
Inconsistencies, Improbabilities and Impossibilities in the Case of Cardinal Pell: A Reply to Memory Science

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This article is a rejoinder to Goodman-Delahunty, Martschuk and Nolan's article published in the Criminal Law Journal in 2020. In particular, the authors critically evaluate the arguments by the psychological researchers that the High Court decision in Pell v The Queen was based upon a misunderstanding of an application of memory science involving routine practices versus singular impactful events. The authors contend their narrow focus on memory science rather than other relevant issues associated with the mind, is flawed. Their approach also overlooked the sheer weight of evidence for the defence presented at trial and the forensic disadvantage faced by Pell after 22 years. The authors argue that the High Court's reasoning was rightly based on concerns that an innocent person had been convicted because the evidence did not establish guilt beyond a reasonable doubt.

Our reality is an infinite battle between what happened and what we want to remember.

Haruki Murakami.

INTRODUCTION

In *Pell v The Queen (Pell)*,¹ the High Court quashed the Victorian Supreme Court of Appeal's decision to uphold the conviction of Cardinal George Pell of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years.² The authors reply to an article published in the *Criminal Law Journal* in 2020 by psychological researchers Goodman-Delahunty, Martschuk and Nolan,³ whose main contention was that "[a]t the heart of the High Court's reasoning [in *Pell v The Queen*]⁴ 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".⁵ This article respectfully argues that such a view is misplaced.

Central to Goodman-Delahunty, et al's argument is an untested assumption that episodic memory is undervalued while routine memory is accorded undue weight.⁶ In fact, it was the cumulative weight of evidence from 23 defence witnesses that led to the Crown having a very narrow window in which to argue the alleged abuse occurred and underpinned the "compounding improbabilities" that the complainant's version of events was truthful. By contrast, the Goodman-Delahunty et al thesis is based on the dubious assumption that the complainant's evidence was reliable and credible. Armed with that assumption, they proceed to identify a "tension between memory of actual events or of practice followed or not followed

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¹ *Pell v The Queen* (2020) 268 CLR 123, [129]; [2020] HCA 12.

² *Pell v The Queen* (2020) 268 CLR 123, [129]; [2020] HCA 12.

³ Jane Goodman-Delahunty, Natalie Martschuk and Mark Nolan, "Memory Science in the Pell Appeals: Impossibility, Timing, Inconsistencies" (2020) 44 Crim LJ 232.

⁴ *Pell v The Queen* (2020) 268 CLR 123; [2020] HCA 12.

⁵ Goodman-Delahunty, Martschuk and Nolan, n 3, 232.

⁶ Goodman-Delahunty, Martschuk and Nolan, n 3, 232.

on a particular day versus memory of typical practice”.⁷ The purpose of such purported tension was to undermine the testimony of key defence witnesses who had no recollection of departures from typical practice, such as Pell being unaccompanied while in robes which would have been contrary to Catholic Church doctrine. Essentially, Goodman-Delahunty et al gloss over inconsistencies and changes in the complainant’s evidence which in a court of law go to the reliability of the witness’s evidence. Rather, they criticise the High Court for failing to understand that false memories only applied to the defence witnesses rather than the complainant apparently because memory fades with age.⁸ The authors take issue with the assumptions adopted, arguing that their approach is neither objective nor neutral.

In Part I, the authors explore the nature of memory science and the claims made by Goodman-Delahunty et al. The authors critique their claims and suggest that the five memory systems espoused by them are problematic and apt to mislead.

In Part II, the authors set out the facts of the *Pell* case and examine problems with delay in complaint in cases of child sexual abuse (CSA) and possible forensic disadvantages experienced by a defendant. In considering these aspects, the authors argue the trial judge had given clear directions consistent with the *Jury Directions Act 2015* (Vic) (*JDA*) as to how trauma may affect recall of events, and consequently there was no need to call an expert on memory science to give opinion evidence as the jury directions were well within the common knowledge of the jury. The authors further contend that:

the problems of forensic disadvantage Pell experienced were not able to be fully explored at trial, given the limitations and restraints placed on the trial judge pursuant to the *Jury Directions Act 2015* (Vic); and Goodman-Delahunty et al ignored any forensic disadvantage to Pell in a trial that took place 22 years after the alleged events.

In Part III, the authors explain the witnesses’ evidence in the *Pell* trial. The evidence is divided into three key characteristics: (1) inconsistencies; (2) improbabilities; and (3) impossibilities. The authors contend that, contrary to the thesis put forward by Goodman-Delahunty et al, memory science played no role in the judgment of the majority in the Victorian Supreme Court of Appeal to uphold Pell’s convictions or in the unanimous decision of the High Court to quash Pell’s convictions and enter judgments of acquittal in their place.

I. MEMORY SCIENCE

Goodman-Delahunty et al state five different types of memory as “generally agreed” among psychologists.⁹ These are (1) procedural memory (2) perceptual representation (3) working memory (4) episodic memory and (5) semantic memory.¹⁰ They explain that:

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. 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”.¹¹

In summary, they found that there was a difference between commonsense memory belief systems and expert scientific memory belief systems.¹² Lay persons expectations of memory are often unrealistic whereas experts anticipate more memory errors.¹³ They argue that laypersons and police erroneously

⁷ Goodman-Delahunty, Martschuk and Nolan, n 3, 240.

⁸ Goodman-Delahunty, Martschuk and Nolan, n 3, 242, citing CP Coleman and A O’Hanlon, “Aging and Adaption” in R Woods and L Clare (eds), *Clinical Psychology of Aging* (John Wiley & Sons, 2008) 17–32.

⁹ Goodman-Delahunty, Martschuk and Nolan, n 3, 234.

¹⁰ Goodman-Delahunty, Martschuk and Nolan, n 3, 234.

¹¹ Goodman-Delahunty, Martschuk and Nolan, n 3, 234 (footnotes excluded).

¹² Goodman-Delahunty, Martschuk and Nolan, n 3, 234.

¹³ Goodman-Delahunty, Martschuk and Nolan, n 3, 234.

believe that memories are like videos or photographs and make an incorrect assumption that memory accuracy is determined by the number of details recalled and their vividness.¹⁴ However, both experts and lay persons understood what is remembered about emotionally evocative events.¹⁵ Memory of specific single events are strengthened by unique or distinctive details and causes these types of events to be well remembered.¹⁶ In contrast, memory of repeated events is less distinct and far more vulnerable to memory errors.¹⁷ This is due to the more general manner in which it is recalled and because it lacks specific details.¹⁸ Goodman-Delahunty et al state that these beliefs about memory increase the likelihood of flawed assessments of memory and influence assessments about witness credibility.¹⁹ The essence of their argument is the trial judge correctly instructed the jury on the scientific memory belief system and the majority of the Court of Appeal, Ferguson CJ and Maxwell P, gave the scientific memory belief system appropriate weight, while the dissenting judge, Weinberg JA, and the High Court erroneously clung to the commonsense memory belief system. The authors argue that such a narrow application of memory to historic CSA cases is inaccurate. Many factors contribute to an understanding about what *might* have occurred and these other factors cannot be so readily excluded.

The memory systems summarised by Goodman-Delahunty et al, have been identified by the same experts on memory they cite, including some other psychological researchers, as problematic.²⁰ There are three main criticisms most often raised in regards to these memory systems. The first is that the systems approach has no criteria that produces exactly five memory systems. There is in fact lack of consensus on what these systems are, how they should be defined and how many exist.²¹ There are also differences between a system and a subsystem. A system is a unitary entity yet, in many areas, this does not appear to be the case, for example, the working memory system is typically fractioned into three different parts and can even be further broken down.²² Furthermore, it has been found that working memory and even episodic encoding and retrieval may recruit different brain areas.²³ The multiple systems, therefore, do not delineate a consistent set of criteria. In fact, there could be up to 20 memory systems or even more different memory systems.²⁴

The second problem pertains to the fact that these memory systems rely on dissociations.²⁵ Although there are many dissociations between episodic and semantic memory, it is believed that there are dissociations between two tasks thought to use the semantic memory system and between two tasks that use the episodic memory system.²⁶ Each of these types of memory also use different areas of the brain but when equated for difficulty, the reverse of that brain area can be exchanged. Therefore, semantic memory under one set of conditions has a different neural substrate than semantic memory under a second set of

¹⁴ Goodman-Delahunty, Martschuk and Nolan, n 3, 234.

¹⁵ Goodman-Delahunty, Martschuk and Nolan, n 3, 235.

¹⁶ Goodman-Delahunty, Martschuk and Nolan, n 3, 235.

¹⁷ Goodman-Delahunty, Martschuk and Nolan, n 3, 236.

¹⁸ Goodman-Delahunty, Martschuk and Nolan, n 3, 236.

¹⁹ Goodman-Delahunty, Martschuk and Nolan, n 3, 235.

²⁰ Aimee M Suprenant and Ian Neath, *Principles of Memory* (Routledge, 2009) 13.

²¹ For details see DF Sherry and DL Schacter, "The Evolution of Multiple Memory Systems" (1987) 94(4) *Psychological Review* 439; HL Roediger III, RL Buckner and KB McDermott, "Components of Processing" in JK Foster and M Jelicic (eds), *Memory: Systems, Process, or Function?* (OUP, 1999) 32–65; W Hirst et al, "More on Recognition and Recall in Amnesics" (1988) 14 *Journal of Experimental Psychology: Learning, Memory and Cognition* 758; LG Nilsson and J Gardiner, "Identifying Exceptions in a Database of Recognition Failure Studies from 1973 to 1992" (1993) 21 *Memory & Cognition* 397; R Schab and RG Crowder, "Odor Recognition Memory" in FR Schab and RG Crowder (eds), *Memory for Odors* (Erlbaum, 1995) 9–20. These sources were all cited in Suprenant and Neath, n 20, 13–14.

²² Suprenant and Neath, n 20, 15.

²³ Suprenant and Neath, n 20, 15.

²⁴ Suprenant and Neath, n 20, 16.

²⁵ Suprenant and Neath, n 20, 16.

²⁶ Suprenant and Neath, n 20, 16.

conditions.²⁷ Suprenant and Neath observe, for instance, that although there are multiple dissociations between episodic and semantic memory, there are also multiple dissociations within these systems.²⁸ The question then becomes which dissociation counts?²⁹ There is also no ability to predict which way a particular dissociation will eventuate³⁰ and there exist numerous dissociations within proposed systems.

A third criticism of the memory systems comes from developmental data.³¹ There are suggestions that episodic memory is the highest form of memory and the last to develop, but the first to decline and is more vulnerable to neuronal dysfunction.³² Although infants will retain these memories if periodically reminded,³³ in respect of adults, age related differences in memory do not follow the pattern predicted by the system.³⁴ Studies have found that adults generally perform worse than young adults that require free recall, worse with cued recall and much the same when given recognition tasks.³⁵ Suprenant and Neath, therefore argue that what is important is not so much the underlying system being episodic or semantic, but the type of test.³⁶ It has been found in studies³⁷ that the pattern differences in memory performance did not fit neatly into the systems categories.³⁸

Overall, comparing and contrasting these memory systems is much more complex than the five different types of memory systems espoused by Goodman-Delahunty et al. The performance of a task may recruit different coordinated activities among brain areas and result in different local brain activations.³⁹ Suprenant and Neath opine that to ask *where* memory is actually located is similar to asking where running is located in the body.⁴⁰ The difference between running and walking⁴¹ is that running requires more co-ordination among the different body parts but can be disrupted by small things like a corn on the toe that may not interfere with walking at all.⁴² The corollary is, therefore, not to assume that running is located in the corn on your toe.⁴³ Suprenant and Neath suggest a more useful approach is to pay less attention to categories but to focus on processing and co-ordination.⁴⁴

In evaluating adults' long-term memory of emotional or traumatizing events, some researchers have utilised information on tragedies, shock or surprise; what are called "flashbulb memories".⁴⁵ The results found that although much was retained, there was also significant degradation in their memory.⁴⁶ On

²⁷ Suprenant and Neath, n 20, 16.

²⁸ Suprenant and Neath, n 20, 16.

²⁹ Suprenant and Neath, n 20, 16.

³⁰ Suprenant and Neath, n 20, 16.

³¹ Suprenant and Neath, n 20, 18.

³² Suprenant and Neath, n 20, 18.

³³ Suprenant and Neath, n 20, 18.

³⁴ Suprenant and Neath, n 20, 18.

³⁵ Suprenant and Neath, n 20, 18.

³⁶ Suprenant and Neath, n 20, 18.

³⁷ FIM Craik, "On the Transfer of Information from Temporary to Permanent" (1983) 302 *Philosophical Transactions of the Royal Society of London B* 341; FIM Craik, "Memory Changes in Normal Aging" (1994) 3 *Current Directions in Psychological Science* 155, cited in Suprenant and Neath, n 20, 127.

³⁸ Suprenant and Neath n 20, 127.

³⁹ Suprenant and Neath n 20, 19.

⁴⁰ Suprenant and Neath n 20, 19.

⁴¹ Suprenant and Neath n 20, 19.

⁴² Suprenant and Neath n 20, 19.

⁴³ Suprenant and Neath n 20, 19.

⁴⁴ Suprenant and Neath n 20, 19, 25.

⁴⁵ Deborah Goldfarb et al, "The Accuracy of Adults' Long-Term Memory for Child Sexual Abuse" in Monica K Miller and Brian H Bornstein (eds), *Advances in Psychology and Law* (Springer Nature, 2020) 51–82, 59.

⁴⁶ Goldfarb et al, n 45.

the other hand, limitations of these experiments have been criticised as well in that the memories do not involve recalling a trauma that occurred directly or within close proximity to the self⁴⁷ (ie, personally experienced) but rather recall hearing about or learning about something.⁴⁸ Other studies have evaluated emotional crimes or persecution, such as the experiences of Holocaust survivors, and compared testimony of camp survivors after the war ended to that taken 40 years later. Researchers found omission errors could and did occur.⁴⁹ Despite their later recall, participants had forgotten about instances of victimization and identity of their abusers, but they also demonstrated that individuals could accurately recall events.⁵⁰ It was found that recall for the emotional events, for example bombings or deaths, was better than neutral events, such as the layout of the camp or the daily routine.⁵¹ More significantly, in a survey study of former rape victims and their subjective reports of their memories (not an objective measure of their accuracy), it was found that the victims did not believe that their own rape memories were remembered well.⁵² Goldfarb states that:

In fact, rape memories (compared to other unpleasant memories) were reported as less well-remembered, less clear and vivid, and less visually detailed; these memories were talked and thought about less, and were less likely to occur in a meaningful order.⁵³

Several factors that influence these studies include the conditions in which the rape occurred (such as in darkness, at night) and greater avoidance of such memories.⁵⁴ This confirms that the events can be remembered, but the quality of the recall may be affected. Some studies have also revealed that there are more psychological vulnerabilities in adulthood that could predispose them to greater vulnerability in terms of immediate suggestibility.⁵⁵ On the other hand, studies have reported that when actual objective accuracy of sexual assault memories was examined, victims who lost and then recovered the memory of assault actually had more accurate memories than other types of victims.⁵⁶ Equally, there are studies that have also found that half of an adult sample could recall prior genital touch and was more likely to report the touch decades later.⁵⁷

Although memory degradation is difficult to properly measure, there appears to be a general consensus that specific details will be forgotten but the significance of what may have occurred may not. It is contended that an evaluation of individual witness evidence remains an important aspect of any case rather than any general application. Generally, what can be summarised from recent research confirms that adults often can and do remember emotional and traumatizing events from childhood. Time does

⁴⁷ Goldfarb et al, n 45.

⁴⁸ Goldfarb et al, n 45, 60.

⁴⁹ WA Wagenaar and J Groeneweg, "The Memory of Concentration Camp Survivors" (1990) 4 *Applied Cognitive Psychology* 77, cited in Goldfarb et al, n 45, 51–82, 60.

⁵⁰ Goldfarb et al, n 45, 60.

⁵¹ Goldfarb et al, n 45, 60.

⁵² Mary P Koss, Shannon Tromp and Melinda Tharan, "Traumatic Memories: Empirical Foundations, Forensic and Clinical Implications" (1995) 2 *Clinical Psychology: Science and Practice* 111, cited in Goldfarb et al, n 45, 51–82, 60.

⁵³ Goldfarb et al, n 45, 60.

⁵⁴ Goldfarb et al, n 45, 60.

⁵⁵ KE Drake, "Interrogative Suggestibility: Life Adversity, Neuroticism and Compliance" (2010) 48 *Personality and Individual Differences* 493; K Drake "Further Insights into the Relationship between the Experience of Life Adversity and Interrogative Suggestibility" (2011) 51 *Personality and Individual Differences* 1056; K Drake, "The Role of Trait Anxiety in the Association between the reporting of Negative Life Events and Interrogative Suggestibility" (2014) 60 *Personality and Individual Differences* 54; KE Drake and R Bull, "Individual Differences in Interrogative Suggestibility: Life Adversity and Field Dependence" (2011) 8 *Psychology, Crime & Law* 8, 677, cited in Monia Vagni, Tiziana Maiorano and Daniela Pajardi, "Effects of Post-traumatic Stress Disorder on Interrogative Suggestibility in Minor Witnesses of Sexual Abuse" (2021) *Current Psychology* 1, 2.

⁵⁶ S Ghetti et al, "What Can Subjective Forgetting Tell Us about Memory for Childhood Trauma?" (2006) 34 *Memory & Cognition* 1011 <<https://doi.org/10.3758/BF03193248>>, cited in Goldfarb et al, n 45, 60.

⁵⁷ D Goldfarb et al, "Long-Term Memory in Adults Exposed to Childhood Violence: Remembering Genital Contact Nearly 20 Years Later" (2019) 7 *Clinical Psychological Science* 381, cited in Monica K Miller and Brian H Bornstein, *Advances in Psychology and Law* (Springer Nature, 2020) 64.

degrade memory but there is certainly evidence to indicate that memories, including traumatic ones, are resilient to this; memories are not like video recordings and therefore can suffer errors and false memories, although this alone is not a proper basis to exclude such important evidence in trials.⁵⁸ More intense emotions are often associated with more vivid memories and can lead to both accurate and inaccurate memories.⁵⁹ What is significant is that emotionality is therefore not a perfect barrier against memory degradation nor does it predict later recall.⁶⁰

The conclusion to be drawn from Part I of this rejoinder is that, with respect, Goodman-Delahunty et al have glossed over many of the limitations identified in the memory research literature. More specifically, the approach of treating the evidence of complainant A (the sole witness to testify against Pell) as credible and reliable because it is episodic, while discounting the weight of routine memory, is both simplistic and selective. It is reminiscent of the altered commandment of Animalism from “four legs good, two legs bad” to “four legs good, two legs better”,⁶¹ where the inconsistencies and changed testimony in complainant A’s evidence which traditionally go to the reliability and weight (or lack of it) that should be given to his evidence, can instead be explained away under the rubric of trauma.

II. PELL V THE QUEEN

In June 2015, complainant A alleged that in December 1996, A and his friend B, both aged 13 years of age, who were choristers at St Patrick’s Cathedral, East Melbourne, were sexually assaulted by Cardinal Pell who had a short time prior been installed as Archbishop of Melbourne. By the time A made his first complaint in 2015, B had died. Complainant A alleged that following Sunday Solemn Mass, they detached themselves from the choir, entered the priests’ sacristy, located some wine and started to drink the wine.⁶² Complainant A alleged that Pell appeared at the doorway. A alleged that he said to Pell: “Can you let us go? We didn’t do anything.” It is then alleged that Pell, parted his robes, took his penis out and forced B’s head down near his genitals. Pell is then alleged to have pushed his penis into A’s mouth and instructed A to take his pants off, touched A’s penis and testicles while touching his own penis.⁶³

Pell was convicted by a jury and sentenced to six years’ imprisonment with a non-parole period of three years and eight months.⁶⁴ This verdict was upheld by a 2:1 majority in the Victorian Court of Appeal. The High Court granted leave to appeal on the ground of whether the jury should have had a reasonable doubt about Pell’s guilt. The High Court quashed the convictions and ordered verdicts of acquittal be entered in their place.

The Role of an Appellate Court – The Verdicts Were Unreasonable

The High Court in *Pell* set out the appropriate process⁶⁵ to be followed by an appellate court when the appeal ground is that the jury’s verdict is unreasonable.

⁵⁸ Goldfarb et al, n 57, 381–396, cited in Miller and Bornstein, n 57, 73.

⁵⁹ Annie Cossins and Jane Goodman-Delahunty, “The Application of the Uniform Evidence Law to Delay in Child Sexual Assault Trials” in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 104, 117, citing The British Psychological Society (BPS) Research Board, *Guidelines from Memory and the Law: Recommendations from the Scientific Study of Human Memory* (2010) 16.

⁶⁰ Goldfarb et al, n 57, 381–396, cited in Miller and Bornstein, n 57, 60.

⁶¹ The quotations come from George Orwell’s satirical novel “Animal Farm” published in 1945. In the novel, when the animals chase the farmer away and takeover the running of the farm themselves, seven commandments of Animalism are painted on the side of the barn, one of which is “four legs good, two legs bad”. However, when the dominant class of animal on the farm, the pigs, learn to walk, the commandment is changed to read “four legs good, two legs better”.

⁶² *Pell v The Queen* (2020) 268 CLR 123, [15]; [2020] HCA 12.

⁶³ *Pell v The Queen* (2020) 268 CLR 123, [16]–[18]; [2020] HCA 12.

⁶⁴ *Pell v The Queen* [2019] VSCA 186, [4].

⁶⁵ *Criminal Procedure Act 2009* (Vic) subs 276(1)(a) reflects the test set out by the High Court in *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ); 76 A Crim R 213: “the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.”

The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence (*Criminal Procedure Act 2009* (Vic), s 276(1)(a)), in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment - 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.⁶⁶

The above passage takes a commonsense approach to the task of assessing whether the jury's verdict is unreasonable. However, there appears to be a misunderstanding of the role of an appellate court in some academic circles. Take the following extract from an article by Byrne lamenting the approach taken by the High Court in *Pell*:

[T]he High Court concluded that it was reasonably possible that the complainant's account was not correct. The High Court did not discuss how this conclusion interacted with their assumption that the complainant was a credible and reliable witness, other than to say that the evidence of the opportunity witnesses should have led the jury to have a reasonable doubt.⁶⁷

With respect, the High Court did not assume that the complainant was a credible and reliable witness, only that the jury did so in this case. Thus, there was no contradiction between the High Court's assumption on behalf of the jury and their own conclusion based on all the evidence. Were it otherwise, either the appellate court ignores the verdict of the jury and commences its own review of the evidence de novo, or all appeals against conviction fail in a case like *Pell*. Byrne concludes by arguing that "it should be clear that the evidence of a compelling, credible, and reliable witness may be sufficient to disprove opportunity evidence and sufficient to prove a charge beyond reasonable doubt".⁶⁸

Goodman-Delahunty, et al cite Byrne with approval: "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."⁶⁹ This surprising statement comes perilously close to saying: "you have to believe the complainant as he or she has no reason to lie", and totally fails to engage with the sheer weight of circumstantial evidence depending on the facts of the case. As the High Court pointed out:

Consistently with its obligation to call all witnesses whose evidence was necessary to give a complete account of material events (*Whitehorn v The Queen* (1983) 152 CLR 657, 664 (Deane J, 674 Dawson J)), the prosecution proposed to call 23 witnesses who were involved in the conduct of solemn Mass at the Cathedral or who were members of the choir in 1996 and/or 1997.⁷⁰

Similarly, judicial minds may differ as to whether a witness is "compelling, credible, and reliable", illustrated by the 2:1 split in the Court of Appeal.⁷¹ The High Court noted Weinberg JA's dissenting judgment that there was ample material upon which the complainant's account could be subject to legitimate criticism given there were inconsistencies and discrepancies, and a number of his answers "simply made no sense".⁷² The real task of an appellate court is to determine whether the evidence of such a witness, measured against all the other evidence in the case, meets the criminal standard of proof of beyond reasonable doubt.

⁶⁶ *Pell v The Queen* (2020) 268 CLR 123, [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

⁶⁷ Greg Byrne, "The High Court in *Pell v The Queen*: An 'Unreasonable' Review of the Jury's Decision" (2020) 45(4) *Alternative Law Journal* 284, 288. The term "opportunity witnesses" refers to witnesses in the Cathedral at the time of the alleged offending, whose unchallenged evidence greatly restricted the span of time in which the alleged offending could possibly have occurred.

⁶⁸ Byrne, n 67, 290.

⁶⁹ Goodman-Delahunty, Martschuk and Nolan, n 3, 237.

⁷⁰ *Pell v The Queen* (2020) 268 CLR 123, [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

⁷¹ *Pell v The Queen* [2019] VSCA 186.

⁷² *Pell v The Queen* (2020) 268 CLR 123, [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12, citing *Pell v The Queen* [2019] VSCA 186, [455] (Weinberg JA).

Jury Directions

In Victoria, a number of reforms to jury directions have occurred following the passage of the *JDA* to reduce problems such as overly complex directions, juror comprehension and dissatisfaction with some common law directions. The two most significant issues in the *Pell* case were in relation to the credibility and reliability of the complainant's evidence, and the forensic disadvantage experienced by Pell.

1. Credibility and Reliability

The *R v Markuleski* (*Markuleski*)⁷³ direction required trial judges to direct juries in word against word cases, if they had a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence to one or more charges, that doubt must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.⁷⁴ The Royal Commission recommended abolition of this direction⁷⁵ despite the Law Council of Australia recommending it be retained to ensure that a jury is not misled by a direction that they should consider each count separately and that different verdicts may be reached on different counts. A danger may exist that a juror, having doubts about a complainant's account in respect of one count, will believe that those doubts should be disregarded when considering the complainant's account in respect of another count. The Council confirmed that a judicial direction may be necessary to ensure that such an erroneous approach is not taken.⁷⁶

The *Markuleski* direction has been abolished in Victoria.⁷⁷ Under the *JDA*, s 52(4) requires the judge to give a direction that is consistent with the scientific data such that:

- a) people may react differently to sexual offences and there is no typical proper or normal response to a sexual offence; and
- (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and
- (c) delay in making a complaint in respect of a sexual offence is a common occurrence.

Under s 53, the prosecution may request the judge to direct the jury that there may be good reasons why a person may not complain or delay in complaining.⁷⁸ This direction is not a direction about the complainant in the trial but relates to victims of sexual assault more generally.⁷⁹ Section 54 also abolishes the common law rule requiring judges to direct the jury that delay in complaint may cast doubt on the reliability of the complainant's evidence and that the jury should take this into account when assessing the complainant's credibility. Section 32 provides that this type of evidence may be referred to as evidence of a kind that may be unreliable. Mere delay does not necessarily mean it is unreliable and there may be no risk at all.⁸⁰ However, if there has been delay, a judge must still consider whether the specific evidence given in the trial is "of a kind that may be unreliable" and in making this determination the judge may take account of the risks identified at common law.⁸¹ These

⁷³ *R v Markuleski* (2001) 52 NSWLR 82; 125 A Crim R 186; [2001] NSWCCA 290.

⁷⁴ Victorian Department of Justice & Regulation, *Jury Directions: A Jury-Centric Approach Part 2* (2017) 10.

⁷⁵ Commonwealth of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, 2017) Executive Summary and Parts I–II, 88.

⁷⁶ Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse*, 17 October 2016, [79], 25.

⁷⁷ See *Jury Directions Act 2015* (Vic) ss 44F, 44G.

⁷⁸ See also *R v ERJ* (2010) 200 A Crim R 270; [2010] VSCA 61; *AC v The Queen* (2014) 42 VR 278; [2014] VSCA 71; *Hermanus v The Queen* (2015) 49 VR 486; [2015] VSCA 304; *Svajcer v The Queen* (2010) 200 A Crim R 587; [2010] VSCA 116; *Jones v The Queen* (1997) 191 CLR 439; 98 A Crim R 107; *M v The Queen* (1994) 181 CLR 487; 76 A Crim R 213.

⁷⁹ *R v Mazzolini* [1999] 3 VR 113.

⁸⁰ See *R v Clark* (2001) 123 A Crim R 506; [2001] NSWCCA 494; *R v Fowler* (2003) 151 A Crim R 166; [2003] NSWCCA 321; *R v Harbulot* [2003] NSWCCA 141; *Derbas v The Queen* [2007] NSWCCA 118.

⁸¹ *Papakosmas v The Queen* (1999) 196 CLR 297; [1999] HCA 37; *R v Stewart* (2001) 52 NSWLR 301; 124 A Crim R 371; [2001] NSWCCA 260; *Robinson v The Queen* (2006) 162 A Crim R 88; [2006] NSWCCA 192.

include the risk that false recollections⁸² will have been converted into honestly and strongly held beliefs.⁸³

The need for an honest but erroneous memory direction under s 32 of the *JDA*, which deals with a direction on unreliable evidence, was affirmed by the Victorian Court of Appeal in *Wade v The Queen* (*Wade*).⁸⁴ In particular, the direction would apply where there was a substantial delay in complaint, evidence of an intervening decade-long intermittent mental illness and where the complainant tried to reconstruct his memories to distinguish fact from fantasy. In *Wade*, the Court held that the trial judge had erred in not giving a requested direction as the risk of confabulation (a type of memory error discussed in Part III 4 The Possibility of Confabulation) may not have been fully appreciated by the jury. The factors relied upon to support a s 32 direction may be of sufficient force to call for a s 32 direction no matter how thoroughly they have been ventilated in cross-examination.⁸⁵

In *Pell*, complainant A admitted he had consulted a counsellor for anxiety and depression in his mid-twenties.⁸⁶ Pell's defence counsel, Richter QC, wanted to introduce this evidence not for its content but just for the fact that the complainant had sought counselling, in order to address the possibility that jurors would use the complainant's lack of psychological issues as evidence of his reliability. The prosecutor, Gibson, objected arguing Richter was placing undue significance on the counselling.⁸⁷ Richter then changed tack and sought to highlight the fact that the complainant had never disclosed the alleged abuse to his counsellor which would be expected if it had really occurred. Kidd DCJ, refused to allow this line of questioning,⁸⁸ which the authors contend was extremely favourable to the Crown in light of the weight given by the jury and the majority in the Victorian Court of Appeal to the reliability of complainant A's evidence.

Section 54D(2)(c) and (d) of *JDA* states that the judge must inform jurors that differences in accounts of a sexual offence are common and can contain both truthful and untruthful accounts, but it is for the jury to decide if these differences are significant in assessing the credibility and reliability of the complainant. In this regard, the directions a trial judge can and must give under the *JDA* would have been of great benefit to the prosecution, and provide at least one potential factor towards understanding the jury's verdict. In essence, memory science had no role to play in this respect.

2. Forensic Disadvantage

A major obstacle for the defendant in historic CSA trials is being able to challenge the allegations given the effluxion of time. The trial judge must find that the accused suffered a significant forensic disadvantage⁸⁹ in challenging, adducing or giving evidence or in conducting the accused's case⁹⁰ because

⁸² *Longman v The Queen* (1989) 168 CLR 79; 43 A Crim R 463; *Crampton v The Queen* (2000) 206 CLR 161; 117 A Crim R 222; [2000] HCA 60.

⁸³ Some cases have doubted the validity of assumptions about child psychology that underlie the need for directions about honest but erroneous memory or whether these directions are mandated: *JJB v The Queen* (2006) 161 A Crim R 187, [3]–[8] (Spigelman CJ); [2006] NSWCCA 126; *R v MBX* [2014] 1 Qd R 438; (2013) 229 A Crim R 302; [2013] QCA 214; compare *Crampton v The Queen* (2000) 206 CLR 161; 117 A Crim R 222; [2000] HCA 60; *R v BWT* (2002) 54 NSWLR 241; 129 A Crim R 153; [2002] NSWCCA 60; *JJB v The Queen* (2006) 161 A Crim R 187 (Kirby J); [2006] NSWCCA 126.

⁸⁴ *Wade v The Queen* [2019] VSCA 168, [36]–[38] (Priest, Forrest and Weinberg JJA).

⁸⁵ *Wade v The Queen* [2019] VSCA 168, [37] (Priest, Forrest and Weinberg JJA). The model direction is set out at [16], the salient part of which is as follows: "The honest recollections of a witness about events that s/he believed to have occurred many years before may be unreliable. You will easily understand that the passage of time may affect any witness's memory. While in some cases people simply forget things, in other cases their memory may become distorted. That is, they may come to remember things that did not really happen. Human recollection is frequently erroneous and liable to distortion in this way. The likelihood of this error increases with delay."

⁸⁶ Melissa Davey, *The Case of George Pell* (Scribe, 2020) 151.

⁸⁷ Davey, n 86, 151.

⁸⁸ Davey, n 86, 152.

⁸⁹ *Evidence Act* s 165B in UFL jurisdictions (except Victoria: see *Jury Directions Act 2015* (Vic)).

⁹⁰ *Robbins v The Queen* (2017) 269 A Crim R 244, [186]; [2017] VSCA 288; *Slater v The Queen* [2020] VSCA 270, [106].

of the consequences of that delay. More specifically, the disadvantage can include obtaining documents, medical records or scientific investigations,⁹¹ calling witnesses who may have died or cannot be located and the deleterious effects of illness and trauma that can impact a critical witness.⁹²

In *Longman v The Queen (Longman)*,⁹³ the High Court held that the longer the period between an event and its recall, the greater the margin for error and the jury should be directed that such delay impairs the defendant's ability to challenge the evidence including the risk that the complainant's recollection of what happened may be honest but erroneous.⁹⁴ The application of the *Longman* direction and common law requirements on judges directing the jury about forensic disadvantage was removed in Victoria. Under the *JDA* a hypothetical disadvantage is insufficient and the direction regarding delay is independent of the direction on forensic disadvantage. The trial judge in *Pell* was also confined by the limitations set out under s 39(3)(b) when giving directions on the forensic disadvantage faced by the defendant many years after the alleged events occurred, and, in particular, the trial judge was not to say or suggest that it would be dangerous or unsafe to convict the accused or the victim's evidence should be scrutinised with great care.⁹⁵

The court is to be satisfied that the defendant suffered a significant forensic disadvantage which is not established by mere passage of time by itself.⁹⁶ Cases have held that specific disadvantages need precise identification⁹⁷ and cannot be speculative or where there could be no confidence that the defendant's case would have been assisted had an earlier complaint been made.⁹⁸ However, several important factors should be considered by the court such as where the passage of time meant that it was "next to impossible" to explore the circumstances surrounding the complainant's account,⁹⁹ the impossibility in obtaining medical evidence as to whether such allegations would have even been physically possible¹⁰⁰ or where a witness who might have been important had died.¹⁰¹ Similar issues also appear in the *Pell* case. For example, the Dean of the Cathedral in 1996, whose evidence would have been material on the issue of Pell's movements following Mass, was in a nursing home and incapable of giving evidence. In contrast, when Monsignor Portello, Master of Ceremonies, gave evidence of standing outside the Cathedral with Pell and returning to the Sacristy with him on the dates in question, the Court of Appeal stated that the jury could doubt this evidence of such an unremarkable event more than 20 years later.¹⁰² However, the High Court held that this evidence was unchallenged by the prosecution as to whether Portelli could be mistaken and noted that the Court of Appeal erred in using the effect of time and delay to disadvantage Pell.¹⁰³

⁹¹ *Robbins v The Queen* (2017) 269 A Crim R 244, [186]; [2017] VSCA 288.

⁹² *Evidence Act 1995 (Cth)* s 165B.

⁹³ See *Longman v The Queen* (1989) 168 CLR 79; 43 A Crim R 463; *Crofts v The Queen* (1996) 186 CLR 427; 88 A Crim R 232; *Doggett v The Queen* (2001) 208 CLR 343; [2001] HCA 46.

⁹⁴ See *Longman v The Queen* (1989) 168 CLR 79; 43 A Crim R 463; *Crampton v The Queen* (2000) 206 CLR 161; 117 A Crim R 222; [2000] HCA 60.

⁹⁵ See *Jury Directions Act 2015 (Vic)* s 39(3)(b).

⁹⁶ *Evidence Act 1995 (Cth)* s 165B(6).

⁹⁷ *PT v The Queen* [2011] VSCA 43, [38].

⁹⁸ *PT v The Queen* [2011] VSCA 43, [39]–[45].

⁹⁹ *Greensill v The Queen* (2012) 37 VR 257, [54]; 226 A Crim R 416; [2012] VSCA 306. In this case the alleged sexual offences involved a 28-year-old female teacher and two 8-year-old boys that occurred 30 years previously. The medical evidence would arguably demonstrate that what was being alleged by the two boys was not possible. See also *Doggett v R* (2001) 208 CLR 343; 119 A Crim R 416; [2001] HCA 46; *R v GTN* (2003) 6 VR 150; [2003] VSCA 38; *Tully v The Queen* (2006) 230 CLR 234; 167 A Crim R 192; [2006] HCA 56.

¹⁰⁰ *Greensill v The Queen* (2012) 37 VR 257, [54]; 226 A Crim R 416; [2012] VSCA 306.

¹⁰¹ *Greensill v The Queen* (2012) 37 VR 257, [54]; 226 A Crim R 416; [2012] VSCA 306. Greensill's husband, who was said to have been at the premises at the time of the offences, and whom one of the 8 year old boys testified was in the house when he went inside, had died. See also *Robbins v The Queen* (2017) 269 A Crim R 244, [178]; [2017] VSCA 288.

¹⁰² *Pell v The Queen* (2020) 268 CLR 123, [88]; [2020] HCA 12.

¹⁰³ *Pell v The Queen* (2020) 268 CLR 123, [91]; [2020] HCA 12.

III. FLAWED APPLICATION OF MEMORY SCIENCE

Goodman-Delahanty et al focus only on one aspect of the human mind, namely, memory science, while at the same time assuming the complainant was a witness of truth. The authors challenge this assumption because logically the complainant cannot be a witness of truth in the face of the overwhelming evidence that the allegations were impossible. Further, there are credible alternative explanations for the manner in which the complainant gave his evidence, which are rooted in the unreliability of demeanour as a gauge of veracity and the possibility of confabulation by the complainant. The human mind cannot be neatly compartmentalised to fit a psychological theory of a case. Therefore, the authors advance three main arguments in this Part to support the conclusion that the narrow application of memory science put forward by Goodman-Delahanty et al is flawed:

1. There were a high number of **inconsistencies** in the complainant's evidence that cannot merely be "expected" due to the passage of time or the nature of the allegations.
2. The complainant's evidence set against the evidence of the opportunity witnesses demonstrated the **improbabilities** of a number of events occurring – what Weinberg JA states as "aligning of the planets".¹⁰⁴
3. The evidence given by the opportunity witnesses confirmed the **impossibility** of the offending being able to be performed at all.

Inconsistencies

According to the scientific memory belief system, errors and discrepancies are of lesser importance than the single-event memory, which in this instance is the alleged sexual abuse that took place in the priests' sacristy. Thus, contrary to the commonsense memory belief system, which has ruled sway in criminal courts for centuries, namely, that the more errors, inconsistencies, and corrections when faced with uncontested facts in a witness's testimony, the less credible the witness, the scientific memory belief system states all this can be put aside in the face of the single-event memory.

1. Significance of Certain Events

A number of inconsistencies were prevalent in the complainant's evidence. Complainant A was adamant that both incidents occurred in the same year.¹⁰⁵ A stated that the offending occurred in 1997 when actually it took place in 1996 when Pell was installed as Archbishop of Melbourne. The Prosecution accepted that this was a mistaken belief.¹⁰⁶ Although it is common in sexual abuse cases that dates may be recalled inaccurately, the year of the alleged sexual abuse in the *Pell* case is significant. The appointment of Pell in 1996 would have been a significant event for the Catholic Church and its parishioners and therefore a memorable event in contrast to being a "blur". Further, A gave evidence that he was also certain that he had drunk red wine in the Sacristy.¹⁰⁷ However, a number of witnesses gave evidence that red wine would not have been used in 1996 or 1997 because Monsignor William McCarthy only drank white wine¹⁰⁸ for health reasons and so insisted that white sacramental wine only be used.¹⁰⁹ These discrepancies and errors cannot be so readily dismissed as of little importance such as to call these errors as entirely "to be expected". The trial judge, in his summing up to the jury, dealt with the inconsistencies in the complainant's evidence in the following way:

He said the fact that aspects of the complainant's evidence had changed between the committal hearing and trial might mean he was less likely to be truthful; on the other hand, Kidd [the trial judge] told them "truthful witnesses may make mistakes about details".

¹⁰⁴ *Pell v The Queen* [2019] VSCA 186, [1064].

¹⁰⁵ *Pell v The Queen* [2019] VSCA 186, [666]–[667].

¹⁰⁶ *Pell v The Queen* [2019] VSCA 186, [681].

¹⁰⁷ *Pell v The Queen* [2019] VSCA 186, [827].

¹⁰⁸ Davey, n 86, 164.

¹⁰⁹ *Pell v The Queen* [2019] VSCA 186, [827]–[828].

“When you are assessing this evidence, I direct that you also bear the following in mind. Experience shows people may not remember all the details of a sexual offence the same way each time. Trauma can affect how you recall events. It is common for there to be differences in accounts. Both truthful and untruthful accounts of a sexual offence may contain differences. It is up to you to decide whether differences in [the complainant’s] account are important and whether you believe all, none, or some of his evidence.”¹¹⁰

In this eminently fair summing up on this point, which reflects ss 52(4) and 54D(2)(c) of the *JDA* discussed earlier, there is no need to invoke memory science or indeed even seek to adduce expert evidence as the matter under consideration is well within the common knowledge of the jury. The language was plain, simple and readily understandable by the average person, reflected in the fact that the Crown did not seek to adduce expert evidence under s 79(2)(a) of the *Evidence Act 2008* (Vic).¹¹¹ The real issue is not, as Goodman-Delahunty et al contend, the importance of the scientific memory belief system as opposed to the commonsense belief system, but whether the weight of inconsistencies in the complainant’s evidence when set against the evidence of the ‘opportunity witnesses’ amounted to a doubt the jury must have had in coming to their verdict.

2. Repetition and Ritual

The tension in CSA cases is reflected in whose version is accepted by the tribunal of fact. Goodman-Delahunty et al state that empirical findings suggest that gaps in memory are normal and that someone who admits to such memory gaps is more likely to be honest than not.¹¹² They state:

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.¹¹³

It is uncertain upon what premise this argument has been based. Perhaps this is a personal view of witness demeanour by the psychological researchers, as there is no footnoted research to support this statement in their article despite their assertion that they are offering an “evidence-based analysis”.¹¹⁴ Stating what would have *more likely* occurred based on routine or repetitive tasks to guide someone’s memory, is not necessarily an indicator of someone lying but could also be due to a person who may be relying on past behaviour of what *they believe* was more likely to have occurred. This would pertain to church rituals or indeed any organisation that is dependent upon strict repetition.

Such recall of repetition of routine schedules or behaviours is not a new phenomenon and in fact has been used in other areas of evidence law to demonstrate a system of practice or behaviour. For example, in the case of *Munro v The Queen (Munro)*¹¹⁵ a statement about a witness’s cleaning regime he performed over many years was admitted as an exception to the hearsay rule. In his statement he described the method he routinely employed in cleaning which was important to the Prosecution case of linking where the defendant was on a particular day. The crucial significance of the system of work was to make it more probable of affecting a fact in issue, that is, that the defendant was at that location when the witness removed the cigarette butts at the bus shelter. If the evidence was accepted, it would tend to establish that the cigarette butts found in and around the bus shelter after the robbery, including those cigarette butts found to contain DNA of the defendant, were deposited in the vicinity of the bus shelter on the days of the robbery.¹¹⁶ It was admitted under the hearsay exception of s 65(2) of the *Evidence Act 2011* (ACT) as being a statement that in the circumstances in which it was made it was highly probable the

¹¹⁰ Davey, n 86, 191–192.

¹¹¹ Section 79(2)(a) states: (2) To avoid doubt, and without limiting subs (1)-(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse).

¹¹² Goodman-Delahunty, Martschuk and Nolan, n 3, 244.

¹¹³ Goodman-Delahunty, Martschuk and Nolan, n 3, 245.

¹¹⁴ Goodman-Delahunty, Martschuk and Nolan, n 3, 232.

¹¹⁵ *Munro v The Queen* [2014] ACTCA 11.

¹¹⁶ *Munro v The Queen* [2014] ACTCA 11, [71].

statement was reliable.¹¹⁷ In that case, the court made an observation that a system of work is likely to be well remembered, not only because of regular repetition but also because as a system, it was, by comparison with a one-off event on a specific day, likely to be organised and structured, and therefore easier to recall.¹¹⁸ The court also noted that the witness had no personal interest in the subject matter, the participants or the outcome of the trial.¹¹⁹

Arguably, *Munroe* is in contrast to Pell who does have an interest in the outcome of the proceedings. However, having performed and rehearsed religious rituals for more than 30 years, it is unlikely to be so easily forgotten, but rather ingrained in one's memory. More particularly, gross deviations to the ritual, such as a robed Archbishop being unaccompanied, would be recalled vividly both by those responsible for accompanying Pell and by anyone seeing him in the Cathedral.

3. Demeanour

A further compelling argument in relation to the inconsistent evidence between the complainant and the opportunity witnesses and the difference between the Court of Appeal and High Court decisions, was the use of witness demeanour. It is argued that the weight given to the demeanour of the sole complainant ignores the evidence that demeanour is an unreliable indicator of whether a witness is telling the truth. Complainant A remained anonymous during the trial, giving his evidence by video link. In 2001, B had been asked by his mother whether he had ever been "interfered with or touched up" while in the Cathedral choir. He said that he had not.¹²⁰ Thus, the Crown case totally rested upon A's evidence. Essentially, the division in the Court of Appeal centred on the weight to be given to A's evidence in light of the evidence of the opportunity witnesses. The High Court summed up the differences between the majority and the minority views as follows:

The members of the Court of Appeal viewed the recording of A's evidence, and that of a number of other prosecution witnesses. The majority, Ferguson CJ and Maxwell P, assessed A as a compellingly credible witness. There was evidence, adduced in the prosecution case from witnesses described as "the opportunity witnesses", with respect to the applicant's and others' movements following the conclusion of Sunday solemn Mass, which was inconsistent with acceptance of A's account. Their Honours concluded that no witness could say with certainty that the routines and practices described by the opportunity witnesses were never departed from (*Pell v The Queen* [2019] VSCA 186 at [166]). Their Honours reviewed a number of "solid obstacles" to conviction and in each case concluded that the jury had not been compelled to entertain a doubt as to the applicant's guilt.

Weinberg JA, in dissent, considered that, in light of the unchallenged evidence of the opportunity witnesses, "the odds against [A's] account of how the abuse had occurred, would have to be substantial" (*Pell v The Queen* [2019] VSCA 186at [1064]). His Honour concluded that the jury, acting reasonably on the whole of the evidence, ought to have had a reasonable doubt as to the applicant's guilt.¹²¹

In this regard, the High Court observed "[t]he division in the Court of Appeal in the assessment of A's credibility may be thought to underscore the highly subjective nature of demeanour-based judgments".¹²² For present purposes, it is illuminating to cite the reference to *Fox v Percy* in full.

[I]n recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances (see material cited by Samuels JA in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 and noted in *SRA* [1999] HCA 3 [88]). Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established

¹¹⁷ *Munro v The Queen* [2014] ACTCA 11, [17], [29].

¹¹⁸ *Munro v The Queen* [2014] ACTCA 11, [16(a)].

¹¹⁹ *Munro v The Queen* [2014] ACTCA 11, [16(b)].

¹²⁰ *Pell v The Queen* (2020) 268 CLR 123, [2] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

¹²¹ *Pell v The Queen* (2020) 268 CLR 123, [5]–[6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

¹²² *Pell v The Queen* (2020) 268 CLR 123, [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12, citing *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ); [2003] HCA 22.

facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.¹²³

Fox v Percy was reaffirmed in *CSR Ltd v Della Maddalena*,¹²⁴ where Kirby J (with whom Gleeson CJ agreed) noted *Fox v Percy* “marked an important change in the approach which appellate courts could take to findings at trial which were founded on the demeanour of witnesses”,¹²⁵ involving “a shift to some degree from the more extreme judicial statements commanding deference to the findings of primary judges said to be based on credibility assessments”.¹²⁶

The reason why the High Court stressed the dangers of relying on “the highly subjective nature of demeanour-based judgments”,¹²⁷ was because the Court of Appeal had watched video-recordings of A’s evidence and the evidence of other witnesses, in an attempt to place the court in the position of the jury. The High Court admonished the Court of Appeal for adopting this practice because there is a demarcation between the province of the jury and the province of the appellate court, stating “generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box”.¹²⁸

A number of commentators have criticised the use of demeanour in assessing truthfulness,¹²⁹ and in *R v Schroen*¹³⁰ it was held: “it is not always easy or even possible to establish that perjury has been committed.” McClellan cites various sources for the proposition that demeanour is a poor indicator as to whether or not a witness is lying,¹³¹ and Ekman came to the conclusion that “most liars can fool most people most of the time”.¹³² Similarly, Ellard has argued that demeanour will only reveal incompetent liars.¹³³ It was not necessary for the High Court to determine whether or not the complainant was lying or was not a witness of truth. It was sufficient to find that the unchallenged evidence of the “opportunity witnesses” was sufficiently strong that the jury must have had a doubt. However, clearly the two starkly contrasted versions of events given by the complainant and Pell are totally incompatible. The defence counsel did not go so far as to call the complainant a liar, preferring instead to describe him as a fantasist.

4. The Possibility of Confabulation

Goodman-Delahanty et al assert that the scientific memory belief system states that human memory is inherently fallible and errors are to be anticipated. The overestimation and narrow focus of memory

¹²³ *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ); [2003] HCA 22.

¹²⁴ *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458; [2006] HCA 1.

¹²⁵ The Hon Justice Peter McClellan, “Who Is Telling the Truth? Psychology, Common Sense and the Law” (2006) 80 ALJ 655, 660.

¹²⁶ *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458, [19] (Kirby J); [2006] HCA 1.

¹²⁷ *Pell v the Queen* (2020) 268 CLR 123, [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

¹²⁸ *Pell v the Queen* (2020) 268 CLR 123, [37]; [2020] HCA 12.

¹²⁹ See, eg, David Hamer, “The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after IMM” (2017) 41(2) *Melbourne University Law Review* 689; James Timony, “Demeanor Credibility” (2000) 49(2) *Catholic University Law Review* 903; Anna Wong, “Looks Can Be Deceiving: The Irrelevance of Demeanour in Witness Assessment” (2020) 68 *Criminal Law Quarterly* 345.

¹³⁰ *R v Schroen* [2001] VSCA 126, [14] (Vincent JA).

¹³¹ McClellan, n 125, 657–658. For example, McClellan cites Mark Frank, “Assessing Deception: Implications for the Courtroom” (1996) 2(4) *The Judicial Review* 315, 321 for the proposition that “there is no universal cue that enables us to tell when a person is lying (ie a ‘Pinocchio response’)”. Furthermore, Frank concludes, that judges and lawyers are no better than lay people in detecting deception: “while they perform better than if they had simply guessed, they do not perform much better than that guess. Thus, working in these high stake deception detection situations does not seem to hone the detection skills of those in the legal profession or any other profession whose jobs require that they be able to detect deceit.”: 323.

¹³² Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, Revised ed, 2009) 162.

¹³³ John Ellard, “A Note on Lying and Its Detection” (1996) 2(4) *The Judicial Review* 303, 307. Ellard describes lying as “a universal human skill” and emphasises the difficulties in detecting a lie, noting that “if one relies on demeanour and behaviour, one will pick the incompetent liars and that is all”.

science rather than an exploration of other issues that could relate to a person's mind, presents an asymmetrical point of view. It is important to distinguish cases where recall of memory is vague or non-specific compared to memory that could be erroneous. Indeed, Goodman-Delahunty et al's thesis that the High Court's reasoning was based on "an assumption that memory about routine practice was to be believed when it contradicted the complainant's memory of the alleged abuse" is an inaccurate statement.

It is not suggested the complainant was lying, but rather whether the possibility of confabulation by the complainant has been properly considered given the strength of the unchallenged evidence of the opportunity witnesses. Confabulation is the creation of false memories in the absence of an intention to deceive. People who confabulate have no recognition that the information being relayed to others is fabricated:

Confabulation is a type of memory error in which gaps in a person's memory are unconsciously filled with fabricated, misinterpreted, or distorted information. When someone confabulates, they are confusing things they have imagined with real memories. A person who is confabulating is not lying. They are not making a conscious or intentional attempt to deceive. Rather, they are confident in the truth of their memories even when confronted with contradictory evidence.¹³⁴

Goodman-Delahunty et al, in focusing on memory science appear to have overlooked the possibility that A was confusing events he imagined with real memories. The false memories can take various forms and "may consist of exaggerations of actual events, inserting memories of one event into another time or place, recalling an older memory but believing it took place more recently, filling in gaps in memory, or the creation of a new memory of an event that never occurred".¹³⁵ Furthermore, "despite appearances of confidence and accuracy, individuals may confabulate entirely false memories of details or events, and, as such, the recognition of confabulation remains incredibly difficult for mental health professionals."¹³⁶ The authors contend that the whole issue of memory in the context of events that took place 22 years previously, when the complainant's evidence was inconsistent with 23 opportunity witnesses whose evidence was unchallenged, requires consideration of alternative explanations of the complainant's apparently credible evidence (at least to the jury and the majority in the Victorian Court of Appeal)

Improbabilities

1. Unchallenged Evidence

When Cardinal Pell was first informed by Victorian detectives that he was accused of sexually abusing two 13-year-old choirboys in the priests' sacristy of St Patrick's Cathedral immediately after Sunday Mass in 1996, while he was Archbishop of Melbourne, his reaction was one of incredulity. Cardinal Pell responded by saying:

Well, need I say any more? What a load of garbage and falsehood. My Master of Ceremonies [Monsignor Portelli] will be able to say that he was always with me after the ceremonies. The sacristan was around. The altar servers were around. People were coming and going.¹³⁷

The Victorian Director of Public Prosecutions, Kerri Judd QC, in her submissions to the High Court, conceded that if Monsignor Portelli's evidence was accepted, it would raise a reasonable doubt about Cardinal Pell's guilt. "Portelli is the key", she said.¹³⁸ As will be seen, the High Court described Monsignor Portelli's evidence as unchallenged.

¹³⁴ Kendra Cherry, "What Is Confabulation?" (30 November 2020) <<https://www.verywellmind.com/confabulation-definition-examples-and-treatments-4177450>>.

¹³⁵ Jerrod Brown et al, "Confabulation: A Guide for Mental Health Professionals" (2017) 4(2) *Neurology and Neurotherapy* <<https://clinmedjournals.org/articles/ijnn/international-journal-of-neurology-and-neurotherapy-ijnn-4-070.php?jid=ijnn>>.

¹³⁶ Brown et al, n 135.

¹³⁷ Chip Le Grand, "How the DPP Allowed a Sliding Door to Close on the Prosecution of Pell", *The Sydney Morning Herald*, 8 April 2020 <<https://www.smh.com.au/national/how-the-dpp-allowed-a-sliding-door-to-close-on-the-prosecution-of-pell-20200408-p54ibk.html>>.

¹³⁸ Le Grand, n 137.

It is therefore illuminating to extract the key passages from Weinberg JA's dissenting judgment, starting with the compounding improbabilities of the complainant's version of events:

[840] Mr Richter [Pell's barrister at trial] submitted that each of a large number of independently improbable, if not "impossible", things would have had to have occurred within a very short timeframe (perhaps 10 minutes or so), if the complainant's account ... were true.

[841] The matters relied upon by Mr Richter in support of that "compounding improbabilities" submission were:

- the applicant does not remain on the front steps.
- he is alone when he enters the priest's sacristy.
- Portelli does not enter to help the applicant disrobe, or to disrobe himself.
- Potter is not there to assist in the disrobing.
- Potter is not moving between the sanctuary and the Priests' Sacristy.
- the altar servers are not moving between the sanctuary and the Priests' Sacristy.
- there are no concelebrant priests in the Priests' Sacristy, or for some reason, they do not disrobe.
- 40 people, some of whom are adults, do not notice the complainant and the other boy break away from the procession.
- the complainant and the other boy enter the choir room, having gone through two locked doors, without anyone having noticed; and
- the complainant and the other boy enter a choir rehearsal which they were required to attend, after being missing for more than 10 minutes, without anyone having noticed.

[842] By "compounding improbabilities", Mr Richter was plainly inviting the jury to approach the matter using a form of probabilistic analysis (without using that expression), demonstrating that the complainant's account could not possibly satisfy the requirement of proof beyond reasonable doubt.¹³⁹

Weinberg JA was rightly troubled as to how the jury could have found Pell guilty beyond reasonable doubt in the face of the sheer number of obstacles to the complainant's version of events, especially when the evidence of key witnesses for the defence was unchallenged. The criminal standard of proof is not met by a jury (and the majority in the Victorian Court of Appeal) finding it was just *possible* that the complainant's version of events could have happened. The actual process of reasoning adopted by the High Court was therefore to review all of the evidence, and in particular the weight of the unchallenged evidence of the opportunity witnesses. Put another way, the High Court examined the extent of the inroads the prosecution had made in blunting the defence case that the complainant's version of events was improbable or impossible. Thus, the High Court was not making any assumptions about memory (there are only four references to memory in the entire judgment), rather it was looking at the cumulative weight of the unchallenged evidence.

2. Perfect Alignment of Events

Weinberg JA returned to Richter's submission later in his judgment:

[1064] In order for the complainant's account to be capable of being accepted, a number of the "things" set out by Mr Richter at [840] - [842] of my reasons, had to have taken place within the space of just a few minutes. In that event, the odds against the complainant's account of how the abuse had occurred, would have to be substantial. The chances of "all the planets aligning", in that way, would, at the very least, be doubtful. This form of "probabilistic analysis", if properly applied, suggests strongly to me that the jury, acting reasonably, on the whole of the evidence in this case, ought to have had a reasonable doubt as to the applicant's guilt.¹⁴⁰

Essentially, Richter QC and Weinberg JA were drawing attention to the "compounding improbabilities" of the complainant's version of events being true, from Pell not lingering on the front steps and being unaccompanied by either Monsignor Portelli or Max Potter the sacristan, to no one seeing two choirboys leave the procession, no one entering the open door of the sacristy for five or six minutes and no one noticing two choir boys turning up 10 minutes late for choir rehearsal.

¹³⁹ *Pell v The Queen* [2019] VSCA 186, [840]–[842] (Weinberg JA).

¹⁴⁰ *Pell v The Queen* [2019] VSCA 186, [1064] (Weinberg JA).

Furthermore, in the course of his closing address to the jury, Richter QC, submitted that “only a ‘madman’ would attempt to sexually abuse two young boys in the priests’ sacristy immediately after Sunday solemn Mass”.¹⁴¹ This submission has considerable weight as (1) the complainant had not suggested the door to the priests’ sacristy was closed and anyone could have walked in; (2) there were dozens of people congregating around the area of the priests’ sacristy shortly after the conclusion of Sunday solemn Mass; (3) there was no ambiguity whatever about the nature of the acts alleged which could not be explained away; (4) there was nothing to have prevented either of the boys from leaving the room while the other was being attacked; and (5) if one of the two boys subsequently made a complaint, the other could corroborate it.¹⁴² If there is any science involved, it is to do with the improbability of the events aligning so perfectly, rather than any aspect of memory science.

Impossibilities

1. Accompanying Pell – The Priests’ Sacristy

A final characteristic of the defence evidence relates to the impossibility of the offending being able to happen at all. It was essential to the Crown case that Pell was unaccompanied when he entered the priests’ sacristy, contrary to long established Catholic Church practice that a fully robed Archbishop is never unaccompanied, evidence that was unchallenged.¹⁴³ The High Court stated:

The honesty of the opportunity witnesses was not in question. Portelli [the master of ceremonies] and Potter [the sacristan] each gave evidence that Portelli accompanied the applicant to the priests’ sacristy after solemn Mass on 15 and 22 December 1996 [the only two dates that the alleged sexual assault could have occurred] ... Portelli’s evidence in this respect was unchallenged [Potter was not cross-examined in light of his apparent infirmity at 84 years of age].

So, too, was the evidence that Catholic church teaching requires an archbishop to be accompanied while in a church, at least while the archbishop is robed, unchallenged. And the evidence that it was Portelli’s role as the applicant’s master of ceremonies to ensure that this requirement was complied with was unchallenged.¹⁴⁴

The evidence of the Monsignor Portelli, was that he “had no recall of any occasion when he did not accompany the applicant to the sacristy to disrobe”.¹⁴⁵ This evidence was also confirmed by the Max Potter:

Potter maintained there was always a priest to assist the applicant [Pell] or “one of us”, a reference it would seem to either Portelli or himself being present in the sacristy when the applicant removed his vestments.¹⁴⁶

Further support was provided by the evidence of four other witnesses, Daniel McGlone (alter server in 1987–1997), Jeffery Connor (alter server diary entries), and David Dearing (former choirboy 1996 13 years) and Rodney Dearing (father of David Dearing and former choirboy).¹⁴⁷ For example, David Dearing’s recollection was that Pell and Portelli were always together when Pell was in robes and he described Portelli as Pell’s bodyguard, a description with which Rodney Dearing agreed.¹⁴⁸ Indeed, somewhat ironically in light of the single and unique event thesis, “Connor had no recall of ever seeing the applicant alone while he was robed [and] [h]e agreed that such an occasion would have been memorable.”¹⁴⁹ Thus, there is powerful direct evidence from two senior and respected church officials,

¹⁴¹ *Pell v The Queen* [2019] VSCA 186, [752] (Weinberg JA).

¹⁴² *Pell v The Queen* [2019] VSCA 186, [752]–[757] (Weinberg JA).

¹⁴³ *Pell v The Queen* (2020) 268 CLR 123, [76] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

¹⁴⁴ *Pell v the Queen* (2020) 268 CLR 123, [101]–[102] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

¹⁴⁵ *Pell v the Queen* (2020) 268 CLR 123, [78]; [2020] HCA 12.

¹⁴⁶ *Pell v the Queen* (2020) 268 CLR 123, [79]; [2020] HCA 12.

¹⁴⁷ *Pell v the Queen* (2020) 268 CLR 123, [80]–[82]; [2020] HCA 12.

¹⁴⁸ *Pell v the Queen* (2020) 268 CLR 123, [82]; [2020] HCA 12.

¹⁴⁹ *Pell v the Queen* (2020) 268 CLR 123, [81]; [2020] HCA 12.

buttressed by unchallenged evidence that a robed Archbishop is never unaccompanied and four other witnesses, in support of the “impossibility” defence mounted by Pell’s counsel, Robert Richter QC.

2. The Robes

The majority in the Victorian Court of Appeal accepted the Crown case that complainant A was a witness of truth.¹⁵⁰ However, where A insisted that Pell had pulled apart his robes to expose his penis, the defence evidence was to the effect that the robes could not in fact be parted.¹⁵¹ The two key defence witnesses, Portelli and Potter, both testified that the manner in which the robes were fastened and the adjustments made to accommodate Pell’s six foot four frame meant that the complainant’s version of events was impossible. Portelli demonstrated to the jury how the cincture (the rope that wrapped around the waist of the vestments) was tied with a total of five knots. Portelli told the jury, “One needs to be like Houdini to get in and out of this.”¹⁵² Similarly, Potter was asked by the prosecutor, Gibson, about the robes:

Gibson: The chasuble [the outermost liturgical vestment] does not prevent one putting one’s hand to one’s groin if one wanted to, do you agree with that?

Potter: No, I’m sorry, I disagree with that because, knowing the type of vestments used by Archbishop Pell, it was not possible to do it.¹⁵³

As the evidence of Portelli and Potter was unchallenged, the only rational conclusion to be drawn is that the jury did not believe the evidence of the two church officials as otherwise the jury could not have convicted Pell. This point was made by Brett Walker SC in the Victorian Court of Appeal, when Ferguson CJ suggested that the chasuble could be moved to the side. “Walker said that would still leave the alb [a liturgical vestment] underneath, which could not be manoeuvred to the side.”¹⁵⁴ The significance of this exchange was not lost on the dissenting judge, Weinberg JA,¹⁵⁵ and has, like so many other circumstantial pieces of evidence in the *Pell* case, nothing to do with memory science.

3. The Interval

A further example of the impossibility of the offending occurring, is that from the time A and B re-entered the Cathedral after leaving the procession to the conclusion of the alleged assaults, both the prosecution and the defence accepted an interval of some five to six minutes had elapsed. The Crown case depended on no other person entering the unlocked priests’ sacristy following the celebration of Sunday solemn Mass during that five to six minute window when Monsignor Portelli and any other priests also used the priests’ sacristy for robing and disrobing.¹⁵⁶

Furthermore, during the five to six minutes window the following needed to occur on complainant A’s version of events:

- (1) A and B had slipped away from the procession, gone back into the Cathedral through the door to the south transept, made their way down the sacristy corridor to the priests’ sacristy.
- (2) They went inside the priests’ sacristy and poked around in a cupboard (which just happened to be unlocked!) in an alcove where they found a bottle of red altar wine (which was actually white wine but no matter on the Goodman-Delahunty et al thesis) from which they had taken a couple of swigs from the bottle when allegedly confronted by Pell.
- (3) Pell then allegedly (leaving aside the evidence previously mentioned as to the impossibility of parting his robes) exposes his penis and forces both boys to separately give him fellatio, which on A’s evidence takes no more than two minutes for each boy (total four minutes).¹⁵⁷

¹⁵⁰ *Pell v The Queen* [2019] VSCA 186, [90] (Ferguson CJ and Maxwell P).

¹⁵¹ *Pell v The Queen* [2019] VSCA 186, [819] (Weinberg JA).

¹⁵² Davey, n 86, 237.

¹⁵³ Davey, n 86, 233–234.

¹⁵⁴ Davey, n 86, 306.

¹⁵⁵ *Pell v The Queen* [2019] VSCA 186, [824] (Weinberg JA).

¹⁵⁶ *Pell v The Queen* (2020) 268 CLR 123, [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

¹⁵⁷ *Pell v The Queen* (2020) 268 CLR 123, [16]–[17] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

The overall timing is exceptionally tight to say the least within the five to six minutes window, and assumes no one enters the priests' sacristy at such a busy time after Sunday solemn Mass.

CONCLUSION

It is worth remembering that Pell's case followed one of the most extensive investigations into CSA, namely, the Royal Commission into Institutional Responses to CSA. More specifically, the investigations delved into religious institutions, which were given significant attention by journalists and media. There was deep criticism of the Catholic church in handling the processes of sexual complaints and abuse. Pell had given evidence at the Royal Commission in which he came across as "wooden and doctrinaire".¹⁵⁸ Pell was also investigated about his knowledge of other priests' sexual abuse and inappropriate sexual conduct on his part. Community prejudice was already rife at the time of Pell's trial and possibly contributed to juror reasoning, if not actual bias, which was the view of Richter QC, who in a post-verdict interview commented that "there was three years of press that painted him as a monster".¹⁵⁹ The concept of a fair trial and any prejudicial effect upon a defendant has been said not to be an abstract concept, but the overriding concern is to avoid practical injustice.¹⁶⁰ Kidd DCJ reminded the jury at trial that this was not an opportunity to make Pell a scapegoat for the failures of the Catholic church.¹⁶¹ It is also arguable that the case should never have come to trial:

George Pell's legal team privately petitioned Victoria's Director of Public Prosecutions two years ago [in 2018 shortly after the committal hearing when the significance of the evidence of Monsignor Portelli, Mr Potter and other witnesses who testified about the regular practices at the cathedral became clear under cross-examination] to abandon the criminal proceedings against the cardinal, citing much of the same evidence that convinced the High Court to quash his conviction.

Had the newly appointed DPP, Kerri Judd, QC, taken up this sliding doors moment, it would have exposed her office to public outcry but avoided the injustice of Cardinal Pell spending 13 months in jail for a wrongful conviction.

Instead, she took Cardinal Pell to trial and set Senior Crown Prosecutor Mark Gibson an invidious task of having to reconcile the account of the former archbishop's sole accuser with the evidence of other witnesses that didn't fit the case.¹⁶²

Cardinal Pell can be thankful that Weinberg JA wrote such a powerful and compelling dissent in the Court of Appeal, which was gratefully taken up by Brett Walker in the High Court. In accepting Weinberg JA's analysis, the High Court was conscious of the advantages enjoyed by the jury, but in the *Pell* case the High Court had no choice but to overturn the guilty verdicts because they were so unreasonable.

This rejoinder has sought to rebut the thesis put forward by Goodman-Delahunty et al that Weinberg JA and the unanimous High Court would have come to a different conclusion if they properly understood their thesis on memory science. The authors have contended that the proper application of the unreasonableness ground of appeal yielded no other outcome than an acquittal in face of the unchallenged evidence of the "opportunity witnesses" for the defence, and that memory science, in fact, played no role in that outcome.

¹⁵⁸ Davey, n 86, 314.

¹⁵⁹ Davey, n 86, 314.

¹⁶⁰ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, [37]; [2003] HCA 6.

¹⁶¹ *Director of Public Prosecutions (Vic) v Pell* [2019] VCC 260, [10].

¹⁶² Le Grand, n 137.