

# INSURANCE LITIGATION™

Reporter

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## The “Notice of Loss” Condition, Judicially Inferred Negations Thereof (To-wit: Lack of Prejudice), and The True Realities of Memory

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Here are the words of Elizabeth Loftus, a well-known scholar and advocate: “Memory is a powerful force, even if it isn’t always accurate. And it isn’t.”<sup>1</sup> For many years Professor Loftus taught and researched at the University of Washington; she has now gone to the University of California—Irvine. Loftus writes reams (over 20 books and many more—often scholarly—articles), speaks often and serves as an expert witness from time-to-time. The last of these is what made her most famous. Now, what has all this to do with insurance litigation?

### I. THE PROBLEM.

Traditionally, many types of insurance policies require that insureds provide insurers with timely—“ASAP”—notification of any possible insured loss and to timely provide proof of any such loss in a timely manner. Here, we shall focus upon the *notice-of-loss* requirement to be found in many types of policies. In almost all policies, the requirement that an insured notify an insurer as to the occurrence of a loss in a timely manner was neither part of the *this-is-covered* portion of the policy, nor the *this-is-excluded* portion of the policy. Instead, the requirement of timely notice

was a condition. Obviously, it would be a condition precedent upon the insurer having a duty to either adjust or pay a loss.

Generally speaking, under both contract law and insurance law, a condition precedent is a requirement in a contract, compliance with which is a necessary condition upon the obligations of the other party. As a general rule, in order to invoke a condition, regulating the conduct of another party, the party whose benefit was protected by a condition could invoke it even if it was not injured by its violation. Of course, there was nothing obligatory about a party invoking a condition. A party need not do so, and across the history of insurance, it frequently happened that insurers did not actually invoke conditions. At the same time, it was not infrequent that they did just that.<sup>2</sup>

Over a considerable period of time, these rules have changed. This trend has even influenced contract law in general.<sup>3</sup> Returning to insurance, these days there are so many different kinds of policies, the rules are not uniform for every different kind of policy. However, with respect to commonly used liability insurance forms and widely used

1. Elizabeth Loftus, *MEMORY* 6 (Addison-Wesley Publishing Company, 1980). (Hereinafter cited as “MEMORY, supra n.1 at \_\_\_.”) Research sources are first cited by the author’s full name and thereafter by its last name. Professor Loftus was, for many years, a full-time Professor at The University of Washington, where she is now an Affiliate Professor of Psychology and Affiliate Professor of Law. In more recent years, she became a Distinguished Professor at The University of California at Irvine, where she serves in several different departments: (1) Psychology and Social Behavior, (2) Criminology Law and Society, and (3) Cognitive Sciences. In addition, she is a Fellow at the Center for the Neurobiology of Learning and Memory. In 2003, she was awarded the American Psychological Association Award for Distinguished Scientific Applications of Psychology, and in 2005, she received the Grawemeyer Award from The University of Louisville. A selection of Loftus’s other publications in magazines and journals are available on her website: [www.seweb.uci.edu/faculty/loftus](http://www.seweb.uci.edu/faculty/loftus). For a dramatic story on Professor Loftus’s career see, Amy Wilson, *War & Rememberance*, THE ORANGE COUNTY REGISTER (November 5, 2002).

2. Lee R. Russ & Thomas F. Segalla, *COUCH ON INSURANCE* 3D § 81.19-20 at 34-35 (2005). (Hereinafter cited as *COUCH*, supra n. 2 at § \_\_\_ at \_\_\_.)

3. RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981).

property insurance forms, the new and applicable rules are not terribly dissimilar. Nowadays, most conditions regulating notices of loss require that the insured provide the insurer with notice of a (hypothesized) loss as soon as “practicable.” The concept of the *practicable* and the concept of *practicability* are not widely used and independent concepts. In fact, the first time we saw these terms in insurance policies, we thought they were an invention of the insurance industry. We were wrong. Still we did not see the term used elsewhere until preparing this paper.

Thus, we simply showed our linguistic ignorance. We shall now demonstrate, in a lengthy and oppressive way perhaps, the use of these terms. Currently, on Google, the word “practicable” has 13.5 million entries, which are associated with defining the term. (If you put in the two words “practicable” and “insurance,” you get only 2.31 million entries.)

Here are some of the dictionary entries found through Google. The AMERICAN HERITAGE DICTIONARY reads as follows when it defines the word “practicable”:

ADJECTIVE: 1. capable of being effected, done, or put into practice; feasible; See synonyms at *possible*. 2. useable for a specific purpose: *a practicable way of entry*.

According to this dictionary, the etymology of the word is Medieval Latin, where it means *capable of being used* and from the earlier Greek where a similar term meant *practical signs*. The dictionary goes on to note the international usage of the word, and its linguistic relatives, though it may not be either practicable or profitable (not to mention possible) to learn the language of every country in Europe.

It is easy to confuse *practicable* and *practical* because they look so much alike and overlap in meaning. *Practicable* means “feasible” as

well as “usable,” and it cannot be applied to persons. *Practical* has at least eight meanings, including the sense “capable of being put into effect, useful,” wherein the confusion with *practicable* arises. But there is a subtle distinction between these words that is worth keeping. Someone with a practical knowledge of French may be able to order coffee in a café, though it may not be practicable to learn the language of every country in Europe.

We are not sure we follow the last sentence of this note upon usage to be found in the AMERICAN HERITAGE DICTIONARY.<sup>4</sup>

Actually published, more advanced, dictionaries are a little different, but not much. The earliest “prestigious” dictionary is that of Samuel Johnson (1709-1784), the hero of James Boswell’s (1740-1795) Eighteenth Century writings, including THE LIFE OF SAMUEL JOHNSON, published in 1791, and the guy many of us heard about in high school. Johnson’s two-volume A DICTIONARY OF THE ENGLISH LANGUAGE, published in 1755, contains the word “practicable” and four literary sources for which the word had previously appeared—one from John Dryden and one from Jonathan Swift. His definition has two parts. The only one that counts is this one. The word “practicable” means “performable; feasible; capable to be practified.” The last word does not appear in Johnson’s dictionary.

Perhaps the most famous dictionary of the present day in America is WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, published in 1986. It, too, defines the word “practicable,” and it does so as follows:

1 : possible to practice or perform : capable of being put into practice, done, or accomplished : FEASIBLE <a ~ method > <a ~ aim > 2 a : capable of being used : USABLE <a

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4. We are quoting from the Fourth Edition of the AMERICAN HERITAGE DICTIONARY, published in 2000 by Houghton Mifflin Company. This edition bears the date 2000. The language of this entry may also be found at [www.bartleby.com/61/79/P0497900.html](http://www.bartleby.com/61/79/P0497900.html). See, [www.thefreedictionary.com/practicable](http://www.thefreedictionary.com/practicable). There is to be found the same information from exactly the same source, although it states that it was updated in 2003. Sticking with the Internet, THELAWENCYCLOPEDIA.COM sets up a different definition. It goes this way: “adj. when something can be done or performed.” This definition, of course, is quite different from the definition in THE AMERICAN HERITAGE DICTIONARY. The dictionary in the latter, already quoted, entry is not a wedded temporality whereas the definition in THE CONCISE LAW ENCYCLOPEDIA is. See [www.thelawencyclopedia.com/term/practicable](http://www.thelawencyclopedia.com/term/practicable). We shall discuss another law dictionary presently.

~ weapon > syn see POSSIBLE....

There is no reference to the word used by Johnson, namely, “practified.” Nearby, however there is the word “practic” which could mean a variety of things, including a concept of Scottish law: “The ancient reported decision of the Court of Session used to show the customary practices and law.”

Another significant dictionary is the OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE, published by the Oxford University Press in 1999. There, the definition of the word “practicable” is as follows:

Adj. 1 that can be done or used. 2 possible in practice.                   prac\_ti\_ca\_bil\_i\_ty  
prac\_ti\_ca\_ble\_ness *n.* prac\_ti\_ca\_bly *adv.* [F  
*practicable* f. *pratiquer* put into practice (as  
PRACTICAL)]

Interestingly, WEBSTER’S and this OXFORD are somewhat different, since the former emphasizes idea of the *possible*, OXFORD does not.

There is a second OXFORD DICTIONARY, the Fifth Edition of which was published in 2002. This is the SHORTER OXFORD ENGLISH DICTIONARY, another two-volume affair. In its second volume, the term “practicable” is defined, in part, as follows: “Able to be put into practice; able to be effected, accomplished, or done; feasible.”

Thus, while the various contemporary dictionaries are somewhat different in subtleties, they are substantially the same. This is true even of the Eighth Edition of BLACK’S LAW DICTIONARY, published in 2004. In that volume, the term “practicable” is defined as follows: “(Of a thing) reasonably capable of being accomplished; feasible.” Obviously, the definition BLACK’S clearly supports the view regarding *practicable* which we stated near the beginning of this semantical discussion.

Probably, the original meaning of the phrase “as soon as practicable” regarding timely notice in most insurance policies and the forms therefore meant *as*

*soon as it (i.e., notice) can reasonably be provided.* The idea of *the* practical is built into the word “practicable.” Naturally, in the early days, many insurers tried to take advantage of the obscurity of the little-used term, “practicable,” and tried to make it mean *as soon as possible*. Slowly, over some considerable number of years, the narrow and draconian interpretations of this phrase came to be limited.<sup>5</sup>

Over later years, this clause changed itself and came to emphasize—and not just acknowledge—such ideas as *the reasonableness of the timing of the notice* or the idea that *the insurer must be prejudiced* by the lateness of the notice before coverage could be refused for the violation of the condition. At the present time, “a majority of jurisdictions now require that the insurance company show that it has been prejudiced by late notice,” before it can claim that the policy does not apply because the condition has been violated.<sup>6</sup> Indeed, “[a]n increasing role is being played by the concept of prejudice to the party in whose favor the condition operate[s].”<sup>7</sup>

An insurer’s burden proving prejudice is a complex, heavy-duty matter, or at least it can be:

In proving prejudice as a result of a delay in providing notice, it has been stated that an insurer is not required to show precisely what outcome would have been had timely notice been given to make [a] showing of substantial prejudice. However, an insurer must show the precise manner in which its interests have suffered, meaning that an insurer must show not merely the possibility of prejudice, but rather, that there was a substantial likelihood of avoiding or minimizing the covered loss, such as that the insurer could have caused the insured to prevail in the underlying action, [if it is a liability insurance policy,] or that the insurer could have settled the underlying claim for a small amount or a smaller sum than that for which the insured ultimately settled

5. Eugene Anderson, et al., *Draconian Forfeitures of Insurance: Commonplace, Indefensible, and Unnecessary*, 65 FORDHAM L.REV. 825, 833-35 (1996).

6. COUCH, *supra* n. 2 at §193:1 at 193-7. Much of the historically interesting case law is cited and discussed here. They do not need re-review here.

7. *Id.* at § 193:25 at 193-37.

the claim [again if the policy was a liability policy.]<sup>8</sup>

“In other words, the insurer must show not just the end results, but also the probability that such results could or would have been avoided absent the claimed default or error.”<sup>9</sup> Such proof is not easy. In fact it is hard. This is especially true when courts believe that insurers should pay, if at all reasonable, and are skeptical of insurer arguments that insureds have not followed complex claims procedures.

Fairly obviously, the same kinds of propositions apply to property insurance. If there has been a delay in the claim, so that information about the property loss cannot, for example, be inspected, then the insurer will want to claim that it shouldn't have to pay the loss, because the amount of the loss cannot be computed. But, so the idea goes, the insurer cannot utilize this gambit, if it cannot prove that it has been prejudiced by the policyholder's delay in filing notice of claim. Surely, so the reasoning will go, the existence of the building, many of the dimensions of the building will already be known. There may very well be many photographs of the building and its contents, and so forth. Why, therefore, should the insurer be able to take advantage of a delay, if it is not prejudiced?

In other words, in order to invoke the *timely notice required* condition, an insurer must be able to establish that it has been actually prejudiced by the untimely notice of the policyholder's loss. As everyone in the practice knows, this is not so easy. The main question presented to the insurer is, “Precisely how were you prejudiced?” This question often comes up in depositions, not to mention trials. (Of course, it should be mentioned that untimely notice is usually not a trial issue. It is much more frequently a deposition issue, and it is often abandoned by trials—which are seldom held anyway.)

Another significant question which every insurance-coverage lawyer must care about, but which will not arise in testimony, is this one: “What counts as prejudice in this contract?”

There is a central problem in proving prejudice. The insurer must prove that he has been hurt by the untimeliness of the insured's notice. How can the insurer prove that it was hurt, if it cannot clearly identify that which it cannot see, find, photograph, feel, test, possibly even identify and so forth, precisely because it is gone, or transformed in some way or another by the delays in notice. This is a real and difficult problem. Insurers often lose when they try to prove prejudice; that can be itself prejudicial—or at least discouraging—in the litigation process; and it can be expensive.

Over many, many years, the *as-soon-as-practicable* requirement for notice of loss has evolved in a direction favoring policyholders. Perhaps there should be some limitation on this evolution. Perhaps the evolution should be reversed to a certain degree. That is the topic of this essay, and we proceed on the basis of a very simple thesis. If the memories of human beings (at least tend to) deteriorate over time, then simply the passage of time may very well, in and of itself, be a source of prejudice to an insurer that is asked to pay a loss. Hence, we will mostly examine some recent studies of memory. The reader should (at least try to) remember that the “Brandeis Brief” can be helpful litigation tools.<sup>10</sup>

## II. SOME RECENT RESEARCH ON MEMORY.

Problems involving memory date back to Greek philosophy, and perhaps before. We have not researched the history of doubts about memory back through the centuries, and we cannot remember what we were taught in our various college and graduate school classes. Besides, the thoughts of Epictetus,

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8. Id. at § 193:29 at 193-44/45.

9. Id. at § 193: 29 at 193-45. Of course not all insurers have the same notice provisions in their policies, and probably the same rule does not apply to all insurers. This point is particular true, of course, if there is a contractual requirement that the injurious event and the notice-to-the-insurer thereof must occur during the policy period. Some malpractice and/or error and omission policies are like this. Fidelity bonds, and like, have their own conditions and rules, which sometimes are and sometimes are not impacted by general common law rules. A problem involving this sort of thing has arise in New York state. A school district came to know that it had been subject to theft by various of its managerial employees. It did not realize that the sum was large, and failed to report. (The actual sum, in the end, was \$6.8+ million. Several years later, large losses were reported. Of the four different annual carriers involved, three denied coverage on the grounds of late notice, and one reserved rights. Alison Leigh Cowan, *Failure to File Timely Insurance Claim May Cost Plundered School System Millions*, NEW YORK TIMEWS, A22 (December 5, 2005). Interestingly, the school board has also sued its lawyers who advised it as to filing insurance claims.

Plato, Aristotle, Aquinas, Leibniz, and Hume will not be very persuasive in the courtrooms and appellate libraries of the Twenty-First Century. (As is often the case, Aristotle is one of the most interesting historical figures to have theories about anything. With respect to memory, he suggests that it is based upon imagination which draws from perceptions of the external world. Obviously, if imagination is involved in every memory of every empirical event in the past, and if imagination is acknowledged to have creative and therefore, distorted effects with respect to historical truth, then memory is always dangerous, and the more imagination is involved, the more dangerous it is.) We therefore, focus on recent discussion of memory by some empirical psychologists.

#### A. Some Recent Work.

In the authoritative and recent book by memory expert and Harvard University Department of Psychology, Professor Daniel L. Schacter, entitled *THE SEVEN SINS OF MEMORY*, the central premise of the entire book is dramatic, serious, though in the end—obvious: people forget facts, distort past events in remembrance, and *often* have erroneous memories!<sup>11</sup> Perhaps the *often* is not so obvious. For example, the two authors of the essay often have

somewhat different rememberings of memorable events of married life, and at least one of them is usually certain and remains so. Even in the face of a disagreement. Most everyone has known the “Schacter Thesis” for thousands of years. Significantly, Schacter poses and explores another question: What are the different ways memory goes wrong? In fact, this is what the title of the book is all about. The “Schacter Seven” have profound implications for legal proceedings, as Schacter himself points out.<sup>12</sup> His seven ways memory goes wrong will be explained presently, and then explored some.

Another scholarly and more historical review of thorough research conducted in the memory field is to be found in Ian Neath and Aimee Suprenant’s book, *HUMAN MEMORY*.<sup>13</sup> This study includes historical accounts running from the first genuinely scientific studies of memory conducted by Hermann Ebbinghaus in 1885 to current information regarding the complexity of the brain and the technological advances allowing deeper study of neurological processes. This study is not so classification and category-oriented as Schacter.

Elizabeth Loftus, already mentioned, another leading memory expert and frequent expert witness,<sup>14</sup> outlines somewhat different (non-Schacterian) categories of forgetting in her earlier, well-known, and widely used book *MEMORY*. The “Loftus

10. Here is how the “Brandeis Brief” has been described: “When Louis D. was to argue the case of *Muller v. Oregon* (1907), 208 U.S. 412 before the U.S. Supreme Court, in which a state statute was attacked as unconstitutional, as being an unreasonable interference with life, liberty, or property, he successfully contended that evidence should be admitted from social study investigations which cast light on the dangers which the statute was intended to counter. This enabled the Court to appreciate the social background as well as the legal logic involved. It has since been used in other similar cases such as *Bunting v. Oregon* (1916), 243 U.S. 426 and *Adkins v. Children’s Hospital* (1923), 261 U.S. 515. Such briefs have been used also in cases where scientific ideas and articles are important.” See David M. Walker, *THE OXFORD COMPANION TO LAW* 149 (1980). Philosophical and psychological thought about memory has a long history. It does as well in the history of theorizing about rhetoric, historically speaking, one of the principal training focuses for lawyers. See Frances A. Yates, *THE ART OF MEMORY* (1966), a true classic of modern scholarship.

11. Daniel L. Schacter, *THE SEVEN SINS OF MEMORY* 1-3 (Houghton Mifflin Company 2001). (Hereinafter, cited only as “7-SINS, supra n. 11 at \_\_\_.”) Professor Schacter joined the Psychology Department of Harvard University in 1991, where he became also Chairman of the Department in 1995. He has been Chairman ever since. He has visited at the Institute for Cognitive Neuroscience at The University College London, and since 1992, he has been the William R. Kenan, Jr. Professor of Psychology at Harvard. The book presently under discussion and just cited was awarded the Notable Book of the Year award by the New York Times Book Review in 2001. He received a similar reward for the same book from Amazon Books, and the William James Book Award from the Society for General Psychology of the American Psychological Association in 2003. Professor Schacter has written dozens of scholarly articles on memory, and they can be found as cited at his website, [www.wjh.harvard.edu/~dsweb/bio.html](http://www.wjh.harvard.edu/~dsweb/bio.html). A selection of Schacter’s other publication in journals are available on his website: [www.wjh.harvard.edu/~dsweb/bio](http://www.wjh.harvard.edu/~dsweb/bio).

12. *Id.* at 5.

13. Ian Neath and Aimee M. Suprenant, *HUMAN MEMORY* (2<sup>nd</sup> Ed.) (Thomas Wadsworth, 2003) (Hereinafter cited only as “HUMAN MEMORY, supra n. 4 at \_\_\_.”)

14. Two of her more important books on this subject are Elizabeth F. Loftus, *EYE WITNESS TESTIMONY*, (a revised edition of a 1979 book) and *THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL*, written with Katherine Ketcham (St. Martin’s Pr. 1991).

Categories” are interference, retrieval failure, motivated forgetting, and memory never being stored.<sup>15</sup>

A third comprehensive and thorough review of the study of memory is THE OXFORD HANDBOOK OF MEMORY.<sup>16</sup> This treatise includes the theoretical concepts of memory, a review of experiments and lab studies of memory, including bio-neurological processes, plus discussions of memory development and memory decline. All of these are valuable citational sources for the lawyer.

The OXFORD HANDBOOK categorizes memory-losses this way: omission and commission. *Omission* is a universal referring to a type of event—one of the type which occurs when people *fail to recollect* something; that is, when memories decisively fade. In other words, nothing about—say—an event is remembered at all. Much more controversial is the universal *commission* which happens when past events are remembered quite differently from the ways in which they actually happened.<sup>17</sup> Some thing or some event is remembered—sort of, but—very incompletely or in a distorted way.

Obviously all of these types of memory problems—some, very incomplete in significant ways, others distorted, twisted, elaborated, or expanded—are important to epistemology, psychology, therapy, history, litigation, and insurance adjustment—not to mention married-life, love-life, raising children, asking out a person (or agreeing to go) when you have known the person well for a long time, and much, and much more. People would like to believe that their memories are fairly accurate renditions of their previous experiences and that the recollections they have accurately derive from stored traces of actual events. In fact, as virtually all scholars in the area suggest, believe, and sometimes prove: Perceived memories go “wrong” in several ways.

Schacter divides memory problems into seven different categories or sins (S):

transience (the loss of memory over time);

absent mindedness;

blocking (like the tip of the tongue phenomenon);

misattribution (assigning memories to a wrong source);

suggestibility;

bias; and

7.persistence.

Obviously, this is a helpful, commonsensical set. To some degree it resembles details for the “Oxford Categories,” although its elements are narrower. S#1 and S#2 resemble *Omission*, while S#3-S#7 resemble *Commission*.

The following is an abstract discussion of some of the ways memory problems can prejudice insurance companies in performing an adequate investigation and proper defense of its insureds when there has been a delay in reporting the loss. To a considerable extent it follows Professor Schacter. At first it will be abstract.

### B. Transience.

The most obvious problem for insurance companies when a loss is not reported promptly is that valuable facts and details are forever lost or distorted. Indeed, in some sense, a whole “thing” may be gone from memory. Transience is the most pervasive memory problem, and it worsens as time goes on.<sup>18</sup> In a prior book, *SEARCHING FOR MEMORY*, Schacter recounts at length research which supports this general rule that memories become gradually less and less accessible over time.<sup>19</sup> It is a wonderfully citable source. Thus in insurance claims-handling, the passage of time usually diminishes and sometimes eliminates reliable memory as time goes by. So does the spread of time before the process begins. As the

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15. MEMORY, supra n.1, at 66-76.

16. Endel Tulving and Fergus I.M. Craik, THE OXFORD HANDBOOK OF MEMORY (Oxford University Press, 2000). (Hereinafter cited as “OXFORD supra n. 16 at \_\_\_.”) Professor Tulving was Professor Schacter’s dissertation advisory at the University of Toronto.

17. Id. at 149. These might be called the “Oxford Categories.”

18. 7-SINS, supra n. 11 at 13.

term “transience” semantically suggests on its face, this form of memory-loss is not sudden. Rather, it proceeds—sometimes slowly—over time. Moreover, memories which can appear to be lost can be *recovered, revived, or—as it were—“re-called.”* At some point in time, depending on the person, the time lapsed, and that which is either remembered or not, a memory once present is gone completely and for good.

Studies abound. Researchers interviewed 590 people injured in automobile accidents within three months of the event. All had reported the accident. But interviews nine to twelve months after the accident showed that 27% failed to report it at all.<sup>20</sup>

Other studies have shown that even in the early days after an event occurs, memories begin to fade so that and after a month up to 75% of a memory is lost. Vivid details rapidly decline over the first three months.<sup>21</sup>

However, if one has an opportunity to discuss or ponder the event early on, remembering the details and facts is vastly improved. Ian Hacking in his book, *REWRITING THE SOUL*, points out that often memory is mostly about the ability to recall. Thus, at least sometimes, forgetting is not so much about *losing* information as it is being *bidden*. Significantly, even this type of recall ability diminishes over time unless one is able to review and rehearse the information.<sup>22</sup> *THE OXFORD HANDBOOK* concurs. The key to encoding information correctly in the first place is attention and rehearsal, the more rehearsal, the better.<sup>23</sup> Early intervention not only assures an insurance company of getting more facts more accurately, but actually aids the witness in retaining those facts both at the time

and later.

Routine transience as a loss of memory can be impacted by intervening forces. Long-term (and hence declining) memory is also impaired by *interference* with experiences that are similar. What may or may not have happened on a seemingly typical Monday in July can be difficult or impossible to retrieve in September.<sup>24</sup> (Question: “Michael, what did you wear to work on the second Monday in July?” Answer: “Good Lord! It is now the third Tuesday in September. How should I know?”) Also, an event happening before or after some other event can (and often does) interfere with or competes with the memory of the original or subsequent event, sometimes causing people to remember the interfering event as if it were the original or other event.<sup>25</sup> Memory is often seen as a discrimination problem in which it is more likely that details will be remembered if they are distinctive.<sup>26</sup> Events are distinctive when they are unusual, dramatic, exciting, riveting, or shocking. Thus, there can be problems when the witness views those distinctive events. High emotion at the time of an event, for example, can affect the accuracy and/or details of the memory.<sup>27</sup> If there is an accident, injury, or catastrophe that causes a loss that arouses strong emotion, the memory will remain but the witness can be so focused upon the emotion generating aspects of the event, (e.g., a dead man in the street), that surrounding details, possibly important to an investigation, begin to fade.<sup>28</sup>

If a witness himself is subjected to great anxiety or stress at an occurrence, then his own memory will likely be affected. “Generally speaking, strongly negative and stressful emotions hinder accurate

19. Daniel L. Schacter, *SEARCHING FOR MEMORY*, 76 (1996). At the time it was published, this book received considerable attention and several awards. It received the New York Times Book Review Notable Book of the Year award in 1996; it was named by the Library Journal to be among the Best Science in Technology Books of the Year for 1996, and it received the William James Book Award from the American Psychological Association in 1997.

20. *Id.*

21. 7-SINS, *supra* n. 11 at 14-15.

22. Ian Hacking, *REWRITING THE SOUL* 214 (Princeton University Press, 1995). (Hereinafter, cited as “SOUL, *supra* n. 22 at \_\_\_\_.”) Ian Hacking is the Chair of the Philosophy in History of Scientific Concepts at the Collège de France, and is a University Professor in Philosophy at the University of Toronto.

23. *OXFORD*, *supra* n. 16 at 93.

24. 7-SINS, *supra* n. 11 at 32.

25. *OXFORD*, *supra* n. 16 at 153.

26. *HUMAN MEMORY*, *supra* n. 4 at 138.

27. *OXFORD*, *supra* n. 16 at 380.

28. 7-SINS, *supra* n. 11 at 162.

perception and memory.”<sup>29</sup> Loftus believes this is because people concentrate on fewer features in high stress situations.<sup>30</sup> And when people witness a disaster, they often remember very little extraneous, yet potentially important details.<sup>31</sup> Early investigation can better retrieve those details before they are completely overshadowed by the traumatic memories.

Finally, neurological studies indicate additional reasons to take forgetting seriously. Neural connections that enable memories actually weaken as time passes.<sup>32</sup> Usually, with prompting some facts can be recalled, but studies by Willem Wagenaar (where significant events are recorded in diaries) show that some experiences disappear altogether.<sup>33</sup> Worse still for legal proceedings, incomplete memories which may remain for months and years can be very misleading, may be even more so than no memory at all. Indeed, “our memories shade and patch and combine and delete.”<sup>34</sup> An example comes to mind. “I saw a man with red hair running down the road right after the crime,” says the witness. This implicates the man unless the memory includes that the running red head was clad in jogging clothes and had his two poodles on a leash. The second is a much more benign scenario, at least on the surface.

There are a variety of ways the impact of transience can be increased. The OXFORD HANDBOOK details six ways memories come to be distorted over time. Here is a summary:

1. Relatedness effects. Here a person tries to retrieve a memory, but his general knowledge influences the memory. To put this another way, general knowledge of the world can “help” people fill-out their episodic recollections, but it can “hinder” them. Not everything conforms to established generalities and expectations.

Interference effects. These are discussed above.

Imagination. Imagining an event makes it more likely to judge later that it had previously occurred.

Retrieval process combined with guessing. In retrieval, the memory itself can be affected by the question asked to retrieve that memory. Further, repeated retrieval attempts that elicit an inaccurate memory will tend to convince the person that it happened in that way and he becomes confident in this mistaken memory.<sup>35</sup> In guessing about possible events, one is likely to provide his own misinterpretation which is later retrieved as a “memory.”

Social factors. People tend to conform their memories to other people’s memories. This has been proven by placing confederates with subjects who come to agree with the confederate about inaccurate memories.

Individual differences. Memory distortions are different for different people and tend to be different for different age groups.<sup>36</sup>

So, if for no other reason, the problem of transience supports the idea of the importance of timely notice, indeed, swift notice of any loss to an insurance company. In fact, most salient for this subject of prompt notice to insurance companies, the prevailing theory in the cognitive sense is not just that memories gradually become less clear or more distorted, but that memories change because they are continually being constructed and reconstructed.<sup>37</sup>

There are several other categories of memory

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29. MEMORY, *supra* n. 1 at 78.

30. *Id.* at 81.

31. *Id.* at 82.

32. 7-SINS, *supra* n. 11 at 33.

33. *Id.*

34. SOUL, *supra* n. 22 at 250.

35. (More will be said on the complicated problem of this misplaced confidence later.)

36. OXFORD, *supra* n. 16 at 151-158.

problems that can adversely affect legal proceedings, not all having to do with the passage of time or transience, but delay can exacerbate these problems as well. Thus, transience is not only an independent and central problem, but also a problem which impacts others.

### C. Misattribution.

*Misattribution* is surprisingly common, for example, and can unfold in several ways. One can "remember" past events that never happened or in which an eye-witness account is proven impossible, because of vivid mental images that seem convincing, or past events can be recalled correctly, but incorrectly placed in the wrong time or location. Reading or hearing about an event can create a recollection that is believed to be something actually experienced.<sup>38</sup>

THE OXFORD HANDBOOK points out similar problems. A witness must distinguish details of the actually witnessed event from similar details from other events. These might arise from his own prior actual memories, approximate memories of specific crime or event from specific information they are exposed to after the event, such as police questions, media exposure, and casual conversations.<sup>39</sup> All these sorts of things make a delayed investigation more difficult and less reliable.

A telling example of misattribution is given regarding the man hunt for Timothy McVeigh after the Oklahoma City bombing.<sup>40</sup> A picture of an accomplice was generated by a witness who saw two men renting the van used in the crime. One was McVeigh; the witness *had* seen him the day before and all alone. The next day he saw two innocent men renting a car; one looked like McVeigh, and there was the other. He became the subject of a search until this unconscious transference of the two incidents was discovered.<sup>41</sup> The point is that if much time had elapsed, unraveling the right memory from the wrong

one would become much more difficult. Also, as time passes and a clear memory becomes a sketchy recollection, this vagueness can cause a witness to misattribute when or where he saw potentially key events, as well as who was involved. He may know something is familiar, but not how, when, or where. This thinking can lead to terribly wrong conclusions. "Memory binding," putting together two incidents as though they are one can also cause one to observe—distinct details but later to combine them together mistakenly. One sees two people at the scene, but days later he combines their outfits or facial features in his memory.<sup>42</sup> His memory then becomes a cesspool of dangerous falsity. All of these problems could be most easily discovered and corrected if caught early in an investigation. An investigation delayed might not even detect a problem. This is particularly true if the investigator is hurried or is subject to felt-confidence.

Finally, misattribution can cause one to have a thought or idea assumed to be original when exposure to that very thought or idea occurred years earlier and has been forgotten. Some cases of plagiarism are really caused by misattribution. A study in 1989 by Alan Brown and Dana Murphy of the Psychology Department at Southern Methodist University in Dallas, Texas shows that one can previously hear something from someone else but believe that he is spontaneously and originally producing it in the present.<sup>43</sup> This is sometimes called "priming" by those who study memory. If an insurance company can investigate a loss early on, one can reduce the amount of priming by reducing the amount of time potential witnesses can be exposed to hearing or seeing reports of the event and thereby contaminating their own personal recollections. Hence, early investigation may be important.

### D. Suggestibility.

Another way misattribution (and hence also

37. HUMAN MEMORY, *supra* n. 4 at 264.

38. 7-SINS, *supra* n. 11 at 90.

39. OXFORD, *supra* n. 16 at 182.

40. 7-SINS, *supra* n. 11 at 91.

41. *Id.*

42. *Id.* at 95.

43. *Id.* at 110.

impacted—transience) through what is thought to be actual memory can worsen over time is caused by yet another category of memory problem: suggestibility. This is the tendency to incorporate misleading information from other people, from pictures or from media into “personal” recollections.<sup>44</sup> This is a perfectly general point. So, if a loss occurs and much time elapses before being reported, then what others say about the occurrence, not to mention what is in the newspapers or media, etc., could easily taint the memory of the only people who actually have first-hand, personal-knowledge based accounts of the event. Suggestibility is similar to misattribution, but the latter can occur without suggestibility. Misattribution can begin *ab initio*; suggestibility cannot. There is at least theoretical empirical evidence about suggestibility. Such is not the case about all forms of misattribution. Dividing what is actually remembered from what has been suggested over time is extremely without independent objective evidence. Often that does not exist.

Suggestibility—or, rather, suggestion influencing memory—can occur as a result of the way questions are asked, or the way something is discussed. The listener can begin to think it happened the suggested way; his own memory becomes faulty. Leading questions are especially problematic because of how implied suggestion can and sometimes does affect memories. But leading questions are standard procedure among many police departments. Insurance adjusters also use them to save time, because they do not trust a person, e.g., a suspiciously insistent claimant, or because they have already made up their minds and they are not so much looking for covered events and damages but looking for evidence to support their views.<sup>45</sup> (Leading questions are those questions suggesting the answer by their context, e.g., “You called the man a “sterling fellow;” didn’t you, and then shot him dead?” This example may contain three leading questions.)

In studies of eyewitness memory it has been revealed that the very question asked can elicit very

different answers.<sup>46</sup> This point applies to all sorts of questions, and not just leading ones. Substituting different verbs for “contacted” (such as “smashed,” “collided,” “hit,” etc.) in a question about how fast cars were going when they “contacted,” elicited answers ranging in difference from 32 to 40 miles per hour, depending on the verb used.<sup>47</sup> If insurance companies come in after others have already investigated, then their own findings may be (and likely will be) tainted, at least to some degree, by the “memories” which were altered after prior misleading questions, if any. Questions asked by the adjuster may have the same effect upon others or even themselves later.

Insurance companies might want to note that the human mind has such a great capacity for suggestibility that not only can suggested information introduce a memory in a person’s mind, but suggested unpleasant symptoms can actually be experienced by people even without a precipitating cause.

Studies show that when the suggestion of an incident that never happened is first mentioned, people will deny it, but that a significant percentage of those asked will later have developed a “memory” of the incident.<sup>48</sup> Because misleading questions can create false memories, by the time a misled witness reaches the stand in a trial, he/she may appear more confident in his testimony than when he/she was first questioned and appeared unsure of what he remembered. We’ve already reported herein that repeated retrieval attempts elicit not only memories but “memories,” some faulty, some not.

Whether he/she is—correct or incorrect—a witness becomes more confident with each recital. By trial time, for example, memories forged from suggestions seem so real that the witness appears very sure of her/his claimed recollection. “In general the chance of changes in memory increase with time, the confidence the eyewitness has that an inaccurate memory is accurate is usually as high or higher than for ‘accurate’ memories, and there is no way to

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44. 7-SINS, *supra* n. 11 at 113.

45. See, Michael Sean Quinn, *Look for Coverage!* 27 INS. LITIG. RPTR. 461 (July 6, 2005.)

46. OXFORD, *supra* n. 16 at 57.

47. *Id.*

48. 7-SINS, *supra* n. 11 at 124.

distinguish inaccurate memories from accurate memories without objective external evidence.<sup>49</sup> Juries tend to believe confident witnesses more than uncertain ones even though those who are highly confident are frequently no more accurate than those less confident.<sup>50</sup>

"The danger of eyewitness testimony is clear. Anyone in the world can be convicted of a crime he or she did not commit, or deprived of an award that is due, based solely on the evidence of a witness who convinces a jury that his memory about what he saw is correct. Eyewitness testimony is so powerful that it can sway a jury even after the testimony has been shown to be false."<sup>51</sup> THE OXFORD HANDBOOK concurs; among jurors, high confidence is taken as an indication of accuracy.<sup>52</sup>

In fact suggestibility is such a problem that the False Memory Syndrome Foundation was established in 1992 to combat false memories being "recovered" by unwitting therapists regarding horrible events of childhood that never happened.<sup>53</sup> This includes outlandish accounts of sexual abuse where children were blatantly led and/or induced by therapists (or something of the sort) to describe unsubstantiated events. In fact an investigation of 84 claims of ritual satanic abuse of minors revealed absolutely no evidence supporting the claims.<sup>54</sup> The same argument also applies to many cases of ordinary sexual abuse where no supernatural forces are even thought to be involved. Again, this is another reason why insurance companies need to interview quickly all witnesses of any accident, injury or catastrophe before any misleading suggestions be lodged in the mind as memories, assuming there might be coverage.<sup>55</sup>

#### E. Bias.

Bias is a distorting influence of one's present knowledge, beliefs or feelings on memories.<sup>56</sup> There are several forms of bias, but two can especially prejudice an insurance company when there has been a delay in reporting the loss. *Hindsight bias* occurs when recollections of past events are filtered by current knowledge. *Consistency bias* occurs when memories are rewritten to be consistent with how one feels now, not how one felt at the time.<sup>57</sup> So, personal reactions to events, if not captured early on, can morph into something else when recalled later. How one feels in the present affects how one remembers that he felt in the past, and how one feels affects what one remembers. For example, if one experiences pain now, then he "remembers" being in pain in the past. Thus, if current pain is not so great, then less pain is remembered.<sup>58</sup>

Hacking provides a provocative example of bias affecting memory. Suppose a parent showered with his 12 year old child. The child felt "funny" about it and later she claims she was abused by the father because now she remembers *feeling* abused then. This actual memory, however, does not answer the question of what the father actually did.<sup>59</sup> It is also not a reliable premise for damning inference. One can extrapolate this scenario to the workplace or other situations where lawsuits are likely to arise.

Hindsight bias affects memories when one comes up with after-the-fact explanations of what caused a prior event.<sup>60</sup> Another example, when one seeks a second opinion from a doctor, if the second doctor knows what the original diagnosis is, he/she is more likely to concur.<sup>61</sup> Or consider this, studies show jurors instructed to disregard inadmissible evidence

49. HUMAN MEMORY, supra n. 4 at 288.

50. 7-SINS, supra n. 11 at 116.

51. MEMORY, supra n. 1 at 162.

52. OXFORD, supra n. 16 at 321.

53. SOUL, supra n. 22 at 121.

54. Id. at 118.

55. For a review of some of this literature, in a legal context, see Micheal Sean Quinn, *Memory, Repression & Expertise: Civilly Actionable Sexual Misconduct in Texas and Individual Rights*. 3 TEXAS FORUM ON CIVIL RIGHTS & CIVIL LIBERTIES 1 (Winter 1997).

56. 7-SINS, supra n. 11 at 138.

57. Id. at 139.

58. Id.

59. SOUL, supra n. 22 at 240.

60. 7-SINS, supra n. 11 at 146.

they have heard or seen cannot do it. This is all the more reason for insurance companies to be able to interview fresh witnesses and do it early.

Finally, there is *self-enhancing* bias. It works like this: If someone achieves a great success or accomplishment, he tends to exaggerate the past obstacles that had to be overcome. People tend to love being a hero even more than they like success.

#### E. Others.

Other memory sins Schacter discusses, run-of-the-mill absent-mindedness and blocking (when one knows the information but cannot name it) seem less likely to come into play when insurance companies are given late notice, though again, it is easier to retrace steps and retrieve details if one begins sooner rather than later. (Misplaced keys on Sunday night may be easily found Monday morning. Two weeks later, the whole incident is forgotten.)

#### G. Conclusion of Research Scholarship.

One of the main problems of late notice to insurance companies is lost or distorted memories, especially of eyewitnesses. It's problematic because of the strong impact these witnesses have on determining what actually happened, not to mention the impact they have on the jury.<sup>62</sup> However, many things can interfere with or distort eyewitness memory. Long delays since the event, the many suggestions occurring in the interval, repeated recounting of the event, the interfering effects of information introduced to the witness after the event, not to mention the simple effect of time passing, all lead to the deterioration and contamination of memory.<sup>63</sup> *The very things that obscure the memory of eyewitnesses who testify at trial are the same things that will impede an insurance company in its defense and investigation if notice is late.*

### III. LEGAL SCHOLARSHIP AND COURT CASES.

Legal scholars and courts are also familiar with the problem of unstable and faulty memories in the judicial process. These sources further highlight the necessity for finders of fact to be alert to memory problems. For insurance companies who are searching for facts regarding claims and liability when a loss arises, these judicial sources underscore just how necessary the need is for timely notice.

#### A. Legal Research.

The legal system has long reflected skepticism about memory, hence the statute of frauds and the parole evidence rule. On the other hand, much credence is placed in the authority and reliability of eye witness testimony.

In a thorough review of eyewitness testimony and the problems of memory published in the HOWARD LAW REVIEW, Robert Hallisly summarizes findings of the academic community and discusses whether courts allow or should allow memory experts, usually psychologists, to testify during trials.<sup>64</sup> Hallisly acknowledges that problems of eyewitness testimony have long been known to courts.<sup>65</sup> Confirming work of psychologists in the field, he cites studies which found that associations, suggestions and expectations all play a role in the accuracy or inaccuracy of a witness's recollections.<sup>66</sup> He reviews recent studies revealing problems with the reliability and stability of witness's memory *and* the many mistakes jurors make in judging the truth of mistaken witnesses.<sup>67</sup> He agrees that eyewitness testimony is frequently unreliable, but he argues that the full judicial process, especially pretrial investigation, will filter out shaky cases.<sup>68</sup> However, shaky cases based on unreliable memories can only be discovered if the investigation begins soon enough to reveal contradictions or early uncertainty, as many witnesses grow more confident after their own original uncertainty. How is an un-

61. Id. at 147.

62. OXFORD, *supra* n. 16 at 158.

63. Id.

64. Robert J. Hallisly, EXPERTS ON EYEWITNESS TESTIMONY IN COURT—A SHORT HISTORICAL PERSPECTIVE, 39 HOW L.J. (Fall 1995).

65. Id. at 3.

66. Id.

67. Id. at 4-5.

68. Id. at 12.

notified insurance company to know this?

A MONTANA LAW REVIEW article by Tom Singer argues that courts should be cautioning juries about the fallibility of memory, or alternatively, allowing expert testimony from those knowledgeable about cognitive psychology to testify regarding the limitations of witnesses to remember events correctly and the tendency to recreate events.<sup>69</sup>

Red flags have now been raised because of the many convictions based on eye witness testimony which have subsequently been overturned and exonerated the defendant. But more pertinent to many insurance cases there is (or should be) concern in civil cases when a claim or defense relies on uncorroborated testimony.<sup>70</sup>

Singer outlines Montana cases where there has been neither expert testimony nor instructions to the jury about the problems of memory. In fact, he finds that many instructions actually inform jurors that witness testimony is presumed true unless shown otherwise with opposing evidence. He also outlines many problems with memory, most of which have been recited above. But the examples he provides are instructive:

In some studies, the deficits in memory performance following exposure to misinformation have been dramatic ... with a little help from misinformation subjects have recalled seeing stop signs when they were actually yield signs, hammers when they were actually screwdrivers, and curly-haired culprits when they actually had straight hair. Subjects have also recalled nonexistent items such as broken glass, tape recorders, and even something as large and conspicuous as a barn in a scene that contained no building at all.<sup>71</sup>

Finally, Singer provides a number of scenarios where memory could significantly affect the outcome. His point is that jury instructions should *not* include

the “presumption of truth” instruction. But the point for our purposes is that those cases could also potentially involve insurance claims. Again, the problems with eyewitness memories at trial are the same problems an insurance company has in attempting to investigate and defend a claim reported late.

- *Discrimination.* Frequently, these claims rest on disputed allegations about racial or sexual remarks.

- *Defamation.* Here there is a challenge to distinguish between mere insults and actionable slander.

- *Contract Disputes.* Waiver, fraud, misrepresentation, promissory estoppel or mistakes are typical elements.

- *Tort.* Here an assumption of risk defense usually entails evidence (frequently uncorroborated) of what the plaintiff said at some point prior to the accident.<sup>72</sup>

Those examples show that memory of what happened or *what was said*, even how it was stated, can be crucial to the claim. Subsequent recall, if delayed because of later notice, can be lost or distorted.

One review presented a study which showed that there is a significant deterioration in memory performance after a 5-6 week retention period.<sup>73</sup> Basically, the study supports the view that accuracy of recall decreases with delay and that memories, with the passage of time, become susceptible to interferences, misinformation and suggestion. Passage of time—the very thing which prejudices insurance companies when notice of loss is delayed.

Other papers concur with the obvious problems of eyewitness testimony and the increasing occur-

69. Tom Singer, *To Tell the Truth, Memory Isn't that Good*, 63 MONT. L. REV. 337 (Summer, 2002).

70. *Id.* at 341.

71. *Id.* at 360-61.

72. *Id.* at 367-68.

73. A. Venter and W.D. Lou, *The Effect of Violent Versus Non-Violent Incidents on Eyewitness Memory*, 23 MEDICINE AND LAW 833 (2004).

rence and need of expert testimony at trial by cognitive or social psychologists who can explain that memory is an elaborate process susceptible to many influences.<sup>74</sup> This expert testimony is necessary because jurors too often believe eyewitnesses, mistaking their confidences as indication of accuracy, and further they often don't know the extent to which memories fade and change over time.<sup>75</sup>

Other lawyer essays concur with both legal and professional scholarship. Memories fade. Memories can be contaminated by misinformation, suggestion, and bias.<sup>76</sup>

### B. Some Case Law.

Federal courts have wrestled with the issues of unreliable memory and, noting the problem with much eyewitness testimony, have allowed experts to testify regarding these issues. This was one result in a case arising in the Seventh Circuit.<sup>77</sup> *Newsome v. McCabe* is a case arising out of mistaken identity where a defendant was convicted of murder, served 8 years in prison and was then exonerated as innocent. He later sued police who he claimed influenced eyewitnesses to falsely identify him. Newsome showed that the police had misled and swayed witnesses to make the identifications ("ids"). This court readily acknowledged all the problems with eyewitness memories and held expert testimony was admissible to educate juries to these issues. The court notes, "most persons have difficulty remembering or describing the features of strangers. A person who sees a criminal for only a brief time takes away a vague sense of appearance and behavior – and that sense may be focused by a sketch, photograph, show-up or

lineup after the events."<sup>78</sup> Further, the mere fact that a witness has great confidence in his memory is not probative of its truth.<sup>79</sup>

In a Missouri slip and fall case, the court of appeals allowed a prior inconsistent statement made by appellant's daughter regarding the condition of the floor.<sup>80</sup> The court pointed out that statements made nearer to an event are more accurate than later recollections.<sup>81</sup> Again, insurance companies don't have access to the "fresh" memories, thus they are at a great disadvantage.

In a criminal case in California involving a series of rapes, the question arose: Were out-of-court "ids" of the defendant made when memories were sufficiently fresh and therefore more reliable?<sup>82</sup> Citing studies showing the ability to recall a face fades rapidly over the course of a year, the court disallowed the lower courts' admission of the stale identifications.<sup>83</sup> Timely notice to an insurance company does not help if witnesses are not timely found, but when evidence and witness memories spoil over time, and reporting *is* possible, delay is prejudicial.

Utah has also dealt with the issues of allowing testimony to educate jurors of problems with memory.<sup>84</sup> Though a divided court held that the lower court did not abuse its discretion in excluding the expert from testifying, it did note that human memory is limited and fallible and further that DNA identification techniques have conclusively established that eyewitnesses can be mistaken for many reasons (many beyond the general knowledge and experience of the average juror).<sup>85</sup> In a similar armed robbery case in Georgia,<sup>86</sup> the only evidence was the testimony of two eyewitnesses who had initially been

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74. Briend Cutler, *Strategies for Mitigating the Impact of Eyewitness Experts*, 37 FED. PROSECUTOR 14, (2003).

75. Brook W. Patterson, *The Tyranny of the Eyewitness*, 28 LAW AND PSYCHOLOGY REVIEW 155 (Spring 2004).

76. Donald P. Judges, *Two Cheers for the Department of Justice Eyewitness Evidence – A Guide for Law Enforcement*, 53 ARK & RW. 231, (2000); See also, Jascha Hoffman, *Suspect Memories*, LEGAL AFFAIRS 42.

77. *Newsom v. McCabe*, 319 F.3, 301 (7<sup>th</sup> Cir. 2003).

78. *Id.* at 3.

79. *Id.* at 4.

80. *Lindsay v. Mazzio's Corporation*, 136 S.W.3d, 915 (June 30, 2004).

81. *Id.* at 6.

82. *People v. Mova*, 2004 WL 383539 (Cal. App. 3rd Dist.) (Jan. 30, 2004).

83. *Id.* at 4.

84. *Utah v. Maestas*, 63 P.3d 621, 2002 UT123 (Dec. 20, 2002).

85. *Id.* at 4-5.

86. *Brodes v. State*, 2005 W.L. 1405986 (Ga.) (June 16, 2005).

uncertain of their "ids." But after misleading suggestions by police, the witnesses at the trial were "dead certain" of the defendants identity.<sup>87</sup> Their testimony was countered by an expert who pointed out problems of eyewitness memory in general and also that certainty does not necessarily equal reliability. The appellate court struck down the jury instruction which authorized jurors to consider the witness's certainty as a factor in his/her reliability.<sup>88</sup>

Finally, another California case<sup>89</sup> deals with memory (especially misattribution problems) where a defendant, accused of murder in California, hitchhiked back home to Maine. There a number of friends and acquaintances became aware of various details of the crime. Those conversations among friends and subsequent rumors formed the basis of testimony presented at trial. Appellant presented expert testimony (out of the presence of the jury) that after *time passes*, memory gets blended and people can't remember where information came from, but they will repeat it, or their rendition of it, and the more it's repeated, the more they believe it.<sup>90</sup> (However, the court affirmed the judgment.)

These cases show that courts have been grappling with the real life consequences of faulty and fading memory as it affects eyewitness testimony. Often times, the culprit is delay in eliciting reliable eyewitness memories. Again, this further supports the necessity for investigations to begin as soon as possible. In order to be fair to insurance companies, timely notice is absolutely required.

#### IV. SOME EVIDENTIARY/DISCOVERY PRACTICALITIES

We have already mentioned one difficulty about proving bad memory. Another one is a paradox to be found in practical law. On the one hand, pretty much everyone actually knows that memory fades over time. Almost everyone also knows that this is not a highly predictable phenomenon. It varies from

person to person, and the same person may have different memories fade or change at different times. On the other hand, courts, and people in general, seem to believe that any memory whatsoever is at least some clue to what happened in the distant past. Most people appear to believe that if one person has some memory and another person has none, with respect to a particular event, they have to believe what the person with some memory says. Those who reject the idea that they "have to believe" in some memory, when there are no competitors, would still adopt the view that's sensible most of the time. Moreover, because all testimony based upon personal knowledge is admissible, courts feel compelled to admit testimony based upon distorted memory, if the memory began with sensory experience.

Lawyers who are trying to establish that a claimant's poor memory of long past events constitutes some prejudice to an insurer, therefore face significant problems. We confess that we are not at all certain how to handle this matter. Three options seem to be available.

The first option is to introduce no evidence but simply argue on the basis of common sense old memory is unreliable. This option can be exercised in either of two contexts. First, it can be exercised before the court, and second, it can be exercised before the jury. It is unlikely to be particularly successful.

The second option is to introduce expert testimony as to the ways memory fades and the extent to which it does so over time. Testimony as to this kind of point is probably admissible. It has been admitted in many criminal cases, although we have never seen it even so much as attempted in an insurance coverage case. The problem with this approach is that it is extremely expensive and we have no idea how effective it would be.

The third option is to take testimony from the claimant as to his memory. There are several ways to

87. *Id.* at 2.

88. *Id.* at 4.

89. *People v. Davis*, 2005 W.L. 11770 (Cal. App. 2nd Dist.) (Jan. 3, 2005).

90. *Id.* at 5-6. Problems of memory have played significant roles in criminal cases which have aged a long time. Some of the trials of war criminals have significantly involved memory issues. See Willem Wagenaar, *IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY* (1988), which contains a somewhat helpful bibliography. At the same time, it should be remembered that there is such a thing as Memory Failure Strategy, as a litigation technique. Paul Ekman, *TELLING LIES; CLUES TO DECEIT IN THE MARKETPLACE, POLITICS AND MARRIAGE* 29-31 (1985).

do this. One way is to ask detailed questions about loss and detailed questions about that object which suffered loss. The chances are that the witness will forget, or be unable to testify about a lot of details. Perhaps that will help. Another approach is to ask a variety of questions about events which occurred at around the time the loss is thought to have happened. For example, if the loss is determined to have happened on the first Tuesday in March two years before claim was made, counsel could ask the witness what he was wearing, what he had for breakfast, and so forth. Almost certainly, the witness will not remember. Unfortunately, both judges and juries will find this approach unconvincing and hostile. Another component of this third option is to ask the witness a variety of questions about all those with whom he has communicated about the loss since the loss. The general approach would be to try to establish that the witness-claimant's memory is determined at least as

much by a loss-subsequent communications as it was by the loss itself.

Thus, if our hypotheses are correct, insurers face an extremely interesting paradox. They have the legal and moral right to inquire that memory of loss notices be accurate, but they endanger themselves in coverage disputes if they try to demonstrate that memory is inaccurate. This is true even if what they are doing is honorable, objective, and so forth.

Because justice requires it, we are absolutely convinced that there must be methods for achieving a just result in this area of legal dispute. We just can't figure out what it is. We, therefore, invite those who are more experienced or more profound than we are to respond to this article, and we pray that it be done both comprehensively and quickly. We need it done quickly so we don't forget what our true concern really is.