SECOND AUSTRALIAN CONGRESS OF

PSYCHIATRY, PSYCHOLOGY AND THE LAW

CONGRESS CENTRE, ROYAL WOMEN'S HOSPITAL, MELBOURNE

FRIDAY, 6 NOVEMBER 1981, 9.30 A.M.

PSYCHOLOGY AND EVIDENCE LAW REFORM

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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INQUIRY INTO EVIDENCE LAWS

My task is to open this Congress. I have much pleasure in doing so. One of the constant themes of the Australian Law Reform Commission has been the need to bring together various specialised disciplines, particularly in the design of new laws. In an age of science and technology, this interdisciplinary communication, useful at any time, becomes imperative. The law cannot be immune from the impact of new scientific and technological discoveries. In almost every project assigned to the Australian Law Reform Commission by the Federal Attorney-General, it has proved necessary to recommend adjustment of the law to advances in scientific knowledge or new technological inventions. In other cases (such as our projects on human tissue transplantation and privacy) the principal rationale for the project is the development of the law to respond to scientific change. In some cases (such as our projects on criminal investigation and alcohol, drugs and driving) a major theme of the report has been the need to utilise new technological inventions, such as sound recording or instruments to measure intoxication. I want to speak briefly today about the implications of psychological research for the most recent project of the Commission, our inquiry into the law of evidence applied in Federal and Territory courts in Australia.

This project is being led by Mr. T.H. Smith, a Melbourne barrister, a full-time Commissioner of the Law Reform Commission. Good progress is being made. In October 1980 an Issues Paper was produced discussing many of the problems of principle that will have to be faced as the reference is developed.[1] In August 1981 two research papers were produced. One detailed the complexities of current Australian evidence legislation. The other proposed important changes in the law governing hearsay evidence.[2] Shortly to be published or completed are research papers that examine Australian case law on evidence, the admissibility of document and microform evidence and the competence of witnesses to give evidence.[3] Others will follow.

In accordance with its normal procedures, the Law Reform Commission has begun a most detailed process of consultation. The Federal Court and the Family Court have established committees of judges to consult with the Commission. The Law Council of Australia has established a national committee of legal practitioners. A team of consultants has been appointed, comprising judges, legal practitioners, academics, police and other experts. One of our consultants in this group is a psychologist, Dr. Don Thomson of Monash University. A meeting of the Commissioners with the consultants took place last Saturday and to it Dr. Thomson made a notable and interesting contribution on the topics to which I plan to address myself today.

Amongst future research papers examining the whole process of the tendering and evaluation of evidence in Federal and Territory courts will be papers on themes of great relevance and interest to psychologists and psychiatrists. For example, research papers will examine such matters as:

- Relevancy of evidence i.e. when one fact can be deemed to have a relationship to another.[4] Some facts, such as bad past character of an accused, may be logically relevant but inadmissible because of a competing social principle. Other facts, such as that a witness is dead, may be admissible, although logically irrelevant to the facts in issue.

- Oaths, affirmations and unsworn statements. What, if anything, is the impact of the oath, or the promise to tell the truth, on the testimony of witnesses in court? Are these historical ceremonies only? Have they relevance only as an implied warning of the consequences of perjury? Or does the solemn promise actually tend to encourage truth-telling, as some psychological tests suggest is the case?

Admissions and confessions. A great deal of law has developed concerning the extent to which interrogation techniques used by police and other authorities are permissible or impermissible. We have come a long way in our legal system from extracting confessions by physical torture upon the rack : once thought an entirely permissible adjunct to the proof of matters to the courts of law. In fact, our legal system prides itself in the right of criminal suspects to remain silent and requires cautions about their rights to be administered to suspects. Yet psychologists have noted that sometimes cautioning suspects to the effect that they need not speak may actually reinforce an illusion of voluntary co-operation, helping to establish rapport with the interrogator dangerous to the exercise of rights. Furthermore, the way the caution is administered may minimise its impact, especially if subjects are ill-educated or over-wrought. Police interrogators are said to be well aware of the embarrassment caused by silence in the face of continuous questioning and this may be intensified by the physical proximity of the interrogator. Embarrassment and disorientation may be caused or increased by arrest, detention and associated procedures. The subject of confessions and the needs to take our legal 'rights' seriously and to provide scientific and institutional guarantees that the rights are observed, was a theme of the Law Reform Commission's earlier report on criminal investigation.[5] This report proposed a Criminal Investigation Bill. I understand that such a Bill may shortly be reintroduced into Federal Parliament.

The course of the trial and the role of the judge. There are relatively few juries in Federal and Territory courts in Australia. It is more than 30 years since the High Court sat with a jury. The Federal Court and the Family Court have never sat with a jury. Magistrates sit without juries. The Territory Supreme Courts sit with juries but only in serious criminal trials, not in civil cases. For these reasons, it may not be necessary for us to examine closely the operation of the jury as a decision-making institution except in criminal trials. It is clear that we have come a long way to the modern jury since the case or R. v. Penn and Mead in 1670, when the jury were locked up for 48 hours without food, drink or chamber pot, until they brought in a verdict of guilty. Bravely, Edward Bushell and his fellow jurors in fact brought in a verdict of acquittal and for their pains were imprisoned in Newgate for many months until released by a writ of Habeas Corpus.[6] There has been a great deal of discussion lately concerning the jury, the extent to which (as finally selected) juries reflect the community, the extent to which people of lower and even middle intelligence can cope with complex jury issues, the growing preponderance of women in juries as many breadwinners who are excused are men, and the capacity of the jury to cope with long trials and technical evidence. One circuit judge, contributing a chapter to a text on 'Psychology in Legal Contexts', expressed his views thus:

> The great majority of jurors are in court for the first time in their lives. The whole atmosphere is to them intimidating. I think that it would not be unfair to say that many jurors have never hitherto been required to make any really momentous decisions in their lives. Now, they are being asked to decide the fate of a fellow human being, and their own personal decision may mean freedom or life imprisonment for the accused. One can sympathise with the juror who recently sought and obtained excusal from jury service in the middle of a long trial on the grounds, in effect, that the whole matter was too much for her. The courts feel that juries must be protected from having their attention diverted from 'real' evidence by expert evidence, unless it is strictly relevant within narrow limits, for fear that they may become confused. This is particularly so if the expert uses technical jargon which they may not understand, but may not wish to say they do not understand. When expert evidence is given in my court before a jury, I always ask the jury to retire to their room before the expert leaves the box in order that they may discuss with their foreperson whether there is any aspect of the evidence which they would like clarified, or whether there are any matters which they would like to raise with the expert. Far too often juries sit completely silent throughout the trial, because no-one encourages them to speak, and then when all the evidence is completed, all the speeches made and the summing up concluded, they send messages from their room raising most important questions which cannot be answered because the evidence is concluded and no further evidence can be introduced at that stage in the trial. They feel cheated and rightly so.[7]

There are so many topics that one could address in study of the dialogue between the disciplines of law, psychology and psychiatry, that one must show self-restraint. I will confine my observations to our evidence project and then deal only with two matters that have already received some preliminary study, namely:

- the reform of the law prohibiting the admission of hearsay evidence in courts; and
- the impact of psychological studies on the way in which witnesses give their evidence in court.

PSYCHOLOGY AND THE HEARSAY RULE

The greatest contribution? The hearsay rule has been described, with the jury, as the greatest contribution of the Anglo-Saxons to the law of the world.[8] The rule itself has never been stated judicially in a complete and explicit form. As with so much of the common law of England, which we have inherited in Australia, it has grown like Topsy. It is now unimaginably complicated. There is a basic rule which excludes the reception into evidence in a court of statements of what people who are not witnesses said out of court. Such statements may not be offered to the court as proof of the truth of what was said. But then there is a long list of exceptions by which courts have permitted people to give evidence of hearsay because some other reason makes the statements, though out of court, acceptable. Thus, in certain circumstances, statements by people who have since died or who are out of the jurisdiction, or statements in public records, or made by people against their financial interests, are admitted because there is some other validating element that tends to make the statement reliable and therefore acceptable in court.

In everyday life, people make decisions, of the greatest importance, without confining themselves to such a narrow range of data. In everyday decisions, we do not hesitate to rely upon hearsay material, newspaper reports, diary entries we have made, gossip, unsubstantiated rumours. In our own, out of court, decision-making, we accept this material but make allowance for the fact that it may be unreliable. It may be so unreliable that we discount it entirely. Courts, on the other hand, applying the hearsay rule, will exclude entirely out-of-court statements by people who are not witnesses. They will thereby limit their range of information in a way that sometimes seems perplexing and even unjust to laymen and experts from other disciplines.

Rationale of hearsay rule. The reasons put forward to support the hearsay rule include:

- Statements in court are on oath. Those made out of court are not, and so are less likely to be true.
- The reporter of the statement may distort it in the process of reporting it, whereas the original maker of the statement is more likely to get the statement right and so should be called as a witness if it is important to prove what he said.
- The court has the opportunity of seeing the demeanour of witnesses but is less able to assess the demeanour of a person making a statement out of court. Non-verbal behaviour is an important part of communication. It is much harder to give it weight where it is necessary to assess the report of what was said out of court. Just how truth telling can be assessed accurately from demeanour is never made entirely clear.

- Repetition may result in change too the content and thereby of the accuracy of any statement.
- The party making the statement is not subject to examination and cross-examination in court. People affected by the statement do not get a chance to confront and scrutinise the person who may be alleged to have said something adverse to their interests. They might feel, sometimes justifiably, that they had not had a fair trial.
- If lies are told in court, the law of perjury can be invoked. Reports by third parties of lies told by others out of court do not typically attract the sanction of perjury.
- The hearsay rule limits the range of material used in courts and hence limits the length and cost of trials, which are already a significant inhibition against ordinary people getting disputes to just resolution. If hearsay evidence could be admitted it would be much more difficult to contain the range of data that could be pressed upon a court as having relevance to the issues for trial.[9]

These are important reasons for considering most carefully any reform of the hearsay rule. But, in practice, the rule has often been found inconvenient, many exceptions have been devised and it sometimes astonishes witnesses that courts refuse even to hear plainly reliable material which any sensible laymen would take into account in determining the matter in dispute. It is because of the gap which has developed between the lawyer's self-inhibition, in the form of the hearsay rule, and lay expectations that pressures have arisen of late to find a more coherent approach to the admission of reliable hearsay evidence in our courts.

Moves for reform. In the United States, the Federal Rules of Evidence were adopted in 1975, effective in 1978. They introduced many important reforms to the laws of evidence in Federal courts in the United States. The Law Reform Commission's exercise is an equivalent opportunity for evidence reform in Australia. In respect of the hearsay rule, after stating the general proposition that hearsay evidence is not admissible[10] and after listing a series of 23 well-established exceptions[11], the US Federal Rules of Evidence attempt a general principle to permit Federal judges to admit a wider class of hearsay, provided it is relevant and reliable. Courts are to admit:

> 24. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by

admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.[12]

Hearsay reform has also been proposed in Australia.[13] The Australian Law Reform Commission is seeking to test the present law and its proposals for reform not only against past criticisms by lawyers but also against available, relevant psychological research. Already in our research paper on hearsay the Commissioner in charge of the reference, Mr. Smith, has collected a great deal of psychological evidence. Much of what I will say is drawn from that paper.

Key questions. Psychologists have for many years been conducting research into perception, memory and narration. These processes are clearly involved in all testimony. They are equally involved when a witness gives evidence of his own observations as when he gives hearsay evidence : typically his account of what another person told him of that person's observations. Psychological research to which I refer has involved the measurement of the accuracy and completeness of the testimony of people who themselves observed an incident and people who, though they did not see the incident themselves, have been told about it by an eye witness. Examination of experiments of this kind may be helpful in determining the extent to which accuracy and detail are lost by the retelling of a story. Put shortly, the key questions for the Law Reform Commission are:

- Is there a noticeable loss of accuracy when a story is retold : so noticeable that we can draw a distinction in kind between direct observations and repetition of third party accounts of events?
- Or are we dealing with a spectrum in which it must be frankly acknowledged that all subsequent repetition of accounts of events are defective, whether the account is offered by a first hand observer or his repeated by someone who heard the account told?
- Do personal characteristics, such as age, health, accuracy of perception, ability to recall details, play a greater part than the mere question of whether the observation was direct or recounted second-hand?
- Are we really looking here at a range : measuring the accuracy of all human perceptions and recall, so that categorisation and differences of kind (insisted upon by the law against hearsay) cannot be justified by psychological investigations and experiments?

If psychological experiments undermined the categorisation approach towards direct and hearsay evidence, this would not necessarily spell an end to the hearsay rule. Other reasons, such as the necessities of procedural fairness in the adversary trial system, including the entitlement to confront witnesses giving testimony against one's cause, might still justify retention of the hearsay rule in some form. But if the categorisation approach between direct and hearsay evidence were undermined and if the teaching of psychology was merely that we should be sceptical about all evidence (whether direct or hearsay) because of the defects in human perception, memory and recall, such a conclusion would obviously have great significanee for the direction in which reform or modification of the hearsay rule could be recommended.

Experiments. Numerous experiments have been conducted by psychologists and lawyers in an attempt to confront these questions. Many experiments have been carried out (and are still carried out) in law schools and before other intelligent groups, designed to test their recall of an incident that happens before them and to demonstrate how faulty it typically is:

- Munsterberg, in the midst of a scholarly meeting of jurists, psychologists and physicians, unexpectedly introduced a clown in bright costume followed by a negro with a revolver. To the astonishment of all present, shouts and other wild scenes took place, and then a shot and suddenly both were out of the room. The whole affair took less than 20 seconds. The distinguished audience was asked to write down their perceptions. Of the 40 reports handed in, there was only one whose omissions were calculated at amounting to less than 20%. But beside the serious omissions, only six among 40 of these trained observers did not set down positively wrong statements. In a quarter of the papers, more than 10% of the statements made were absolutely false, in spite of the fact they all came from scientifically trained observers.

- A series of experiments known as the Bartlett experiments were conducted by a procedure involving repetition of a somewhat complex North American folk tale. There was seven attempts, down a chain, to retell the story. Significant changes occurred between the first and second reproduction, but also between later reproductions.[15] To what extent were the differences a function of the particular subjects? To what extent was the ability of recall a function of the background experiences of the participants in this experiment? Distortions became greater as the chain progressed. Each listener performs his own transformations. But relevant information did remain. Even the last version may be better than no version at all. The experiment tends to demonstrate the commonsense fact that distortions can occur not only in perception but in

repetition. No-one doubts this. But the issue remains whether the added distortions involved in repetition are so significantly greater than those involved in perception itself that we must, whilst admitting the latter, totally exclude the former? Plainly further research is needed on this issue. Happily, Dr. Thomson has agreed to conduct such research for the Commission. Sometimes, doubtless, it may be better not to receive unreliable hearsay evidence at all. It may be too unreliable or remote. Especially where a jury is involved, it may be unduly prejudicial. But one suspects that the present rule against hearsay — even with its numerous exceptions — is not always justifiable — at least by reference to the test of accuracy of recall.

A number of experiments have sought to demonstrate and measure the loss of memory over time. Two Cambridge psychologists, Blackburn and Lindgren, made a recording of a discussion which followed a meeting of the Cambridge Psychological Society. Two weeks after the discussion they wrote to all those who attended and asked for a written version of all they could recall about the discussion. The average number of specific points recalled was 8.4% of the total recorded. Of the points recalled, 42% were substantially incorrect. Hence, even in the case of direct participation in the relevant events, the passage of time may have a great impact on accurate recall by direct participants.[16] An experiment by Marshall and Manson involved 167 law school students, 102 police trainees and 22 people living in low-income housing. They were shown a film and then asked to record what they perceived. Of 115 possible items to be recalled in the picture, the average recall was:

Law students	14
Police	10.3
Housing group	5.3

But perhaps even more interesting was the mean number of incorrect recall items:

Law students	2.8
Police	2.5
Housing group	1.6

In other words, there was a reverse relationship between the degree of recall and degree of error in recall in the three groups studied.

There are many other examples in the Commission's Research Paper 3, including those involving colourful attacks on the professor in a classroom. Time after time, they demonstrate the unreliability of eye witness testimony, the great amount of inaccurate perception that occurs in perfectly honest, decent and reliable citizens and the rapid fall-off in memory that occurs when any interval is allowed to pass between the events being recalled and the time when a person is asked to recall them. On this last point, Ebbinghaus launched the attempts scientifically to investigate the rate at which we forget information. His experiment in 1885 has been repeated many times since. The results illustrate that forgetting is rapid at first and then becomes progressively slower.[17] The inference that may be drawn from this is that the sooner an undistorted version of events can be taken from a witness to relevant events, the greater is the chance that this record will be accurate. The longer the interval of time between relevant events and the time the witness is asked to recall them, the greater is the chance of loss of memory and distortion in recall. All of this argues for making admissible in courts statements made by persons immediately after events occur. Yet, such statements are, according to orthodox hearsay rules, quite frequently excluded from evidence in our courts. Instead we insist upon procedures of taking oral testimony, sometimes years after events, though such testimony may amount to little more than a reconstruction of memory prompted by out of court scrutiny of contemporaneous statements or the hazy, defective recall, prompted by staccato questions which trigger off particular memory patterns. Clearly our direction of hearsay reform must be to encourage and facilitate the admissibility of contemporaneous statements of people with relevant testimony — particularly where they are actually called as witnesses. This seems clear because — even if the trial is not a search for ultimate truth but a means of settling disputes — it must be seen as a genuine attempt to establish relevant facts that are in issue. Otherwise the credibility of the process will be damaged.

PSYCHOLOGY AND THE INTERROGATION OF WITNESSES

Questions affect recall. Sometimes psychological experiments do nothing more than confirm what commonsense tells us anyway. Sometimes, however, the results of scientific experiments tend to point in a direction opposite to the expectations of commonsense. In Munsterberg's famous experiment, he found that those most upset by the episode were the least accurate in recall. Those who were totally unaffected were somewhat more accurate and those who were moderately involved emotionally were the most accurate. These findings seem to contradict the expectation that people will remember most vividly events that effect them most closely. It seems that stress factors may have a significant impact to distort or obliterate recall.

Similarly, the way in which we conduct court business by asking questions and interrupting witnesses to lead them through evidence or cross examination would seem, at least possibly, to involve the risk of distorting recall by the impact upon the answer of the way in which the question is framed. It has been found that many more errors occur when witnesses are asked to answer questions than when they are simply told to narrate, as best they can and uninterrupted, what they observed.[18] Furthermore, having been asked questions and answered them, the answers tend to be recalled later as genuine recollections and to influence subsequent recall.[19] Much research has been done on the effect of giving a bias to recall by the way in which questions are posed.

An example of how the wording of a question can affect a person's answer to it has been reported by Harris. His subjects were told that the 'experiment was a study in the accuracy of guessing measurements and that they should make as intelligent and numerical a guess as possible to each question'. They were then asked either of two questions such as : 'How tall was the basketball player?' or 'How short was the basketball player?' Presumably the former form of question presupposes nothing about the height of the player, whereas the latter form involves a presupposition that the player is short. On average, subjects guessed about 79 and 69 inches respectively. Thus, the way the question was framed led to a difference of ten inches on average in the answer tendered to the question. Similar results appeared with other pairs of questions, for example 'How long was the movie?' led to an average estimate of 130 minutes. Whereas 'How short was the movie?' led to an estimate of 100 minutes. The form of the question led to a very significant difference in the average estimate, namely 30 minutes.

Whilst Harris' study was not specifically directed to the issue of distortion by questioning, Elizabeth Loftus has concluded that the study demonstrates objectively how profoundly the answer to a question may be affected by the wording of a question.[20] Loftus conducted her own experiment involving a total of 490 subjects. In four groups they saw films of complex, fast-moving events, such as automobile accidents or classroom disruptions. The purpose was to investigate how the wording of questions asked immediately after the event could influence responses to questions asked considerably later. It was shown that when the initial question contained either true presuppositions or false presuppositions, the likelihood was increased that subjects would later report having seen the presupposed object. The results suggested to Loftus that questions asked immediately after an event can introduce new and not necessarily correct, information to subsequent recall. Those questions become part of the memory and when the memory is recalled, the form of the question may affect reconstruction of the event.

All of this emphasises that if we are to encourage the admission into court, months or years later, of written statements made immediately after events, in order to combat the rapid decline of human memory, the price of doing so must be the greatest care in ensuring that the statement recorded is not itself the subject of distortion by reason of an interested or prejudiced approach to the way in which the statement was taken down : for example, full of false or biased presuppositions.

Puncturing recall? The experiments with leading questions have an even greater significance than for post-incident statements and reform of the hearsay rule. The whole way in which we take testimony in courts of law involves puncturing the memory of the witness by a hail of questions directed to the witness, generally by lawyers or by the Bench. This is the way the adversary trial system has been conducted during its recorded history. It has the advantage of ensuring that trained lawyers usually remain in control of the proceedings. It is said to promote an orderly presentation of evidence, permits the prompting of memory, the testing of recall, the denial of suppositions that are put and above all it is the way our legal profession is used to doing things in courts in all parts of the country.

Now we are confronted by psychological evidence which suggests that this technique of the law may be actually counter-productive to the processes of human memory recall. Experiments suggest that questioning in the form usually adopted in courts may positively distort recall. The experiments seem to demonstrate the way in which leading questions can profoundly influence patterns of recall in people who are completely genuine and whose honesty cannot be in dispute. It has been suggested to the Law Reform Commission that a quicker, cheaper and more accurate way of securing testimony from witnesses would be to permit them an uninterrupted period in which they could state simply everything they can recollect relevant to the issues before the court, without interruption. Certainly, the psychological evidence available suggests that such a procedure (sometimes adopted in European court systems) could allow a more accurate statement of the current position of a person's memory than is likely to occur when the testimony is interrupted by questions which may themselves distort recall. Whether deliberately or innocently, sometimes judges, in our tradition, encourage counsel to permit a witness to proceed in this way, without interruption. But this is the exception. Critics of the 'free go' for the witness assert:

- that it would lead to some witnesses rather than lawyers taking charge of proceedings, allowing a great deal of court time to be wasted;
- that it would permit a whole range of irrelevant and inadmissible material to be placed before the court, including hearsay evidence — specially damaging in jury cases;

that some people would be advantaged by the procedure, namely the articulate, and that it would disadvantage the inarticulate, those inexperienced in courts and people who were nervous or overawed by the circumstances in which they found themselves.

Certainly this is an important issue and will have to be most carefully considered by the Law Reform Commission, with the benefit of psychological experimental evidence and submissions from the legal profession. But the Commission will also be seeking out submissions from people who have been witnesses and who feel that the current way of doing things impedes rather than promotes the presentation of testimony that is as accurate and honest that defective human recall permits.

CONCLUSIONS

This is not, of course, a dissertation on all of the psychological evidence that is relevant to the law of evidence, let alone to the law generally. We have opened an important dialogue between psychologists, psychiatrists and lawyers which has now progressed to the practical stage of having a practical part in the processes of law reform. In the past, many lawyers of our tradition have tended to react (probably with many members of the public) with distinct scepticism about psychology and its implications for legal process. Experiments have been rejected as unrepresentative or incapable of reconstructing real-life situations. The lessons of psychology have been dismissed as nothing more than dressed-up commonsense. But some of the psychological experiments studied by the Law Reform Commission have tended to raise questions about so-called commonsense.

- Some of the experiments raise fundamental questions about the orthodox way in which lawyers have been questioning witnesses for centuries. Some of these experiments suggest that such questioning will distort recall — and that witnesses should at least be given an opportunity for an unstructured statement without interruption.
- Other experiments have tended to cast very serious doubt about the typical accuracy and reliability of recall of perfectly honest witnesses.
- Others have demonstrated the very rapid fall-off in memory that occurs where there is a lapse of time between an event and the demand for its recall.
- Other experiments have shown the personal variations in the capacity of people to recall the same perceived event.
- Others have shown the added distortions that can occur through the processes of retelling.

All of this material is clearly relevant to a thorough inquiry into the law of evidence. Specifically, it is relevant to the way in which the law should move in the direction of admitting probative hearsay evidence.

One psychologist wrote recently of the danger that lawyers, when faced with impossible decisions, may seek to pass the buck to add 'expert' psychologists:

> Psychologists may be only too willing to hold themselves out as experts, and lawyers only too happy to be relieved of their especially difficult responsibilities.[21]

I can assure you that this is not the approach being taken by the Law Reform Commission. We have a healthy appreciation of the limitations of the law and of psychology and psychiatry and the duties of each to do the best they can within their own disciplines. But we will all do better if we are aware of the lessons which other disciplines have for us. It is in the hope of extending dialogue that I am here today. And it is in the hope that I may have contributed to the dialogue that I have much pleasure in opening this Second Congress.

FOOTNOTES

1. Australian Law Reform Commission, Issues Paper 3, Reform of Evidence Law, 1980.

2. Australian Law Reform Commission, Evidence Research Paper 1, Comparison of Evidence Legislation Applying in Federal Courts and Courts of the Territories; Evidence Research Paper 3, Hearsay Evidence Proposals.

3. Australian Law Reform Commission, Evidence Research Paper 2, Common Law Rules of Evidence in Federal and Territory Courts; Evidence Research Paper 4, Secondary Evidence of Documents; Evidence Research Paper 5, Competence and Compellability of Witnesses.

4. L.R.C. Haward, Forensic Psychology, 1981, 133.

5. Australian Law Reform Commission, Criminal Investigation, Interim Report (ALRC 2), 1975. See Criminal Investigation Bill 1977 (Cwlth). The topic of confessions was the subject of psychological research commissioned by the recent Royal Commission on Criminal Procedure in England. See Report, 1981.

6. The tale is told in Haward, 115.

7. Judge Brian Clapham in S.M.A. Lloyd-Bostock, 'Psychology in Legal Context : Applications and Limitations', 1981, 101.

8. Haward, 150.

9. id., 151.

10. United States Federal Rules of Evidence, rule 802.

11. ibid, Rule 803(1)-(23).

12. id., Rule 803(24). Emphasis added.

13. New South Wales Law Reform Commission, The Rule Against Hearsay, Report LRC 29, 1978. Tasmanian Law Reform Commission, The Hearsay Rule, Report 1972; Queensland Law Reform Commission, Report on the Law of Evidence, 1975.

14. Munsterberg, On the Witness Stand, 1908, 51.

15. F.C. Bartlett, Remembering : A Study in Experimental and Social Psychology, 1932.

16. I.M.L. Hunter, Memory, 1968, 161.

17. E. Loftus, Memory, 65.

18. E. Loftus, Eye Witness Testimony, 90.

19. Hunter, 267-8.

20. E. Loftus, 'Leading Questions and the Eye Witness Report', in Cognitive Psychology, 7, 560.

21. Lloyd-Bostock, xv.