

## CHAPTER 5

### MEMORY AND SEARCHING FOR THE TRUTH

#### I.

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We are made aware on many occasions that people who have witnessed the same event tend to disagree about what they have seen. For example, consider the testimony of witnesses who were at the scene of the tragedy involving Steven Spielberg and the filming which resulted in the deaths of two children in a helicopter on the set. Witnesses were asked to answer one question: "Was Spielberg on the set on that day?" A special effects truck driver testified that Spielberg had been on the set. Spielberg said he wasn't there. Other witnesses agreed with him. The question is, why did someone who apparently is objective say positively that he saw Spielberg that day when in fact he did not?

Deception is not the only problem. It is more than that. Witnesses really try to remember what they saw, but error creeps in. Why?

A similar perceptual problem arose in connection with testimony of witnesses in the Hyatt Hotel tragedy in Kansas City when the overhead walkway collapsed onto the ballroom floor and 114 people died. The survivors were intensively questioned about how many people were on the walkway at the time since the load-capability was at issue. Some said very few, that most had already gone down to dance. Others said they remembered seeing lots of people on the walkway. This discrepancy is common, especially if it is a very emotional event. And people also tend to change their versions of what happened after hearing what others have to say or reading about it in the papers. Some survivors who originally said few people were on the walkway later changed their testimony and said they saw lots of people.

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Why is it that people can give one version and later change their testimony to precisely the opposite? What went on during the interval?

There are other interesting memory problems. Take the example of Chief Justice William Rehnquist during his confirmation hearing. He was accused of harassing minority voters in Arizona in 1960. He said it did not happen, but people testified that they remembered him engaging in that behavior. It's possible that their memories had made a composite of what various people had done.

President Ronald Reagan gives us another side of memory. We read in the Tower Commission report on page 28 that in January 1987 Reagan recalled that he had authorized the arms shipment to Iran. But in February he had a conversation with Donald Regan who reminded him that he did not authorize the shipment. Later in February, with his recollection influenced by others, he said he had no memory of the shipment at all.

Sometimes people suffer very serious misfortune because of memory. In Texas, you will remember, an engineer was accused of stealing from a Kentucky Fried Chicken establishment on the basis of the eyewitness testimony of someone who identified him with certainty. His fellow workers testified that he had been at work at the time the incident occurred. The jury did not believe them and convicted him, but later he was proven innocent.

Thus, these questions arise: How can an eyewitness be so absolutely positive and be so wrong? How is it that the jury finds this kind of testimony so persuasive? The engineer was eventually released only through the efforts of a *Dallas Herald* reporter and "60 Minutes," but he spent 16 months in prison. Later he was invited to appear on various TV and radio shows but he turned them down. Finally he agreed to appear on a Boston TV station. He was motivated to talk about what it's like to be accused of a crime and imprisoned for something that you did not do. The matter of why witnesses make mistakes was discussed and how they can be so confident about something that didn't happen. Kentucky Fried Chicken also felt they owed him something and, the engineer told me, they offered him a lifetime supply of Kentucky Fried Chicken. He turned it down.

Here we are interested in analyzing errors of perception and how we can better understand why they occur and protect against them. The most usual method of approaching the problem is through simulation, by having people look at the same film

and later try to remember what happened. Or we could interview real witnesses and learn something about memory, but that always raises the problem that we actually don't know the truth. It's hard to assess the accuracy of an incident that can't be duplicated except for the testimony of witnesses. But if we bring people into a laboratory for an event they can experience through a simulated accident, our chances of understanding how they deviate from the truth are better.

The U.S. Department of Transportation funded a study of recollections of accidents. We simulated an event of violent accidents to arouse stress or fright, to find out what factors influence high stress testimony. These factors usually run counter to the instincts of ordinary people. They cannot believe that, when you witness some frightening event, you can get an erroneous impression which is a function of your memory system. Highly stressful circumstances reduce the ability to remember.

We have come to believe that police officers have better memories than ordinary people, but we have found that in most circumstances the memory of police officers is not better than that of the average citizen. Police officers can learn to notice clues that we might miss, such as whether a license plate was clean or whether a car was dirty, but their identification of a stranger is no better than others'. In fact, they sometimes see crime and inappropriate behavior even when it is not present.

As a result, I and other psychologists are often asked to come into court to testify about psychological factors influencing high stress accounts. Although this usually happens in criminal cases, it applies equally well in the civil area. An example in the criminal arena is that of a robbery that occurs in a liquor store. A clerk is killed during the course of the robbery. A surviving clerk describes the robber, and the police artist draws a sketch while the clerk looks through the photo books. He finds a picture of a man we will call Garcia and says, "I think this is the guy." In fact, the clerk had passed over the very same picture earlier, but his memory tells him he has seen the man before. By the time of the trial the witness is absolutely positive that this is the man and says, "I'll never forget that face."

This kind of testimony is difficult to cross-examine, and I am often asked to testify about the psychological factors that cause problems for accurate testimony and how a stressful, violent event affects human memory.

Such testimony is also being used in civil cases. For example, there was an accident in which a truck ran into a car and killed both passengers. A witness was drinking coffee on the side of the road and saw the accident. He said it occurred on one side of the road when all the physical evidence pointed to the other side, indicating that his depth perception was skewed. This is the type of thing that becomes a subject for expert testimony.

Usually it is the defendant in a criminal case who offers such testimony. Sometimes the courts don't allow it. Until 1983, the higher courts upheld convictions where experts had been excluded. It remained a matter of the trial judge's discretion. However, in 1983 in the State of Arizona the Supreme Court said that the defendant had a right to this testimony and that the expert witness would have told the jury something they did not know. The conviction was reversed.

[Here a film was shown of an accident involving two cars at an intersection. The audience was interrogated later about what had occurred—the color of the cars, whether there was a policeman or a stop sign—and it was clear that they did not agree on the facts.]

One factor that affects witness accuracy is how questions are asked. In one study, various men and women were brought from a shopping center into an office building to participate in what they thought was market research involving the product Anacin. They were not aware (until later) that they were being filmed for a TV commercial. When they were asked how many other products they had used—1, 2, or 3?—the mean answer was 3.3; but, when they were asked how many other products—1, 5, or 10?—the mean answer was 5.2. When they were asked how often they got headaches, the mean answer was 2.2, but when they were asked whether they got headaches occasionally, the mean answer was less than one.

This brings us to the relationship between language and memory. We found from a very simple study that the way a question is worded affects the answer. Again, we brought people into a laboratory situation, showed them an event, and then questioned them about it. For example, in an accident scene, when we asked whether they had seen *the* broken headlight, more than twice as many answered yes as when we asked whether *a* headlight was broken. It seems that use of the indefinite article reduced their assumption of fact. In fact, no headlight had been broken.

In the use of language lawyers are known to have the advantage. The way you word a question can affect the answer not only in the present, it can also affect a later answer about something entirely different. I showed this in a study in which people saw a film of an accident. To some witnesses, I mentioned that there was a stop sign for one of the cars, car A; to others, I did not. Later when I asked who had seen the stop sign, of those to whom I had mentioned it before, 53 percent said yes, whereas only 35 percent of those who had not heard it mentioned answered that they had seen the stop sign. In fact, there was no stop sign. Mentioning it earlier as if it did exist increased the likelihood that people would say they saw it.

In other work I have actually changed people's memories by the way I asked a question. If, for example, the car in an accident was green and we suggest that it was blue, when people look at a color chart later, they will usually pick a color that is somewhere between blue and green.

Can you suggest something as large as a barn? The answer is yes. There was a film of an accident on a country road but there was no barn. We asked one group, "How fast was the car going when it passed the barn?" The control witnesses did not get the question about the barn. When we later asked the first group if they had seen the barn, 17.3 percent said yes, whereas only 2.7 percent of the control group said they had seen it.

Why do these distortions in memory occur? We really don't know why; we only know they do happen. And, they last a long time. For example, in the broken headlight case, we brought people back a week later and asked them more questions about the broken glass. In the group to whom we talked about a car *smash*, 16 out of 50 said they had seen broken glass, whereas in the group who didn't hear the word "smash," only seven out of 50 saw broken glass, indicating that the word "smash" connoted speed, so they assumed there had to be broken glass even though there was none in the film.

Whenever somebody sees something complex, such as an argument or an accident, some information gets into memory but it is in bits and pieces. But with an accident, for example, when we ask, "How fast were the cars going when they smashed into each other?", we are simultaneously delivering information to their memory. We are telling the witnesses that there was a smash. The smash connotes a severe accident at high speed, so they are more likely to see it. This becomes incorporated into memory and contaminates or distorts it.

Leading questions are not the only way that memory is affected. Another means of contaminating memory is to have the witness engage in conversation with other witnesses. Exposure to media can also contaminate memory.

What is the message in all this? It is captured best in the quotation: "Some things that will live longest in my memory never really happened."

## II. EVIDENCE: TAKING IT FOR WHAT IT'S WORTH

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Let me state my view of the matter to be discussed this afternoon—for what that view may be worth. The program you have received suggests you might be in for some sort of a tome on evidence. The field of "evidence" is, however, simply too large a bite substantively to be digested in the time allotted, even conceding the skill and adjudicatory sophistication of this distinguished audience—and you can take that remark for whatever it may be worth!

I have, therefore, focused my remarks upon a single aspect of the treatment of evidence in arbitration. I do this in the hope that some support may emerge for the thesis I advance herein. For what it may be worth, I strive in this exercise to advance the cause of limiting the arbitration hearing to what is *relevant* and to what is *material*.

It is my firm conviction that no single development in the evolution of labor arbitration as it is practiced in this decade has been as unfortunate as the widespread acceptance among arbitrators (and, indeed, even among a few advocates) of the belief that some precept of forensic therapy demands that any and all proffered evidence be received "for what it may be worth." No matter that the result is an unnecessarily prolonged hearing, increased costs attendant to an elongated record, plus wasted time and effort devoted to responding to evidence that may well have already been subjectively discarded by the arbitrator. Additionally, the practice permits the introduction of a distraction to the focus and concentration of the proceeding. I

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