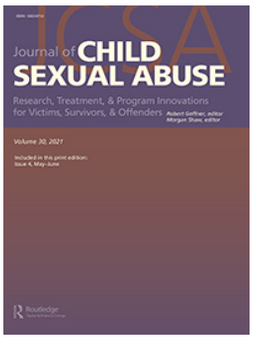

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REPORT

How Do Judges Discuss Memory Failures in Childhood Sexual Abuse Cases? A Brief Report

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ABSTRACT

The natural fading of memory presents a difficulty for complainants who report childhood sexual abuse after a significant delay. The complainant's recollections, and their failures to recollect, may be the only source of evidence about the alleged offense and so may be determinative of outcome. We analyzed 101 published judicial decisions of timely tried and delayed complaints of child sexual abuse and coded for judge's comments related to complainants' memory failures. We utilized qualitative and quantitative methods for this study. There were more memory failure comments reported for cases with a delay to trial compared to no delay to trial. Further, there were more memory failure comments in cases that ended in acquittals than convictions when there was a delay to trial. Judicial discussion of memory failures about abuse setting or circumstances accounted for the highest percentage of comments.

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Children; child sexual abuse; memory failures; verdict; delay; long-term memory

In trials involving child sexual abuse (CSA), the child's testimony is often the only evidence (Howe, 2013); this is especially likely to be true when there is a long delay between the abuse and the trial (historic child sexual abuse or HCSA; Woiwod & Connolly, 2017). A long delay to disclosure or trial is common in reported cases of sexual abuse (London et al., 2005). In an analysis of over 3000 HCSA cases, D. Connolly et al. (2015) found that the average delay from end of abuse to trial was 13.62 years. In Canada (and in Australia, New Zealand, Scotland, Ireland, England, Wales, and several U.S. states), there are no criminal statutes of limitations, which allows a case to be tried no matter how long ago the alleged offense occurred (Connolly et al., 2017). A troubling consequence of delayed disclosure from a legal perspective is that the complainant may forget details of the alleged abuse, making it difficult to evaluate the veracity of a report.

Triers of fact (e.g., judges) often discuss a witness' memory and take notice when the complainant has trouble remembering details of the alleged abuse (Connolly et al., 2009). This is particularly evident when the complainant's

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memory report is the only evidence against an accused. Although it is well known that memory for events likely fades over time, there is little research focused on how judges interpret and discuss the memory failures of complainants. The present study aims to explore judicial discussion of memory failures with respect to verdict decisions and timeliness of the trial. For the purposes of this research, and consistent with previous related research (e.g., Connolly et al., 2017; Connolly & Read, 2006), a case is considered timely if it reaches trial within two years of the end of the alleged abuse, and is considered historic if there is a delay of two years or more to trial.

Memory for an event becomes less complete as time passes (Ebbinghaus, 1964/1964). The degree of decay, however, can be impacted by a variety of factors including salience and/or stress. Some research has found children can retain accurate memories for traumatic events after lengthy delays, while others have found that childhood memory for traumatic events is often distorted and incomplete (see Greenhoot & Sun, 2014 for a comprehensive review). CSA victims may forget entire events of sexual abuse (Loftus, Garry et al., 1994). Further, some research has shown that abuse victims can sometimes recall that abuse happened, but are not able to recall the entirety of the abuse (e.g., Loftus, Garry et al., 1994 found that 12% of a sample of CSA victims reported remembering only parts of their abuse). It is also possible that abuse victims intentionally try not to think about their abuse (Loftus, Polonsky et al., 1994), which could cause difficulty recalling the abuse at a later time as thinking about events typically would strengthen the memory trace. It should be noted that not all children perceive sexual abuse as traumatic while the abuse is occurring (Kilpatrick, 1992), which may further influence the rate of memory decay.

Though there are many aspects of the alleged abuse a complainant might be questioned about at trial, there is little research on which specific types of details complainants can recall accurately in delayed CSA cases about their alleged abuse. Research suggests that when recalling HCSA, children may contradict their own prior reports on particular details (e.g., duration of abuse, age at time of abuse), potentially indicating difficulties with recall (Edelstein et al., 2005). In a case study, Bidrose and Goodman (2000) interviewed four young girls about recent documented sexual abuse. Despite overall high accuracy of children's reports, many omission errors were made, suggesting forgetting of some aspects of the abuse. Although it is not known what types of details children may be able to recall concerning alleged abuse in CSA and HCSA cases, it is likely that some details will be forgotten. Indeed, emerging research on reports of child abuse suggests that it is normal for children who have been maltreated to have imperfect memories of the alleged abuse (Najman et al., 2020). Forgotten details do not mean that an allegation is untrue or lacks credibility.

Research with children in an experimental setting may help inform what we can expect children to remember about past events. For example, memory for repeated events has been shown to be more complex than for single events (Connolly et al., 2016; Price & Connolly, 2007; Woiwod et al., 2019), and children who are abused are often abused repeatedly (Connolly & Read, 2006). In a legal context, a complainant may be asked to provide the particulars of one instance out of a series (Brodie & The King, 1936, p. 198) which can be difficult for a child (Price & Connolly, 2007). Similarly, recalling temporal details (dates or times) may be difficult for children (Saywitz et al., 1991). Additionally, research focused on children's memory for conversations suggests that recalling verbatim conversations can be a difficult task. Lawson and London (2015, 2017) found that children could recall the gist of their conversations after a one week and one year delay, but verbatim details were infrequently reported. These findings highlight the potentially challenging task children are faced with when testifying. However, the task may be especially difficult if there has been a long delay between the time the alleged offense occurred and trial.

It is important to understand not only what children can remember, but also what professionals in the justice system, in particular judges, may expect from them. Some lab research suggests that a report is perceived by mock jurors as more accurate and credible if it contains many details in comparison to a report that contains few details (Bell & Loftus, 1988, 1989; Desmarais, 2009). Similarly, Conway et al. (2014) found that around 58% of a sample of laypersons believed that the more detailed and vivid a childhood memory is, the more accurate. Akhtar et al. (2018) conducted a survey of police and laypersons to analyze beliefs about memory. Police and laypersons mostly agreed that vivid and specific details are associated with accuracy in memory reports. Further, police and laypersons tended to believe that traumatic or emotionally intense events lead to more vivid and accurate memory recall. Little research has focused specifically on which aspects of a child's report a judge may prioritize in their assessment of perceived credibility, and the related influence on a child's perceived credibility or trial outcome.

PRESENT STUDY

The present study examined the relationship between judicial discussion of memory failures and verdict decisions in CSA and HCSA cases. Written judicial decisions were analyzed and references to complainants' memory failures were identified. As memory is known to fade with time, it was hypothesized (H1) that judicial discussion of HCSA cases would contain more references to memory failures than would CSA cases. The following exploratory research questions were developed: (RQ1) Is the presence of

memory failure comments related to verdict?; (RQ2) What types of memory failures are discussed by judges in CSA and HCSA cases?

METHODS

Four hundred and sixty-eight trials (208 CSA complaints and 284 HCSA complaints) with 892 (321 CSA complainants and 571 HCSA complainants)[1] complainants were obtained from Quicklaw dating between 1998 and 2002. Quicklaw contains written judicial decisions from all Canadian cases from the Supreme Court of Canada, Courts of Appeal, written decisions from provincial Superior Courts, and some cases from provincial courts which were forwarded to Quicklaw at the judge's discretion. Quicklaw is not an exhaustive list of criminal cases. There is no way of knowing exactly why judges forward certain decisions to Quicklaw and not others. A judge may forward a case to Quicklaw if they decide it is important to the legal community, as the decisions in Quicklaw often inform policy and legal practice. These written decisions contain an explanation as to what evidence the judge used to make their legal decision about a given case. The following search criteria was used to identify relevant cases: "child," "sexual offense(s)," "sexual assault," "sexual interference," "sexual intercourse," "gross indecency," "indecent assault," "incest," "rape," "bestiality," and "buggery." A case was included if it contained "child" and one of the other key terms used in the search criteria. Additionally, the complainant must have been under the age of 18 when the offense began. For the present study, we sought to compare complainants of timely tried CSA and HCSA (a delay of 2 years or longer from the end of abuse to trial). Thus, 101 (52 CSA complainants and 49 HCSA complainants) complainants were selected from the larger dataset for analysis, and were matched on the following criteria: verdict (coded as either convict or acquit), age of complainant when the alleged offense began (in months), and frequency of alleged abuse (once or repeated). If there was more than one charge associated with a complainant, the most serious offense was coded. CSA and HCSA complainants were matched on verdict, age, and frequency. We selected 101 cases to balance feasibility of coding and statistical power. To maintain a reasonable sample size, CSA and HCSA cases could not be matched on all case variables. Some variables such as duration of alleged abuse, nature of the allegation (e.g., fondling versus penile penetration), and gender of the complainant, varied across CSA and HCSA cases. We matched on verdict to facilitate analyses comparing acquit and convict cases. We prioritized matching age and frequency of alleged abuse

[1]There were multiple complainants in some cases.

because these variables are particularly relevant to our research questions about memory failure.

CODING

Judicial decisions were coded for 17 variables related to complainant credibility. One person coded all judicial decisions after acceptable intercoder reliability (Kappa = .77) was established. The present study is focused on one of the 17 variables; "memory failures." A phrase was coded as a "memory failure" if it contained a description of forgotten details, or if the judge discussed any difficulties with complainant memory. Of the 101 judicial decisions, there were 245 comments and 50 decisions contained at least one memory failure comment. To explore the nature of the "memory failure" comments for the present study, two coders adapted a thematic coding approach. As recommended by Gibbs (2007), the two coders independently read all "memory failure" comments to identify themes. The coders met and discussed themes for coding, then coded together for training purposes before coding all phrases independently. Because this was exploratory, our identification of themes was primarily driven by the most common comments. However, we were partly informed by previous literature focused on children's memory (e.g., memory for conversations, memory for repeated events). The "memory failure" comments were sorted into the identified themes, as discussed below. The coders agreed on 86% of codes. All disagreements were resolved through discussion.

RESULTS

To explore the hypothesis that HCSA cases would contain more memory failure comments than CSA cases (H1) and the exploratory question about the presence of memory failure comments and verdict decisions (RQ1), we conducted a 2 (case type: CSA, HCSA) × 2 (verdict: convict, acquit) factorial analysis of variance. See Table 1 for all means and standard deviations. There was a main effect of case type. There were significantly more memory failure comments in judicial decisions for HCSA cases than CSA cases, $F(1, 97) = 4.58$, $p = .035$, $\eta_p^2 = .045$. There was a significant qualifying interaction between verdict and case type, $F(1, 97) = 4.77$, $p = .031$, $\eta_p^2 = .047$. We

Table 1. Mean number (SDs) of memory failure comments across case type and verdict.

Verdict	Acquit	Convict	Total
Case type			
CSA	1.24 (2.63)	1.52 (2.23)	1.37 (2.44)
HCSA	5.38 (8.48)	1.48 (2.39)	3.55 (6.63)
Total	3.20 (6.42)	1.50 (2.23)	

conducted follow up *t*–tests to analyze the interaction. Among HCSA cases, there were more memory failure comments for cases that led to an acquittal than a conviction, $t(50) = -0.41$, $p = .685$, 95% CI [−1.66, 1.10], $d = 0.14$. Among CSA cases, there was no difference in frequency of memory failure comments across acquittals compared to convictions, $t(47) = 2.25$, $p = .038$, 95% CI [0.36, 7.45], $d = 0.63$. To further explore the relationship between delay and memory failures, we also analyzed the number of memory failure comments and delay as a continuous variable (delay from end of abuse to trial in months) using a linear regression. The overall model was significant $F(1,84) = 6.04$, $p = .016$. Delay in months accounted for 6% of the variability of frequency of memory failure comments ($R^2 = .06$).

THEMES

To address our research question about the content of judicial discussion of *memory failures*, we read all memory failure comments mentioned in the 101 judicial decisions and identified distinct six themes. Here, we did not conduct inferential statistics, but rather we report the nature of the most frequent comments about memory failure. The largest percentage (34%) of memory failure comments concerned the inability to remember the *circumstances or setting*. A memory failure comment was coded in this category if it described an inability to remember where the alleged abuse occurred or a description of the setting (e.g., "does not remember if the room had a decorative theme"), when it occurred (e.g., "doesn't remember what time of year it was") and why specific actions were carried out (e.g., "she didn't remember why she sat on the bed"). References to the presence of people other than the complainant and accused were also included (e.g., "cannot recall what staff were on duty").

Judges often commented that the complainant had *overall difficulties with memory of the event(s)* (20%). A comment was put into this category if the judge stated that the complainant's memory was incomplete or if the complainant admitted they had difficulty remembering details (e.g., "details were 'fuzzy' in her mind," "he had blocked out the incidents," "she admitted other details were not so clear," "he cannot remember anything before age 5," "the memories of the complainant may have dimmed with the passage of time").

Judges noted when complainants had trouble remembering *particulars of one instance of a repeated event*. This accounted for 12% of all memory failure comments. However, it should be noted that this theme was only present for those complainants who were abused repeatedly (48% of this sample). For those cases in which abuse was repeated, this theme accounted for 17% of the memory failure comments. Comments were categorized here when the judge mentioned the complainant's inability to particularize specific actions, dates, and places to one specific instance of the repeated abuse (e.g., "can't remember whether he took her pants down or she did the second time," "couldn't recall

the names of the other beaches the accused took him," "complainant is unable to say which instance was the first," "cannot remember the exact dates . . . but knows it was every 2-3 months").

The inability to remember *conversations* accounted for 11% of all memory failure comments. This included comments about phone calls, in person conversations, and letters. These conversations were not limited to those between the complainant and accused, and included conversations with family members, friends, and therapists/social workers (e.g., "She didn't remember saying okay in reply," "doesn't remember what she told her social worker about the incident," "she wasn't sure how much she told her boyfriend," "if [the complainant] wrote [the accused], he doesn't recall").

Ten percent of the memory failure comments were focused on the complainant's inability to remember *specific actions during the event in question*. This category included the inability to remember both the complainant's own actions and the actions of the accused (e.g., "she couldn't remember if he took off her bra," "unable to say which hand was down her pants," "couldn't remember if he wore a condom").

Judges also pointed out complainants' inabilities to remember *what happened directly before and after the event in question*. This accounted for 6% of all memory failure comments (e.g., "does not remember who he saw immediately after," "not sure how long accused hung around the house after the incident," "does not remember what she was doing before the accused came home").

Seven percent of memory failure comments did not fit into any of the themes and were placed in an *other* category (e.g., "No recall of homosexual fantasies he may have had when he was a child," "did not remember if anything untoward happened while [accused] was blow drying her hair," "She has resorted to her father to refresh her memory of the events.").

DISCUSSION

Overall, judges discussed memory failures more frequently in delayed (HCSA) than timely tried (CSA) cases, and the presence of memory failure comments were related to verdict decisions only when there was a lengthy delay (i.e., 2 + years). This finding was unsurprising given that complainants in delayed cases would be more likely to have forgotten more details due to the passage of time. It may be that judges in this sample were understanding of a few memory failures, but less so when there were several. Rather, judges may conclude that insufficient evidence exists to support a conviction if a complainant fails to remember **many** aspects of an alleged offense.

Because the complainant's memory is often the only evidence, it is not surprising that judges often scrutinized the quality of this memory evidence by noting that the complainant had overall difficulties with recall. Despite

some uninformed comments (e.g., "going through traumatic events means you remember them with great detail," "complainant should not forget details"), it is also clear that many judges acknowledged the likelihood of forgetting (e.g., "every memory fades with time," "time erodes context and details"). Importantly, the content of the memory failures identified by judges (i.e., circumstances/setting of the event, particulars of repeated alleged abuse, conversations, actions during alleged abuse, and before/after aspects of alleged abuse) might represent: a) the types of details that children have difficulty recalling about alleged abuse, and/or b) the types of details judges are interested in when deciding a case.

A closer analysis of the memory failure comments allowed us to understand the types of memory failures discussed by judges in their decisions. Judges in this sample made note of the complainants' inability to remember the specific actions of the alleged offense, as well as what happened immediately before or after the alleged offense, and the settings/circumstances of the alleged offense. The highest proportion of memory failure comments referred to inabilities to remember setting or circumstances. Judges may have wanted circumstantial information in order to provide enough detail about the alleged offense so as to "lift it from the general to the particular" (Brodie & The King, 1936, p. 198, affirmed in *R. v. B. [G.]*, 1990; see Woiwod & Connolly, 2017).

Judges deciding CSA and HCSA cases are faced with a difficult challenge. There is little guidance for judges regarding how memory evidence pertaining to cases with lengthy delays to trial should be evaluated. More research is needed and it is important that memory researchers communicate their findings to those in the justice system (Howe, 2013). Further empirical work is needed to determine which types of details about an alleged offense are important to triers of fact, relative to the types of details children can realistically recall about past abuse.

LIMITATIONS

The current sample of judicial decisions included cases that were only as recent as 2002. It is possible that the opinions of Canadian judges about memory have changed over time. However, memory processes are not likely to have changed. Memory failures of complainants in recent dates will likely mirror those found in this study. Nonetheless, a natural next step would be to replicate this study with recent judicial decisions. Additionally, it may be important to explore potential jurors' expectations of complainants' memory of CSA and HCSA, given their reduced familiarity with witness evidence, relative to judges.

Our main focus of this research was to assess the relationship between memory failure comments, verdict, and delay. Recall that we matched cases

on verdict, frequency, and age, but could not match on all variables such as the nature of the alleged abuse. Obtaining a larger sample would have allowed for matching on additional variables that may be related to judicial discussion of memory failures. Importantly, the frequency of memory failures did not differ based on nature of the abuse, $F(2,85) = 1.86$, $p = .163$.

Quicklaw is not a complete list of all criminal cases and we cannot know why certain cases are forwarded for publication and not others. Further, judicial decisions may not contain all information about memory failures that are present in any given case. It is possible that the complainants forgot more than what was mentioned in each judicial decision, and these judges did not report all memory failures in the decisions. However, it is likely that the memory failures included in the decisions are the memory failures the judges in this sample felt were the most important for deciding verdict.

CONCLUSION

This research suggests that judicial discussion of complainant memory failures is associated with verdict decisions in HCSA cases more than CSA cases. Despite the apparent intuitiveness of this finding, there is very little empirical support for it. Judges most often discussed complainants' inabilities to remember details relating to setting and circumstances of the alleged offense, perhaps because setting and circumstances are important for particularizing the alleged abuse. This study highlights the need for more research about the types of details children can reasonably recall about alleged abuse, especially after a long delay. Such knowledge could assist in developing guidance for triers of fact who are faced with deciding HCSA cases that rely on memory reports.

Disclosure statement

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