

Empirical Legal Research on Memory and Child Sexual Abuse: The Case of Cardinal Pell



Prof Jane Goodman-Delahunty, JD, PhD

School of Psychology, Charles Sturt University, Manly, Australia

Case chronology

- 2015 complainant spoke to police.
- 1996 Archbishop George Pell sexually abused 2 choirboys aged 13 years.
- Two incidents: oral rape in Sacristy at St Patrick's Cathedral, Melbourne; sexual assault by genital groping a few weeks later in church corridor.
- Second victim died age 30 from accidental heroin overdose.
- 2018 jury trial on 5 charges.
- Jury deliberated 4 days returned a **unanimous guilty verdict**
- Pell, 6-year prison sentence, eligible for parole 2022 (3 years 8 months).
- Cardinal Pell , now age 78, in prison, filed a series of legal appeals.



Eggleston (1983) six factors to assess evidence

- consistency of witness story
- consistency with other witnesses
- consistency with undisputed facts
- 'credit' of the witness (in witness-box, evidence of bias)
- observation of witness
- inherent probability/improbability of story

R Eggleston (1983), *Evidence, proof and probability* (Weidenfeld & Nicolson, 2d ed).

Pell Victorian Court of Appeal 2019

Majority and dissent applied same six factors

Majority:

Affirmed jury verdict of guilt
beyond reasonable doubt

Open to the jury to be satisfied of
Cardinal Pell's guilt beyond
reasonable doubt

Jurors were not unreasonable to
believe the testimony of Pell's
victim.

Dissent:

Jury erred, reasonable doubt exists

- ample material upon which the complainant's account could be legitimately subject to criticism:
- inconsistencies and discrepancies
- a number of answers simply made no sense

*George Pell High Court appeal:
Cardinal granted final
challenge against child sexual
abuse conviction*

13 Nov 2019, *The Guardian*

Full bench of seven judges to decide
Cardinal Pell appeal to Australian High Court





Defence appeal

- There remains a reasonable doubt as to the existence of any opportunity for the offending to have occurred.
- In a criminal trial it is up to prosecutors to establish proof, not the defendant to prove innocence.
- Victorian appellate judges wrongfully reversed this onus of proof.

Prosecution

- No question of law of public importance
- Facts of the case carefully and thoroughly explored by jurors and the majority of Victorian Court of Appeal.



Central facts in controversy *Pell v R* [2019].

Defence:

Accounts described by the complainant were impossible because there was no opportunity for the offending to have occurred due to the invariability of routine Church practices

(it was not possible for Pell to be robed and alone in the Priests' Sacristy).

- Conceptual, semantic memory

Prosecution:

One needs to distinguish between practices and protocols developed over time, as described by many witnesses, from what actually occurred on the specific occasions.

- Episodic, event memory

“Inherent probability or improbability of the story” (Eggleston, 1983)

Credibility of complainant vs opportunity witnesses called by the defence

‘Word against word’ case – no corroborative witnesses for complainant

Is complainant’s evidence **honest, truthful** (i.e., lacking *deception*)
and accurate, reliable (i.e., lacking *error*)

Distinction emphasised by the trial judge in directing the jury.

SL Sporer, ‘Lessons from the Origins of Eyewitness Testimony Research in Europe’, *Applied Cognitive Psychology*, 2008, Vol. 22, 737-57.

People always complain about their poor memory never about their decisions.

Francois de La Rochefoucauld

Where does the evidence-based consensus lie?

- Reasoning and the psychology of jury and judicial decisions
- Empirical legal research on memory and child sexual abuse

Australian Royal Commission into Institutional Responses to Child Sexual Abuse



<https://www.childabuseroyalcommission.gov.au/>

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Report for the Royal Commission into
Institutional Responses to Child Sexual Abuse

JULY 2017

EMPIRICAL GUIDANCE ON THE EFFECTS OF CHILD SEXUAL ABUSE ON MEMORY AND COMPLAINANTS' EVIDENCE

JANE GOODMAN-DELAHUNTY
MARK A NOLAN
EVIANNE L VAN GIJN-GROSVENOR

ROYAL COMMISSION INTO INSTITUTIONAL
RESPONSES TO CHILD SEXUAL ABUSE

Public Roundtable - Criminal Justice
MEMORY OF CHILDHOOD SEXUAL ABUSE AND THE LAW

Hearing Room 2
Level 17, Governor Macquarie Tower
Farrer Place, Sydney

On Friday, 31 March 2017 At 9.30am

<https://www.childabuseroyalcommission.gov.au/roundtables>

Memory experiments vs child sexual abuse

Feature	Experiment	Child sexual abuse
Episodic memory	x/✓	✓
Participants abused	x	✓
Negative events	x	✓
Familiarity with known perpetrator	x	✓
Prior relationship with perpetrator	x	✓
Ongoing relationship with perpetrator	x	✓
Personal life significance	x	✓
Autobiographical memory	x	✓
Consequences of memory report	x	✓
Number of reported events	1	≥1
Time between event and report	0-2 days	varies

Common sense vs scientific memory beliefs

- Survey of 853 memory experts, police and the general public about perceptions of human memory
- 5 topics addressed re:
 - nature of memory
 - determinants of accuracy
 - the relation of emotion and trauma to memory
- Participants indicated agree/disagree with each of 36 statements.
- Conducted a factor analysis – yielded 8 factors
- Significant differences in beliefs of lay public and police vs beliefs of memory experts

S Akhtar, LV Justice, L Knott, F Kibowski, MA Conway, 'The "Common Sense" Memory Belief System and Its Implications', *The International Journal of Evidence & Proof*, 2018, Vol. 22, 289-304.

“Common sense” misperceptions by public and police:

- Memories are like videos and photographs,
- Accuracy was determined by the number of details recalled
- And by their vividness.

Scientific memory findings:

- Memories are fragmentary,
 - No. of details and their nature does not predict accuracy
 - Memories and their details can be in error and even false
-
- Raises the probability of flawed judgments of memory
 - High attrition in complaints of adult and child sexual assault

Common sense vs science of memory

Key factors distinguish non-expert from expert views:

- memory is continuous and permanent like a video;
- memory is generally accurate;
- more memory details imply more accurate core memory;
- traumatic memories can be repressed for many years;
- emotional intensity or trauma leads to vivid memory accuracy; 'reliving' trauma increases memory accuracy
- memory fades steadily over time.
- false memories are common, especially of childhood sex abuse;
- childhood memory is unreliable as children are suggestible.



Schacter's 7 “deadly sins” of memory

- **Omission errors**

- Memory transience – use it or lose it
- Absent-minded or inattentive at encoding or retrieval
- Blocking – temporary inaccessibility

- **Commission errors**

- Bias at encoding or retrieval due to understanding, schema
- Misattribution source at retrieval - time, place, person
- Suggestibility – post-event misinformation effects

- **Persistence errors**

- Inability to forget traumatic events, intrusive, repetitive involuntary memories

1. Misconceptions about memory shape expectations of witnesses

“Memory is less like a digital recording of a concert that sounds the same each time you play it back, and more like an improvisational performance based on a common theme.

It can differ each time it's played back, and those differences can accumulate over time.”

Conley (2011)



Autobiographical memory misperceptions

- Accurate adult autobiographical memory exists for very early childhood events (e.g., events when aged 2-5 years) (Conway et al., 2014)
- Repression of traumatic memories of childhood sexual abuse occurs and recovery is always possible even after long delays of decades (Pelisoli et al., 2015)

<https://www.wnyc.org/story/what-if-you-could-remember-everything/>



2. Gaps in recall are features of normal memory



- Someone who admits memory gaps is more likely honest 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.

Pell complainant admitted memory gaps

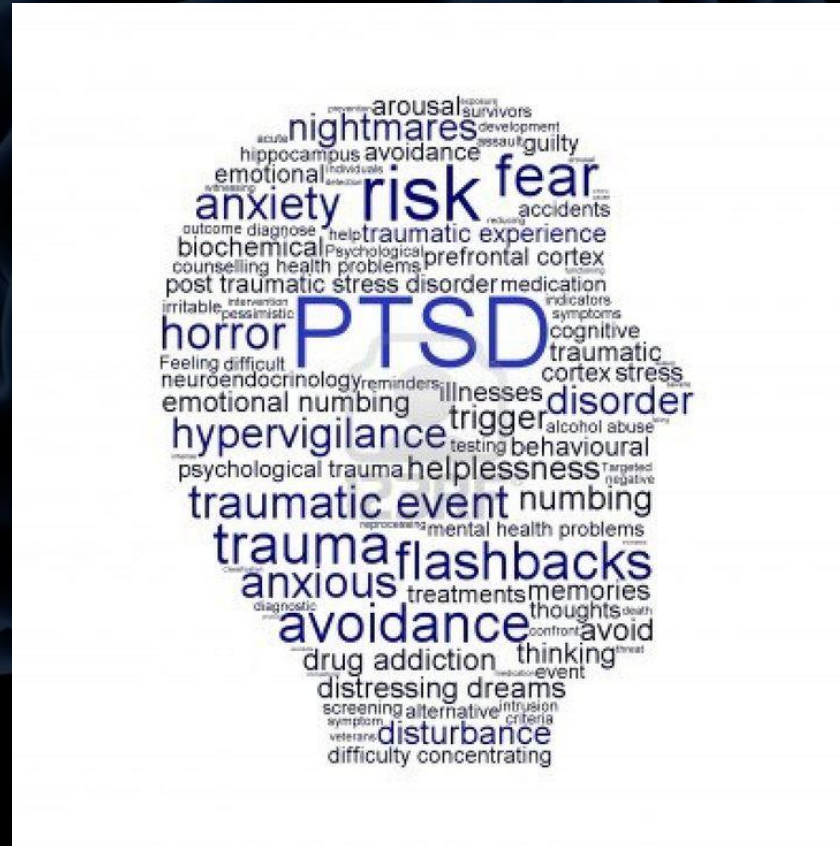
Defence:

- Memory gaps and alterations in the complainant's account were indicators that the complainant was **not a reliable source**.

Majority:

- Assessed 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.”
- Admissions were a **marker of veracity or indicator of high credibility** rather than a deficit in reliability.

3. Traumatic events disrupt memory encoding and retrieval



Pell complainant's demeanour

- Complainant angry when cross-examined as to why he never discussed abusive events with his now deceased co-complainant

Majority:

Complainant showed a total lack of emotional contrivance.

Defence:

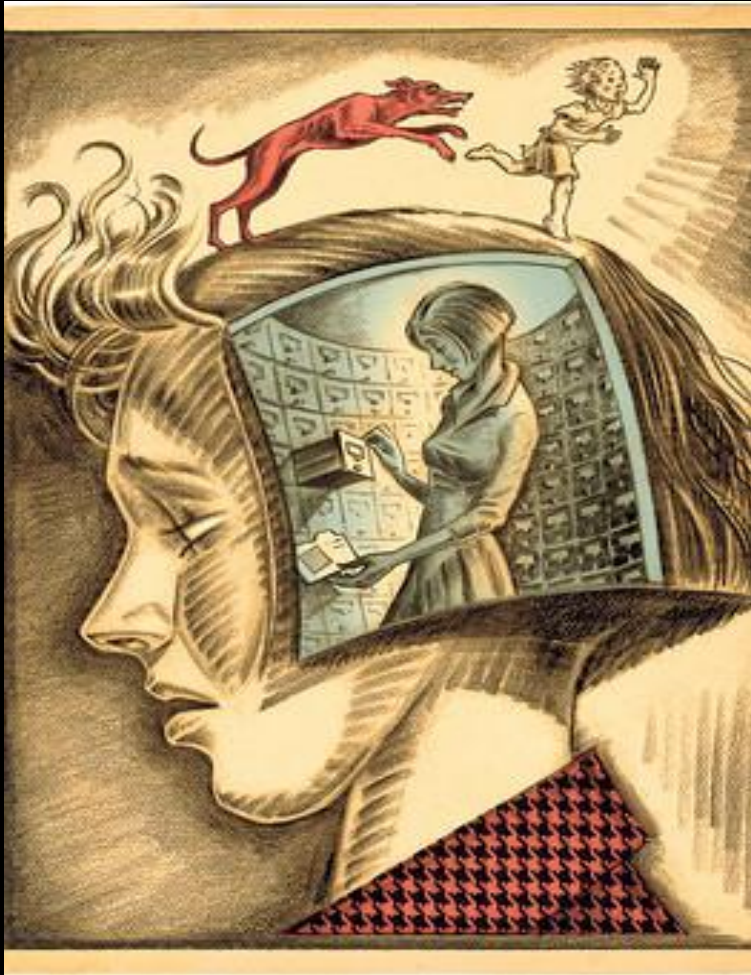
- Emotional intensity = accuracy
- Appropriate emotion is a cue to credibility of witnesses

Misperceptions of emotional displays



- Emotional displays by a witness are cues to reliable memory
- Intensity = accuracy

Misperceptions of emotion and memory

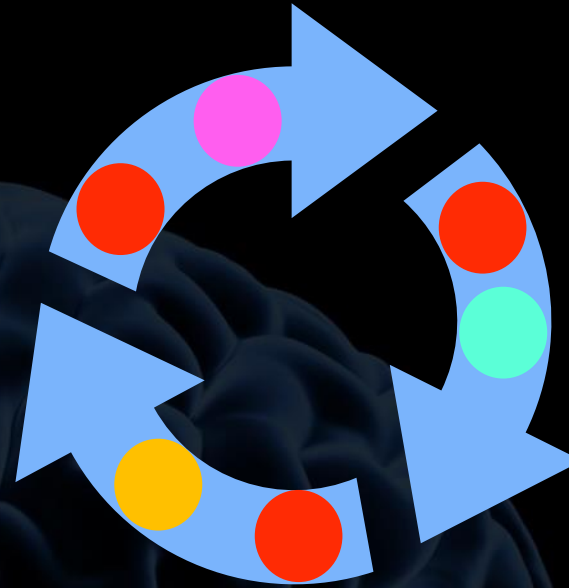


- Traumatic memories are more accurate
- Vividness = accuracy

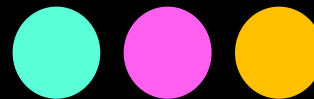
4. Memory for Recurring Events



Series of repeated events
with different features

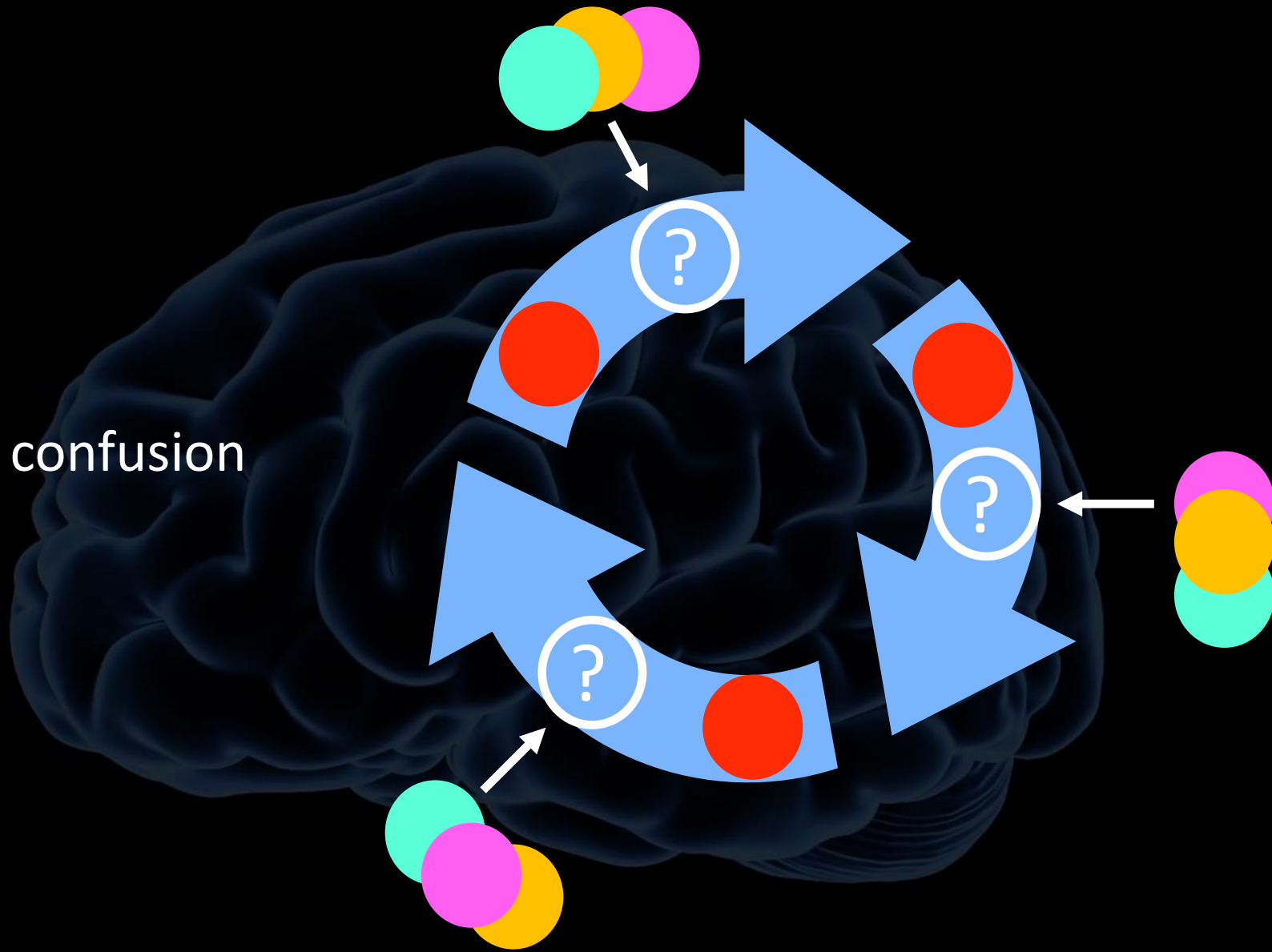


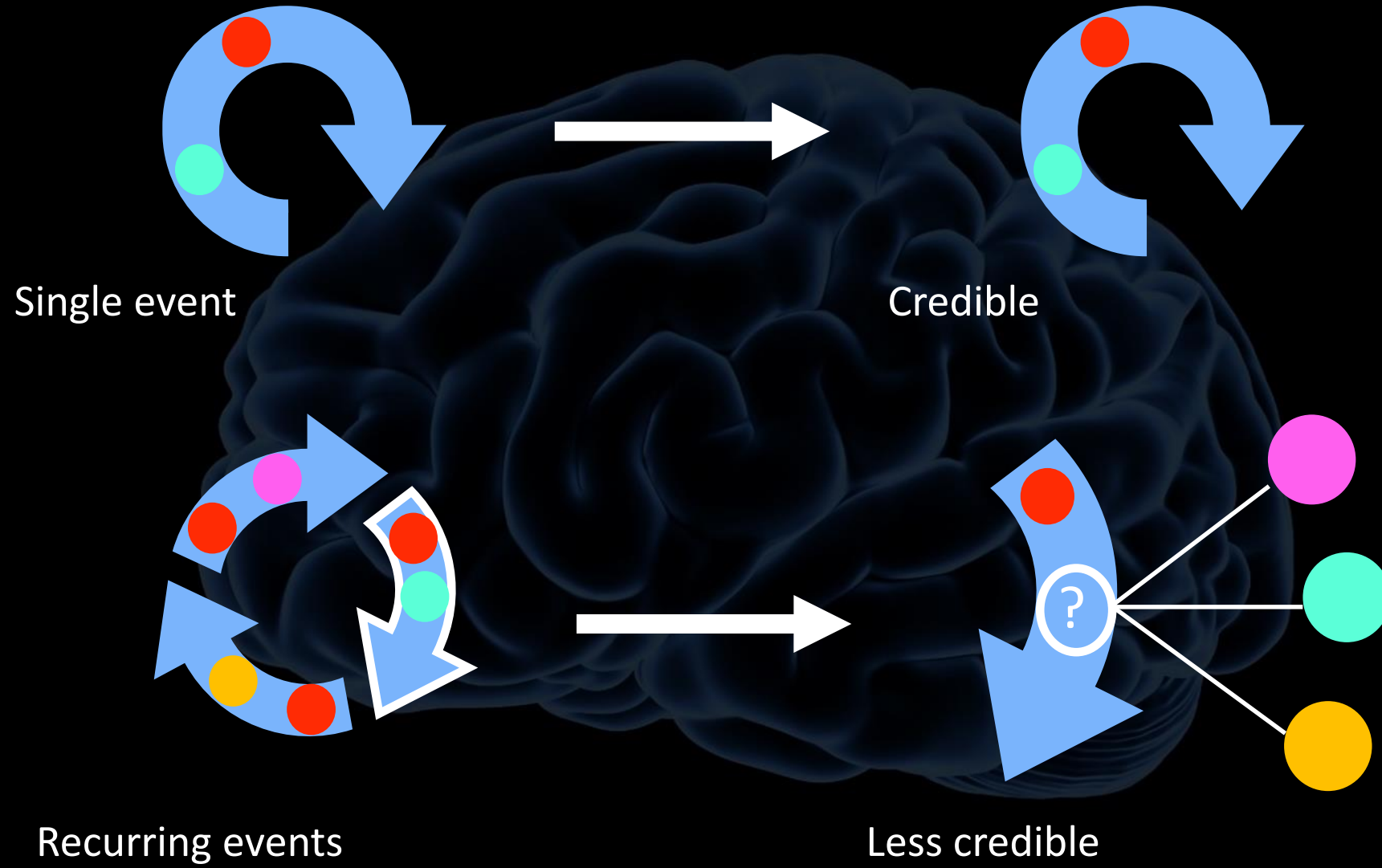
Invariant features: forming a script



Variant features

Source confusion





Pell defence “opportunity witnesses”

- What would typically have happened
- Uncertainty about routine matters of liturgical practice 20 years ago
“I don’t think so” “I don’t believe so”
Organ player: View from organ was poor; he was busy playing
- Schema for repeated protocols and practices
- Conceptual knowledge about idealised procedures
- Recalled gist of repeated events
- Schacter’s sins of commission = memory distortions due to schema
- General recall, not specific occasions
- No episodic memory trace for specific instances

Event memory of Pell complainant

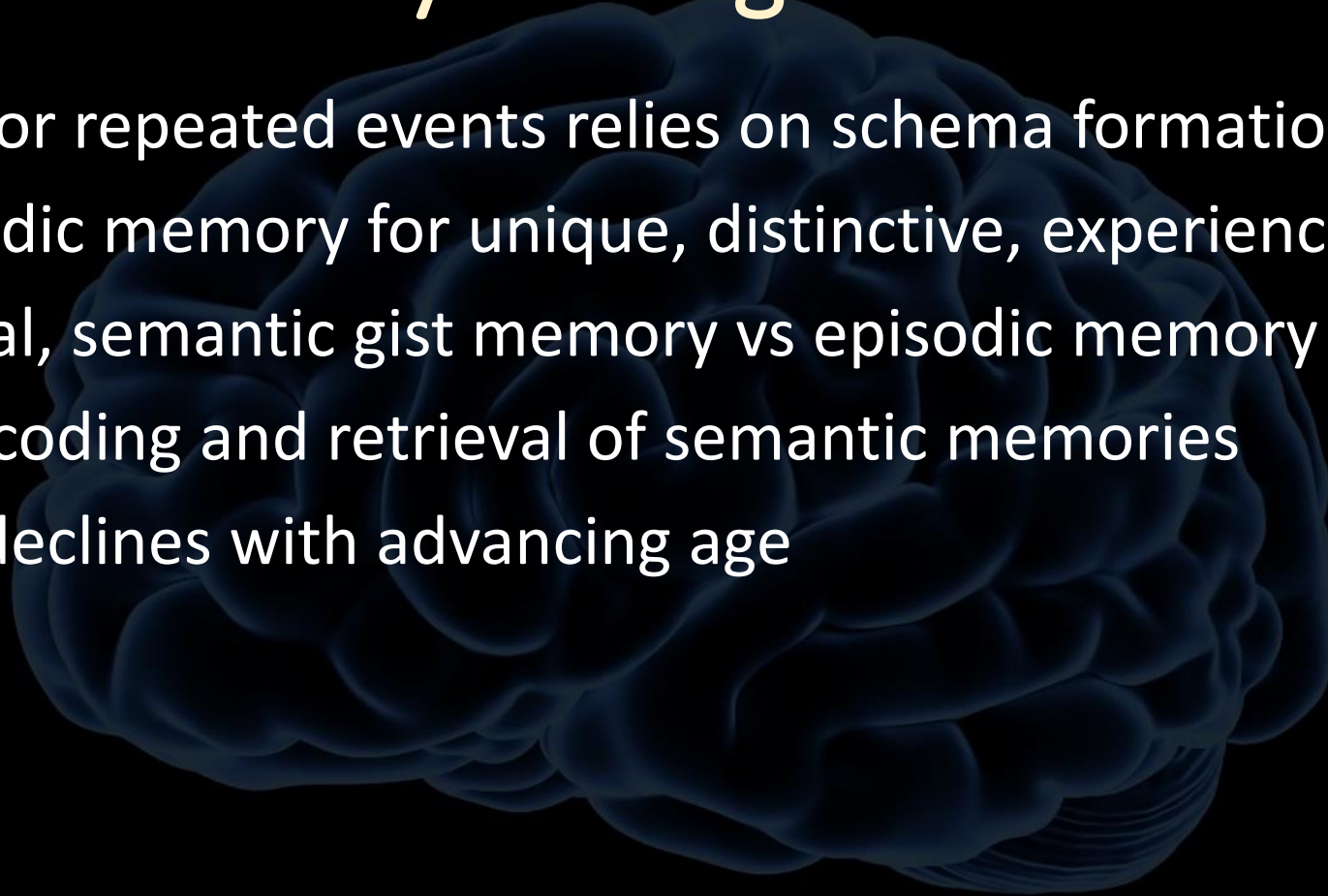
- Unique, distinctive, exceptional autobiographical events

Majority:

- Particular sexual conduct in issue and the location “likely to have been fixed in complainant’s memory in a way which could not be said of anyone else”
- None of the defence opportunity witnesses could confirm that the alleged conduct was impossible. e.g., Potter in mid-80s at time of trial, of questionable reliability, best when led on direct examination; confused important details and dates on cross-examination.

Scientific memory findings:

- Memory for repeated events relies on schema formation vs episodic memory for unique, distinctive, experiences
- Conceptual, semantic gist memory vs episodic memory traces
- Bias at encoding and retrieval of semantic memories
- Memory declines with advancing age



5. Cue sensitivity

National Institute of Child Health and Human Development
(NICHD) protocol



Cognitive Interview

Developmental Narrative Elaboration Interview



open-ended questions



closed-ended questions



leading questions



questions posing options

Pell complainant's evidence

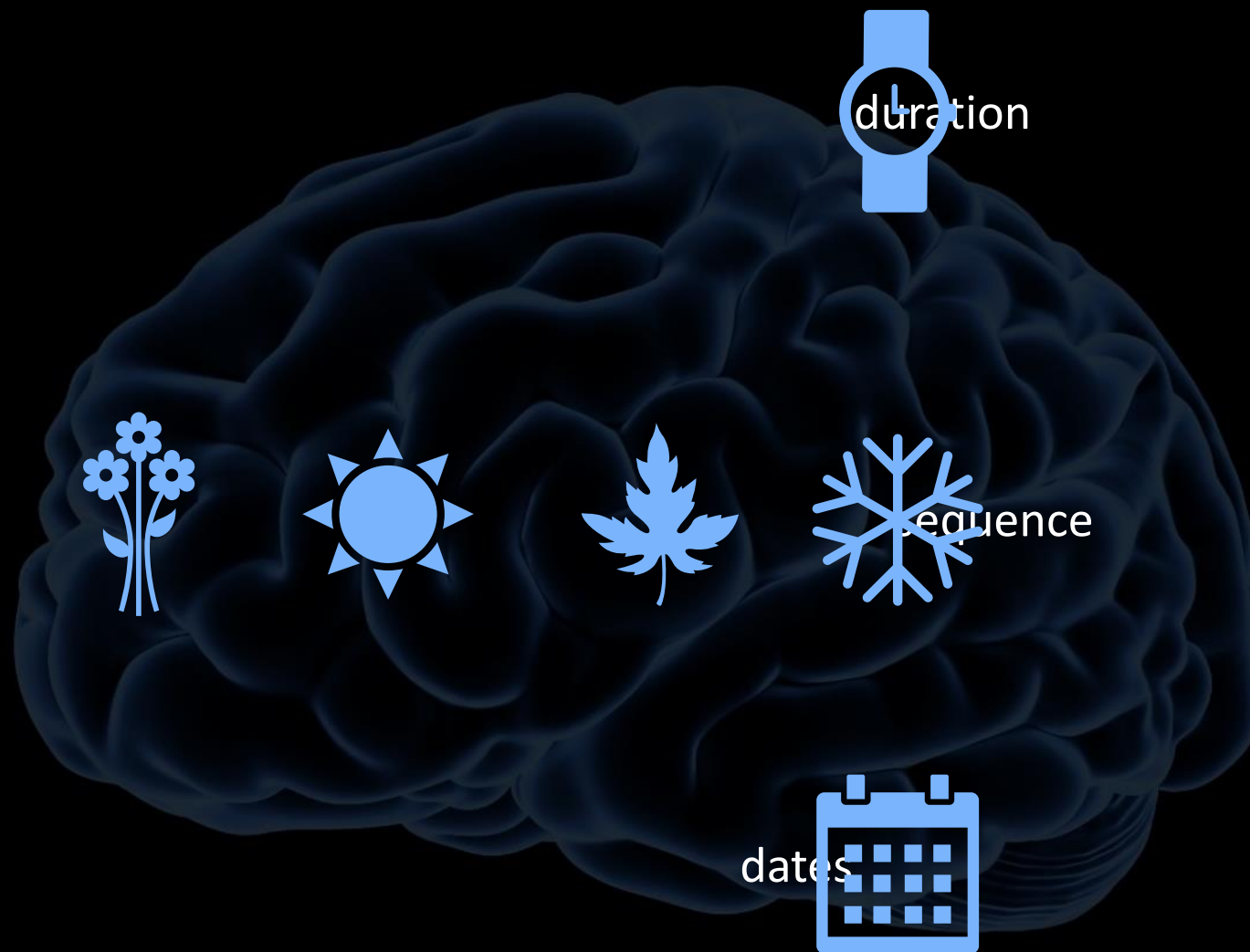
Defence:

Complainant made a strategic alteration to his evidence “when confronted by the impossibility of his allegations”

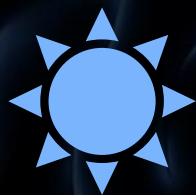
- (a) What Pell's role had been in the Mass, whether he had *said* Mass versus had been *leading* the Mass;
- (b) Where the two choir boys detached from the choral procession;
- (c) Route by which they came into the Priests' Sacristy.

Majority

- Believed complainant's explanation that no one asked him about those details before, or he did not think those details were important to report at the time.



duration



sequence



dates

Use of landmarks



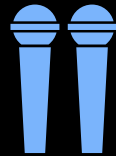
Pell complainant's confusion about dates

- Police report - both incidents in 1997; police investigation - both in 1996. At trial - first incident December 1996, second in February **1997**.
- **Dissent:** Date changes “without any sufficient justification” and a “matter of concern” regarding reliability of the complainant.
- **Majority:** “The kind of detail about which honest witnesses make mistakes.”
- **Empirical evidence:** Normal adult autobiographical memory often includes self-contradictions about dates, times and the number of people present at an event. People are particularly poor at reconstructing the time frame of an event. For childhood experiences, contextual information about the timing of an event is recalled better than temporal information.

6. Repeated interviewing



Foster incremental reporting



Multiple interviews: accurate, less susceptible to misleading questions

7. Inconsistencies are normal



Self-contradictions



Inconsistencies



Credible witness whose memory includes:



self-contradictions



inconsistencies

Pell trial jury direction on inconsistencies

Some inconsistencies as well as new details emerged for the first time during cross-examination of the Pell complainant.

Majority:

Inconsistencies between and within the opportunity witnesses were unsurprising due to:

- long delay of 22 years
- attempts to recall a particular event out of series of repeated events and rituals.

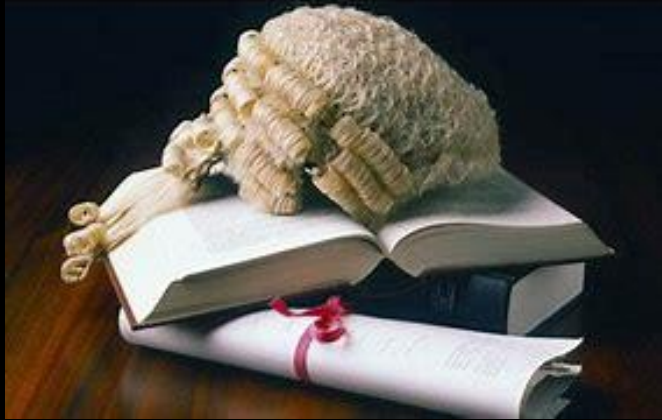
Jury directions reflect research showing that inconsistencies and errors about peripheral details to a central event are common, and do not indicate that a person is lying.

Empirical evidence:

- Consistency of peripheral vs central details: not predictive of accuracy of core memories
- “Reminiscence” effect: later recall usually more accurate

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).

8. Rehearsal strengthens memory traces and durability



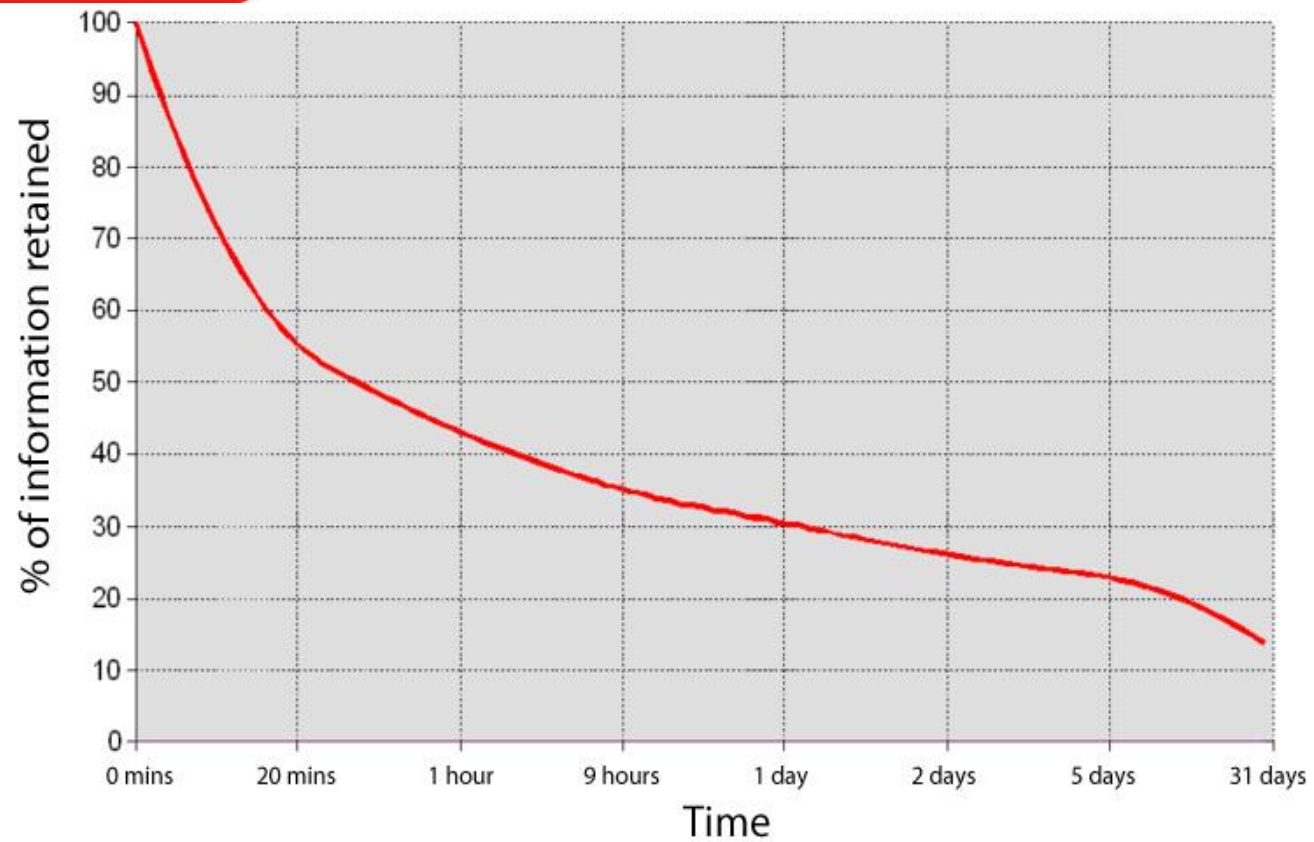
“A mental record which is fixed at the time the experience of an event and then fades (more or less slowly) over time.”

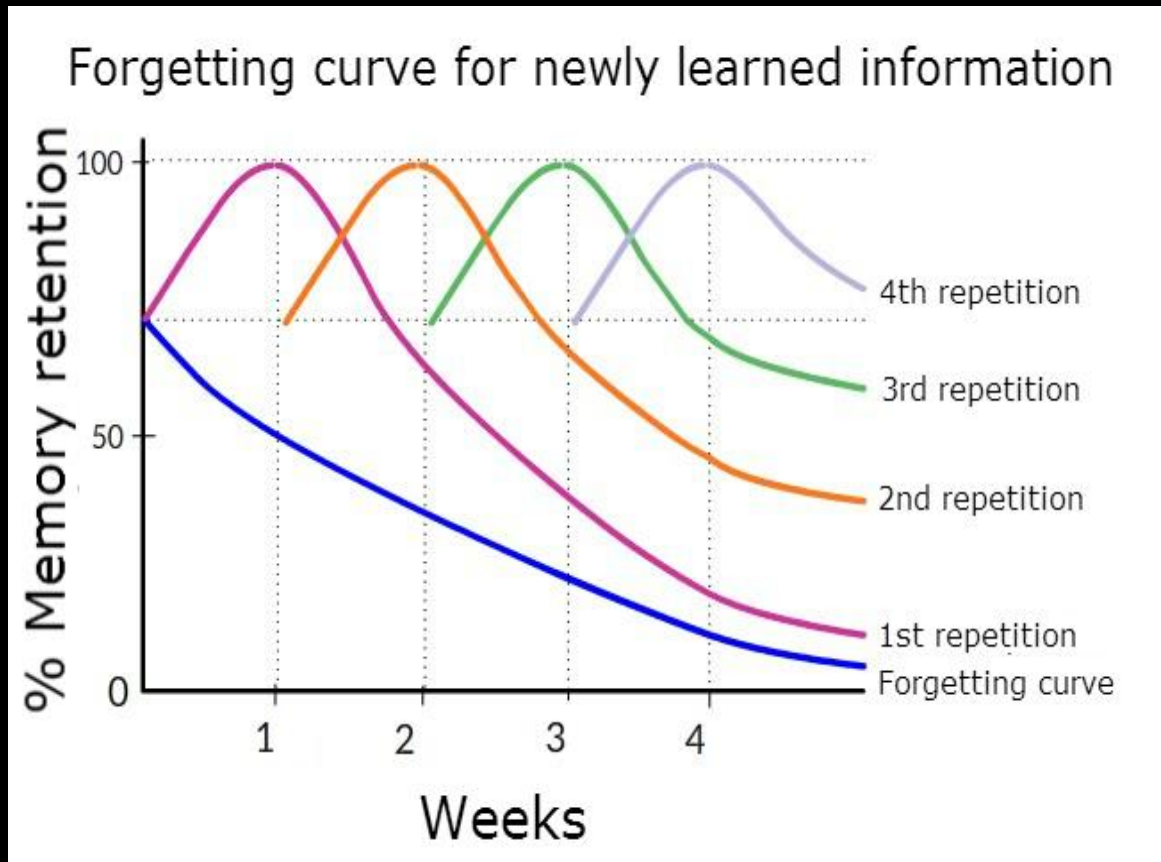


Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm) (Leggatt J)



Ebbinghaus' forgetting curve





9. Memories of children work the same way as those of adults, with less capacity



10. Adults and especially young children are less suggestible than is often assumed



Developmental reversal effects



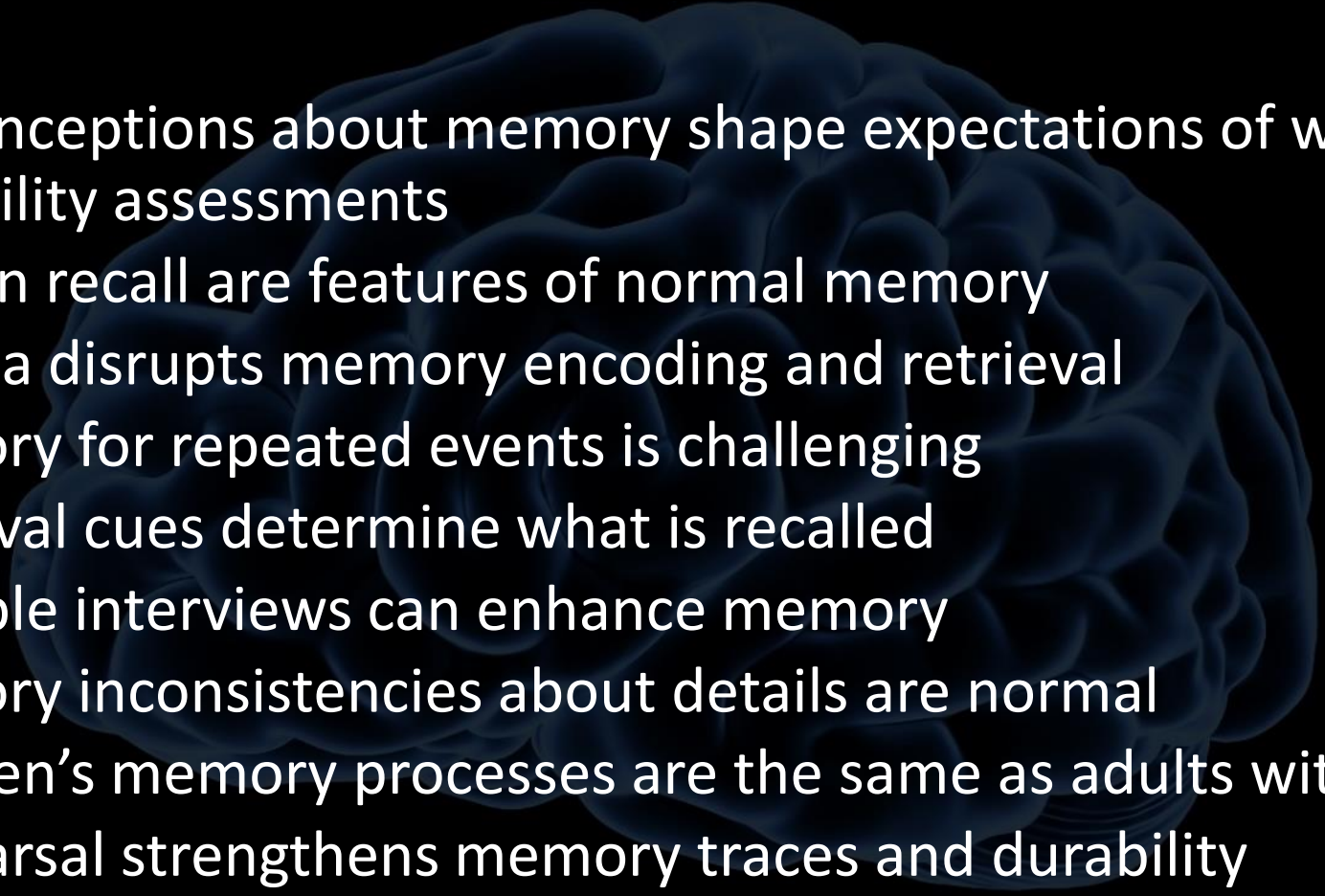
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- Event participation
- Personal experiences
- Identify familiar person
- Resist misinformation
- Social conformity
- Withstand delay
- Word recognition



Children's
event
memory is **not**
significantly
related to
suggestibility

Summary: Top 10 memory facts

- 
1. Misconceptions about memory shape expectations of witnesses and credibility assessments
 2. Gaps in recall are features of normal memory
 3. Trauma disrupts memory encoding and retrieval
 4. Memory for repeated events is challenging
 5. Retrieval cues determine what is recalled
 6. Multiple interviews can enhance memory
 7. Memory inconsistencies about details are normal
 8. Children's memory processes are the same as adults with less capacity
 9. Rehearsal strengthens memory traces and durability
 10. Adults and especially young children are less susceptible to suggestion than is often assumed

Assessments of evidence in Pell case

Comparison of judicial approaches

Defence and minority:

Evaluated witnesses in general
as reliable or unreliable,

- No assessment of memory or memory type

Prosecution and majority:

Evaluated events and issues affecting
accounts of key events
by specific witnesses

Compatible with contemporary
empirical evidence

e.g., prosecution direction to be
analytical about complainant
evidence, jury direction on
inconsistencies

Common sense vs science of memory

Key factors distinguish non-expert from expert views:

- memory is continuous and permanent like a video;
- memory is generally accurate;
- more memory details imply more accurate core memory;
- traumatic memories can be repressed for many years;
- emotional intensity or trauma leads to vivid memory accuracy; 'reliving' trauma increases memory accuracy
- memory fades steadily over time.
- false memories are common, especially of childhood sex abuse;
- childhood memory is unreliable as children are suggestible.





Empirical guidance summary of the effects of childhood sexual abuse on memory and complainants' evidence (Appendix 10.1)

- Reflects general memory processes based on contemporary scientific research and does not explain individual differences or deviations from generic developmental stages.
- Provides an empirical basis to assist police, courts, legal professionals and juries to evaluate memories of child sexual abuse.
- Footnotes cross-refer to chapter sections for details and sources.

CRIMINAL JUSTICE REPORT



Royal Commission
into Institutional Responses
to Child Sexual Abuse



Questions?



jdelahunty@csu.edu.au

Multiple interviews: Interviewer familiarity and supportiveness



2x2 experimental design, 160 children age 5-9 years learned about germs and personal hygiene from Mr Science for 10 minutes. Interviewed twice about the event by same or different interviewer using one of two interview styles:

Half the children: Interviewer displayed **supportive behaviors** (smiled, used names, leaned in, frequent eye contact). Other half: used **neutral demeanor with** minimized supportive behaviors.

- **Interviewer familiarity:** children reported **more new acts** that they had not shared in first interview to unfamiliar interviewers.
- **Supportive manner:** reported more wrongdoing during the second interview than to interviewer who displayed a neutral demeanor.

Supportive questioning is more important than a familiar interviewer.

San Diego Archival Sentencing Studies

- Reviewed 1000+ felony case files, coded 350 potential predictors of outcomes.
- Compared factors cited by judges for decisions with coded predictors.
- **Outcome:** Wide discrepancies in prison sentences imposed.
Judges articulated the prescribed legal factors which they claimed to be considering. *However*, decision strategies were simplistic compared to what judges claimed to be doing.
- Overwhelmingly, judges appeared to use a similar strategy: most relied on a single factor or “rule.” In 90% of cases, judges followed the recommendation of the probation officer.

Judges lacked insight into their own decision behaviour.

(Ebbesen & Konecni, 1982)

Heuristics in legal decision-making

- Bail a defendant unconditionally or impose conditions?
- Magistrates in UK reported complex examination, weighing all available evidence (Dhimi & Ayton, 2001)
- Analysis of hundreds of trials in two London courts showed that magistrates spent a range of 6-10 minutes per case (Dhimi, 2003)
- Punitive and non-punitive decisions were better predicted by a “matching heuristic” than a weighted additive model

Fast and frugal heuristics facilitated adaptive decision making when faced with numerous cues and high case loads, but may be contrary to legal ideals of due process

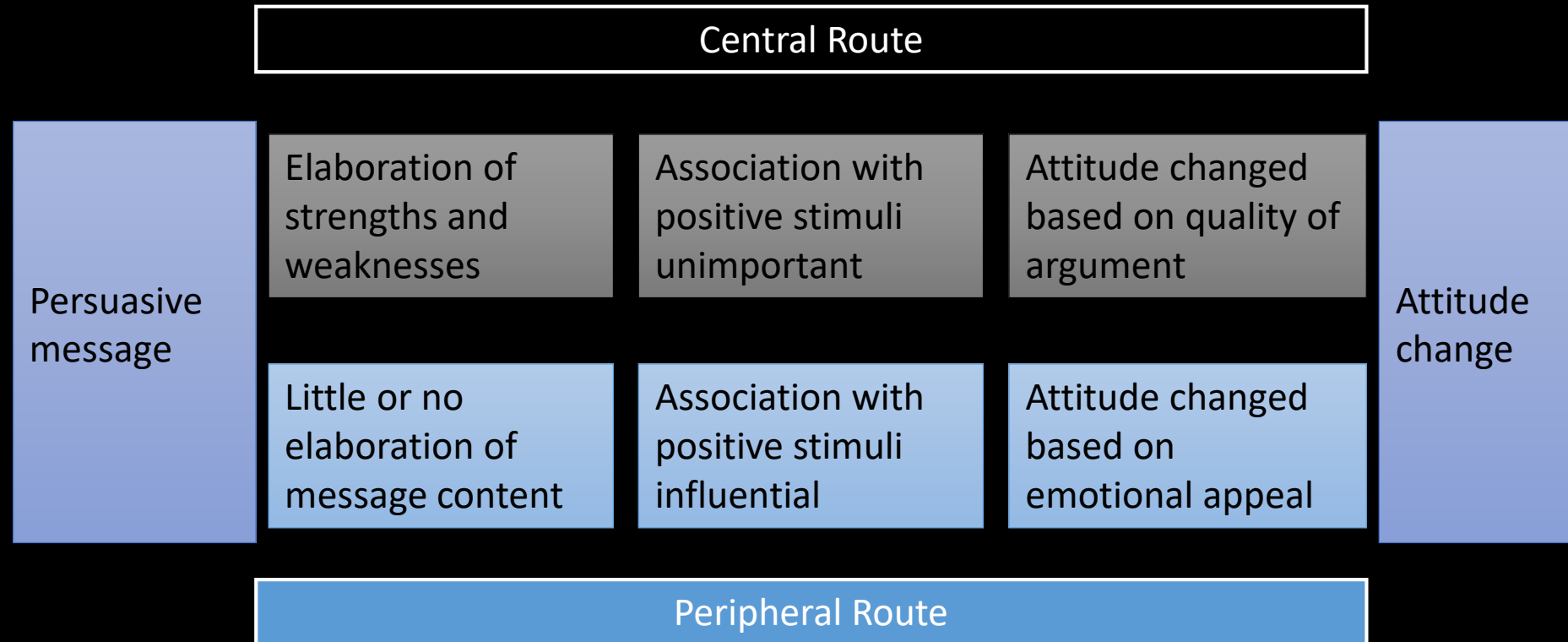
Non-informational influences on decisions

- Integrating multiple sources and types of information
- Heuristic vs weighted additive decision strategies
- Format and structure of task influences the approach:

More emphasis to **clinical and qualitative information**
promotes intuitive reasoning

More emphasis to **statistical quantitative information**
promotes analytical reasoning

Elaboration Likelihood Model



(McKimmie & Nitschke, 2014)

Elaboration Likelihood Model:

Using each of the processing routes

Central Route	Peripheral Route
Issue important to us	Issue not important to us
Time to think about the issue	Limited time to think about the message
Cognitive capacity to think about the issue	Distracted, in a good mood

(McKimmie & Nitschke, 2014)

Relationship between serial position of case in decision-maker's daily calendar and case outcome?

- a. No relation between order of case and outcome (approval/denial).
- b. Chances of a favourable decision increase as session extends, e.g., better right before lunch than first in the morning.
- c. Most favourable at the start of the session and declines as time passes

(Danziger, Levav, & Avnaim-Pesso, 2011)

“What the judge had for breakfast”

Parole decisions of 8 experienced judges:

1,112 rulings across 50 sample days over 10 months.

Excluded cases where agreement was presented to the court.

Work day segmented: 3 sessions separated by 2 breaks for food and rest.

Tested effect of the ordinal position of a case on the judge's decision, and the effect of the judge having a meal break.

Status quo was to deny a prisoner's request for parole.

Favourable rulings dropped gradually $\approx 65\%$ to nearly zero in each session returned abruptly to $\approx 65\%$ after a break.

Judicial rulings influenced by legally irrelevant and extraneous factors.

Experienced judges susceptible to psychological bias.

First 3 and last 3 decisions across 3 sessions per day

