been hugely damaged…[these are] the ashes of what you had" (Barry George in BBC, 2015, n.p).

This statement, made by a victim of wrongful conviction in the UK, highlights the devastating impact of miscarriages of justice upon individuals who suffer them. Put simply, miscarriages destroy people's lives, erode public support for the Criminal Justice System (CJS) and are inimical to wider society (Gardner, 2015). However, they can also have positive impacts, serving as 'lessons to be learnt' concerning what went wrong in particular cases. The contribution of psychological research here, has proved invaluable in revealing that most of these lessons relate to the police investigative process and potential weaknesses of that process and in helping to explain particular phenomena, such as why individuals might falsely confess (Brants, 2008). Psychologists have also advocated, and helped to implement improvements to investigative processes aimed at reducing future incidences of miscarriages (Gudjonsson, 2003; Grieve, 2007). Nevertheless, much more remains to be learnt and to be done, in terms of on-going psychological research in this field.

This chapter will consider what we have, and can, learn from miscarriages of justice in England and Wales, chiefly as a result of psychological research. It will highlight what psychologists have discovered about the role of police investigative processes in causing miscarriages and how their research findings have helped to kick-start change agendas relating to those processes, which have in due course involved legislative, policy and practice reforms. Indeed, we will see that not only does the process of criminal investigation contribute to miscarriages; the lessons learnt from miscarriages due to the input of psychological research, have contributed to the ways in which criminal investigations are conducted. The chapter will begin by considering 'What is a miscarriage of justice?' It will then highlight research, which reveals the causes of miscarriages, demonstrating as it does, that many relate to police investigative processes. The chapter will next outline the contribution of psychological research to our understanding of the causes that are connected to police investigative processes, focussing specifically upon issues surrounding: i) the investigative process generally, including investigative philosophy, strategy and tactics; ii) interview practices involving suspects, victims and witnesses; and iii) identification procedures. Official responses to lessons learnt from psychological research and improvements made to investigative processes and techniques as a result, are also discussed. The chapter ends by stressing that many opportunities remain for psychologists to conduct research in this area, so as to continue to work towards reducing miscarriages of justice.

What *is* a miscarriage of justice?

There is much disagreement concerning what the term 'miscarriage of justice' means. Definitions differ greatly, and are dependent upon individuals' perceptions and perspectives and the circumstances in which the phrase is used (Leverick and Chalmers, 2014). Interestingly, the word 'miscarriage' may have derived from Plato, (whose mother was said to be a midwife) (Grieve, 2007) and certainly, one of the most comprehensive definitions, that of Walker (1999: 33-4) suggests that the term refers to a failure to reach the end goal of 'justice'. However, where the State seeks to sanction an individual, the process is, by its very nature, coercive and unbalanced. Therefore, 'justice' might be said to be an instance in which that imbalance and coercion is minimised to tolerable levels; hence a 'miscarriage of justice' is a situation where this does not occur (Hall, 1994). Of major contention, is whether the expression 'miscarriage of justice' encompasses both factual innocence (i.e. an individual did not commit the crime for which they were convicted) *and* procedural innocence (i.e. an individual committed the crime, but as their rights were violated during the justice process, they should not have been convicted) (Hall, 1994). However, in truth it is very difficult to identify the factually innocent (see Campbell, 2015).

The aforementioned discussion highlights the importance of the integrity of the *process* of justice as much as the result of that process. That process occurs not only in court-rooms, but for example, on streets (Weber & Bowling, 2012), and in police cars and police stations, where Walker (1999) suggests 'justice' is achieved when the State and its representatives, give equal respect to individuals' rights. Therefore, a miscarriage of justice is a *breach* of an individual's rights (whether suspect, defendant, convict, victim, or witness), by the State/State agencies. Walker (1999) also highlights that miscarriages can be institutionalised within laws *and/or* the result of laws being mis-applied/interpreted, as a recent Justice Select Committee report (2014) concerning Joint Enterprise Law exemplified.

Part of the process of justice involves criminal justice practitioners dealing with victims (and witnesses) of crime. Here, miscarriages can occur not only in situations where those practitioners have *done the wrong thing*, but where they have *not done enough/anything* in response to victimisation (Walker, 1999). This can include failure to: i) investigate crimes, ii) identify offenders, iii) press charges, and iv) mount a robust prosecution case (Savage, Grieve and Poyser, 2007), resulting in the failure to hold offenders accountable.

Miscarriages of justice can also include failure to support, and poor treatment of, victims of crime/their families through for example, neglecting to inform them of developments in their case (Savage et al, 2007). This can lead to secondary victimisation, as research by the Victims' Commissioner has recently highlighted (see Bowcott, 2015). Miscarriages may also be defined as failures on the part of the CJS and peripheral agencies, to recognise, intervene and safeguard the public from 'known' risks or dangerous individuals (see for example the case of Carl Mills in Morris, 2015). Such miscarriages may lead to falling public confidence in the CJS and to individuals being less willing to engage with it (Hall,1994). In addition to acknowledging high-profile wrongful convictions, any definition of a miscarriage of justice

must also recognise the rather commonplace wrongful convictions obtained in the Crown Courts, regularly over-turned in the Court of Appeal and those obtained in magistrates courts, routinely overturned in Crown Courts (Naughton, 2013), particularly as the harms resulting from these miscarriages, can be just as damaging as those caused by notorious miscarriages of justice (Ford, 1998).

Interestingly, Naughton (2014) who contends that the label 'miscarriage of justice' does not adequately represent all types of wrongful convictions, uses the concept of 'intent' to differentiate between '*miscarriages* of justice' which he argues, are not caused by deliberate acts by individuals to transgress due process and '*abortions* of justice', which he suggests, are. Importantly, however, Naughton (2014) contends that at a structural level, miscarriages can *themselves* be viewed as abortions of justice, as they are *intended* by a crime control-oriented CJS that sees inherently unreliable forms of evidence, such as uncorroborated eyewitness testimony as admissible in court, despite psychological research (discussed shortly) warning that they render the innocent vulnerable to wrongful conviction. In reality however, it is often difficult to ascertain whether mistake or malicious intent is behind the construction of individual miscarriages (Poyser and Milne, 2015). Clearly, whilst any comprehensive assessment of miscarriages of justice should include reference to as many definitions as possible, due to its particular focus, the following discourse will principally use the term to refer to wrongful conviction. Nevertheless, there are clearly copious complexities involved in seeking an all-encompassing definition, making further debate upon this issue, vital.

Miscarriages of justice: the contribution of research

Scholarly interest in miscarriages of justice has increased massively over the past 20 years or so (Radelet, 2013), however the first substantial study in this area was published by Borchard (1932). This detailed 65 miscarriages of justice (62 U.S and 3 U.K cases) and crucially forced a change in academic thought on the issue, from questioning whether miscarriages *do* occur; to consideration of *why* they occur and how we can reduce them. Importantly, Borchard (1932) found that the main causes of miscarriages were: mistaken eyewitness identification, improperly obtained confessions, unreliable forensic science and expert evidence, witness perjury, inadequate defence representation, and public pressure to solve horrific crimes - findings that have been reflected in almost every subsequent study. Most of the research that followed, consisted of small-scale studies of similar case descriptions (see for example, Frank & Frank, 1957; Radin, 1964; Huff, Rattner and Sagarin, 1986). This changed with the publication of Bedau and Radelet's (1987) large-scale study of 350 miscarriages in capital cases (1900-1985), which demonstrated that miscarriages were not the rarity once thought. From the mid-1990s onwards, such studies in the U.S permanently altered in nature, with the publication of research by Connors, Lundregan, Miller and McEwens (1996), which evidenced the ability of DNA testing to conclusively establish the

prisoner's innocence in 28 cases. Subsequent research (Leo and Ofshe, 2001; Drizin and Leo, 2004), together with an ongoing database of DNA exonerations (Innocence Project, n.d) in part, spurred a series of enquiries into the legitimacy of the death penalty in the U.S (Leverick and Chalmers, 2014).

DNA evidence has not featured highly in most miscarriages of justice in the UK, making such studies impossible. Nevertheless, researchers have contributed to the scholarly analysis of miscarriages (Brandon and Davies, 1973; Walker and Starmer, 1999), with some work showing promise in terms of meeting Leo's (2010) call for the development of *theories* of miscarriages (see Naughton, 2013). In order to find research that has made the *biggest* impact in reducing miscarriages however, we must look to the 'specialised causes' literature (Leo, 2005: 210). Here, the research findings of psychiatrists and psychologists, working primarily in the U.S and U.K on factors identified as causes of miscarriages, such as false confessions and erroneous eyewitness identification are presented (see for example: Gudjonsson, 2003; Horry et al, 2014). Such research confirms that these causes are comparable historically and globally (Radelet, 2013). Despite research highlighting a multiplicity of causes of miscarriages, studies worldwide indicate that the most frequent causes, are those linked to the police investigative process (Cutler, 2012). They include: i) reliance on circumstantial evidence, ii) fabrication of evidence, iii) non-disclosure of evidence; iv) unreliable cell confessions (Stevens, 2010); v) unreliable confessions due to external factors such as police pressure and/or internal factors, such as suspect vulnerabilities (Gudjonsson, 2003), and vi) unreliable victim and eyewitness identification and testimony (Forst, 2013).

Certainly, in the UK, many have asked 'What can we learn from miscarriages of justice?', resulting in attempts to address and reduce their causes. This is particularly the case in relation to psychological research, which has provided important information to help to explain such phenomena and suggest changes in legislation, policy and practice to improve the investigative process, with the aim of lessening future miscarriages. The following discussion outlines what we have, and can learn from miscarriages of justice in the UK due to psychological research, and how subsequent reforms have worked to address and reduce their occurrence in a manner that Leo (2010) insists, has not occurred in most other countrie

Miscarriages of justice and the investigative process: from building a case for conviction to building a case for convicting only the guilty

Although the responsibility for miscarriages of justice extends far and wide, the police investigative process plays a major role in their genesis (Savage and Milne, 2007). The contribution of the investigative process to causing injustice, has been highlighted in many dreadful cases, including those of Timothy Evans and Derek Bentley, wrongly convicted and hanged for murder in the 1950s (Innocent, n.d). However, the miscarriages which focussed a critical spotlight on the police investigative process more strongly than ever before, were

those associated with the Irish Republican Army's terrorist activities during the 1970s (May, 1992). In the case of the Birmingham Six for example, suspects had not only been mentally and physically abused by police, evidence had been deliberately manipulated to fit in with the case that the police wished to present (Mullin, 1996). At face value, the miscarriages that resulted from such practices were caused by false confessions and fabrication of/tampering with evidence. However, stepping back from this, we might ask *why* confessions for example, were such a focal concern of the investigative process in the first place. Clearly, the problems leading to these, and other miscarriages that came before and after them, go much deeper. Arguably, what most of these miscarriages have in common, is that from the early stages of their investigation, police officers *believed* they had the 'right' person and throughout the investigative process, sought to confirm this belief. Potentially, these miscarriages were by-products of very human cognitive phenomena that led to problematic investigative decision-making (See Chapter 3, this volume) and ultimately inaction, incompetence and/or malfeasance (Findley and O'Brien, 2014).

Psychological research in this area, has contributed to identifying how investigators make decisions, the factors that undermine the reliability of their decision-making, and their contribution to causing miscarriages (Irving and Dunnighan, 1993; Ask and Granhag, 2005). In particular, it has established that the phenomenon most central to the miscarriages mentioned above, is what has been called 'premature case closure' of police investigations. Psychologists initially alluded to this concept in relation to police interviewing, describing it as *"…the disposition to draw pre-emptive conclusions from information processed prior to conducting an interview"* (Shepherd and Milne, 1999: 26). However, it is also applicable to the entire investigative process, whereby investigations which start with 'investigator openness' to consider many potential lines of inquiry, close, at an early stage, around a particular 'thesis' and accompanying suspect/s. Once this situation occurs, psychological research suggests that starting from the assumption that they have the guilty person, tunnel vision, belief perseverance and confirmation bias work in tandem towards 'successful' case construction, with detectives "*...selectively weav[ing] together available pieces of information…to produce a simplified & coherent story"* (Sanders, Burton and Young, 2010: 368). Thus, premature closure operates around the logic of 'case construction' in that once a suspect is identified, the investigation alters from being a neutral, objective search, focussed upon 'What happened?', to being a search for information that supports suspicions that the suspect is the culprit (Maguire & Norris, 1992). In this situation, investigators have focussed on a particular conclusion and then filtered all information in a case through the 'tunnel-vision lens' provided by that conclusion. Through that filter, information supporting the conclusion is elevated in significance and deemed relevant and information which is inconsistent with the chosen theory is *"overlooked or dismissed as irrelevant, incredible or unreliable"* (Findley and Scott, 2006: 293). Indeed, psychological research has demonstrated how tunnel vision is both the *result* of fixation on a certain suspect (bias) and the *reason* for a one-sided search for more incriminating evidence or interpretation of evidence as incriminating (bias confirmation), even in the face of facts that point in the opposite direction (belief perseverance) (Ask, Rebellius and Granhag, 2008).

Importantly, as problems, which can undermine accuracy in the investigative process, are caused by vulnerabilities underlying human cognition, they are unintentional. Thus, the investigator *unwittingly* assigns too much weight to evidence, which confirms their hypothesis, and too little to disconfirming evidence; and *inadvertently* clings to a belief in the face of evidence that discredits it (Findley and O'Brien, 2014). Additionally, another psychological phenomenon, namely 'groupthink', may also be operating here, in that investigators working as part of a close-knit team, may seek to reduce conflict and promote consensus at the expense of questioning ideas and underlying assumptions (Orenstein, 2011). This may involve stifling dissent and self-censoring opinion that undermines the group's decisions (Tedlow, 2010). Clearly, in a police investigation this may exacerbate existing biases and undermine critical thinking, as recent revelations in Sweden's worst miscarriage of justice has demonstrated (see Crouch, 2015).

Certainly, the shift from considering *what happened,* to *proving* it, presents a risk that investigators will overlook/minimise new evidence (perhaps calling into doubt the suspect's guilt) that contradicts an early theory of the case they have psychologically committed to (O'Brien, 2009). Psychological research has also established that when cognitive biases affect early evidence gathering and processing in this way, they can thereafter taint the *entire* process, impacting upon not only decisions made by police, but by other professionals involved in the case (Dror and Charlton, 2006). This can ultimately result in evidence against the suspect, looking stronger than it actually is and may account for situations wherein innocent people find themselves in court with a compelling case against them. This problem arguably continues through to the appellate process where, considering that *"…the evidence and the State's resources have coalesced around a narrative of guilt which [frames] the case"* (Findley and O'Brien, 2014: 40), to an appellate judge, the guilt hypothesis is particularly strong. Clearly, cognitive biases have implications for appellate review and evaluation of fresh evidence that the CJS convicted an innocent person, thereby overturning the version of events that everyone involved in the case had hitherto psychologically committed to (Nenkov and Gollwitzer, 2012).

Many miscarriages of justice seem to highlight that investigators in the cases operated on preconceived notions of guilt. In some cases, institutional cynicism around 'the usual suspect/s', (i.e. someone known to the police through previous convictions, is quickly focussed upon in their investigation) may have played a role (Poyser and Milne, 2015). Other psychological studies suggest that even 'inappropriate' emotional display in the accused early on in an investigation, may lead investigators to adopt a mind-set that the suspect is guilty, causing them to neglect other investigative leads (Savage and Milne, 2007). Media, political, and public pressure placed upon the investigation, particularly in child murder cases, may also be partly responsible. At times, this pressure can be almost unbearable, causing investigators to prioritise *speed* in bringing the case to a conclusion (Maguire, 2003) and creating a climate where the investigation can become 'ends' rather than

‘means’-oriented. This may explain the alleged activities of officers in miscarriages associated with the child murders of Lesley Molseed and Carl Bridgewater (Innocent, n.d). Clearly, environmental pressures may create the conditions for system failure, which, in the police investigative context, may be reflected in misconduct (Punch, 2003).

Allegations of misconduct appear in numerous miscarriages. Convinced of a suspect’s guilt, the closed mind-set of investigating officers is sometimes pushed to the limit, with their activities proceeding beyond unintentionally constructing a case around a suspect, to intentional malfeasance/malpractice in suppressing, excluding and/or eradicating all that *does not* fit, and/or constructing evidence to ensure it *does* fit with the original ‘guilt’ narrative (Savage and Milne, 2007). Here, police may not only ignore the facts; they may demolish or invent them (Sanders et al, 2010). Some studies identify ‘police malfeasance/malpractice’ as featuring second only to eyewitness misidentification in wrongful convictions (Scheck, Neufeld and Dwyer, 2000). It also figures in some investigations, which fail to bring anyone to justice (Maguire, 2003: 376). There were allegations, for example, that such behaviour adversely affected the Stephen Lawrence murder investigation in 1993 (Peachey, 2012). This case also illustrates that premature investigative closure may also be a cause of miscarriages involving a failure to investigate a crime, due to ‘case denial’, as here, officers whose investigative mind-set was arguably closed to the theory that the crime was racially motivated, failed to gather evidence with this in mind (Savage & Milne, 2007).

Clearly, psychological research has made major contributions to revealing cognitive weaknesses associated with investigative processes. Consequently, psychologists have made recommendations for improving and professionalising that process in the U.K, aimed at minimising future miscarriages. In this way, the lessons learnt from miscarriages have helped to shape the investigative process of the future. This said, it was a specific miscarriage, namely the Lawrence case, which drove such recommendations through into policy and practice (Savage et al, 2009). In his inquiry into what could be learnt from the Lawrence miscarriage of justice, Sir William MacPherson (1999) identified several lessons relating to criminal investigation and made recommendations aimed at confronting the cognitive biases which had dominated it. Concerned with the quality of, and quality assurance measures absent throughout, the investigation into the murder, MacPherson’s report emphasised the importance of review and oversight of the investigative process, so that if mistakes/miscalculations are made at one stage (such as those caused by cognitive biases), procedures are available to remedy them at later stages. Here, MacPherson was calling for greater openness in investigations (so as to counter the problem of premature case closure). He recommended that this should be achieved through conducting rigorous reviews of investigations and of the decision-making involved and that the Association of Chief Police Officers (ACPO) devise codes of practice to govern such reviews (Savage and Milne, 2007: 623).

Subsequently, ACPO updated their policy guidelines on the investigation of major crimes through the Murder Investigation Manual (MIM) (see Chapter 3, this volume), with the aim

of institutionalising formalised review of investigations (ACPO, 2006). The Professionalising the Investigative Process (PIP) programme (see also Chapter 12, this volume), launched by ACPO in 2005, further aimed to enhance the investigative process through training and development of all police investigators (Centrex, 2005a). The Core Investigative Doctrine (CID) stated that this would be achieved through work-placed assessment and accreditation (Centrex, 2005b). The CID advises investigators to: challenge dubious assumptions, promote healthy scepticism, explain gut instincts, create, and be receptive to, the generation of alternative hypotheses, never rush to premature judgements regarding the meaning of material gathered and to test the 'null hypothesis' i.e. to seek to disprove a theory (Centrex, 2005b: 23-63). Such advice is firmly rooted in the lessons learnt from miscarriages of justice.

The aforementioned discussion does not suggest that the task facing investigators has become simple. Indeed, it often remains extremely complex (Grieve 2014) and therefore, we must certainly not assume 'problem solved'. As psychological research has highlighted, much of the investigative process is invisible, in terms of being behind closed-doors and cerebral. Therefore, challenges in ensuring that it is undertaken professionally will arguably remain (Stelfox, 2011). A doctrine alone cannot ensure the type of investigative mind-set which effective, fair investigation requires. Perhaps the analysis of lessons to be learnt from miscarriages of justice should feature in investigator training (Savage and Milne, 2007), because as recent miscarriages have demonstrated, cognitive biases continue to impede investigator decision-making. Indeed, as Barri White stressed when his murder conviction was recently quashed: *"[After our arrest] it then became a selective investigation. They didn't look anywhere else [they] thought they had the right people"* (Smith, 2013, n.p). Much remains to be learnt in this area, thereby providing continuing opportunities for psychological research. The same is true of the police interview process.

Miscarriages of justice and the police interview process

Whilst concern regarding the involvement of the police suspect interview process (see also Chapter 8, this volume) in contributing to miscarriages of justice did not begin with the Maxwell Confait murder investigation in 1972; it was this case, which pinpointed the contribution of the interview process, to causing them in the U.K (Price and Caplan, 1977). Three youths were arrested, falsely confessed to Confait's murder, and were found guilty at trial. However in 1974, judges at the Court of Appeal, quashed the convictions, labelling them as 'unsafe and unsatisfactory' and emphasising that the confessions upon which they were chiefly based, had been extracted from the youths under improper police pressure (Williamson, 2007). Following the appeal, a public inquiry into the case established (from evidence provided by psychologists), that a flawed interview process coupled with the youths' psychological vulnerabilities had resulted in them falsely confessing (Fisher, 1977). These findings set the agenda for the subsequent Phillips Commission (1981), which stressed the psychologically coercive nature of the police questioning process and found the Judges Rules surrounding that process to be inadequate. Additionally, it highlighted the effects of

custody on suspects (particularly the vulnerable) and sought reliability in terms of the information they provide during interviews (Steer, 1981). Changes to police practices and procedures were subsequently recommended, based on the findings of psychological research into police working practices, authorised by the Commission. This research demonstrated that during interviews, police prioritised gaining a confession over searching for the truth of what happened in cases, and that this was leading to oppressive questioning and/or taking advantage of suspects' vulnerabilities (Baldwin and McConville, 1981; Irving, 1981; Irving and Hilgendorf, 1981; Softley, 1981).

Unfortunately, the widespread use of police threats and pressure during questioning continued, as later psychological research noted (Smith, 1983), thereby raising concerns about police conduct more generally. This was directly responsible for driving the enactment of the Police and Criminal Evidence Act (PACE) in 1984. PACE and its codes of practice, provided a legislative foundation for the operation of police powers, suspects' rights, and the regulation of custodial questioning designed to secure *fairness* and *transparency* in the process (Sanders et al, 2010). Section 66, covering detention, treatment and questioning of suspects in custody, aimed to protect suspects during the questioning process, through ensuring their interviews were tape-recorded and that they were offered the right to free legal advice. It also moved to secure fair treatment of vulnerable young and mentally disordered individuals and drove the later investigative interviewing agenda (Williamson, 2007). The establishment of another of Phillips' recommendations, the Crown Prosecution Service followed in 1985, removing the task of prosecuting offenders from the police (Scott, 2010).

Official recognition of the causes of miscarriages of justice had, in part, driven such reforms, however they did not disburden the CJS of miscarriages; nor, as psychological research found, did they immediately improve the quality of police interviews. Interview quality remained poor and confession-focussed, rather than searching for an accurate and reliable account of 'what happened' (McConville, Sanders and Leng, 1991; Baldwin, 1992) and miscarriages with causes similar to those revealed in the Confait case, continued to occur (see Roberts, 2007). Clearly, individuals were still being negatively affected by poor police questioning and safeguards in place to protect suspects, were sometimes failing.
The exposure of poor suspect interviewing practices in many more miscarriages of justice during the 1980s and 90s led to urgent calls for reform, indicating that lessons still needed to be learnt. This led to the establishment of the Runciman Commission (1993), which drew upon the findings of 22 research studies (see for example Irving and Dunnighan, 1993) examining the conduct, role, and working practices of criminal justice practitioners. Its report revealed that whilst PACE had increased suspects' rights and introduced openness into the investigative process, gaining a confession remained investigators' priority. Changes in police interviewing practice and training were still required.

The latter came, to some extent with the PEACE (a mnemonic for the Planning and Preparation, Engage and Explain, Account, Closure, and Evaluation stages of an investigative interview: see Chapter 11, this volume, for an explanation of the stages) interviewing model (Milne & Bull, 1999). Developed by psychologists, this model recognised that information-gathering should play a core role in the planning and preparation for an interview, as well as the interview itself and consisted of two interview types: i) 'conversation management' - for less co-operative interviewees (Shepherd, 1993) and ii) 'cognitive interview' - for more co-operative interviewees (Fisher and Geiselman, 1992).

The UK Police subsequently trained over 120,000 officers in the PEACE model, training which a national evaluation found had, (in combination with the recording of interviews) significantly improved the quality of suspect interviews (Clarke and Milne, 2001). Indeed, not only had officers' interviewing style improved (for example, there was a reduction in the use of leading questions), there was also more frequent provision of information as required by law, such as notifying the suspect of their right to legal advice. However, researchers also discovered that the listening skills of interviewing officers remained poor and that 10% of interviews studied, contained possible breaches of PACE (Sanders et al, 2010). Later psychological research concluded that ethical interviewing techniques emphasised by the PEACE model, were commonly found in the police interviews analysed (Soukara et al, 2008) and that the PEACE model elicits a fuller account and therefore, a better interview outcome (Walsh and Bull, 2010). Other research emphasised the need for refresher training (Griffiths and Milne, 2006). However, the fruits of psychological research in this area, continued to ripen.

Following psychologists' national evaluation of police interviewing (Clarke and Milne, 2001), a 5-tiered structure of interviewing skills, aimed at providing officers with theory-driven interview training specific to their career requirements, and at developing other aspects of investigative interviewing, (relating to vulnerable victims/witnesses and the supervision and monitoring of interviews) was developed (Griffiths & Milne, 2006). In 2007, this structure was incorporated into the PIP, aimed at increasing the professionalization of all investigators. Subsequently, research has found that 5-tier interview training has improved interviewing skills and resulted in the transmission of some of the best practice learnt, to the wider workplace (Scott, 2010), with priority being placed upon an open-minded search for the truth and the collection of accurate information in investigative work more generally. Nevertheless, poor interviewing practices persist in some quarters, and whilst the introduction of PACE, PEACE and the five-tier training system has facilitated a change in the ethical conduct of interviews, many officers continue to believe that 'facts' are best secured in the form of a confession (Bearchell, 2010: 71). Therefore, whilst improvements in the practice of police interviewing of suspects have been made, a confession focus, and the allied risk of miscarriages occurring, remain pressing concerns.

Interview processes with adult victims and witnesses

Recent research analysing victims' experiences of engaging with the CJS, revealed that many felt it an experience worse, than their "*…actual journey of being a victim"* (Newlove, 2015: n.p). Crucial to any criminal investigation, is the information provided by victims and witnesses. Criminal justice practitioners, particularly the police in their front-line public position, must not only treat victims and witnesses with respect; they must conduct successful interviews with them, so as to enable their voice to be heard, voices which contain information crucial to achieving justice in criminal cases. Conversely, poor interviews may lead to miscarriages of justice, which harm the victim of the wrongful conviction and the victim/witnesses of the original crime (Poyser and Milne, 2015).

Regrettably, psychological research examining interviews with adult victims and witnesses (see Chapter 6, this volume) has established that these are often poor in terms of their focus on statement-taking rather than trying to gather as much information as possible about the crime and very much police-led, sometimes benignly motivated in only supplying what they *think* the CJS needs (Shepherd and Milne, 2006). It has also found that the questioning techniques used are problematic, particularly relating to the use of leading questions, which can alter human memory (Milne and Bull, 1999). Since the introduction of the 5-tier model of interviewing, additional psychological evaluations of police interviewing skills with victims and witnesses revealed that inexperienced frontline police officers, who conduct most witness interviews, felt under-trained, under pressure, and ill-equipped to conduct a PEACE cognitive interview, despite receiving training (Dando, Wilcock and Milne, 2008). As witness interviews are not routinely recorded in England and Wales (unless involving vulnerable, intimidated and/or significant witnesses) (Ministry of Justice, 2011) this is of concern, particularly because, as recent miscarriages of justice have revealed, poor police questioning may lead to unreliable witness testimony (see Morrison, 2013). Clearly, although in the UK psychological research has contributed to changing policy and practice in relation to victim/witness interviewing, through its recommendations for improvements to interviewing standards being incorporated into a national investigative interviewing strategy, more work is required. A related area where psychological research is urgently required, concerns the efficacy of police officers' contemporaneous handwritten statements (Westera, Kebbell, and Milne, 2011). Indeed, it has been found that due to reliance on the interviewer's (fallible) memory of what was said (Conway, 2008), such statements (eventually presented in court as evidence) contain little detail (Rock, 2001) and many inaccuracies (McLean, 1995).

With the increased societal focus on the place of victims, and indeed witnesses, within the CJS (Newlove, 2015), the interviewing of these *key players* and their provision of accurate information regarding the criminal incidents they experience, is likely to gain heightened importance (Gabbert et al, in press). Here then, are favourable circumstances for psychologists and the CJS to join forces to help victims and witnesses impart reliable evidence, so as to achieve justice for all.

Miscarriages of justice and police procedures for eliciting eyewitness identification evidence

In 1976, Peter Hain, a victim a miscarriage of justice caused by erroneous witness identification, said: *"We should not be blind as to the numbers…of people…that get gobbled up by the monster 'Mistaken Identity'"* (in Robins, 2014: 129). Nearly 40 years on, this statement remains as pertinent as ever because, as research worldwide indicates, although each miscarriage is generally triggered by multiple factors, mistaken identification evidence continues to be *the* major cause (Huff and Killias, 2013). This is despite the many lessons learnt from psychological research (see also Chapter 7, this volume). Eyewitness identification is an influential component of the CJS, affecting virtually every aspect of the justice process, from the initial police investigation to trial, with most professionals viewing it as compelling evidence in criminal cases (Cutler, 2012). Psychological research has found for example, that a positive identification can guide the police investigation towards/away from a suspect and that police officers believe that eyewitnesses are usually correct (Kebbel and Milne, 1998). Similarly, at trial, when a witness states 'That's the person I saw', this is hugely compelling to a jury (Howitt, 2015). Identification evidence is, psychological research has demonstrated, extremely fallible. However, it is also the second most incriminating type of evidence after confession evidence (Kassin and Neuman, 1997), with wrongful convictions based upon such evidence, being extremely difficult to rectify (Rowley, 2009).

The first records of miscarriages caused by mistaken eyewitness identification in England and Wales, date back to 1735 (Shepherd, Ellis and Davies, 1982). However, it was not until 1860 that formal identification (ID) parades (i.e. placing a suspect amongst a group of his/her peers, and requesting that a witness see if they can identify the perpetrator of the crime) were introduced by the Metropolitan Police. Subsequently, procedures for such parades evolved, driven by the exposure of more miscarriages, including that of Adolf Beck who was wrongly convicted on two occasions (1896 and 1904) of defrauding women, having been erroneously by 10 out of 15 victims! (Naughton, 2013). The Court of Enquiry (1904) into Beck's case found that the ID parade was comprised of foils who did not resemble Beck! The Home Office subsequently revised the advisory codes of practice surrounding ID parades (Wilcock, et al, 2008), and did so again in 1925 after an enquiry into another miscarriage, caused by mistaken identification, involving army officer Major Sheppard (Davies and Griffiths, 2008). These guidelines emphasised that foils should closely resemble the suspect and that s/he should be told that they may have a legal representative present during a parade. Still miscarriages caused by mistaken eyewitness identification continued, including those resulting in the innocent being hanged (see Robins, 2014).

The still *advisory* guidelines were revised once more in 1969, in response to miscarriages exposed in a communication from the National Council of Civil Liberties to the Home Office in which 15 wrongful convictions involving misidentification were detailed (Williamson,

2007). Circular (9/1969) stated that an officer of inspector rank or above, with no knowledge of the case should conduct parades and witnesses should be instructed to say if they cannot make a positive identification (Wilcock et al, 2008). Unfortunately however, miscarriages of this nature continued and crucially, were beginning to attract media attention, thereby fuelling public controversy. These cases included that of Peter Hain, who later led the campaign 'Justice Against the Identification Laws' (JAIL) and that of George Davis (Poyser, 2012). However, it was the cases of Laszlo Virag and Luke Doherty, wrongly convicted in 1969 and 1972 respectively that forced further change. When their convictions were quashed in 1974 on the basis of erroneous eyewitness identification, there was public outrage and a committee under Lord Devlin (1976), to review the law and procedures relating to ID parades, was established. The lessons learnt here, would be those 'delivered' by 30 convictions based on mistaken identification including those previously mentioned, presented by the campaigning body JUSTICE (Robins, 2014). Devlin concluded that erroneous eyewitness identification evidence was a potent source of miscarriages and crucially, requested that psychological research be conducted on it (Wilcock et al, 2008). Devlin's (1976) report recommended reforms including that: i) ID parades should be photographed for greater transparency and ii) if identification evidence was crucial in a case, judges should appraise the jury of any specific issues, such as if the witness viewed the crime in poor light. Devlin also urged that no one should be convicted on contested identification evidence alone; however it remains the case today that a conviction can be secured on the uncorroborated evidence of a single eyewitness (Roberts, 2007).

Despite Devlin's recommendations, no action was immediately taken. However, in 1977, a landmark ruling in R v Turnbull (1976 63 Cr App R 132) resulted in specific guidelines being established governing the way a judge directs a jury when the evidence against a person rests on a disputed identification (Williamson, 2007). Under the Turnbull guidelines, many of Devlin's recommendations were realised in that judges were now *required* to warn juries to be cautious when relying on such evidence and to direct juries to relevant circumstances in which the crime occurred and the later identification took place (Sanders et al, 2010). In addition, police officers were also required to cover these issues when eliciting eyewitness accounts (Wilcock et al, 2008). Juries also had to be warned that a mistaken witness could nonetheless be a convincing one, and that many witnesses could all be mistaken. Seven years later *legislation* governing constructing and delivering ID parades, came into force. PACE, 1984, Code D set out the procedures (revised since on several occasions) for the conduct of identification attempts, aiming to ensure that these were planned, monitored and properly recorded (Naughton, 2013). In addition, psychologists *did* respond to Devlin's request for more research to be conducted on eyewitness identification and their findings have resulted in more lessons being learnt and further improvements in procedures surrounding identification evidence, as outlined below

The application of psychological research to this area

The 1970s in particular, was a key phase in terms of Psychology's contribution to understanding witness identification performance, with ground-breaking work by Loftus (1979) in the U.S and Clifford and Bull (1978) in the U.K. Through this, and subsequent studies, psychologists have shown that the roots of eyewitness fallibilities lie in human memory, which alters over time and is suggestible and susceptible to error (Thompson et al, 1998). More troubling is that their work since (including several meta-analyses), has consistently confirmed that eyewitnesses often perform at a level not better than chance (Memon, Hope and Bull, 2003). Psychological research has established that our ability to successfully remember a crime and identify its perpetrator, relies on three stages: i) perception and encoding of the crime, ii) retention of the information, and iii) retrieval of that information (Wilcock et al, 2008) and that many factors including i) social perceptions and demographic features of witnesses; ii) situational factors; and iii) facets of interrogative situations, can influence any/all of these stages and therefore eyewitness performance in a) person descriptions and b) identification (Davies and Griffiths, 2008).

a) Person descriptions

Psychological research has demonstrated that many factors may affect eyewitness accuracy in providing person descriptions to police, whether in an initial emergency call (Ambler and Milne, 2006), a police interview (Milne and Bull, 1999), or whilst constructing facial composites (Wells, Charman and Olsen, 2005). These include factors relating to: *i) the witness themselves*, including: age (Milne, 1999), gender (Sporer, 1996), ethnicity (Meissner and Brigham, 2001), and attitudes, experiences, expectations, prejudices and stereotypes (Chance, Goldstein, & Sporer, 1996), *ii) conditions under which the crime was viewed,* including: lighting (Sporer, 1996), stress levels of the witness/victim, and the presence of a weapon at the scene (Steblay, 1992), witness involvement (Yuille and Tollestrup, 1992), and factors relating to attention paid to the event (Fruzzeti et al, 1992); and *iii) memory retrieval,* including: time lapse between viewing the crime and giving a person description (Ellis, Davies and Shepherd, 1978), witness collaboration (Gabbert, Memon and Allan, 2003), and the way in which information about the crime is elicited from witnesses during a police interview. Here, the asking of leading questions (Milne and Bull, 1999) and repeating questions (Brown, Lloyd-Jones and Robinson, 2008), can affect the quality and quantity of person description.

As previously mentioned, tools developed by psychologists, such as the PEACE cognitive interview, have, to some extent, improved the quality and quantity of information gained from eyewitnesses during interviews (Milne and Bull, 1999). Psychologists have also suggested that such interviews are recorded electronically, so as to ensure that all information reported is captured (Wilcock et al, 2008). Additionally, psychologists have stressed that because memory is malleable and fragile, it should be managed in the same way as a physical

crime scene (to, as far as possible, preserve it and avoid contamination) (Wells and Loftus, 2001). However, presently this does not occur and therefore the risk of miscarriages caused by contaminated witness memory remains.

b) Person identification

Psychologists have discovered that many factors affect eyewitness accuracy in ID parades and have divided these into i) estimator variables (the effect of which on subsequent identification accuracy can only be estimated *after* a crime's occurrence and which therefore, the police cannot control) and ii) system variables (that are under the control of the police) (Wells, 1978). The discussion below only briefly mentions estimator variables (see Chapter 6, this volume, for more detailed coverage of estimator variables as applicable to eye-witnesses) as psychological research on system variables has had more impact on criminal justice practice.

i) Estimator variables

Psychological research into the effect of estimator variables on eyewitness identification performance has been substantial, including two meta analyses (see Shapiro and Penrod, 1986 and Narby, Cutler and Penrod, 1996). Such research has demonstrated that *i) witness factors* such as: age (Valentine, Pickering and Darling, 2003), race (Meissner and Brigham, 2001), gender (Wright and Sladden, 2003) intelligence (Wojcikiewis, 1990), personality (Hosch, 1994) occupation (Christianson, Karlsson and Persson, 1998), expectations and stereotypes (Kassin et al, 2001) and confidence (see Sporer et al, 1995; Brewer, 2006); *ii) perpetrator factors,* such as race (Meissner and Brigham, 2001), gender (Shapiro and Penrod, 1986), distinctiveness of face (Valentine, 1991), and use of disguises (Patterson and Baddley, 1977); and *iii) situational factors,* including stress and arousal (Deffenbacher et al, 2004), weapon presence (Loftus, Loftus and Messo, 1987), alcohol consumption (Dysart et al, 2002), and view of perpetrator (Shapiro and Penrod, 1986) may affect eyewitness accuracy (Dysart et al, 2002). These findings have permitted criminal justice practitioners to make more informed decisions on the impact of some estimator variables upon later identification performance (Wilcock et al, 2008).

ii) System variables

A lesson to be learnt from miscarriages of justice is that inadequate procedures used by the CJS are often responsible for mistaken identifications (Bedau and Radelet, 1987). Psychological research conducted on system variables has demonstrated the utility of one procedure over another, thereby helping to steer current UK legislation and guidelines and improve methods relating to ID parades (Wilcock et al, 2008). Examples of system variables include line-up construction, presentation and administration.

In relation to constructing line-ups, psychological research has demonstrated the importance of considering: i) numbers of suspects per parade - recommending one per parade, ii) size of parade - recommending that the larger the parade, the less likely the suspect will be identified by chance alone, and iii) bias in a parade – recommending that all foils should be *viable* alternatives to the suspect (Wells and Turtle, 1986). These recommendations have influenced PACE code D, which stipulates that a parade must contain at least 8 foils, selected via the 'match to similarity of suspect method' (Darling, Valentine and Memon, 2008).

Regarding presentation of a line up, psychological research has found little difference between live, video tape and photo line-ups in terms of witness performance (Shapiro and Penrod, 1986). However, as video parades are easier, cheaper, more convenient for witnesses, and possibly fairer to suspects from all ethnicities (see Valentine, Darling and Memon, 2007), they are used in the U.K. Psychological research has been unable to conclude whether, in order to reduce erroneous identifications, line-up members should be presented simultaneously or sequentially (as is the case in the U.K) (Lindsay and Wells, 1985; Flowe, 2014). Therefore, further research is required.

Regarding administration of a line-up, the findings of psychological research suggest that, line-ups should be administered double-blind, where the administrator is naïve to the suspect's identity and position (to avoid inadvertent transmission of cues to the witness) (Garroch and Brimacombe, 2001). It has also established that line-up instructions given to witnesses should be inform them that the perpetrator may/not be there. This reduces erroneous identifications (Malpass and Devine, 1981) and is a requirement of PACE Code D.

What else could we learn?

Psychological research has made major contributions to our understanding of identification procedures and has guided legislation relating to line-ups, thereby making them fairer to witnesses and innocent suspects. However, before ending this discussion, we must also acknowledge, psychological research concerning voice identification, which indicates that it is considerably error prone (Clifford, 1980; Philippon et al, 2007). Further research is also required to understand why vulnerable witnesses (due to for example, their age or learning disabilities) are particularly prone to making false identifications from line-ups (Pozzulo, 2014; Wilcock and Bull, 2014). The CJS needs to urgently understand which investigative methods might aid their performance in target absent situations (Wilcock et al, 2008).

Further psychological research is also arguably required in order to understand why, despite the regulations/guidelines surrounding this area, criminal justice practitioners still sometimes fail to do what they are required to do. This includes judges failing to give correct Turnbull warnings (see Naughton, 2013) and police officers failing to comply with the regulations governing how they must obtain identification evidence. Indeed, as noted at Patrick Quinn's recent successful appeal: *"Where a detailed regime regarding eyewitness identification is*

laid down in a statutory code…it is not for the police to substitute their own rules and procedures" (R v Quinn, p.481 cited in Naughton, 2013: 90). Such miscarriages strengthen calls for psychologists to continue to conduct research in this area, where possible, through careful consideration of actual cases (Kebbel and Wagstaff, 1999).

Conclusion

Some errors - structural, systemic and even malign - are perhaps inevitable in all human systems and the CJS is no exception (Grieve, 2007). Miscarriages of justice are generated by a multitude of factors, which we can never rid the system of entirely (Forst, 2013). Nevertheless, we should take all steps possible in order to learn from our experiences and minimise their occurrence. As many of the causes of miscarriages relate to police investigative philosophy, strategy and tactics, and in particular interview and identification processes, most of these steps should arguably be centred on these issues. Certainly, there is an on-going opportunity for criminal justice practitioners to learn many lessons from miscarriages of justice and to make appropriate changes to policy and practice in doing so. Psychological theory and research has, we have argued, made huge contributions to our understanding of some of the causes of miscarriages, thereby helping us to learn those lessons, which include the fact that: i) high-calibre pre-trial investigation and custodial questioning processes will reduce reliance on confession evidence and encourage a search for the truth, ii) good quality and more thorough questioning of victims and witnesses will enable them to provide their best evidence, iii) greater sensitivity in dealing with, and interviewing, vulnerable individuals, will permit them to give their best interview and identification evidence and iv) criminal justice practitioners' adherence to due process rules and regulations, will ensure that the efforts of psychologists in these areas are not wasted. Psychological research has demonstrated, through its practical impact, that the risk of miscarriages of justice occurring, can be minimised through such measures. Crucially however, there remains much work to be done and a range of opportunities for psychologists to continue to identify weaknesses and propose reform based on scientific research of the kind that has been so valuable in reducing miscarriages to-date. In addition, recent austerity measures must not be allowed to undermine the progress that psychology has helped to instigate (Grieve, 2014). After all, surely a civilised society is *morally obliged* to ask 'What can we learn from miscarriages of justice?' At the very least, it owes all the victims of its mistakes and malfeasance, this, so as to try to meet their appeal for *'…no one else [to] suffer what I've been through"* (victim cited in Poyser, Nurse and Milne, in prep).

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