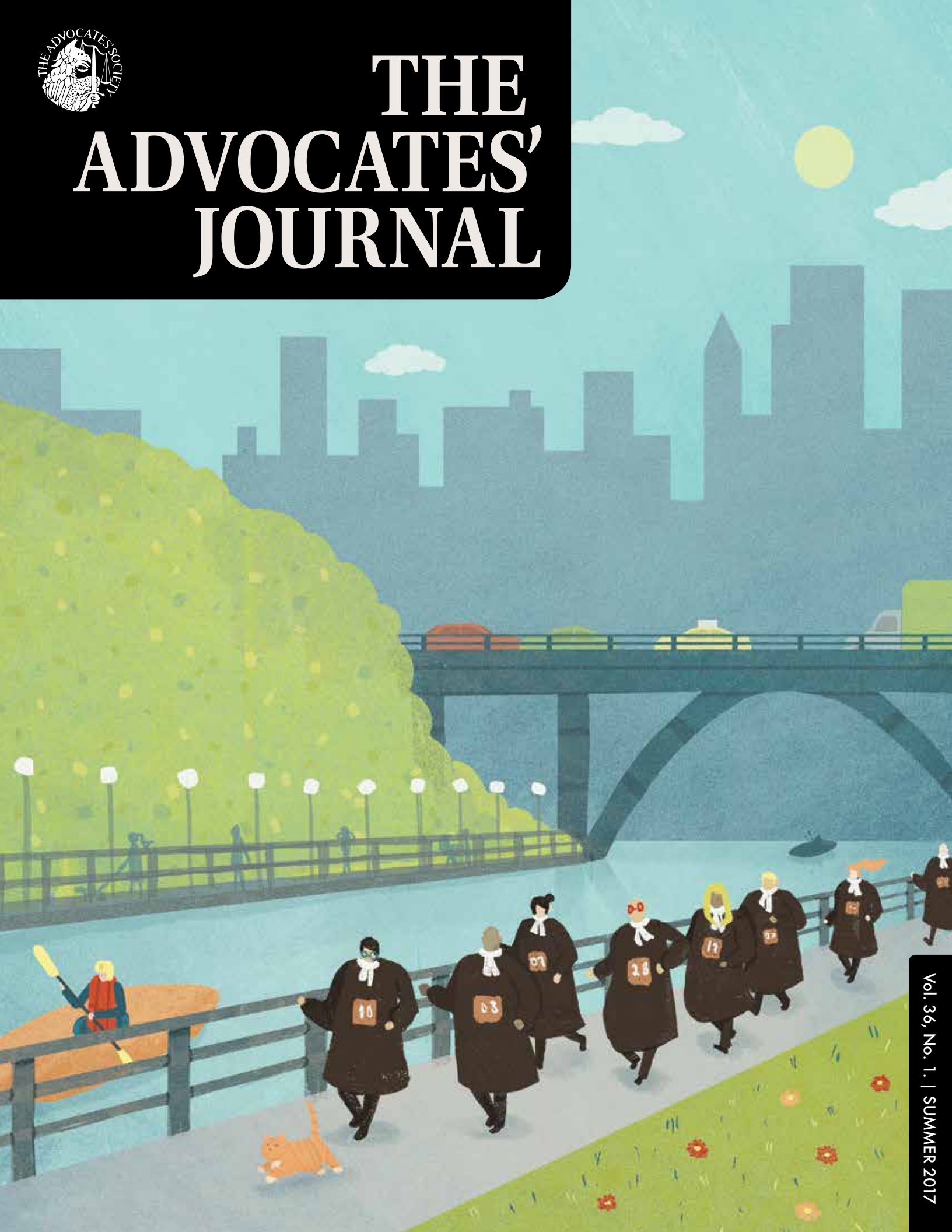




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Why we can't trust witnesses


Paul Fruitman



The most fascinating witnesses are those I call “credible fabricators.” They confidently recount their recollections, although it is clear that those recollections do not match the documentary record.

In another time, we simply called these witnesses “liars,” even sociopaths. However, with the benefit of recent research into human psychology, it is just as likely that these witnesses are telling the truth – as they observed and remember it.

It turns out the human mind has serious deficiencies. We do not think clearly, and we have questionable observational skills and poorer memories. Yet we think our memories and powers of observation range from great to fantastic.¹

This reality has profound implications for our common law, which is grounded in and depends heavily on witness testimony.

We require facts be proven through witnesses, and witness credibility weighs heavily in judges’ reasons. Our system trusts that witnesses who testify credibly and confidently are telling the truth. It appears that trust is misplaced.

However, this realization coincides with an explosion of hard data – email, social media and cellphone cameras – that more accurately capture every moment of our lives. The future development of the common law will likely depend more on data than witness testimony, as technology improves and we face growing evidence of our limited cognitive abilities.

We have bad memories, including of things we “remember” well
Scholars have been challenging the accuracy of witness

memory for nearly a century.² They have shown our memories to be amalgams of things that actually happened and details we invent to make those events conform to our views of the world and ourselves.

Until recently, however, it was believed that we could comfortably rely on so-called “flashbulb memories,” those that leave an indelible imprint on our minds such that we “remember them like they were yesterday.”³ It turns out that even our most vivid memories are not especially accurate despite our subjective belief in them.⁴ Studies of memories of the 9/11 attacks and Michael Jackson’s death, among other events, show that “flashbulb” memories decline over time just as other memories do.⁵

In addition, we are susceptible to creating flashbulb memories of events that never really happened to us. It is apparently easy to implant false memories through suggestion and the use of photographs.⁶

Why do we place so much trust in these inaccurate (and perhaps untrue) flashbulb memories? One theory is that the emotional nature of flashbulb memories breeds false confidence in them. What we fail to appreciate is that the brainpower used to capture these memories so vividly comes at the expense of processing their peripheral details.⁷ We clearly remember seeing the twin towers fall but might misremember where we were when we heard of the attacks.

This tendency to misremember provides an explanation for witnesses who appear credible but whose testimony does not fit with the documentary record. I have had this experience with witnesses on several occasions. My instinct was to think these witnesses were lying, and some of them likely were. However, some probably believed what they were saying – which explains their apparent credibility –

even though their memories had failed them.

As Hollywood producer Robert Evans (*The Godfather*, *Chinatown*) said, “There are three sides to every story: your side, my side, and the truth. And no one is lying. Memories shared serve each differently.”⁸

We miss what is right in front of us

Not only do we have suspect memories of events we witness, our initial observations of these events are also questionable. A great example is “Gorillas in our midst,” perhaps the most famous study in modern psychology. The study asked participants to watch a short video of people passing around a basketball and to count the number of passes. In the middle of the video, a woman in a gorilla suit walks from the right of the screen, pounds on her chest and walks off. Amazingly, 50 percent of participants failed to notice the gorilla.⁹

A 2000 study of changing scenes in videos and in real life produced similar results. The video scenes featured changes to actors and dinner plate colours in a restaurant scene. The real life scene involved a pedestrian asking for directions, interrupted by two people walking by carrying a door. During the interruption, the actor playing the pedestrian changed into a different person. An average of 83 percent of participants across the experiments predicted they would notice the changes. Only 11 percent did.¹⁰

The authors of the original gorilla study, Christopher Chabris and Daniel Simons, argue that our recognition failures are due to the limited processing power of the human brain and our consequent tendency to view life through a series of mental models.

When we focus on a specific task, we tend to miss things that do not fit in within those models, such as a gorilla walking through a game of basketball. We fail to recognize our limitations because we wrongly assume that unusual or distinctive objects will attract our attention. It is the reason drivers say they did not see the pedestrian they hit until just before the body bounced off the windshield.¹¹

I can think of several occasions where witnesses have been baffled at failing to have noticed a key fact, be it a fateful clause in a document or a dangerous spot on an X-ray. Such facts seemed obvious after the fact, but, being unexpected, they were missed as they happened.

We are overconfident and easily swayed by the confidence of others

One reason witnesses fail to see the limitations of their memories and observational skills is an inflated sense of self. It is a well-documented human trait. Everyone thinks he or she is above average, at pretty much everything,¹² which of course is statistically impossible.

In addition, we are more likely to believe individuals who express confidence in themselves, irrespective of their level of ability. Juries¹³ and study groups alike¹⁴ have demonstrated this susceptibility to assurance. Humans mistake confidence for competence in an individual, until we have enough exposure to the person to assess his or her ability fully.

All things being equal, the more confident a witness is in his or her memory, the more likely the trier of fact is to believe that witness.

However, the research on flashbulb memories shows that the confident witness is no more likely than the hesitant one to be telling the truth.

Objective data can compensate for human frailties

Among the modern advocates’ chief complaint is being “drowned in data.” We claim the ubiquity of email, for example, has made the discovery process overwhelming. However, such data can compensate for our poor memories and observational skills. Data are objective and do not miss gorillas or misremember.

The most obvious example of data’s superiority over witness testimony is the use of DNA evidence to exonerate the wrongly convicted. Eyewitness testimony engages all the pitfalls listed above. Crimes involve unexpected events that do not engage our typical mental models. Because of their traumatic nature, crimes also tend to generate flashbulb memories, which are inaccurate but imbue the witness with confidence owing to their vividness. Not coincidentally, false witness identifications account for fully 70 percent of wrongful convictions overturned as a result of DNA testing.¹⁵

In the same way, contemporaneous documents more accurately reflect what really happened than does the testimony of witnesses. Video and audio records are better still. Even when witnesses are certain of their testimony, there is a good chance they are misremembering their observations. There is also a good chance those observations were themselves inaccurate. My recollections of the anecdotes shared in this article are, I now realize, just as uncertain. The more we can rely on objective data, the more likely we are to do justice to the dispute. ■

Notes

- Expounding on the failings of the human mind has become its own cottage industry over the past decade. Some notable examples include Rolf Dobelli, *The Art of Thinking Clearly* (New York: HarperCollins, 2013); Richard H Thaler, *Misbehaving: The Making of Behavioral Economics* (New York: Norton, 2015); Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux, 2011); and Christopher Chabris and Daniel Simons, *The Invisible Gorilla* (New York: Crown Publishing Group, 2010).
- See eg Hugo Mustenberg, *On the Witness Stand: Essays on Psychology and Crime* (New York: Doubleday, Page, 1908).
- Roger Brown and James Kulik, “Flashbulb Memories” (1977) 5 *Cognition* 73.
- Dr Julia Shaw, *The Memory Illusion: Remembering, Forgetting and the Science of False Memory* (New York: Random House, 2016) at 159–186 [Shaw].
- The 9/11 study examined participants’ memories, one week, six weeks and 32 weeks after the attacks, and compared them with memories of everyday events at the same time intervals. The study posed similar questions – such as “where were you?” and “who else was there?” – about each memory. The participants assessed their memories of 9/11 as being better than their memories of everyday events at each interval, but both sets of memories in fact declined equally over time: Jennifer M Talarico and David C Rubin, “Confidence, Not Consistency, Characterizes Flashbulb Memories” (2003) 14 *Psychological Science* 455. The Michael Jackson study tested participants’ memories of his death shortly after it occurred and again 18 months later. Those who felt a stronger emotional attachment to Jackson expressed greater confidence in their memories of his death at the second interval than did those who were not fans, but the memories of the attached group were no more enduring: Martin V Day and Michael Ross, “Predicting Confidence in Flashbulb Memories” (2014) 22 *Memory* 232.
- Shaw, *supra* note 4 at 170–182; Kimberly A Wade et al, “A Picture Is Worth a Thousand Lies: Using False Photographs to Create False Childhood Memories” (2002) 9 *Psychonomic Bulletin & Review* 597.
- Maria Konnikova, “You Have No Idea What Happened” *The New Yorker* (February 4, 2015); online: <newyorker.com/science/maria-konnikova/idea-happened-memory-recollection>.
- The quote comes from the 2002 documentary about Evans, *The Kid Stays in the Picture*. A decade earlier, the glam rock-funk band Extreme used the title *Three Sides to Every Story* for its third record, the follow-up to the *Extreme II: Pornograffitti*, which contained the smash hit ballad “More Than Words.” *Three Sides to Every Story* was a “concept record” that grouped its songs into three “sides”: “Yours,” “Mine” and “the Truth.” However, the album and cassette versions still used two-sided records and tapes. Despite their prescience, and technical proficiency (and pretentiousness), the rockers in Extreme could not figure out how to make a three-sided piece of vinyl.
- Not surprisingly, many of the participants who missed the gorilla refused to believe that it was there. In a separate study, 90 percent of participants said they would expect to see the gorilla, although the 50 percent rate of actually seeing it has remained constant through various subsequent iterations of the gorilla experiment: Christopher Chabris and Daniel Simons, *The Invisible Gorilla* (New York: Crown Publishing Group, 2010) at 5–8, 31 and 249 (fn 11).
- Daniel T Levin et al, “Change Blindness Blindness: The Metacognitive Error of Overestimating Change-detection Ability” (2000) 7 *Visual Cognition* 397.
- Chabris and Simons, *supra* note 9 at 7, 15 and 24–30.
- This is known as the Dunning-Kruger Effect. In 1999, Justin Kruger and David Dunning of Cornell University subjected participants to tests of humour, grammar and logical reasoning. In general, participants overestimated their abilities, and those in the bottom quartile assessed themselves in the upper half. Interestingly, the more those in the bottom quartile improved their skills, the more realistic their self-assessments became. See Justin Kruger and David Dunning, “Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Leads to Inflated Self-Assessments” (1999) 77 *Journal of Personality and Social Psychology* 1121.
- Gary L Wells et al, “The Confidence of Eyewitnesses in the Identification from Lineups” (2002) 11 *Current Directions in Psychological Science* 151.
- Cameron Anderson and Gavin J. Kilduff, “Why Do Dominant Personalities Attain Influence in Face-to-Face Groups? The Competence-Signaling Effects of Trait Dominance” (2009) 96 *Journal of Personality and Social Psychology* 491.
- Innocence Project; online: <innocenceproject.org>.



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