



## How good are future lawyers in judging the accuracy of reminiscent details? The estimation-observation gap in real eyewitness accounts



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### ABSTRACT

Research has shown a discrepancy between estimated and actually observed accuracy of reminiscent details in eyewitness accounts. This estimation-observation gap is of particular relevance with regard to the evaluation of eyewitnesses' accounts in the legal context. To date it has only been demonstrated in non-naturalistic settings, however. In addition, it is not known whether this gap extends to other tasks routinely employed in real-world trials, for instance person-identification tasks. In this study, law students witnessed a staged event and were asked to either recall the event and perform a person identification task or estimate the accuracy of the others' performance. Additionally, external estimations were obtained from students who had not witnessed the event, but received a written summary instead. The estimation-observation gap was replicated for reminiscent details under naturalistic encoding conditions. This gap was more pronounced when compared to forgotten details, but not significantly so when compared to consistent details. In contrast, accuracy on the person-identification task was not consistently underestimated. The results are discussed in light of their implications for real-world trials and future research.

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## Habilidad de los futuros abogados para valorar la precisión de detalles evocados. La brecha entre estimación y observación en el relato real de testigos oculares

### RESUMEN

La investigación ha revelado que hay diferencias entre la precisión estimada y la observada realmente en los detalles evocados en los relatos de testigos oculares. La brecha entre estimación y observación es especialmente importante en la evaluación de los relatos de testigos oculares en el contexto legal. Sin embargo, hasta la fecha solo se ha demostrado en contextos no naturales. Además, no se sabe si esta brecha es extensible a otras tareas habituales en pruebas en el mundo real, como las de identificación de personas. En este estudio, estudiantes de Derecho presenciaron un montaje y se les pidió que lo recordaran y llevaran a cabo una tarea de identificación de personas o bien que estimaran la precisión de la actuación de los demás. Además se obtuvieron estimaciones externas de los estudiantes que no habían presenciado el montaje, recibiendo un resumen escrito en su lugar. La brecha entre estimación y observación se replicó para detalles evocados en condiciones de codificación naturales. La brecha era más pronunciada cuando se comparaban con detalles olvidados, aunque no significativa cuando se comparaban con detalles congruentes. Por el contrario, no fue infravalorada de un modo coherente la precisión de la tarea de identificación de personas. Se comentan los resultados desde el punto de vista de sus implicaciones para los ensayos en el mundo real y la investigación futura.

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#### Palabras clave:

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Consider the case of a witness who has been questioned twice by the police and who reports some details only at the second interrogation, one week later. Would you trust such novel recollections?

Research indicates that reminiscent details—details that have not been previously reported (Ballard, 1913)—are perceived to be less credible than details that have been consistently reported in both interrogations (Berman & Cutler, 1996). More importantly, they are perceived to be less credible than they actually are. In a recent study, Oeberst (2012) asked students to encode two different types of stimuli (pictures in Experiment 1 and a film in Experiment 2). Directly after encoding as well as one week later, they were asked to remember as many details as they could. Crucially, another group was asked to estimate their fellow students' accuracy on this task. Accuracy of reminiscent items was tremendously underestimated: while, after one week, only 19% of novel recollections were *expected* to be accurate, 84% were *observed* to be accurate (Oeberst, 2012; Exp. 2). Moreover, even though an estimation-observation gap was also found for forgotten as well as for consistently recalled items, it was most pronounced for reminiscent items. These findings are of particular relevance when it comes to eyewitness testimony and its evaluation in the legal context. After all, a discrepancy between actual and assumed accuracy can result in momentous consequences for the involved persons' lives. But does this striking pattern extend to more complex and dynamic real-world events? The current study aimed at answering this question by having participants witness a staged event. In addition, it was examined whether an estimation-observation gap would also be found in person-identification tasks, which are often used in real-world trials.

Presumably based on informal observations of one's own memory for everyday experiences, individuals commonly hold the implicit assumption that memory for an event is best immediately after that event, and that it subsequently decreases with the passage of time (Ballard, 1913; Gilbert & Fisher, 2006; Magnussen et al., 2008; Oeberst, 2012)<sup>1</sup>. Although this is true with respect to net memory performance over extended time intervals (e.g., Ebbinghaus, 1885), forgetting does not necessarily preclude reminiscence of items, which were not previously recollected (e.g., Buschke, 1974)—it only implies that forgetting exceeds reminiscence (Erdelyi, 2010). However, the pattern of forgetting is much more consistent with one's expectations (Fisher, Brewer, & Mitchell, 2009; Gilbert & Fisher, 2006). In contrast, the frequent occurrence of reminiscence as well as its reliability (Baugerud, Magnussen, & Melinder, 2014; Bluck, Levine, & Laulhere, 1999; Brock, Fisher, & Cutler, 1999; Dunning & Stern, 1992; Erdelyi, 2010; Gilbert & Fisher, 2006; Oeberst, 2012) is rather unknown.

These considerations gain particular importance with regard to the legal system. After all, decision-makers in this system are laypersons when it comes to memory functioning (Fisher et al., 2009; Wise & Safer, 2003). Thus, empirical evidence stands in stark contrast to what these laypersons might expect. Expectations, however, guide the evaluation of eyewitness evidence (Leippe & Romanzyk, 1989). Moreover, some jury instructions even explicitly recommend consideration of the (in)consistency of a witnesses' statement made on various occasions (e.g., Florida

<sup>1</sup> Note that there are also two studies arriving at the opposite conclusion, namely that the forgetting curve does not represent a common assumption among (potential) jurors, judges, and law enforcement (Benton, Ross, Bradshaw, Tomas, & Bradshaw, 2006; Wise & Safer, 2003). I believe, however, that this may be due to its operationalization. Both studies assessed (dis)agreement to the statement "The rate of memory loss for an event is greatest right after an event and then levels off over time" (Wise & Safer, 2003; p. 11), which represents a rather complicated wording and might thus be difficult to understand. Simple visualizations of memory performance over time as used by Oeberst (2012), in contrast, should be less prone to misunderstandings.

Supreme Court Standard Jury Instructions 3d, 2009). Reminiscence falls under the umbrella of such inconsistencies since the term 'inconsistencies' is referred to in a rather general way (e.g., Sixth Circuit Criminal Pattern Jury Instructions, No. 107, 2005) thereby conflating different types of inconsistencies (e.g., reminiscence, forgetting, contradictions). Logical and empirical aspects argue against such a conflation, however (Berman & Cutler, 1996; Brock et al., 1999; Fisher et al., 2009; Gilbert & Fisher, 2006). After all, only contradictions involve at least one false statement<sup>2</sup>. Details, in contrast, which were recollected only once, but not another time, could very well be accurate. That is, neither details, which were forgotten thereafter, nor recollections that were reported only at a later date (i.e., reminiscence) are necessarily inaccurate. However, whereas the pattern of forgetting seems in line, reminiscence seems at odds with one's expectations (Fisher et al., 2009; Gilbert & Fisher, 2006). Furthermore, doubts in the reliability of reminiscent recollections may be nourished by lawyers, who are trained to provoke such inconsistencies (e.g., Prager, Moran, & Sanchez, 1996) in order to discredit vulnerable eyewitnesses (Ellison, 2001).

Despite the sizable gap between estimated and observed accuracy of reminiscent details found by Oeberst (2012) it remains unclear whether the results generalize to naturalistic settings. In that study, participants' attention was explicitly drawn to the to-be-remembered materials because of the research setting (i.e., participants were explicitly asked to watch a video or view pictures), which is usually not the case in real-world settings. Moreover, events in the real world differ from pictures and films in various ways. Beyond differences in scaling (screen-size vs. life-size) and dimensionality (two- vs. three-dimensional, e.g., Schmitt & Anderson, 2002), witnesses in real-world settings not only view the event from their unique perspective, but are also involved to some extent. All in all, encoding pictures or films is not comparable to real-world situations and hence, generalizability cannot be taken for granted (e.g., Fariña, Arce, & Real, 1994; Ihlebæk, Løve, Eilertsen, & Magnussen, 2003). Despite this insight and previously raised concerns regarding ecological validity (e.g., McCloskey & Egeth, 1983; Yuille & Wells, 1991) hardly anything is known for adult witnesses about the actual accuracy of reminiscent items under natural encoding conditions since research on the accuracy of reminiscence usually employed videos (e.g., Brock et al., 1999; Gilbert & Fisher, 2006; Scrivner & Safer, 1988; Turtle & Yuille, 1994) and studies investigating memory of naturally encoded events (e.g., autobiographical memory) often lack the possibility to assess accuracy reliably (e.g., Campbell, Nadel, Duke, & Ryan, 2011; Nadel, Campbell, & Ryan, 2007) or the possibility to identify genuine reminiscences due to media coverage (Yuille & Cutshall, 1986). However, should the estimation-observation gap be of any relevance for real trials, it is necessary to show that it occurs in more naturalistic settings as well. The main objective of the present study is therefore to examine whether the large discrepancy between expected and observed memory accuracy would replicate under naturalistic conditions.

A second goal of the present study was to examine whether the estimation-observation gap extends to identification tasks. To date, a majority of wrongful convictions may be attributed to errors in this process (Innocence Project, 2012; Scheck, Neufeld, & Dwyer, 2000). This suggests the opposite of what has been found for reminiscent items, namely an *overestimation* of what eyewitnesses are actually capable of. Moreover, research conducted under natural encoding conditions hints towards a rather low actual performance (e.g., Behrman & Davey, 2001; Fariña

<sup>2</sup> Note that there are some cases such as when continuous information (e.g., age) is involved, in which two different statements could both count as correct – if one assumes a certain range of correct answers (e.g., 22–25 years).

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