
Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies

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We examine the appeals from the conviction of Cardinal Pell in light of the common sense versus scientific belief system about human memory and robust principles of memory. We outline how assumptions about memory operations appeared to influence the legal decisions. At the heart of the High Court's reasoning seemed to be an assumption that memory about routine practice was to be believed when it contradicted the complainant's memory of the alleged abuse. We question whether the complainant's episodic memory was undervalued compared to potential over-reliance on sometimes questionable schematic recall of repeated events by the opportunity witnesses. This analysis does not suggest that the rule about appellate review of jury trials re-emphasised by the High Court was in error. In many types of legal cases, memory of institutional figures about routine practices, absent clear memory of specific adherence to the practice on a particular occasion, is accorded undue weight.

I. INTRODUCTION

In December 2018, Cardinal Pell was convicted of five charges of historical child sexual abuse in 1996–1997 against two 13-year old choirboys and sentenced to six years in prison.¹ This case attracted extensive media coverage and divided the community,² not only because the accused was one of the most powerful figureheads in the Catholic Church but also because the conviction was based on the evidence of one complainant without independent corroboration about events that transpired over 20 years before the trial. The second choirboy had died before the complainant reported the matter to the police in 2015.

In the Court of Appeal, and, again in the High Court, the central premise of the defence case was that the accounts as described by the complainant could not be established beyond reasonable doubt, based on assertions of “impossibility”;³ that is, there was no opportunity for the offending to have occurred due to the invariability of routine church practices and therefore the prosecution had not “excluded the reasonable possibility that the applicant did not commit the offence/s”.⁴ In this article, we offer an evidence-based analysis of aspects of the decision of the High Court and the Victorian Court of Appeal, informed by empirical scientific memory research. This includes how the memory about routine practice given by the opportunity witnesses was so persuasive in the ultimate reasoning of the High Court and for the dissenting judge in the Court of Appeal.⁵

The Pell convictions were upheld by the Victorian Court of Appeal in August 2019 in a 2:1 majority decision.⁶ In April 2020, the High Court judgment quashed the convictions and acquitted Cardinal Pell

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¹ *DPP (Vic) v Pell* [2019] VCC 260.

² *DPP (Vic) v Pell* [2019] VCC 260, [2].

³ A term criticised by Weinberg JA: *Pell v The Queen* (2020) 94 ALJR 394, [42]; [2020] HCA 12.

⁴ *DPP (Vic) v Pell* [2019] VCC 260, [122]; *Pell v The Queen* (2020) 94 ALJR 394, [42]; [2020] HCA 12.

⁵ To ensure a fair trial, these witnesses were called by the prosecution. Leave was granted to the prosecution by the trial judge to cross-examine these witnesses.

⁶ *Pell v The Queen* [2019] VSCA 186.

of all charges on the grounds that the jury’s reasoning was in error because opportunity witnesses could be believed when recalling routine practices (Pell greeting congregants on the Cathedral steps when the first incident of abuse was claimed to take place, or during an internal procession, when the second incident was claimed to take place) and their evidence “ought to have caused the jury, acting rationally, to entertain a doubt as to the applicant’s guilt of the offence ... [and that] making full allowance for the jury’s advantage, there is a significant possibility that an innocent person has been convicted”.⁷

Some commentators⁸ also noted a further dispute brought to the High Court, namely, whether the Court of Appeal majority should have reviewed video evidence of witnesses and their demeanour. Concerns were that the majority appellate judges in the Court of Appeal may have been guided inappropriately by judgments of demeanour,⁹ particularly of the complainant, rather than assessing the whole of the evidence and determining if the jury’s verdict could stand. The High Court emphasised that the “functional or ‘constitutional’ demarcation between the province of the jury and the province of the appellate court”¹⁰ was important to uphold when the appellate judges engaged with the record of the court below. The High Court, without clearly stating that the appellate judge should never watch video recordings of witnesses’ testimony from the first instance proceeding, nevertheless took the opportunity to reinforce the point that the role of the appellate court, even in the age of ready access to video-recorded evidence presented at first instance, was to examine:

[T]he record to see whether, notwithstanding that assessment [the assessment of the jury that the complainant was credible and reliable] – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.¹¹

To emphasise that point further, the High Court noted that the demarcation between the role of the jury in assessing the credibility and reliability of the witnesses and the role of the appellate court in determining if the jury, acting rationally, ought nonetheless to have entertained reasonable doubt as to proof of guilt, is a demarcation that “has not been superseded by the improvements in technology that have made the video-recording of witnesses possible”.¹²

In the Court of Appeal, Weinberg JA was persuaded that contradicting evidence from the opportunity witnesses was enough to overturn the jury’s verdict, and, also expressed separate concerns about the credibility and reliability of the complainant’s account in the first place.¹³ In a video-recorded interview with the police, Pell said that after Mass, at the time of the alleged first offence, based on established liturgical practices and routines, he “was always” at the front of the Cathedral with his Master of Ceremonies greeting the congregants, and that the sacristan and assistants “would be” in the sacristy cleaning up. In all, 23 opportunity witnesses offered support for this contention.

We were intrigued by the contrast in the Pell case of evidence from single-event versus repeated-event witnesses, and how the Court of Appeal and the High Court evaluated this evidence. We explore this assessment by examining established principles of memory, and research on common sense versus scientific beliefs about memory.

A. The Nature of Human Memory

Human memory is not a unitary system, but is comprised of multiple “memory systems that can be distinguished in terms of the different kinds of information they process, and the principles by which

⁷ *Pell v The Queen* (2020) 94 ALJR 394, [127]; [2020] HCA 12.

⁸ M Bagaric, “George Pell’s Successful Appeal Hinged on the Tricky Question of Witnesses”, *ABC News Opinion*, 8 April 2020 <<https://www.abc.net.au/news/2020-04-08/george-pell-aquitted-high-court-sexual-abuse/12130064>>.

⁹ *Pell v The Queen* (2020) 94 ALJR 394, [49]; [2020] HCA 12.

¹⁰ *Pell v The Queen* (2020) 94 ALJR 394, [38]; [2020] HCA 12.

¹¹ *Pell v The Queen* (2020) 94 ALJR 394, [39]; [2020] HCA 12.

¹² *Pell v The Queen* (2020) 94 ALJR 394, [38]; [2020] HCA 12.

¹³ *Pell v The Queen* (2020) 94 ALJR 394, [48]; [2020] HCA 12.

they operate”.¹⁴ Psychologists generally agree that five different types of memory systems can be distinguished: (1) procedural memory; (2) perceptual representation; (3) working memory; (4) episodic memory and (5) semantic memory.¹⁵ Explicit or declarative conscious memory is comprised of episodic and semantic memory. Episodic memory or personal event memory is specific to a time and place, thus provides specific contextual information. Episodic memory of personal experiences and events is gained directly through the five senses, accessed by sensory cues, contextual knowledge, identification of times, places, and associated emotions. Semantic memory is general fact memory based on conceptual or semantic knowledge.¹⁶ Semantic memory is often gained indirectly and is “memory for general factual knowledge and concepts that endow information with meaning, ultimately allowing people to engage in complex cognitive processes such as recognising objects and using language”.¹⁷ The conscious recollection of factual information and general knowledge about the world is generally independent of context and personal relevance. Semantic or gist memory does not discriminate between contexts.¹⁸

B. The Common Sense vs the Scientific Memory Belief System

In the Pell trial, at first instance the prosecutor invited the jury to be reflective and analytical, to “think about the overall impression” of the complainant’s evidence, and to assess whether he had “the sort of memory blanks you would expect a person to have about unimportant details or peripheral matters given the passage of time and given their lack of significance to the actual event itself”.¹⁹ This entreaty raises questions about what lay jurors, lawyers and judges know about the nature of human memory. People’s knowledge of human memory has been formally studied.

In a recent study that examined people’s knowledge about human memory, 853 memory experts, police and members of the general public each rated their level of agreement with 36 statements about five key topics pertaining to human memory.²⁰ The results disclosed two contrasting memory belief systems: (1) the commonsense memory belief system, endorsed predominantly by police officers and members of the general public; and (2) the scientific memory belief system, endorsed predominantly by memory experts. In brief, non-experts’ beliefs about memory were contradicted by scientific psychological research findings. The differences were significant across six separate factors disclosing core misperceptions held by the general public and police about fundamental memory operations.

The key differences between the commonsense memory belief system and the expert scientific memory belief system are that a layperson’s expectations of memory are often unrealistic whereas the experts anticipate more memory errors. For instance, police and laypersons believed that memories were like videos/photographs, which is mistaken due to the fact that “memories are time-compressed, fragmentary, contain amnesic gaps, and do not preserve fine-grain temporal order”,²¹ reflecting psychological reconstructions and representations of an event that are highly selective and influenced by affect. In addition, specific memories may be accompanied by sensory input other than visual imagery (eg, smell, touch) and contain both episodic components and conceptual knowledge.²² A further common error was the incorrect assumption that memory accuracy was determined by the number of details recalled and

¹⁴ LR Squire and JT Wixted, “Remembering” (2015) (Winter) *Daedalus, Journal of the American Academy of Arts and Sciences* 53.

¹⁵ AM Surprenant and I Neath, *Principles of Memory: Essays in Cognitive Psychology* (Psychology Press, 2009).

¹⁶ Surprenant and Neath, n 15.

¹⁷ GR VandenBos, *APA Dictionary of Psychology* (American Psychological Association, 2nd ed, 2015).

¹⁸ LR Squire et al, “Memory Consolidation” in E Kandel, Y Dudai and M Mayford (eds), *Perspectives in Biology: Learning and Memory* (Cold Spring Harbor Laboratory Press, 2015) 1.

¹⁹ *Pell v The Queen* [2019] VSCA 186, [55].

²⁰ S Akhtar et al, “The ‘Common Sense’ Memory Belief System and Its Implications” (2018) 22 *International Journal of Evidence & Proof* 289.

²¹ Akhtar et al, n 20, 300.

²² Akhtar et al, n 20, 300.

by their vividness.²³ Another study revealed that laypeople knew least about general memory principles and operations, while they were more knowledgeable about mnemonics (memory aids) and eyewitness memory.²⁴ By comparison, experts perceived memories to be fragmentary, that the number of details and their nature did not predict accuracy, and that memories and their details could be erroneous, and even false.²⁵ One topic about which no differences between the memory beliefs of experts, police and members of the public emerged was what we remember about emotionally evocative events. The researchers noted that reliance on erroneous commonsense beliefs about memory increases the probability of flawed assessments of memory. These flaws may influence witness credibility assessments, potentially contributing to wrongful convictions and wrongful acquittals in criminal cases.

Our analysis of the *Pell* appeals cases explores the extent to which the unanimous High Court Bench and the Victorian Court of Appeal majority (Ferguson CJ and Maxwell P) and the dissenting judge (Weinberg JA) may have endorsed either common sense or scientific expert beliefs about the memory of the complainant and the opportunity witnesses. This analysis reflects how direct evidence of recalled events can be judged alongside indirect evidence in the form of memory of typical practice, often without clear and precise recall by institutional officials as to whether typical practice was followed on a particular day when abuse was alleged to occur. Such a tension between complainant memory of abuse and memory for typical practice by institutional officials may be one of the most concerning trends to emerge in historical child sexual abuse cases in the wake of the Royal Commission into Institutional Responses to Child Sexual Abuse. Of course, this was also a feature of cases that predated the Royal Commission, and of numerous other criminal and civil cases that do not involve allegations of child sexual abuse. For example, cases of industrial accidents in which repeated activities and routine precautionary and safety measures are critical present similar evidence and questions.²⁶ In conducting this analysis, we have drawn on research that seeks to convey a realistic picture of the nature and capacity of human memory for single events and repeated events.²⁷

II. SINGLE-EVENT MEMORY AND REPEATED-EVENT MEMORY

Research on general robust principles of memory has highlighted three fundamental principles of memory, namely (1) the relative distinctiveness principle, (2) the specificity principle, and (3) the cue overload principle²⁸ as most critical in examining the memories of the witnesses in the *Pell* case.

Memory of a particular or specific single event is strengthened by the presence of unique or distinctive details that make the event stand out from other life experiences. This causes unique single events to be well-remembered. This phenomenon reflects a well-acknowledged principle of memory, the relative distinctiveness principle.²⁹ By comparison, memories of repeated events suffer from a lack of distinctiveness. However, memories of a single event are more vulnerable to memory errors than is memory of general information, such as an overall description of typical features of an event, for example a description of how a certain type of event usually occurs. The vulnerability or fragility of

²³ This finding has been corroborated by other researchers: L Patihis et al, "Are the 'Memory Wars' Over? A Scientist-practitioner Gap in Beliefs about Repressed Memory" (2014) 25 *Psychological Science* 519; DJ Simons and CF Chabris, "What People Believe about How Memory Works: A Representative Survey of the U.S. Population" (2011) 6 *PLoS ONE* e22757; S Magnussen et al, "What People Believe about Memory" (2006) 14 *Memory* 595.

²⁴ B Bornstein, "Memory Myths: A Review and New Data" in *Popular Myths about Memory: Media Representations versus Scientific Evidence* (ProQuest Ebook Central, 2017).

²⁵ Akhtar et al, n 20.

²⁶ CL MacLean et al, "Breaking Script: Deviations and Postevent Information in Adult Memory for a Repeated Event" (2018) 4 *Journal of Applied Cognitive Psychology* 474.

²⁷ See, eg, B Bornstein, *Popular Myths about Memory: Media Representations versus Scientific Evidence* (ProQuest Ebook Central, 2017); DL Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* (Houghton, Mifflin and Company, 2001).

²⁸ Surprenant and Neath, n 15.

²⁹ Surprenant and Neath, n 15.

specific detailed episodic information as opposed to more general schematic semantic information, is another widely acknowledged principle of memory,³⁰ the specificity principle.

When someone has experienced a series of many repeated events, and is asked a question about a particular event within that series, retrieving that information is difficult, in part because nothing stands out, and in part because of an oversupply of similar associations between the multiple similar events. This makes particular instances difficult to distinguish and retrieve because the memory cues used to retrieve memories are less effective when they have too many associations. This task implicates the cue overload principle, a third widely acknowledged fundamental principle of memory.³¹

In fact, the term “repisodic memory”³² was initially coined to refer to the recollection of repeated events that has an overall correctness in its generality, although the specific details of one specific event may readily be ascribed to the wrong event on another occasion. Due to cue overload, it is difficult for a witness to specify to which individual event in a series a particular detail belongs, and to describe the individual events in detail.

By applying the three general principles of memory to the complainant’s recall of the two discrete unique events in issue in the Pell case, his memory was likely to be (1) enduring due to the high relative distinctiveness of the two events (relative distinctiveness principle), but (2) vulnerable to some memory errors regarding specific details of these events due to their contextual singularity (specificity principle), and (3) responsive to effective retrieval cues due to the presence of few confounding associations with those events (cue overload principle).

By comparison, these three memory principles predict (1) poor recall of the opportunity witnesses for any particular instances and events within a series of similar events due to the fact that the similarity and invariant nature of repeated routine practices made them low in distinctiveness (relative distinctiveness principle), with (2) stronger recall for general information about the routine practices (specificity principle), (3) vulnerability to retrieval errors such as confusion between specific dates or substitution of one date for another due to multiple similar associations (cue overload principle).

Memory for repeated events versus single events is less distinct and far more vulnerable to memory errors than memory for single events. Repeated events are recalled in a more general manner than single and unique events. The gist of common information to repeated events is usually remembered well, while specific details are vulnerable to errors. Thus, “an individual who has experienced a number of similar events, regardless of how many, is likely to provide less specific memories than someone who has experienced a single event”.³³

Put simply, the quality of the memory for a series of repeated events is different from that of memory for single events. People can recall how a repeated event usually happened (the gist) but face difficulties when trying to specify details or describe individual instances or episodes within a series (eg, what happened on the specific days in question in the Pell case versus any other Sunday). Surprisingly, people who have attended more of the same type of repeated events (eg, sacristan Max Potter, master of ceremonies, Monsignor Portelli, and others who attended multiple years of Sunday mass) do not demonstrate better memory for details than those who attended only a few in a series of similar events.³⁴ For example, in a study in which adult witnesses watched either one or three videos of road accidents, those who experienced the repeated events had less accurate memories than those witnesses who experienced a single event.³⁵ Once a few similar events have been experienced, a memory “script” or template that

³⁰ Surprenant and Neath, n 15.

³¹ Surprenant and Neath, n 15.

³² U Neisser, “John Dean’s Memory: A Case Study” (1981) 9(1) *Cognition* 1.

³³ RM Willén, PA Granhag and LA Strömwall, “Factors Affecting Two Types of Memory Specificity: Particularization of Episodes and Details” (2016) 11 *PLoS ONE* e0166469; RM Willén, “Recollection of Repeated Events: Difficulties and Possibilities” (Licentiate Thesis, University of Gothenburg, 2015).

³⁴ Willén, Granhag and Strömwall, n 33.

³⁵ TP Theunissen et al, “Adult Eyewitness Memory for Single versus Repeated Traumatic Events” (2017) 31(2) *Applied Cognitive Psychology* 164.

captures the general repeated features develops. This script is a form of schematic knowledge about events, a set of expectations that individuals have about routine events organized in a temporal-causal sequence of acts or single actions.³⁶ Individuals use the organization of scripts to describe routine events and to aid in their memory of specific instances of events.³⁷

Memory for repeated events is especially vulnerable in comparison with single event memory because experienced details become linked to the memory script rather than to the episodic memory traces for the instance in which they were experienced.³⁸ “Repisodic memories” can be influenced both by scripts for different types of events³⁹ and by other schematic knowledge.⁴⁰ A memory schema (pl schemata) is any general knowledge about the world around us; about events, people, things, places, and actions. Gist memory for repeated events is easily influenced by schematic knowledge or semantic memory⁴¹ which in turn may lead to inaccurate inferences and errors in recalling details.

Some scholars have submitted that “opportunity evidence” should not have a higher status or be accorded more weight than other exculpatory sworn evidence by the accused.⁴² The extent to which lay jurors and members of the legal profession are aware of the vulnerable features of memory for repeated events is unknown. A recent scientific study compared the perceived credibility of witnesses providing single-event versus repeated-event reports after controlling for the accuracy of the information conveyed by the witnesses, that is, the reports were equally accurate.⁴³ Findings showed that witnesses providing repeated-event reports, such as the opportunity witnesses in the Pell case, were rated less credible than were witnesses providing single-event reports. The assessment of evidence in the Pell case by the Victorian Court of Appeal majority was in line with this finding, that is, their evaluations matched those of the research participants. Accordingly, the High Court determination that the repeated-event witnesses were credible enough to provide reasonable doubt about the complainant’s single-event memory captured our interest.

III. THE “IMPOSSIBILITY” ARGUMENT IN PELL: MEMORY FOR PRACTICES AND PROTOCOLS

In evaluating the weight of the evidence of witnesses, lawyers and judges are often advised to consider the “inherent probability or improbability of the story”.⁴⁴ In the Pell trial, the prosecution argued that “one needs to distinguish between practices and protocols developed over time, as described by many witnesses, from what actually occurred on the specific occasions”.⁴⁵

This distinction has important memory implications, as outlined in the previous section. For example, statements about repeated events, and routine practices and policies are likely to draw on an individual’s conceptual memory based on the aggregated general factual knowledge of that witness, acquired directly

³⁶ A Baddeley, MW Eysenck and MC Anderson, *Memory* (Psychology Press, 2009); Willén, n 33.

³⁷ GH Bower, JB Black and TJ Turner, “Scripts in Memory for Text” (1979) 11(2) *Cognitive Psychology* 177; C Berg and BL Ross, “Individual Differences in Script Reports: Implications for Language Assessment” (1990) 10(3) *Topics in Language Disorders* 30.

³⁸ DM Woiwod et al, “A Meta-analysis of Differences in Children’s Reports of Single and Repeated Events” (2019) 43(1) *Law and Human Behavior* 99; DA Connolly et al, “What Children Recall about a Repeated Event When One Instance Is Different from the Others” (2016) 52(7) *Developmental Psychology* 1038.

³⁹ RC Schank and RP Abelson, *Scripts, Plans, Goals and Understanding: An Inquiry into Human Knowledge Structures* (Psychology Press, 1977).

⁴⁰ FC Bartlett, *Remembering: A Study in Experimental and Social Psychology* (CUP, 1932).

⁴¹ A Koriat, M Goldsmith and A Pansky, “Toward a Psychology of Memory Accuracy” (2000) 51 *Annual Review of Psychology* 481; Willén, n 33.

⁴² G Byrne, “The High Court in Pell v The Queen: An ‘Unreasonable’ Review of the Jury’s Decision” (2020) *The Alternative Law Journal*, forthcoming.

⁴³ C Weinsheimer et al, “Perceptions of Credibility for a Memory Report of a Single Versus Repeated Event: Perceived Credibility for Repeated Events” (2017) 31(4) *Applied Cognitive Psychology* 414.

⁴⁴ R Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983).

⁴⁵ *Pell v The Queen* [2019] VSCA 186, [123], citing judicial summation of the prosecution case.

or indirectly, that is, “semantic memory”.⁴⁶ By comparison, recall of what transpired on a specific occasion draws on a specific episodic memory trace, “slices of experience” or “summary records” of a specific experience or event,⁴⁷ associated with a particular time and place.⁴⁸ This knowledge is typically acquired directly, and closely associated with sensory perceptions (visual, auditory, tactile or haptic, taste, and smell).

In the Court of Appeal, the majority’s analyses of the evidence revealed that the opportunity witnesses frequently resorted to expressions of uncertainty, generality, and self-serving consistency with a script or schema when describing rules and routine practices that had a bearing on the alleged impossibilities of the events. Their evidence in the form of statements such as “I don’t think so”, “I don’t believe so”,⁴⁹ or what typically “would have happened” reflected their general conceptual knowledge of abstract idealised practices and not their episodic memory traces of what happened on a specific occasion, namely the date of the alleged abuse.⁵⁰ Some such weaknesses in the memory precision of some, but, importantly, not all, of the opportunity witnesses were also noted by the High Court. For example, the High Court noted that altar server Connor:

[...] did not have a specific recall of the services on those dates but said it was the applicant’s “invariable” practice to greet congregants on the steps of the Cathedral after Mass.⁵¹

Similarly, the evidence of Monsignor Portelli as the Master of Ceremonies, the evidence that the High Court considered was unchallenged and persuasive, seemed to impress the High Court as Portelli was unable to recall instances of departure from the script accessible to memory at time of the trial. As the High Court described that evidence:

Portelli acknowledged that it was possible that there was an occasion when he did not return to the sacristy with the applicant although he had no recall of this happening and in such a case *he would have made sure* that the applicant was accompanied by Potter or a priest.⁵²

What is striking here is the assertion by Portelli that “he would have made sure that the applicant was accompanied”; a classic example of schema and script adherence leading the recalling witness to conclude, absent a specific episodic memory, that something *would have occurred* according to the script of a routine practice. Perhaps a similar example referred to by the High Court came in the testimony of David Dearing, a 13-year-old chorister at the time of the alleged abuse, who expressed his evidence with tell-tale signs of schematic memory recollection, unable to remember departures from the script for the repeated events, and, finding the thought of any departure difficult to contemplate and rather implausible when suggested:

David Dearing was asked if he had ever seen the applicant in robes without Portelli accompanying him. He replied, “*I wouldn’t have thought so, no. My recollection is that they were always together.*”⁵³

One important aspect of human memory in this context is the reliance on the script or schematic memory developed for recurring events. People remember gist features of a repeated event instead of encoding the specific features of a single, unique event,⁵⁴ which reflects a memory bias or distortion due to developed schemata of practices.⁵⁵ In other words, people rely on typicality or plausibility of an event, which leads

⁴⁶ VandenBos, n 17, 960; HL Roediger, FM Zaromb and MK Goode, “A Typology of Memory Terms” in R Menzel (ed), *Learning Theory and Behavior* (Elsevier, 2008) Vol 1.

⁴⁷ Martin Conway, “Episodic Memories” (2009) 47(11) *Neuropsychologia* 2305, 2306.

⁴⁸ VandenBos, n 17, 377.

⁴⁹ *Pell v The Queen* [2019] VSCA 186, [314].

⁵⁰ *Pell v The Queen* [2019] VSCA 186, [317].

⁵¹ *Pell v The Queen* (2020) 94 ALJR 394, [67]; [2020] HCA 12.

⁵² *Pell v The Queen* (2020) 94 ALJR 394, [77]; [2020] HCA 12 (emphasis added).

⁵³ *Pell v The Queen* (2020) 94 ALJR 394, [82]; [2020] HCA 12 (emphasis added).

⁵⁴ The Research Board of the British Psychological Society, *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (British Psychological Society, 2010) 2, 12.

⁵⁵ Schacter, n 27.

to an increased likelihood of false memories, in particular when people are recalling practices with which they are familiar.⁵⁶ Although evidence from various opportunity witnesses was supportive of the defence case,⁵⁷ most of these witnesses provided general statements and could not pinpoint specific events when they were challenged. One example of a witness expressing uncertainty was the organist who said that after the Mass he would not have noticed if boys were passing by, because the view from the organ was poor and he was busy playing.⁵⁸

This general gist memory by the opportunity witnesses for the schemata of repeated events stands in stark contrast to the memory of the complainant, as the alleged abusive events comprised a unique, distinctive, exceptional autobiographical memory for him. The Court of Appeal majority argued that the particular conduct and the location “are likely to have been fixed in his memory in a way which could not be said of anyone else except (on his account) Cardinal Pell”.⁵⁹ This elaboration by the majority reflects empirical findings that retrieving a memory for one specific event out of a series of repeated events is challenging, unless something exceptional happened to make it distinctive.⁶⁰ According to the Court of Appeal majority, the evidence confirmed that what the complainant claimed had occurred was not impossible, and that the prosecution could rely on the evidence in discharging its burden to establish that there was a realistic opportunity for the offending to have occurred.⁶¹

One of the opportunity witnesses was Potter, who was in his mid-80s at the time of the trial. In his dissenting judgment, Weinberg JA viewed Potter’s evidence as “reliable when it comes to matters of liturgical practice”.⁶² Because these memories belonged to a series of repeated events that took place more than 20 years earlier, and some witnesses, including Potter, were elderly, the Court of Appeal majority concluded that the reliability of these accounts was likely questionable.

Scientific memory research reflects that adults’ schema-based memories are often the result of witnesses filling in gaps with their general expectations based on conceptual semantic knowledge about what would occur, and this leads those memories to diverge from “reality:”

People compensate for their failure to recover specific details about a past episode by drawing inferences and then mistake these inferences for material they had actually experienced. The likelihood of inferential errors increases substantially as the retention interval increases.⁶³

Weinberg JA concluded that the general schema evidence from defence opportunity witnesses refuted the possibility that the alleged offence could have happened.⁶⁴ His Honour took a different approach by assessing these witnesses separately in terms of their general credibility as sources, without any critical evaluation of the reliability of their memories.

A review of defence counsel’s questioning of the opportunity witnesses disclosed considerable leading about the routines and general practices within the church (who did what, who was or was not alone). When Potter and Portelli were challenged by the prosecutor, their answers were less clear, and obvious contradictions emerged. In particular, Potter confused important details and dates, likely due to his

⁵⁶ B Bornstein, “An Unholy Tetrad: Repression, Recovered Memory, False Memory, and Hypnosis” in *Popular Myths about Memory: Media Representations versus Scientific Evidence* (ProQuest Ebook Central, 2017); K Pezdek, K Finger and D Hodge, “Planting False Childhood Memories: The Role of Event Plausibility” (1997) 8 *Psychological Science* 437.

⁵⁷ *Pell v The Queen* [2019] VSCA 186, [456].

⁵⁸ *Pell v The Queen* [2019] VSCA 186, [318]–[321].

⁵⁹ *Pell v The Queen* [2019] VSCA 186, [162].

⁶⁰ J Goodman-Delahunty, MA Nolan and EL van Gijn-Grosvenor, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 46.

⁶¹ *Pell v The Queen* [2019] VSCA 186, [170].

⁶² *Pell v The Queen* [2019] VSCA 186, [1088].

⁶³ SL Hannigan and MT Reinetz, “A Demonstration and Comparison of Two Types of Inference-based Memory Errors” (2001) 27(4) *Journal of Experimental Psychology: Learning, Memory and Cognition* 931, 939.

⁶⁴ *Pell v The Queen* [2019] VSCA 186, [586]–[587].

advanced age.⁶⁵ Weinberg JA stated that if the evidence of each of the opportunity witnesses was credited, the “reasonably possible” argument of the prosecution was logically refuted.⁶⁶

The High Court adopted the perspective of Weinberg JA and focused on the plausibility of the complainant’s evidence in light of the evidence by defence opportunity witnesses about three routine liturgical practices, specifically that: (1) after Sunday solemn Mass, Pell would greet congregants on or near the Cathedral steps; (2) when robed in the Cathedral, an archbishop was always accompanied; and (3) the sacristy was used by several people after the conclusion of the procession.⁶⁷ However, some witnesses referred to the disruption in the usual sacristy routine due to renovations at the time of the alleged offending.⁶⁸

The tension between memory of actual events or of practice followed or not followed on a particular day versus memory of typical practice was alluded to in the course of argument in the High Court by a question to counsel for the respondent (the Victorian DPP, Ms Judd) by Justice Keane:

KEANE J: Okay. So in terms of the way the case was run, it was not open to the jury to take the view that Monsignor Portelli was not there. Monsignor Portelli gives evidence of a couple of practices that exist and says, it is possible they were not followed because of the exigencies of the particular day, but he cannot recall that there was any particular exigency that caused a departure from the practice. Is not the evidence of practice, where it is honestly given, usually regarded as powerful evidence?

MS JUDD: Yes, but...

KEANE J: I mean, I can say I shaved last Friday, not because I actually have a specific recollection of it, but because it was a workday and I shave on workdays.⁶⁹

Furthermore, in the unanimous High Court judgment, the Court dismissed the possibility (not argued in the High Court proceeding) that memory of typical practice adopted after the relevant time may have affected any memory of departure from that practice, stating conclusively and controversially in light of known memory phenomena:

The suggestion that witnesses’ memories may have been affected by ritual that developed thereafter has echoes of the prosecutor’s closing submission, which was that the applicant’s practice of greeting congregants may not have developed before 1997. It is a contention that finds no support in the evidence and was not pursued by the respondent on appeal to this Court.⁷⁰

In particular, when suggesting that the evidence of practice given by Portelli as Master of Ceremonies, on the likely dates of the first instance of alleged abuse, went unchallenged and should have caused the jury to form a reasonable doubt, the High Court noted that an uncontested recollection about routine practice is acceptable evidence, *in the absence of direct evidence of a clear memory that the usual practice was followed on a particular occasion*:

Evidence of a person’s habit or practice of acting in a particular way to establish that the person acted in that way on a specific occasion may have considerable probative value. As Professor Wigmore explained, “[e]very day’s experience and reasoning make it clear enough.”⁷¹ The evidence of religious ritual and practice in this case had particular probative value for the reason that their Honours first identified: adherence to ritual and compliance with established liturgical practice is a defining feature of religious observance. Contrary to the Court of Appeal majority’s analysis, the absence of any “significant and unusual event” associated with solemn Mass on 15 and 22 December 1996 tells against the likelihood of Portelli having departed from his duties as master of ceremonies.⁷²

⁶⁵ A Aizpura, M Migueles and E Garcia-Bajos, “Accuracy of Eyewitness Memory for Events in Young and Older Adults” in MP Togliani, DF Ross, J Pozzulo and E Pica, *The Elderly Eyewitness in Court* (Psychology Press, 2014) 210.

⁶⁶ *Pell v The Queen* [2019] VSCA 186, [491], [510], [520], [587].

⁶⁷ Bagaric, n 8.

⁶⁸ *Pell v The Queen* [2019] VSCA 186, [459], [498].

⁶⁹ *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12, *Pell v The Queen* [2020] HCATrans 27.

⁷⁰ *Pell v The Queen* (2020) 94 ALJR 394, [89]; [2020] HCA 12.

⁷¹ JH Wigmore, *Evidence in Trials at Common Law* (Tillers rev, 1983) Vol 1A, §92, 1607. See also *Cross on Evidence* (9th Aust ed, 2013) 19–20 [1135].

⁷² *Pell v The Queen* (2020) 94 ALJR 394, [93]; [2020] HCA 12.

The invocation of Wigmore, an evidence lawyer rather than any reference to the psychology of memory for events versus memory for typical practice, is telling here and reminiscent of earlier tensions between legal psychologist Hugo Muensterberg and Wigmore himself.⁷³ What is more interesting to reflect on is how often in cases of repeated historical child sexual abuse the memory of typical abuse practice given by the complainant is suspected, while in this case, the memory of typical practice given by the opportunity witnesses was accepted here; at least for the reason of showing on appeal that the jury should have entertained a reasonable doubt as to whether the abuse could have occurred. What is interesting is that schematic memory of routine treatment or practice can be a shared feature of both the complainant's evidence and the evidence of institutional opportunity witnesses in cases of child sexual abuse. An important challenge is to assess when errors relating to schematic memory may have effected either the complainant's or the opportunity witnesses' account. In the Pell case, though, the complainant's evidence was of single events of abuse and not repeated events of abuse vulnerable to the errors known to accompany schematic memory for repeated events. However, the opportunity witnesses were recalling repeated events of liturgical practice.

The High Court criticised the majority of the Court of Appeal's view that Portelli's evidence of routine practice could be vulnerable to the weaknesses of schematic memory. The High Court's view was that:

Notwithstanding that Portelli's evidence of having an actual recall of being present beside the applicant on the steps of the Cathedral as the applicant greeted congregants on 15 and 22 December 1996 was unchallenged, the Court of Appeal majority said it was open to the jury to have reservations about the reliability of his affirmative answers given in cross-examination. The Court of Appeal majority also considered that it was open to have reservations about the reliability of this evidence given the improbability of Portelli having a specific recollection of particular Masses in the absence of "some significant and unusual event" having occurred at one or other of them. Their Honours observed that, while Portelli may have had a general recollection of the first time the applicant said Sunday solemn Mass at the Cathedral, he had demonstrated a lack of detailed recall of the events of that day.⁷⁴

Clearly the High Court focused mainly on what they believed should have been the impact on the jury's reasoning of what they thought was credible and reliable memory of invariable practice by the opportunity witnesses that became indirect evidence of occurrence, or, at the very least, enough to raise a reasonable doubt in the face of even credible and reliable evidence from the surviving complainant:

It may be accepted that the Court of Appeal majority did not err in holding that A's evidence of the first incident did not contain discrepancies, or display inadequacies, of such a character as to require the jury to have entertained a doubt as to guilt. The likelihood of two choirboys in their gowns being able to slip away from the procession without detection; of finding altar wine in an unlocked cupboard; and of the applicant being able to manoeuvre his vestments to expose his penis are considerations that may be put to one side. It remains that the evidence of [the opportunity] witnesses, whose honesty was not in question, (i) placed the applicant on the steps of the Cathedral for at least ten minutes after Mass on 15 and 22 December 1996; (ii) placed him in the company of Portelli when he returned to the priests' sacristy to remove his vestments; and (iii) described continuous traffic into and out of the priests' sacristy for ten to 15 minutes after the altar servers completed their bows to the crucifix.⁷⁵

While the High Court seemed to have considered both the credibility and reliability of the complainant, it focused on the *honesty* of the opportunity witnesses, without specific consideration of the *reliability* of their memories, in particular in light of the advanced age of some opportunity witnesses, such as Potter or Portelli. Leading contemporary memory researchers emphasise that human memory is not inherently unreliable, and that factors such as delay (a long lapse of time between the event and recall of it) do not inevitably render memory unreliable.⁷⁶ With periodic reminders, even very young preverbal infants can

⁷³ JH Wigmore, "Professor Muensterberg and the Psychology of Testimony Being a Report of the Case of Cokestone v Muensterberg" (1909) 3 *Illinois Law Review* 399.

⁷⁴ *Pell v The Queen* (2020) 94 ALJR 394, [88]; [2020] HCA 12.

⁷⁵ *Pell v The Queen* (2020) 94 ALJR 394, [118]; [2020] HCA 12.

⁷⁶ JT Wixted, L Mickes and RP Fisher, "Rethinking the Reliability of Eyewitness Memory" (2018) 13 *Perspectives on Psychological Science* 324.

retain memories of specific episodic events for long periods of time.⁷⁷ However, older age is a factor correlated with delay that does have a bearing on memory.

It is well known that memory fades with age due to age-related changes of the brain structure.⁷⁸ Longitudinal studies showed that episodic memory, in particular, starts to decline from the age of 60 to 65 years.⁷⁹ Moreover, during the ageing process, memory systems gradually differentiate, culminating in “a dynamic shift toward favouring semantic memory”.⁸⁰ This factor alone increases the likelihood that the older witnesses may have had only sporadic memory of what happened on the specific occasions in issue on the Pell case.

The acceptance of recall accuracy about typical practice by members of an institution therefore led the High Court to conclude in terms of both of the instances of abuse that:

Upon the assumption that the jury assessed A’s evidence as thoroughly credible and reliable, the issue for the Court of Appeal was whether the compounding improbabilities caused by the unchallenged evidence summarised in (i), (ii) and (iii) above nonetheless required the jury, acting rationally, to have entertained a doubt as to the applicant’s guilt. Plainly they did. Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to charges one to four that an innocent person has been convicted.⁸¹

A similar style of conclusion was drawn by the High Court in relation to the second instance of abuse, an indecent assault alleged to have occurred during an internal procession. Here, the High Court again noted that uncontested memory of typical practice relating to internal processions of a good number of celebrants and others meant that even an apparently credible and reliable claim by a complainant should have been doubted as possible by the jury:

The unchallenged evidence of the applicant’s invariable practice of greeting congregants after Sunday solemn Mass, and the unchallenged evidence of the requirement under Catholic church practice that the applicant always be accompanied when in the Cathedral, were inconsistent with acceptance of A’s evidence of the second incident. It was evidence which ought to have caused the jury, acting rationally, to entertain a doubt as to the applicant’s guilt of the offence charged in the second incident. In relation to charge five, again making full allowance for the jury’s advantage, there is a significant possibility that an innocent person has been convicted.⁸²

IV. THE TIMING OF THE ALLEGED EVENTS

Establishing the timing of an alleged offence is essential in criminal cases, as it provides an indication as to whether the defendant was there (ie, presence or absence of an alibi) and whether the incident could have taken place as described. However, when it comes to the memory of childhood experiences, contextual information about the timing of an event seems to be better remembered than temporal information.⁸³ Although the complainant in this case was an adult, one needs to consider that the information was encoded into memory in childhood, when his brain was still in development. Normal adult autobiographical memories of their childhood often include self-contradictions about dates,

⁷⁷ C Rovee-Collier, K Hartshorn and M DiRubbo, “Long-term Maintenance of Infant Memory” (1999) 35(2) *Developmental Psychobiology* 91.

⁷⁸ CP Coleman and A O’Hanlon, “Ageing and Adaptation” in R Woods and L Clare (eds), *Clinical Psychology of Ageing* (John Wiley & Sons, 2008) 17–32.

⁷⁹ M Rönnlund et al, “Stability, Growth, And Decline in Adult Life Span Development of Declarative Memory: Cross-sectional and Longitudinal Data from a Population-based Study” (2005) 20 *Psychology and Aging* 3; KW Schaie, “What Can We Learn from Longitudinal Studies of Adult Development?” (2005) 2 *Research in Human Development* 133.

⁸⁰ N Ofen and YL Shing, “From Perception to Memory: Changes in Memory Systems across the Lifespan” (2013) 37 *Neuroscience & Behavioral Reviews* 2258.

⁸¹ *Pell v The Queen* (2020) 94 ALJR 394, [119]; [2020] HCA 12.

⁸² *Pell v The Queen* (2020) 94 ALJR 394, [127]; [2020] HCA 12.

⁸³ MB Powell, Royal Commission into Institutional Responses to Child Sexual Abuse, Public Roundtable, “Memory of Childhood Sexual Abuse and The Law” (31 March 2017) 21, lines 39–41. Cited in Goodman-Delahunty, Nolan and van Gijn-Grosvenor, n 60.

times and the number of people present at an event.⁸⁴ People are particularly poor at reconstructing the timeframe of an event. Thus, it is unsurprising that tracking the timing of the incidents became difficult in this case.

In his initial statement to the police, the complainant reported that both incidents occurred in 1997. However, in the course of the police investigation, the year was corrected to 1996.⁸⁵ At trial, the complainant reported that both incidents had taken place in the second half of 1996,⁸⁶ over a month apart.⁸⁷ Considering that the records showed only two dates on which the Archbishop said Mass that year, on 15 and 22 December, this seemed impossible. In the course of the trial, with the help of diary entries, the timing was further adjusted placing the first incident in December 1996 and the second incident in February 1997.

Misattributions in the recollection of dates is a common memory distortion, first, because there are many competing associations for time and dates, so the cue overload principle comes into effect, predicting that specific memories will not readily be retrieved; and second, because it typically relies on inferences based on general conceptual semantic knowledge, not episodic recall.⁸⁸ The Court of Appeal majority acknowledged that, “[t]his is the kind of detail about which honest witnesses make mistakes”.⁸⁹ Weinberg JA viewed the changes of date, and in particular the change of the date of the second incident to February 1997 “without any sufficient justification” as a “matter of concern”.⁹⁰

V. INCONSISTENCIES IN THE COMPLAINANT’S ACCOUNT

A second critique of the complainant’s evidence was that the complainant was making a strategic alteration to his evidence “when confronted by the impossibility of his allegations”.⁹¹ The criticism related to: (1) what Cardinal Pell’s role had been in the Mass, that is, whether he had *said* Mass or he had been *leading* the Mass;⁹² (2) the point at which the two choir boys detached from the choral procession;⁹³ and (3) the route by which the boys came into the priests’ sacristy.⁹⁴

Some of these inconsistencies, as well as new details, emerged for the first time during cross-examination. The appellant argued that memory gaps and alterations in the evidence of the complainant were indicators that the complainant’s evidence was not reliable,⁹⁵ reflecting the lay misconception that memory fades steadily over time.⁹⁶

Although these details seem important, they were not as important to a young, developing child. In fact, the complainant expressed his uncertainty and willingly admitted memory gaps in these contexts. He reported during his testimony that his first recollection was “being in that room”. The complainant provided several assurances that the new details were not disclosed earlier as he did not think they were important, and because no one asked him about those details before.

The explanation provided by the complainant is consistent with the general scientifically derived principle of memory that what is remembered depends on the goodness of the match between conditions

⁸⁴ Goodman-Delahunty, Nolan and van Gijn-Grosvenor, n 60, 49.

⁸⁵ *Pell v The Queen* [2019] VSCA 186, [666].

⁸⁶ *Pell v The Queen* [2019] VSCA 186, [667].

⁸⁷ *Pell v The Queen* [2019] VSCA 186, [669].

⁸⁸ Schacter, n 27.

⁸⁹ *Pell v The Queen* [2019] VSCA 186, [237].

⁹⁰ *Pell v The Queen* [2019] VSCA 186, [1029].

⁹¹ *Pell v The Queen* [2019] VSCA 186, [210].

⁹² *Pell v The Queen* [2019] VSCA 186, [421].

⁹³ *Pell v The Queen* [2019] VSCA 186, [217].

⁹⁴ *Pell v The Queen* [2019] VSCA 186, [220].

⁹⁵ *Pell v The Queen* [2019] VSCA 186, [68].

⁹⁶ Akhtar et al, n 20.

at the time of encoding and at the time of retrieval.⁹⁷ Extensive research has shown that different questions asked across multiple interviews are likely to produce different recollections, and that the fact that these differences emerge does not diminish the overall report accuracy.⁹⁸ Empirical research shows that inconsistencies and errors relating to peripheral details to a central event are common, and do not indicate that a person is lying.⁹⁹ The Court of Appeal majority believed the complainant, while Weinberg JA regarded reports of these new details as a reason to doubt his evidence.

Researchers have used the term “reminiscences” to refer to later recall by a witness of previously unreported facts, that is, information that was not reported in an earlier interview. This phenomenon is counterintuitive as it contravenes a common legal assumption about memory, namely, that memory declines steadily with the passage of time. This issue is important as it implicates another widely accepted general principle of scientific memory research, the cue-driven principle of memory. This principle states that recollection will always begin with a cue.¹⁰⁰ Yet jurors, police officers and legal professionals are often unaware of how sensitive memories are to retrieval cues. Memory scientists have cautioned:

If the question that is posed to a witness changes from one interview to another, the witness’s recollections may change. In general, the more different are the retrieval cues (questions) across interviews, the more dissimilar will be the recollections on the two interviews. Reminiscence may occur, therefore, if a retrieval cue is present on the second interview, but not on the first interview. The amount of reminiscence should reflect the amount of dissimilarity between the retrieval cues (questions) on two interviews.¹⁰¹

A study examining the outcomes of 19 empirical experimental studies confirmed that specific inconsistencies in the evidence of a witness are often poor predictors of the accuracy of overall memory of the witness. The researchers compared statements given by witnesses 30 minutes after viewing a videotaped crime with a further statement given after an interval of up to two weeks later. The results yielded many instances of reminiscences where witnesses provided new information and details in the second statement that were not provided in their first statement.¹⁰²

No evidence emerged to support the legal supposition that reminiscence is predictive of inaccuracy of the overall testimony: the researchers found no correlation between the proportion of reminiscences and overall report accuracy. However, the type of questions or memory retrieval cues that served as cues for recall were important. Responses to open-ended questions were considerably more accurate than were responses to closed questions, whether these questions were posed immediately after viewing the videotape or two weeks later. Open-ended questions yielded a very high proportion of correct responses, 0.97 and 0.94, respectively. In sum, the study demonstrated that reminiscences in response to appropriate open-ended questions are highly accurate.¹⁰³

The researchers have cautioned that inconsistencies in evidence should be not judged at the level of the witness rather than the statement, because “witnesses who make inconsistent statements, on the whole, are not less accurate than witnesses who make only consistent statements”. They advised police, lawyers and courts that evidence should be weighed and assessed “in terms of individual facts of the case, not in terms of witnesses”.¹⁰⁴

Similarly, the presence of memory gaps reflects memory transience. Empirical findings suggest that gaps in memory are normal,¹⁰⁵ and that someone who admits such memory gaps is more likely to be honest

⁹⁷ Surprenant and Neath, n 15.

⁹⁸ RP Fisher, N Brewer and G Mitchell, “The Relation between Consistency and Accuracy of Eyewitness Testimony: Legal versus Cognitive Explanations” in T Williamson, R Bull and T Valentine (eds), *Handbook of Psychology of Investigative Interviewing: Current Developments and Future Directions* (Wiley-Blackwell, 2009).

⁹⁹ Fisher, Brewer and Mitchell, n 98.

¹⁰⁰ Surprenant and Neath, n 15.

¹⁰¹ Fisher, Brewer and Mitchell, n 98.

¹⁰² Fisher, Brewer and Mitchell, n 98.

¹⁰³ Fisher, Brewer and Mitchell, n 98.

¹⁰⁴ Fisher, Brewer and Mitchell, n 98.

¹⁰⁵ Goodman-Delahunty, Nolan and van Gijn-Grosvenor, n 60; The Research Board of the British Psychological Society, n 54.

than not. By contrast, someone who is lying is unlikely to admit memory gaps, but instead will try to fill the gaps logically based on their general conceptual knowledge about what would typically happen in a given context.

The Court of Appeal majority used the complainant's admission of uncertainty (or ready acknowledgment of the limits of his recollections) as a marker of veracity or indicator of high credibility rather than a deficit in reliability,¹⁰⁶ as contended by the defence. By contrast, Weinberg JA perceived the changes in the complainant's account as "a significant departure"¹⁰⁷ from a previous position and discrepancies as an indication that he was not credible or reliable – a conclusion that was shared by the High Court, criticising the "highly subjective nature of demeanour-based judgments"¹⁰⁸ exercised by the majority of Court of Appeal.

VI. IMPLICATIONS FOR PRACTICE

Knowing that a memory conforms to the scientific memory belief system may be useful in informing judgments of memory evidence in criminal trials.

For example, in many sexual assault cases, complainants are exposed to repeated similar incidents of abuse. In this respect, their memories for recurring events may resemble those of the opportunity witnesses in the Pell trial. That is, accounts that are not recalled fluently, that are fragmentary, that have missing details due to reliance on a script or schema that is formed for repeated events. The Royal Commission into Institutional Responses to Child Sexual Abuse noted these difficulties that complainants experienced in particularising their evidence after experiencing multiple incidents of repeated abuse because of the ways in which repeated events are recalled.¹⁰⁹ This was acknowledged to present a "perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence" because the victim is unable to describe specific or distinct occasions of abuse.¹¹⁰

Similarly, witnesses are usually questioned on multiple occasions and exposed to different types of questions in the course of a criminal trial. New or different information is likely to be elicited in response to different retrieval cues or questions. In these circumstances, the fact that new or different details emerge does not imply that the overall report of that witness is unreliable. A key implication for practitioners is that assessments of the credibility and reliability should be made by weighing the evidence "in terms of individual facts of the case, not in terms of witnesses".¹¹¹

Notably, the nature of memories within the scientific memory belief system is not specific to complainants or defence witnesses but applies to all witnesses. Knowledge of these attributes of memory does not shift the burden of proving a case beyond reasonable doubt from the prosecution to the defence. Nor does knowledge of the nature of memories within the scientific memory belief system and the common memory belief system diminish the right of the accused to be notified of the allegations and circumstances of the complaint against him/her. In calling evidence that raises doubt about the details of the allegations, a well-informed defendant will take the scientific memory belief system into account to strengthen his/her defence case and will avoid reliance on erroneous beliefs about memory that are implicitly used by police and some jurors.

VII. CONCLUSION

The discussion by the Victorian Court of Appeal of instances of memory inconsistencies, memory for repeated versus unique events, and confusion about key dates, are topics about which there is extensive

¹⁰⁶ *Pell v The Queen* [2019] VSCA 186, [77]–[78], [216].

¹⁰⁷ *Pell v The Queen* [2019] VSCA 186, [455].

¹⁰⁸ *Pell v The Queen* (2020) 94 ALJR 394, [49]; [2020] HCA 12.

¹⁰⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, "Criminal Justice Report, Executive Summary and Parts I-III" (2017) 38–39.

¹¹⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, n 109, 39.

¹¹¹ Fisher, Brewer and Mitchell, n 98, 133.

psychological scientific research. The majority decision in the Court of Appeal appears to conform with the contemporary scientific expert belief system about human memory. Aspects of the decision of the dissenting judge appear to adopt an approach more akin to the commonsense system about human memory which incorporates a number of fundamental misperceptions of memory. Such implicit or non-conscious reliance on commonsense beliefs about memory can lead to errors in judging the reliability of a witness. Conversely, knowing that a memory description conforms to the scientific memory belief system may be useful in informing assessment of and in crediting and weighing memory evidence.

Central to the decided appeal in the High Court was whether there remained a reasonable doubt as to the existence of any opportunity for the offending to have occurred. When faced with memory of typical practice given by the opportunity witnesses, notably not always direct evidence of memory of a particular occasion or of whether practice was followed on that occasion, the High Court decided that such memory for typical practice should have raised a reasonable doubt in the minds of the jury, and, in the reasoning of the majority in the Court of Appeal. The foregoing analysis offers an evidence-based approach to inform jurors, lawyers and judges about factors to consider in assessing and weighing the evidence of the complainant and defence witnesses on facts that bear on this issue.

An intriguing question is whether views about the forensic assistance given by memories of routine practice belong to the contemporary scientific belief system, or whether the positive views of memory of routine practice afforded the opportunity witnesses by the High Court reflect use of commonsense beliefs about human memory, which may incorporate a number of misperceptions of memory. The studies conducted to date on memory beliefs did not include statements about memory for single events and repeated events, leaving this question unanswered.