

The Fanciful World Of Memories: Science Undermines Many Of Today's Claims

We recently defended a client against the claims of a plaintiff who worked as a pipe fitter in an oil refinery from 1953 until he retired in 1985. At trial, the plaintiff was to testify about equipment he worked with, identify the equipment manufacturers and testify

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that their products contained asbestos. His testimony would be based on his recollection of products and equipment he worked with at least twenty, and up to fifty, years before.

If someone asked you what type of toothpaste or shampoo you used 30 years ago, could you answer with certainty? Is it possible to remember such details? Since this case is one of many involving long ago exposures to products worked with only in passing, it begs the question: can plaintiffs have such certain memories?

In the early years of asbestos litigation, most plaintiffs were insulators and they worked with a few brands of insulation. Johns-Manville was everywhere and plaintiffs identified it in every case. In 1982, Manville declared bankruptcy. Virtually overnight, plaintiffs, whose co-workers had repeatedly identified Johns-Manville products, suddenly had no memory of seeing Manville materials present. However, they had impeccable memories of solvent defendants' products. So litigation proceeded against those defendants. This pattern continued as more defendants filed for bankruptcy protection.

Mass tort litigation has evolved to the point where plaintiffs have encyclopedic recall of the most minute details of their jobs. While it is hard to evaluate the significance of this phenomenon in the case of an individual plaintiff, it is possible to evaluate it at a macro level. That plaintiff-pipe fitters today do not recall Johns-Manville pipe covering at major job sites stretches credulity. That these same pipe fitters remember the makers of pumps, turbines and other equipment they worked on or around

from time to time raises questions about how the human memory works. Is it possible for people to remember who manufactured the equipment on jobsites where they worked decades ago?

It is common perception that memory works like a video or digital recorder, with life's events encoded into our mind's memory chips. People assume all one needs is a reason to "replay the tape" to bring distant memories to the forefront, where they can be repeated in an honest replay of the past. Scientific study of human memory has thoroughly debunked this notion, however. Memory is not a videotape of life. It is, instead, based on the concept of encoding information and the degradation of information over time.

Memories, in the form of eyewitness testimony, have long been offered as evidence in criminal cases. Historically, eyewitness testimony was considered reliable because the witness had recently observed a fact at issue. Beginning in the 1970s, however, scientific research began to undermine the reliability of eyewitness testimony. Significant research by Elizabeth Loftus, Ph. D., among others, found clear and striking evidence that eyewitness memory is not so accurate.¹ Based on a growing body of scientific work, courts now commonly allow experts to testify in criminal cases about the unreliability of eyewitness testimony. By the mid 1990s, according to a *Wall Street Journal* report, more than one hundred psychologists had testified in court as experts on eyewitness testimony. Three state supreme courts—Arizona, South Carolina, and California—have overturned convictions where the expert testimony was excluded.²

In *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983), the Arizona Supreme Court found the trial court abused its discretion by precluding Dr. Loftus' expert testimony on the reliability of eyewitness identification. The court discussed Dr. Loftus' credentials, stating "Dr. Loftus specializes in an area of experimental and clinical psychology dealing with perception, memory retention and recall.

Her qualifications are unquestioned and it may fairly be said that she 'wrote the book' on the subject." *Id.* at 1218. In reversing the trial court's decision to exclude Dr. Loftus' testimony, the court commented: "[e]xperimental data indicates that many jurors 'may reach intuitive conclusions about the reliability of [such] testimony that psychological research would show are misguided.'" *Id.* (citation omitted). Finally, the Court emphasized "Dr. Loftus' testimony would have informed the jury that there are many specific variables which affect the accuracy of identification . . . [including, for example that] immediate identification is much more trustworthy than a long-delayed identification." *Id.*

In *People v. McDonald*, 108 Cal. Rptr. 236, 690 P.2d 709 (Cal. 1984), the California Supreme Court found the trial court prejudicially abused its discretion in excluding the testimony of a memory expert on the accuracy of eyewitness testimony. In weighing the admissibility of the expert testimony, the Court relied heavily on the *Chapple* Court's analysis, and "conclude[d] that although jurors may not be totally unaware of the . . . psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.'" 108 Cal. Rptr. 248, 690 P.2d 722 (citing the CAL. EVID. CODE § 801).

In *State v. Moon*, 726 P.2d 1263 (Wash. Ct. App. 1986), the Washington Court of Appeals held the trial court's exclusion of expert testimony regarding reliability of eyewitness identification constituted reversible error. The Moon court noted "other jurisdictions have recently found that the exclusion of [similar] testimony . . . is an abuse of discretion" *Id.* "[T]his evidence would not only have been relevant to the facts of the case and helpful to the jury, it might well 'have refuted their otherwise common assumptions about the reliability of eyewitness identification.'" *Id.* at 1267 (quoting *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984), *cert. denied*, 469 U.S. 868 (1984). See *State v. Moon*, 739 P.2d 1157, 1160 (Wash. Ct. App. 1987) (affirming earlier decision, on appeal after remand, as "dispositive of issue whether expert testimony is admissible on reliability of eyewitness identification.")

In the experts' views, product identification testimony in civil asbestos is even more unreliable. It has all the flaws of regular eyewitness testimony, but is further

tainted by the passage of time because memory degrades over time. Two well-respected psychologists working in the area recently published a paper about their study of memory for specific brand identification. Krug, Kevin S., and Weaver, Charles A., *Eyewitness Memory and Metamemory in Product Identification: Evidence for Familiarity Biases*, *Journal of General Psychology*, Vol 132, Issue 4 October 2005. Professors Krug and Weaver asked participants to follow recipes and then gave them surprise memory tests on the specific brands of ingredients used in the recipes. The results showed participants' memory of the brands was poor after even a brief delay, and they were apt to recall familiar, common brands, even when those brands were not actually used. After a long delay, participants were twice as likely to falsely identify common products. These findings cast real doubt on the reliability of eyewitness identification in products liability cases.

Plaintiffs' lawyers fight vigorously to exclude memory experts in civil cases. They recognize how hard it is for a defense lawyer to challenge the veracity of a dying plaintiff. In fact, they believe such challenges cause juries to consider punitive damages they otherwise would not. Memory experts provide a scientific basis for defendants to argue the plaintiff's good faith belief in the truth of his testimony is not the issue, and challenge his testimony without attacking his credibility or integrity. As the science of memory continues to develop, we predict memory experts will become a common fixture in civil litigation involving toxic exposures.

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1. Dr. Loftus is the Distinguished Professor of Psychology at the University of California at Irvine. Among scores of awards, Dr. Loftus is a fellow of the National Academy of Sciences, the most distinguished award a scientist can receive in the United States. Dr. Loftus has been retained as a memory expert by Mr. Lamb and Ms. Shelton in various lawsuits.

2. Most recently, in *State v. Frazier*, 392 S.E.2d 621 (S.C. 2004), the South Carolina Supreme Court found the trial court abused its discretion in excluding a portion of Dr. Loftus' videotaped deposition.