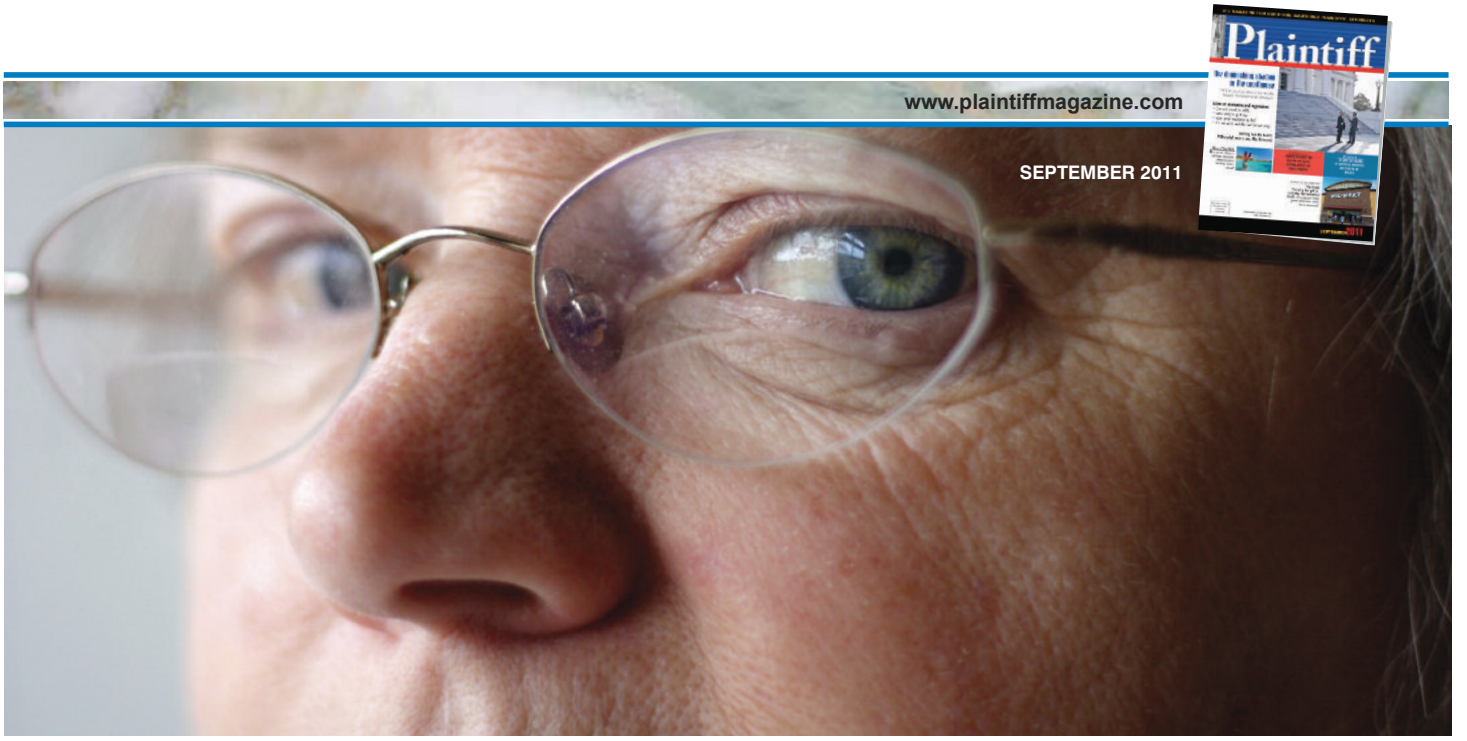


The utter unreliability of eyewitness testimony

It turns out that the eyes don't "see;" the brain does. This can make eyewitness testimony unreliable – but how can we question it?

By Larry Booth

Our system of justice is based almost entirely on the assumption that eyewitness testimony is reliable. That assumption has been shaken in recent years by the science of DNA, but nonetheless it persists. Take, for example, the infamous Casey Anthony case in Florida. The whole nation was transfixed by this tragedy and nearly everyone thought the jury got it wrong. The jury apparently demanded a level of proof that just isn't likely in most murder cases, confusing the jury instructions on circumstantial evidence and reasonable doubt. Whether this confusion was generated by a less-than-competent job by the prosecution is a matter for debate.

The eyes are not a high-speed digital video camera

Most people assume that a witness to some event simply sees it and can report with some reliability what he saw. In fact, vision is not comparable to a high-speed digital video camera because there is no mechanism for playback and analyzing the recorded data. And it is not a matter of memory.

In his latest book, Incognito, David Eagleman, a neuroscientist from Baylor University, explains the subject of vision, its history and limitations. It turns out that the eyes don't see; the brain does. Billions of photons stream into the brain from what we might think of as receptors. Only a fraction of what the eye "sees" is recorded in our consciousness. The rest is an instant blur of images which can be compared to looking through a frosted shower door.

The brain processes only small bits of the visual scene, not everything that hits your retina. To make things worse, the brain fills in the gaps so that there is a tremendous amount of guesswork. This is not lying. The witness does not know the difference between the small amount he saw and what he reports. Often, his attention is not on the critical images.
A simple example is the art of ventriloquism. We hear a voice and only the dummy's mouth moves and we can swear that the ventriloquist "threw his voice."

Application to trial tactics

We have all had cases where there is physical and scientific evidence which demonstrates that an adverse eyewitness is wrong. Our first attack is to look for some motive or memory loss, and, if that fails, to try clever cross examination to establish that the witness's attention was not on the critical part of the scene at the critical moment. We are missing the big picture. Eyewitness testimony is unreliable because of the science of how we see.

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Serious thought should be given to calling as an expert witness a neuroscientist who can explain in simple terms that for a human being to accurately recall and relate an event which took an instant and was a complete surprise is denying a hundred years of science. The expert can use home-spun examples which will entertain, transfix and convince the jury.

The expert is not there to call this witness a liar or even wrong, but to assist the jury in determining the accuracy of this eyewitness testimony as against other evidence. The definition of an expert is simply someone who has superior knowledge as compared to the rest of us on some subject relevant to the case and the search for the truth. Such a witness may be unique, but it is no different than a mechanical engineer explaining why a piece of metal failed.

Larry Booth is the author, along with his son Roger Booth, of the 600-page Personal Injury Handbook *(www.JamesPublishing.com)*


Booth

and has tried hundreds of jury trials. His firm, Booth & Koskoff, *has achieved over 70 jury verdicts and settlements in excess of one million dollars. In 1974 he was selected to the Inner Circle of Advocates, whose membership is limited to the top 100 Trial Lawyers in the United States.*

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