Memory and the Law: Insights from Case Studies

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Memory frequently provides key evidence in the courtroom. Whether children or adults are providing evidence, all memory reports contain details of past experiences, ones that have usually happened months or years in the past or, in an increasing number of cases (at least in the UK), involving memories that may have been formed some 20, 30, or 40 years earlier. Worse, some of these memories may have been formed during periods of life when encoding, storage, and retrieval processes were not operating in an optimal fashion (e.g., during early childhood, under conditions of extreme stress, or under the influence of alcohol or drugs that compromise memory functioning). As testimony based on such reconstructive memories can convict, the important forensic issue concerns how well versed triers-of-fact are on the vicissitudes of memory. If triers-of-fact are not aware of how memory operates under the various different conditions in which witnesses have formed their memories (not to mention what has transpired between the encoding of these experiences and the time they are recalled on the witness stand), then how can they possibly be expected to adequately evaluate memory-based evidence? This is particularly worrisome when memory evidence is uncorroborated and, therefore, serves as the only evidence.

This latter question is not as simple as some of us might have hoped. There are some circumstances in which courts decide that memory expertise is not necessary at all. This is because, as some judges have opined, jurors have experience with their own memories and should be able to capitalize on this knowledge when evaluating memory evidence. Indeed, in some cases, experts have been seen as usurping the function ascribed triers-of-fact. That is, jurors, not experts, are to decide where the truth lies.

Of course, the role of the expert is not to say where the truth of the case lies, but rather, to provide the truth about what our science says about memory. Such

expert evidence serves the probative function of allowing the triers-of-fact to properly evaluate memory evidence, without which, judgments are made on the basis of personal introspection of how memory works. Such judgments are notoriously unreliable and inaccurate. Any numbers of surveys have found that most people have very little insight into how memory operates and a number of authors have tried to dissuade laypeople about the many myths of memory (e.g., Patihis, Tingen, & Loftus, 2013). It is not just laypeople who are naïve when it comes to memory, but research has established that judges, jurors, and law enforcement personnel are all too often relying on "common sense" notions of memory rather than scientific facts (e.g., Benton, Ross, Bradshaw, Thomas, & Bradshaw, 2006; Magnussen et al., 2006).

It is difficult to know the number of miscarriages of justice that exist due to triers-of-fact not having sufficient knowledge about memory, relying instead on common sense. Figures from the Innocence Project in New York City (www.innocenceproject.org) show that 306 people have been exonerated (as of May 14, 2013), people who had been wrongly convicted in whole or in part based on eyewitness testimony, people who spent an average of 13.6 years in prison prior to being released. It is clear that the current disconnect between what the science of memory has to offer and its acceptance in the judicial process can have serious consequences. Not only does expert testimony about memory need to be a part of the judicial process in trials where memory provides the key (or only) evidence, but it should also form part of the instruction provided to triers-of-fact before they decide the guilt or innocence of the defendant (for recent progress along these lines, see Schacter & Loftus, 2013).

With this as backdrop, we wanted to provide a compendium of articles where memory scholars who have provided expert memory evidence could demonstrate how the science of memory can best serve the course of justice. To this end, we offer this Special Issue of Memory, one that contains articles by leading memory researchers who also provide their memory expertise through evaluating evidence or

providing testimony in the courtroom. We specifically asked that these articles detail the authors' experiences in legal cases and by writing about cases the authors have acted in (usually as an expert witness). We asked contributors to describe a case or several cases in which they provided expert advice, advice that clearly demonstrates the contribution of a memory expert to a court or other body in judging evidence in the form of memories. We asked that they describe their contribution to the legal process whether that contribution was accepted or rejected, influenced the outcome positively or negatively, or impacted on some aspects of the proceedings but not others. Authors were encouraged to give firsthand accounts of their own experiences and to discuss any lessons learned, lessons that may help others wanting to become a memory expert witness.

Our overall aim was to compile a volume that provides a record of experience and practice as well as accounts of lessons learned and how being a memory expert has allowed a contribution that would not have been otherwise possible. Although this Special Issue may not eliminate the gap between the science of memory and it application in forensic contexts, we hope it serves to lessen the divide. If nothing else, the contributions to this issue contain some extremely useful suggestions as to how courts and other official bodies might be guided by and benefit from our current understanding of memory. Together, these articles provide direct links between what we have learned from the scientific study of memory and the applications of this knowledge to specific legal cases.

References

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