

## Eyewitnesses Seldom Are

By Jonathan W. Brogan, Esq. At trial no evidence is more compelling than that of an eyewitness. A person who was at the scene watching the events, hearing the cries of the injured and the crunching of metal, helping victims, guiding rescue worker is powerful and usually very convincing before any jury. Any experienced trial lawyer knows a credible and convincing eyewitness can establish or destroy a case. Recently, I represented a client who was involved in an automobile accident on a major thoroughfare between Maine and New Hampshire. At the time he was traveling southbound from Wells, Maine, returning to his home in New Hampshire. Traveling in the opposite direction was a 103 year old gentleman who had just left his daughter's home in southern York County and was traveling northbound towards his home in Sanford, Maine. In front of him was a vehicle that was trying to make a left-hand turn. The older gentleman was driving a 4-door sedan. My client was driving a 4-door pickup. The older gentleman rear ended the woman making a left-hand turn causing a chain reaction accident which ended up involving, finally, four vehicles. There were three independent eyewitnesses on the side of the road eating a piece of pizza at the convenience store that the turning woman was trying to enter. Unfortunately the older gentleman died as a result of the accident without making a statement about which way he was traveling. However, the testimony of my client was taken and he and his front seat passenger stated, truthfully, that they were traveling southbound. The family of the older gentleman testified that he had immediately left their home just before the accident and that his trip, if he was traveling as he should have been, could only have taken him northbound. The eyewitnesses testified that, in fact, all the vehicles were traveling in opposite directions to where they should have been. At the deposition of the main eyewitness, a motorcyclist who was eating a piece of pizza at the side of the road, he was completely convinced that the truck driven by my client was traveling northbound. Despite being presented with undeniable evidence that he was incorrect, his memory was firm and his testimony was, in his mind, unshakable. Unfortunately, this is not an unusual event. Recently in a trial that I was defending, an eyewitness testified that the ambulance driven by my client was traveling without siren or emergency lights. At the trial, we presented the testimony of the driver, two EMTs, and the patient in the ambulance involved in the accident. All testified that the lights were activated and the siren was working. The "eyewitness" stuck to her story despite conclusive proof that she was incorrect. Justice Felix Frankfurter once said, "Identification testimony, even when uncontradicted, is proverbially untrustworthy." The criminal courts have long dealt with this issue and in fact the United States Supreme Court requires trial judges to assess the reliability of any eyewitness identification by applying a five factor test. Criminal defendants have been allowed to call expert witnesses to educate jurors on the scientifically proven perceptual difficulties of humans, especially under extreme stress. Despite the known, and proven, fact that eyewitness testimony is intrinsically unreliable, most people, especially jurors, rely on eyewitness testimony at trial. The lawyer who is presenting that eyewitness testimony feels much more confident than the person having to cross examine that testimony even when it is patently unreliable. A famous jurist once wrote:

The basic findings are: accuracy of recollection decreases at a geometric rather than an arithmetic rate (so the passage of time has a highly distorting effect on recollection); accuracy of recollection is not highly correlated with the recollector's confidence; and memory is highly susceptible - people are easily reminded of events that never happened, and having been 'reminded' may thereafter hold the false recollection as tenaciously as they hold the true one.

All of us are familiar with the difficulties that Brian Williams encountered in 2015 when talking about his "memory" problems. Though it made Mr. Williams the source of much derision, his same testimony, presented at trial, without

refutation, would have been powerful and dispositive. Scientifically, memory is a three stage process. First, there is perception. Perception, especially perception that takes place for a short time in an unfamiliar location in a moment of great stress, is highly suspect. Once a perception is formed, every person then retains that perception in their memory. Unlike a photograph or a recording, a person's memory is not fixed at the time of the perception. In fact, memory is a malleable process subject to subsequent information and misinformation. In other words, a person who has a memory and begins to retain it, may have that memory changed by subsequent events, including interviews and suggestions. It has been shown through numerous tests that scientists can introduce misinformation to their subjects, destroying their memories, and creating, even in the strongest minded person, erroneous memories. Time is also the enemy of eyewitness testimony. The further from the actual event, the less likely the person who perceived it will remember it accurately. However, anyone experienced with the trial process understands that people cling to their memories. Permanent memories, which have been formed for years, are much more susceptible to memory illusions than recent memories. Memory illusions are the result of a human being's need to make sense of events. For instance, in the automobile accident case with the two vehicles traveling in opposite directions, the motorcyclist eyewitness was very influenced by the fact that the driver of the sedan that struck the turning vehicle was very elderly. It was clear he was trying to protect that gentleman and make his memory fit his belief that the older gentleman could not have caused the accident. The same was true with the ambulance case in which the eyewitness, who worked at a local bus station, saw emergency vehicles traveling through this very busy intersection near the hospital on many occasions and believed they did so without due regard for other vehicles. She also believed that this ambulance, which because of the grave nature of the condition the patient within the ambulance, was ordered to leave the scene of the accident and go to the hospital, had obviously not been operating as it should have under the law. Therefore, at many trials we are confronted with witnesses who testify, honestly, as to what they thought happened even though it didn't. Finally, the third stage of memory is retrieval. Each time a person is asked to remember an event, that event is retrieved and organized based upon the present situation of the eyewitness. If the eyewitness has to reconstruct the memory each and every time, the possibility of distortion is huge. Needless to say the same memory issues that can confront an eyewitness also confront jurors when they are evaluating the testimony of witnesses who are testifying at trial. The underlying biases and prejudices of jurors are meant to be discovered during voir dire, but jurors tend to believe fact witnesses who testify to what they saw, heard or felt in compelling detail even if that testimony has been shown to be incredible or lacking in truth. Hundreds of criminal defendants have been convicted of crimes based on eyewitness testimony. It is only later that DNA testing shows that that eyewitness testimony was completely unreliable. In those situations, corroborating evidence is needed to break the jury from the belief that eyewitness testimony is infallible and must be believed at all times. The best response to any eyewitness testimony that is irrational is to establish the basic underlying facts through corroboration. It is fascinating that even with the actual facts being established through corroboration that witnesses and their attorneys will still cling to the belief that a jury will reject the facts and accept the perception of an eyewitness, however tainted. More than once a trial has ended with the lawyer who had the better case finding that the jury did not believe his client because they believed the disputed and disproved eyewitness testimony. This is especially true in very emotional cases such as those involving the death of a highly susceptible victim (a child or an older person), a person claiming abuse at the hands of another or one claiming discrimination. It is important to remember that those kinds of highly stressful and difficult cases create in jurors the belief that they may have to "stand up" for the victim and therefore believe what they want to believe to do so. In especially difficult eyewitness cases, behavioral and psychological experts can be employed to explain to jurors that humans are very prone to misperception of stressful events and that they overwrite their recollections of events with misinformation and are

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not “lying” when presenting these perceptions at trial. Obviously if a juror can be convinced by corroborating evidence and expert testimony that a sincere eyewitness is “sincerely” incorrect in their perception then that testimony is nullified. W.C. Field famously said “there’s a sucker born every minute”. Someone once observed it is important to “tell them what they want and then give them what you tell them.” In a trial situation, credibility is always crucial. An eyewitness, who will come into court, raise his or her hand, and relate what they claim they saw, is always difficult to refute. However, eyewitness testimony is highly unreliable and if it is the centerpiece of the opposition’s argument, it must be refuted through corroborating evidence and, possibly, expert testimony regarding the unreliability of a person’s memory. Though many don’t want to believe it, most have had a Brian Williams moment. Nothing is more embarrassing then for someone’s “recollection” to be pointed out to be wholly or partially false. Luckily most of us don’t have network news shows and dozens of reporters recording our every move. However, reminding a juror of “Brian Williams moments” as well as the frailty of their own memory (how many of us have forgotten where are glasses are when they are still right on top of our head?) can be highly effective in helping jurors recognize that people make up stories for any number of reasons. The criminal courts have recognized this problem and have instructions to deal with eyewitness testimony. In civil cases, however, the law still assumes that jurors and judges can tell fact from fiction. As we all know, that is not correct. Jurors need to be told, either through other testimony, expert testimony, and in instructions from the judge that their daily experiences may not be the best preparation to evaluate the truth of eyewitness or memory based testimony and that the human memory is open to error at each of three stages or memory. Despite the jurors’ belief, eyewitness testimony is often the worst kind of testimony, not the best.