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One researcher judges recall

Decisions cite UCI psychologist's work on false eyewitness testimony.

By Don J. DeBenedictis

For more than 30 years, UCI psychologist Elizabeth F. Loftus has been challenging people's confidence in their memories. So it's not surprising that her research was cited nearly a dozen times in last week's groundbreaking New Jersey Supreme Court decision challenging the justice system's confidence in eyewitness identification of criminal suspects.

"I'm thrilled about the case," Loftus said. "Give those judges Ph.D.s in eyewitness testimony. ... They get the scientific work."

Chief Justice Stuart J. Rabner, writing for a unanimous panel, ruled that the state's trial courts now must hold extensive pretrial hearings "to weed out unreliable identifications" and that the court system must devise new instructions that teach jurors how "to evaluate the identification evidence they hear." *State v. Henderson*, (A-8-08) (062218) (N.J., Aug. 24, 2011).

"Science has proven that memory is malleable," Rabner declared, and that "an array of variables can affect and dilute memory and lead to misidentifications."

In his 134-page opinion, Rabner mentioned Loftus' work 10 times, citing seven different books and papers. The opinion cited a few other social scientists more often, but Loftus' works date back the furthest, to 1974.

That's the year she demonstrated that people shown films of automobile accidents would estimate higher speeds and remember nonexistent broken glass if asked to describe how the cars "smashed" into each other than if they were told the cars "contacted" each other.

The following year, in another paper Rabner cites, Loftus showed that leading questions could change students' memories of what they saw in a film of a car driving down a road.

Loftus is a giant among researchers in the field, according to Justin P. Brooks, the director of the California Innocence Project at California Western School of Law in San Diego.

"Her work has been groundbreaking. ... We've actually used that research to get people out of jail," he said.

"She has had a huge impact for many decades," said Loyola Law School Professor Laurie L. Levenson, who is beginning an evidentiary hearing today in Los Angeles Superior Court in a habeas corpus case that turns in part on false identification and memory issues.



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California Supreme Court

Liu gets high marks in advance of confirmation hearing

Goodwin Liu is exceptionally well-qualified to join the state Supreme Court, the State Bar said Monday.

Litigation

Judge considers release of Prop. 8 recordings

Northern District Chief Judge James Ware appeared torn as he heard arguments Monday on whether he should release to the public a video recording of last year's Proposition 8 trial.

Flap over actor's contract nears trial

A studio's loss from a contractual blunder with "No Country for Old Men" star Tommy Lee Jones should not be passed on to the film's financiers, Marathon Funding LLC will argue before a jury Sept. 19.

Mergers & Acquisitions

Dealmakers

A roundup of recent M&A and financing activity and the lawyers involved.

Labor/Employment

Judge rules in employer's favor on meal breaks

A Watsonville-based cement company did not violate California labor laws relating to lunch breaks because its workers were aware of their rights and chose to waive them, a Santa Clara County Superior Court judge has held.

Health Care & Hospital Law

Insurers' critics see case as a boost

Health insurance providers can expect new litigation - and pressure from existing litigants - after a federal appellate court decision on Friday said they are responsible for covering mental health treatment on par with physical illnesses.

Litigation

Attorneys referred to State Bar over alleged hacking

Two one-time co-counsel have been referred to the State Bar of California to determine whether they illegally intercepted then used privileged emails of their opposing party and his lawyer last year at a deposition.

A Southern California native, Loftus earned her Ph.D. from Stanford University in 1970 doing work on how mathematics is learned and later on how memories are stored in the mind.

But she wanted to research real-world problems. Court cases and legal issues were an obvious direction, she said.

By the mid-1970s, she was a professor at the University of Washington in Seattle, and she connected with a public defender she knew who had her consult on a murder case against a woman who claimed to have killed her husband in self-defense.

The woman was acquitted, and Loftus wrote an article on the case for Psychology Today magazine, which in 1974 had a circulation of more than a million.

"That's when my life changed big time," Loftus said. "My phone started ringing off the hook" with offers to consult on other cases, to speak and to write.

Since then, she has consulted and sometimes testified in many headline-grabbing cases, including Ted Bundy, O.J. Simpson, the Hillside Stranglers, Timothy McVeigh, Martha Stewart and I. Lewis "Scooter" Libby.

In fact, Loftus testified Monday in a child molestation trial in Santa Ana, *People v. Wellen*, 10CF0786.

In a short autobiography she wrote for an American Psychological Association book, Loftus said she feels "infinite passion about [her] role in individual court cases," especially when she believes she is helping the innocent.

Her academic career has been even more impressive. Although she has authored or co-authored several books on eyewitness testimony, including four editions of the leading text in the field, her work on memory goes far beyond that field.

In 2002, Loftus was ranked 58 among the 20th century's most eminent psychologists - about midway between Sigmund and Anna Freud - and she was elected to the National Academy of Science in 2004.

Much of her early work involved what she calls "the misinformation effect," in which test subjects are told of events from their past that never happened. A significant percentage come to believe the stories and even to embellish them.

One of her most significant studies involved getting relatives to convince some children that at age 5, they had become lost in a shopping mall and been rescued by a kindly stranger. Even though the incidents were false, many of the subjects eventually gave very specific accounts of their experiences, including details they had not been told.

Loftus has used misinformation more recently to convince people that a certain food made them sick long ago. The test subjects then won't eat the food. In a PBS science program, Loftus got actor Alan Alda, the show's host, to refuse hard-cooked eggs.

In the early 1990s, Loftus grew "a tad bored" with the misinformation effect, she said in her autobiographical essay. What came next made her more famous, and infamous, than ever.

At a time when many people were uncovering hidden memories of sexual abuse, Loftus set out to prove that so-called recovered memories are false, many planted unwittingly by the patients' own therapists.

Advocates for women's rights and for rape victims sharply criticized her. One woman slapped her with a newspaper on an airplane. She received death threats, and some groups provided her with armed guards when she spoke.

In the late 1990s, one woman whose case Loftus had thoroughly investigated complained to the University of Washington that Loftus had invaded her privacy. The university seized Loftus' work, and eventually Loftus left the school where she had taught for 29 years to come to UCI, where she now teaches in the psychology and criminology departments and the law school.

Tax

Lawmakers and Amazon battle escalates
Ping pong match between lawmakers and Amazon over online tax rages on. By **Jessica A. Levinson** of Loyola Law School

IRS cracks down on independent contractor misclassification

Misclassifying workers as independent contractors is becoming a dangerous game of roulette. By **Robert W. Wood** of Wood LLP

Perspective

Beyond inadvertent production: Attorney disqualification and privileged information

A 4th District ruling on attorney disqualification goes against an established line of California cases. By **Amy L. Bomse** of Howard Rice Nemerovski Canady Falk & Rabkin PC

Judges and Judiciary

A lesson in humility

The black robe should not give judges superpowers vis-a-vis the law. By **Hirbod Rashidi** of the University of California, Riverside

Litigation

Does Concepcion mean the death of Gentry?

The debate over the validity of class action waivers continues. By **Ronald W. Novotny** and **Robert R. Roginson** of Atkinson, Andelson, Loya, Ruud & Romo

Corporate Counsel

Philip Andrew Bordages

Senior vice president and general counsel at Specific Media LLC Irvine

Criminal

One researcher judges recall

A significant new ruling demanding caution with eyewitness identification testimony grew in large part from groundbreaking work by UCI psychologist Elizabeth F. Loftus.

The woman, Nicole Taus, sued Loftus in 2003 for invasion of privacy, and the case made its way to the California Supreme Court. The court upheld only one cause of action, and the case settled for \$7,500 and waiver of costs. *Taus v. Loftus*, 40 Cal. 4th 683 (2007).

These days, Loftus is leading investigations into what sort of people might be most susceptible to false memories or flawed identifications. She is also trying to understand people who confess to crimes they didn't commit.

Although she claims only "a teeny, weeny bit of the credit" for the New Jersey Supreme Court decision - she reviewed one of the amicus briefs - she said she is very pleased with the ruling.

As Loftus said in her autobiographical article, "I brim over with pride when I see memory science being used to change polices that can help large numbers of people avoid injustice."

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