

News

Memory may fail, but faith in it may not

KIM ARNOTT

While time may dull the accuracy of a witness's memory, it doesn't necessarily dull the confidence of their memory.

That's one of the findings from a study published earlier this year in the *International Journal of Humanities and Social Science Research*.

Windsor, Ont. Crown attorney Brian Manarin and British academics Jacqueline Wheatcroft and Graham Wagstaff co-authored a paper that tested the effect of a six-month delay on the memories of people who were shown a video of a crime and then questioned about its contents in a "lawyerly fashion."

Five minutes after watching the video, people were asked a series of easy, moderate and difficult questions about what they saw, using courtroom-style queries. They were also asked to rank their confidence in the answers.

Six months later, the study participants were asked the same questions about what they had viewed.

"What we found was that both accuracy and confidence in that information were significantly reduced," said Wheatcroft, a forensic and investigative psychologist with the University of Liverpool in England.

But while the study found that the delay made people generally less accurate and less confident in their answers, their confidence in inaccurate answers to difficult questions tended to stay the same, or even improve.

"Taken together, for all practical purposes, the present results



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Victoria lawyer

would support the views of those who have concerns that delays in justice systems can have a significant and deleterious effect on the witness's ability to provide accurate testimony in court," noted the paper.

"The tendency that effects can be worsened over time if those who were confident in wrong answers remained confident in their incorrect answers later in court means that such evidence could critically influence outcomes."

The study's findings don't surprise a number of veteran lawyers, who said they simply add to an abundance of research suggesting the need for caution when dealing with eyewitness testimony in the courtroom.

"Memory is a frail capacity that is susceptible to innumerable influences, one of which is the passage of time," said Toronto lawyer Joseph Markson. "We are usually shocked when our memory is corrected by an objective litmus test, whether that happens to be a video recording or multiple other witnesses who saw the same thing, and we're off by a lot.

"We stand back in honest shock at our error. We've all experienced that and lived that."

Ottawa defence lawyer Vincent Clifford said he often sees witnesses become more confident and certain about their recollections the longer they are involved with a case.

Testimony given at a trial is more certain than at a preliminary hearing, and the recollection is even more assertive if the witness attends a re-trial as a result of a successful appeal. Repeated interviews and court preparations help people solidify their memories, he notes.

"What I have seen is that an erroneous memory is often increasingly solidified with the passage of time," Clifford said.

And while certainty "has a very tenuous connection to accuracy," it can be very compelling in a courtroom, he added.

"The degree of confidence someone displays in the witness box is really a main indicator that's used by jurors to determine reliability. Jurors equate confidence with accuracy and reliability."

Lawyers, judges and prosecutors are much more aware of the frailty of eyewitness evidence, he added. Recent decades have highlighted the unreliability of such testimony, with DNA evidence exonerating individuals who were wrongly convicted based partly on eyewitness identification.

It's a point that Victoria criminal lawyer Robert Mulligan also makes.

"The time that passes until judicial examination of eyewitnesses is not necessarily a problem or a significant factor in the final result because there is normally an early statement or other record that preserves what such witnesses had to say close to the period in question," he noted.

"The real potential problems with eyewitness evidence lie in the inherent weaknesses of such evidence, not the time it may take to test the evidence in court."

But delays in criminal proceedings can certainly exacerbate the problems related to witness reliability, says Clifford.

He notes that a significant amount of jurisprudence around

the s. 11 *Charter* right to a fair trial has established that delays can unfairly disadvantage an accused.

"When you have a significant passage of time that has ravaged the memories of eyewitnesses, it negates the ability of the defence to effectively test or challenge their evidence on cross-examination."

Countering the confidence of a witness by identifying the potential unreliability of the recollection requires a cross-examination that explores the various physical and emotional factors—from intoxication to shock, to time and distance—that may have impacted on the observations made by the witness, says Markson.

"There are classic ways of revealing to the trier of fact the presence of these corrupting influences on the integrity of the memory," he said.

He adds that the human tendency to fill in gaps in memory must also be highlighted.

"You hear a lot of 'must haves'—I must have done this, this is what I usually do. When people lack a specific recollection, they resort to habit. Or they resort to reconstruction to fill in the gaps," he said.

Beyond a detailed cross-examination, Clifford suggests the results of studies such as this one should also come before juries.

"What would be helpful would be if there was a strong movement in the jurisprudence to allow the defence to call evidence from social scientists and experts to explain the frailties of eyewitness evidence," he said.

Boyd: 'Risk attached' to divorce funding because it's a niche market

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including those "who are good family lawyers but may not have the resources to cover not only their own legal fees but start paying for experts, forensic and business valuations."

Novitas doesn't work with litigants directly but once it signs up a law firm, there's a five-page application outlining where the client is in the matter. The lawyer submits that to the client, who sends the application to Novitas, which sends it to underwriters who decide which clients are chosen. Noonan envisions the same process being followed in Canada.

Although "we really cherry-pick the cases, unfortunately we can't help everyone," said Noonan, who adds that the U.K. operation funds only one or two of every 10 potential clients. So far, it has financed



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John-Paul Boyd
Family law expert

more than 1,500 divorces.

With a minimum loan of \$15,000 to \$20,000 and no maximum amount, the average cost of a Novitas loan is about \$150,000. That covers legal fees, expert costs and living expenses. Funding is based on the client having an asset that will cover the cost of the

loan. "So there has to be not a pot of gold but something that's there at the end of the day for us to actually fund" a client.

But with an 18 per cent interest rate, that funding isn't cheap. The rate is "akin to a credit card," said Noonan, but "a lot of credit cards

aren't going to give you \$100,000 for your divorce." Family law practitioners often help bankroll those who can't rely on friends and family for financial help. "You cannot take a contingency fee on a matrimonial case," she said, so they carry that cost and hope to get paid a settlement.

Family law expert John-Paul Boyd, director of the non-profit Canadian Research Institute for Law and the Family in Calgary, sees Novitas as a potentially valuable resource for those leaving high net worth marriages who are "income- or asset-poor following separation as a way of securing justice for that narrow segment of the separating population." However, he added, "it is very niche; there is risk attached to it and it's really only going to fly in those jurisdictions where there can be sizable pots of property that

are presumed not to be shared."

Having practised family law in Vancouver for 14 years before working at the institute, Boyd has seen clients pay for counsel on credit cards or through the bank of mom and dad. "There often comes a point where the expenses of the litigation just have exhausted the litigant's ability to borrow money from all sources. That's obviously quite tragic because that's the point at which they wind up self-representing usually, and no matter what are going to see their share of the matrimony quite diminished once they pay off their obligations in connection with the litigation."

Boyd added, "It would be nice if this was an access-to-justice thing but this is sort of access to justice for the *Real Housewives* of Vancouver."