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This Week's Feature

Memory Experts in Toxic Tort Litigation

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In toxic tort cases such as asbestos, benzene and silica, the plaintiff's accurate recollection of a manufacturer's name is often the crux of the plaintiff's case. In some toxic tort cases, the plaintiff's attempt to recall the manufacturer's name of a product is based on events that date back to the 1950s. The majority of today's asbestos cases involve facts that occurred prior to 1980. Accurate product identification by the plaintiff will determine the amount of potential settlement money he or she may receive from the defendants. A plaintiff's recollection of a product also directly affects the likelihood that a plaintiff will survive a motion for summary judgment or motion for directed verdict. In an attempt to refute the plaintiff's identification of a product name from many years ago, sometimes 40 to 50 years ago, some defendants have disclosed memory expert witnesses to call into question the plaintiff's recollection of brand names. The use of memory experts is not a new idea; however, defense counsel's ability to overcome pretrial motions to bar memory experts has become increasingly problematic.

For the last decade, a defendant's disclosure of a memory expert witness has been met with strong opposition by plaintiffs' attorneys throughout the country. Some of the most intense and heated arguments occur during pre-trial hearings on plaintiffs' motions to bar a defendant's memory expert witness. Plaintiffs' attorneys generally argue that these "so-called memory experts" invade the province of the jury and do not provide any additional knowledge beyond that which a juror already obtains from his life experiences. Plaintiffs argue that defense memory experts only present "common sense" concepts that the passage of time distorts memory recollection.

In three of the writer's recent asbestos trials, however, memory experts have been allowed to testify in the jurisdictions of Madison County, Illinois; Sangamon County, Illinois; and Milwaukee County, Wisconsin. Based on this experience, a defendant's greatest chance to survive a motion to bar memory expert testimony is to focus the memory expert's testimony on general scientific principles rather than refuting case specific facts. Trial courts have agreed that a memory expert is beneficial to a jury because memory and cognition are valid scientific areas of study in the field of psychology. Studies in the area of memory and cognition have been funded by the National Science Foundation and other federal agencies. Research in the area of memory and cognition has been generally and widely accepted in the scientific community, as evidenced by (1) major universities offering courses in the area; (2) government funding of research on the subject; (3) peer-reviewed journals reporting research in the field; (4) the awarding of a Nobel Prize in the area of human cognition; and (5) the fact that more than 50 members of the National Academy of Science are experimental psychologists.

In addition, these courts have allowed memory experts to testify regarding the process of memory formation, lay misconceptions regarding brain function and factors known to compromise the reliability of memory. Memory experts evaluate factors that have been shown scientifically to compromise the reliability of memory. They have offered opinions as to the presence of any such factors in any given witness' recollection of working with or around products manufactured by the defendants and, in fact, have been allowed to evaluate the presence or absence of any such factors in the testimony of any fact witnesses.

These courts have agreed that memory expert testimony is not within the common knowledge and experience of the average juror. Memory experts discuss the common lay misconceptions regarding brain function and the process of memory formation. Lay persons hold beliefs about memory and cognition that are not valid and have been proven invalid by scientific study and inquiry. The following chart displays beliefs commonly held by lay persons that have been proven by science to be false.

Common Misunderstanding	Scientific Understanding
Memory stores information perfectly	Memory is highly selective, encoding and storing only certain elements (Roediger & Gallo, 2002).
Trivial details of events are as well remembered as important details	Details that are central to an event are much more likely to be recalled than events that are peripheral (Christianson & Loftus, 1991; Frost, 2000; Frost, Ingraham, & Wilson, 2002; Frost & Weaver, 1997).
Retrieval of information from memory is complete and accurate	Memories can be distorted in many ways during the retrieval process, such as with leading questions (Loftus, 1998; Loftus & Pickrell, 1995) and suggestion (Roediger & Gallo, 2002; Zaragoza & Lane, 1998).
Forgetting is usually the result of an inability to recall information, rather than a failure to store it.	Much of what is commonly believed to be "forgetting" is more accurately portrayed as a failure to encode the information to begin with. For example, Nickerson and Adams (Nickerson & Adams, 1982) found that less than 10% of individuals could correctly identify all eight features on the penny (See also Frost & Weaver, 1997).
Refreshing recollection produces unbiased memories	When suggestive techniques are used to "refresh" memory, they often have the effect of creating memories for events that never transpired (Hyman & Loftus, 2002; Loftus & Pickrell, 1995; Mazzoni & Loftus, 1998; Mazzoni, Loftus, Seitz & Lynn, 1999; Wade, Garry, Read & Lindsay, 2002). In one case, viewing childhood photographs doubled the rate of false recollections, compared to those who were not shown photographs (Lindsay, Hagen, Read, Wade & Garry, 2004)
	Memory changes over time as the result of a number of factors, such as

Memories are stable over time	retrieval context, newly acquired information and misinformation presented after the original event (Koriat, Goldsmith & Pansky, 2000).
When remembering episodes and facts, retain the source of the information, as well as the content	The phenomenon of "source confusion" exerts powerful effects on eyewitness reliability (Dobson & Markman, 1993; Dodson & Johnson, 1993). Witnesses often retain the content of newly learned information, but they misattribute the source (Ceci, Loftus, Leichtman & Bruck, 1994; Zaragoza & Lane, 1994).
Confidence is a reliable indicator of accuracy in eyewitness memory	The relationship between confidence and accuracy in eyewitness memory is modest at best (Kebbell & Wagstaff, 1997; Penrod & Cutler, 1995; Perfect & Hollins, 1999; Read, Lindsay & Nicholls, 1998; Winningham & Weaver, 2000). Factors influencing eyewitness confidence and eyewitness accuracy are not necessarily the same (Wells, Olson & Charman, 2002); as a result, questioning practices can inflate confidence without improving accuracy.
Children's memory for events is usually as reliable as adult recollection	Children are more susceptible to suggestion, fantasy, perceived demand characteristics and source confusion (Gordon, Baker, Ward & Ornstein, 2001; Peterson & Whalen, 2001; Roebbers & Schneider, 2000; Zaragoza, Graham, Hall, Hirschman & Ben Porath, 1995).
Memories that are otherwise inaccessible can be retrieved through processes like hypnosis	Hypnotically refreshed testimony is widely acknowledged to be unreliable (Kassin, et al., 2001; Orne, Soskis, Dinges & Orne, 1984).
Emotional events are always better recalled than normal events	The relationship between emotion and memory is not linear. Rather, both extremes of the emotional continuum tend to reduce the number and accuracy of memories (Christianson, 1992; Christianson & Hubinette, 1993; Dutton & Carroll, 2001; Loftus, Loftus & Messo, 1987; Shaw & Sholnick, 1999; Weaver, 1993; Yerkes & Dodson, 1908).
Careful witnesses can eliminate the possible effects of suggestible questioning	Clear warnings about possible misinformation do not always eliminate their effects (Ghetti & Goodman, 2001; McDermott & Roediger, 1998; Weingardt, Loftus & Lindsay, 1995).

When arguing in opposition to a plaintiff's motion to bar a memory expert from testifying, defense counsel may wish to first focus upon what such testimony *will not* do. For instance, defense counsel can argue that memory expert testimony does not invade or usurp the province of the jury to assess witness credibility; this duty remains with the jury. Further, such expert testimony does not impeach the testimony of any specific witness, does not state that any testimony is true or untrue, generally does not provide opinions as to whether or not a witness' recollection is in fact accurate, and does not provide personal accounts of specific witnesses. Moreover, the proffered memory expert will not attempt to classify the recollections and related testimony in the case as being the same as a traumatic event in a criminal case.

Instead, defense counsel may argue, memory experts identify and explain scientifically established factors that affect the reliability of memory in the witnesses' recollections regarding exposures to asbestos. Therefore, such testimony provides the jury with an accurate framework from which to evaluate memory, and in fact, aids the jury in understanding factors related to memory of which they may not have been aware. Toxic tort litigation is an area where a memory expert's testimony is absolutely critical and essential given the length of time involved between the alleged exposure and trial, especially in cases where a long latency period between exposure and diagnosis is present.

With the assistance of jury consultants, the writer has conducted post-trial interviews of several juries to determine their opinions on memory experts. In the jurisdictions set forth above, jurors have expressed a general interest in the testimony elicited from memory experts. Specifically, jurors have stated that memory expert testimony in trial shows the fallibility of witness testimony which was likely "led" by plaintiff's counsel during examination. In addition, jurors have commented on how memory experts prompt jurors to think about memory, encoding and the process of remembering things. On a scale of 1 to 10, jurors rank memory experts in the range of 7 to 10 with respect to their importance to a juror in rendering a verdict.

In toxic tort cases with questionable product identification, it is extremely helpful to remember to retain a memory expert. The challenge to defense practitioners is to overcome the expected pretrial motions to bar this testimony. Successful results in Madison County, Illinois; Sangamon County, Illinois; and Milwaukee County, Wisconsin, give defense counsel hope that, in subsequent toxic tort trials, courts will allow memory expert testimony to reach the jury more frequently.

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