

# Autobiographical Memory Misconceptions and the Police Investigative Response to Rape Complaints

**Louise Taylor**

*The Open University*

**Lucy Justice**

*Nottingham Trent University*

☞ Criminal investigations; Criminology; Memory; Police officers; Police powers and duties; Rape

*Police officers are regularly required to make judgements of memories, however little is known about how they make these judgements. Research shows that police officers often rely on beliefs about memory that are not in line with scientific knowledge, meaning that flawed judgements of memory evidence may be being made. In this paper, we describe a recent empirical study that has quantified police officers' beliefs about memory and apply the findings to Commissioner of Police of the Metropolis v DSD, showing how decision making may be driven partly by erroneous beliefs about memory.*

## Introduction

Very little is known about the way in which police officers make judgements of the memory-based evidence they encounter when a victim makes a complaint of criminal wrongdoing.<sup>1</sup> Indeed, it has been proposed that individuals often rely on their own common-sense beliefs about memory to make such judgements and that this may be at odds with the scientific understanding of how memory works. Erroneous judgements of memory evidence in criminal cases can have devastating consequences, from false accusations and convictions, to victims' complaints failing to proceed through the criminal justice system because their accounts are not believed. Flawed judgements of memory evidence are particularly concerning in cases involving complaints of rape and sexual assault, when frequently, the victim's memories of the offence are the only, or primary evidence upon which

<sup>1</sup> Although a great deal of research has been done to investigate factors that influence police decision-making, (for example in the context of rape cases see S.A. Alderden and S.E. Ullman, "Gender Difference or Indifference? Detective Decision Making in Sexual Assault Cases" (2012) 27(1) *Journal of Interpersonal Violence* 3; E.C. Barrett and C. Hamilton-Giachritsis, "The victim as a means to an end: detective decision-making in a simulated investigation of attempted rape" (2013) 10 *Journal of Investigative Psychology and Offender Profiling* 200; E. Sleath and R. Bull, "Police perceptions of rape victims and the impact on case decision making: A systematic review" (2017) 34 *Aggression and Violent Behavior* 102), very little of this has focused on police judgements of memory evidence.

officers base their decisions about how to direct the investigation. Further, rape cases have a very high attrition rate, with a conviction rate of as low as 7 per cent,<sup>2</sup> and the extent to which officers' errors in judging memory evidence may contribute to that problem is not currently understood.

In a recent large-scale investigation of beliefs about memory, Akhtar et al.<sup>3</sup> argue that police officers and the public both hold a similar constellation of beliefs about memory, termed the "common-sense memory belief system" (CSMBS). These beliefs, Akhtar et al. argue, are often contradictory, unsupported and refuted by the current scientific understanding of memory. In this article, we take the CSMBS and apply it to the facts of *Commissioner of Police of the Metropolis v DSD*<sup>4</sup> (hereinafter *DSD*), a case brought against the Metropolitan Police Service by two victims of the "black cab rapist", John Worboys, for failures in the police investigations of their respective rape complaints. In doing so we are the first to identify aspects of the decision-making in *DSD* that was likely to have arisen because of officers' reliance on the CSMBS. This analysis is particularly significant in the context of police decision-making because police officers are the initial gatekeepers to the criminal justice system<sup>5</sup> and they exercise extensive discretion when deciding how to deal with the cases that come to their attention.<sup>6</sup> The impressions formed by officers about the credibility and reliability of information provided in autobiographical accounts are also likely to go largely unchallenged<sup>7</sup> and prove highly influential to other decision-makers in the criminal justice system, such as the Crown Prosecution Service (CPS).<sup>8</sup>

In the first part of this article we highlight the central role that memory evidence plays within the criminal justice system. The second part outlines the study undertaken by Akhtar et al. and analyses the way in which the CSMBS is likely to impact on police judgements of autobiographical memory accounts provided by complainants in rape cases. The third part focuses on the case of *DSD* and considers the role that the CSMBS is likely to have played in the decision-making which led to the serious investigative failures identified in that case. The final part of the article then considers the broader impact of cases such as *DSD* on rape victims' willingness to engage with the criminal justice system and makes some limited suggestions for training of police officers to help challenge their reliance on the CSMBS.

<sup>2</sup> K. Hohl and E.A. Stanko, "Complaints of rape and the criminal justice system: fresh evidence on the attrition problem in England and Wales" (2015) 12(3) *European Journal of Criminology* 324.

<sup>3</sup> S. Akhtar et al., "The 'common sense' memory belief system and its implications" (2018) 22(3) *Int J Evid Proof* 289.

<sup>4</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895.

<sup>5</sup> D.M. Soulliere, "Pathways to attrition: a qualitative comparative analysis of justifications for police designations of sexual assault complaints" (2005) 10(3) *The Qualitative Report* 416, 416; K. Hohl and E.A. Stanko, "Complaints of rape and the criminal justice system: fresh evidence on the attrition problem in England and Wales" (2015) 12(3) *European Journal of Criminology* 324, 327.

<sup>6</sup> L. Artz and D. Smythe, "Losing ground? Making sense of attrition in rape cases" (2007) 22 *SA Crime Quarterly* 13, 17.

<sup>7</sup> K.A. McClure, J.J. Myers and K.M. Keefauver, "Witness vetting: What determines detectives' perceptions of witness credibility?" (2013) 10 *Journal of Investigative Psychology and Offender Profiling* 250, 251; M.A. Alderden and S.E. Ullman, "Creating a more complete and current picture: examining police and prosecutor decision-making when processing sexual assault cases" (2012) 18(5) *Violence Against Women* 525, 526.

<sup>8</sup> J. Gregory and S. Lees, "Attrition in rape and sexual assault cases" (1996) 36(1) *British Journal of Criminology* 1, 3; K. Hohl and E.A. Stanko, "Complaints of rape and the criminal justice system: fresh evidence on the attrition problem in England and Wales" (2015) 12(3) *European Journal of Criminology* 324, 337.

## Memory overview

It is hard to conceive of a legal system that does not, to some degree, rely on memory. Memories from victims, defendants and witnesses are present throughout all aspects of the legal system, from initial interviewing to evidence-giving in court. Complainants may be required to identify potential perpetrators, witnesses may be asked to describe full narrative accounts of a specific crime, jurors may be required to recall evidence presented to them during a trial. In recalling these types of details and events, individuals are recruiting *autobiographical memory*, a memory system that allows specific events to be recalled from across the lifetime. Information in autobiographical memory is organised hierarchically<sup>9</sup> and can contain a broad range of information from general knowledge about lifetime periods (e.g. “I lived in London during university”) through to very specific information about a particular event (e.g. “My bag was snatched from my right shoulder”). The accuracy of this recall can be, under certain circumstances, relatively high.<sup>10</sup> However, what information is encoded (“laid down” in memory) and recalled about specific events depends on a great deal of factors. Diverse event variables ranging from the level of light available at a scene through to the duration of an event can affect where attention is focussed and in turn what is and is not encoded.<sup>11</sup> Person variables such as emotion,<sup>12</sup> current beliefs, biases and self-concepts shape memories, affecting what is remembered and indeed misremembered.<sup>13</sup> Further, how memories are elicited, interrogated and rehearsed can additionally affect the accuracy and inaccuracy of memory.<sup>14</sup> As such, autobiographical memories are not verbatim copies or recordings of an experienced reality but are psychological representations of the self in the past, shaped and misshaped by many internal and external processes. Errors can include what happened during the event, who was involved, when it happened and what was felt at the time. Whilst memory researchers are aware of these opportunities for error, it is, without objective evidence, almost impossible for a rememberer to know or even realise which elements of a memory have been altered.<sup>15</sup> This means that often information that an individual believes to be true may not map onto objective reality, but may be believed to do so.<sup>16</sup>

Nevertheless, legal professionals and lay individuals such as jurors are frequently required to judge both the credibility (believability) of the rememberer and reliability (accuracy) of their memories.<sup>17</sup> However, little is known about the processes, beliefs or heuristics that might affect or drive these judgements. Akhtar

<sup>9</sup> M.A. Conway and C.W. Pleydell-Pearce, “The construction of autobiographical memories in the self-memory system” (2000) 107(2) *Psychol. Rev.* 261.

<sup>10</sup> C. Brewin and B. Andrews, “Memory accused: research on memory error and its relevance to the courtroom” [2019] *Crim. L.R.* 748.

<sup>11</sup> For a comprehensive list of event variables see A. Kapardis, *Psychology and law: A critical introduction* (Cambridge University Press, 2009).

<sup>12</sup> R.L. Kaplan et al., “Emotion and false memory” (2016) 8(1) *Emotion Review* 8.

<sup>13</sup> M.A. Conway, “Memory and the self” (2005) 53(4) *J. Mem. Lang.* 594.

<sup>14</sup> See C.J. Brainerd and V.F. Reyna, *The Science of False Memory* (Oxford, Oxford University Press, 2005), Ch.6.

<sup>15</sup> M.K. Johnson, S. Hashtroudi and D.S. Lindsay, “Source monitoring” (1993) 114(1) *Psychol. Bull.* 3-, available at: <http://www.ncbi.nlm.nih.gov/pubmed/8346328> [Accessed 19 July 2019]; M.K. Johnson and C.L. Raye, “Reality monitoring” (1981) 88(1) *Psychol. Rev.* 67.

<sup>16</sup> See M.A. Conway, “Memory and the self” (2005) 53(4) *J. Mem. Lang.* 594 for a discussion of “truth” in memory, and J. Cohen, “Questions of credibility: omissions, discrepancies and errors of recall in the testimony of asylum seekers” (2001) 13(3) *International Journal of Refugee Law* 293 for a comprehensive review of memory processes.

<sup>17</sup> L.V. Justice and H.M.J. Smith, “Memory judgements: the contribution of detail and emotion to assessments of believability and reliability” (2018) 26(10) *Memory* 1402.

et al. proposed that without a scientific framework to refer to, the only basis police have to judge memories is their own beliefs about memory. These personal beliefs, termed by Akhtar et al. as “common sense beliefs” are likely to be comprised of experiences of the individual’s own memory, experience and knowledge of others’ memories, cultural norms and beliefs and quite possibly media influences such as the representation of memory in films, books and art. But are these common sense beliefs in line with current scientific knowledge about memory? If they are not, it follows that any decision-making about memory evidence will be flawed, and often simply wrong.

Despite the advances made to the scientific understanding of human memory, the courts have maintained stringent limits on the admissibility of expert evidence based on memory research. Although the Court of Appeal in *X (Childhood Amnesia)*<sup>18</sup> was willing to admit evidence from a memory expert to explain why remarkably detailed accounts from a 19-year-old woman of her experiences of sexual assault as a very young child may be unreliable, they also found it necessary to issue an extremely weighty caution against the admissibility of such evidence in other less exceptional cases.<sup>19</sup> The result being that what initially appeared as a somewhat liberal approach to the admissibility of expert evidence to explain the workings of human memory was in reality only a limited acceptance of memory research in exceptional cases where a complainant had provided an account of very early childhood events containing an unusually high level of detail.<sup>20</sup>

In *S (Jonathan Charles)*<sup>21</sup> the Court considered that the appeals against conviction did not meet the threshold of exceptionality identified in *X* and ruled the expert memory evidence to be inadmissible on that basis.<sup>22</sup> In respect of one of the complainants referred to in the case this was primarily because their accounts related to memories of sexual assaults which took place in later childhood which led the Court to conclude that expert evidence was not needed to explain aspects of memory unaffected by childhood amnesia.<sup>23</sup> In *S (Jonathan Charles)* the Court also stressed an unwillingness to widen the ambit of the decision in *X* to admit expert evidence to explain the normal operation of memory which was likely to be within normal human experience.<sup>24</sup>

Underpinning such a restrictive approach to the admissibility of memory evidence appears to be the perceived adequacy of common sense memory beliefs as the basis upon which to judge memory-based evidence,<sup>25</sup> a view that can be observed, for example, in Lady Justice Hallett’s dictum in *E*:<sup>26</sup>

“Some may think that the nature of the evidence put before us, in the final analysis, comes to little more than common sense. There was no reason to

<sup>18</sup> *X (Childhood Amnesia)* [2005] EWCA Crim 1828; [2006] 1 Cr. App. R. 10.

<sup>19</sup> *X (Childhood Amnesia)* [2005] EWCA Crim 1828; [2006] 1 Cr. App. R. 10 at [47], [48].

<sup>20</sup> I. Freckleton, “Expert evidence about memory” (2008) 15(3) *Psychiatry, Psychology and Law* 362, 368.

<sup>21</sup> *S (Jonathan Charles)* [2006] EWCA Crim 1404; [2007] 2 All E.R. 974.

<sup>22</sup> *S (Jonathan Charles)* [2006] EWCA Crim 1404; [2007] 2 All E.R. 974 at [30].

<sup>23</sup> *S (Jonathan Charles)* [2006] EWCA Crim 1404; [2007] 2 All E.R. 974 at [27].

<sup>24</sup> *S (Jonathan Charles)* [2006] EWCA Crim 1404; [2007] 2 All E.R. 974 at [14], [26] and [30].

<sup>25</sup> On the courts’ reliance on common sense views of memory see M.A. Conway, “On Being a Memory Expert: Three Cases” [2013] *Memory* 1; British Psychology Society Research Board Working Group, *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Leicester: British Psychology Society, 2008).

<sup>26</sup> *E* [2009] EWCA Crim 1370 at [42]. See also the judgment of Lord Justice Gage in *B (T)* [2006] EWCA Crim 417; [2006] 2 Cr. App. R. 3 at [168]; [2006] Crim. L.R. 745.

burden the jury, in our view, with conflicting evidence from experts on how much detail might be expected from a child of 10 trying to remember what happened when she was aged 4, 5, 6, 7 and 8.”

However, evaluating memory evidence is difficult and at a minimum requires some understanding of the fallability and constructive nature of memory but ideally requires a comprehensive knowledge of the factors and processes that influence memories, along with an understanding of the causes of memory errors, distortions and false memories.

### **Akhtar et al.’s study**

Empirical work has begun to examine the extent to which police officers’ beliefs about memory are consistent with scientific research on memory. Benton et al.<sup>27</sup> surveyed 52 (US) law enforcement personnel regarding their beliefs about the acquisition and evaluation of eyewitness evidence, with 30 questions covering topics including line-up accuracy, rate of forgetting, memory malleability and child witnesses. Broadly, responses given by law enforcement personnel differed to current scientific knowledge on 18 of the 30 questions (60 per cent), with notable differences occurring for questions regarding malleability of memory, characteristics of memory accuracy, and false memory formation in adults and childhood. These findings highlight that not only are there discrepancies between law enforcement beliefs and the scientific understanding of memory, but that these discrepancies are in some cases very large. Therefore without an understanding of the scientific nature of memory, flawed judgements of memory evidence may be made. However, with the exception of Benton et al.’s study, no other research has investigated police beliefs about memory, and none in a British sample. Akhtar et al. therefore extended Benton et al.’s work by surveying over 500 British police officers, of all ranks, from two regional police forces. In addition, Akhtar et al. also included a sample of 240 academic memory researchers or “experts”, at all stages of their careers, to act as a control group, along with 81 jury-eligible members of the public. Statements were extended to encompass beliefs about the nature and features of autobiographical memory. In the following sections, we reiterate the methods and findings of the study.

### *Methods*

Participants were presented with a questionnaire which contained 31 statements about human memory. These statements were centred around eight sub-topics, named: “memory is generally accurate”, “the more details the more accurate the memory”, “memories can be false”, “memory is like a video”, “emotional intensity and accuracy”, “trauma and memory”, “childhood memory” and “durability and reliving trauma” (the statements associated with each can be seen in Table 1). To prevent the statements biasing the respondents, some were written in line with current scientific consensus, and some ran contrary. Respondents were required to indicate their agreement/disagreement to each statement using a 4-point scale:

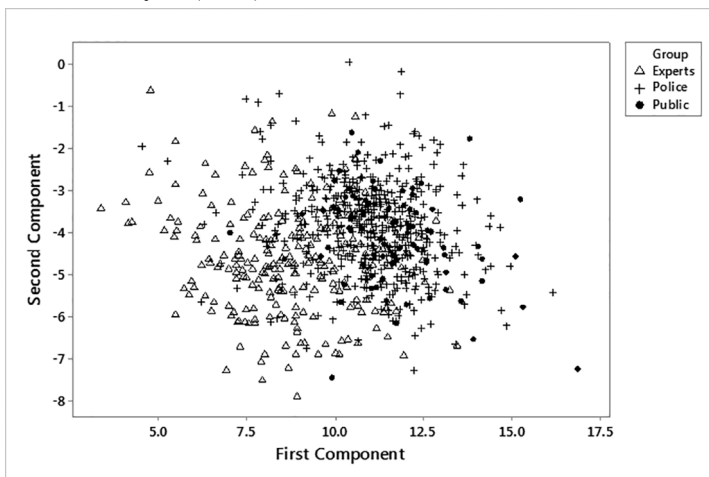
<sup>27</sup> T.R. Benton et al., “Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts” (2006) 20(1) *Applied Cognitive Psychology* 115.

strongly disagree, disagree, agree, and strongly agree. It was decided not include a “neither agree nor disagree”/neutral option since such a position usually cannot be taken in a legal setting. The police were also asked to indicate how many years they had served, and the memory researchers were asked to indicate how many years they had studied memory. Basic demographic information was also taken for all participants (age, sex and highest level of education attained).

### Findings

Firstly, the authors wanted to understand whether answering patterns across all items on the questionnaire differed by group (police, memory researchers and public). To do this a principal component analysis (PCA) was conducted. PCA is known as a “dimension reduction” technique; it essentially maps all responses into a new coordinate system, so that every response to every question from each participant has a new x,y value. The axes on a PCA plot do not represent anything physical, they are mathematical constructs calculated to represent variation in the data. This technique was used since it allows broad patterns to be found in data and acts as a strong starting point for understanding group differences and similarities.

Figure 1 shows the output of the PCA and details all responses given to all statements on the questionnaire, with group membership identified by shape. The figure shows, broadly, that responses to items on the questionnaire from the police (cross) overlap considerably with the public (circle), with responses given by memory researchers (triangle) clustering separately. However, the PCA is only descriptive and does not statistically show whether groups are similar or dissimilar in their answers to items on the questionnaire. Therefore, to understand whether the police and public showed dissimilar answering patterns to the researchers a Latent Class Analysis (LCA) was run.



**Figure 1.** PCA score plot detailing individual responses, categorised by group.

The LCA confirmed that, based on answering patterns, there were two groups in data—one that comprised the majority (but not all) of the police and the majority

(but not all) of the public (Class 1) and one that comprised the majority (but not all) of the memory researchers (Class 2). We further investigated the individuals in the police, public and memory researcher groups and found that younger memory researchers (those aged 25 or younger) were more likely to be placed in Class 1 than respondents aged 36–45 and 46–55, who were more likely to be placed in Class 2. This shows that training and exposure to memory-based research is critical in gaining a scientific understanding of memory. No other factors, such as number of years police had in service, were reliably associated with Class membership. Nevertheless, this analysis confirmed that police and the public have similar beliefs about the way in which memory works and that these beliefs were statistically dissimilar to the beliefs held by memory experts. But how did the two classes respond to items on the questionnaire?

Although some statements in the questionnaire showed similar likelihoods of endorsement (probability of a group member agreeing with a given statement), some substantial differences were found, and these are shown in Figure 2. Broadly results showed that Class 1 were more likely to endorse items centring around indicators of accuracy, in particular that detailed, vivid and fluent memory descriptions are likely to be accurate. This set of beliefs is entirely unsupported by scientific evidence. Memory research has shown that people tend to remember a “core” or gist of the original event, with specific and especially peripheral details not frequently recalled.<sup>28</sup> Further, the belief that highly vivid memories are more accurate than vague memories is not supported by scientific evidence, with very emotional or vivid memories being as prone to error and forgetting as vague.<sup>29</sup> Finally, as noted at the beginning of this paper, memories are time-compressed, do not preserve fine-grain temporal order and may or may not represent an event in its original sequence, therefore it would be expected that recall is not temporally linear, and may be fragmentary when recalled.<sup>30</sup>

The LCA also showed that Class 1 was more likely than Class 2 to endorse items surrounding the notion that memory is a literal record of the past. However, as noted in the introduction, memories are fragmentary, constructive and error-prone. They are accompanied by emotion and information that is encoded is highly dependent on the individual’s beliefs and understanding of the world, attention at the time of the event, and previous experience, amongst many other things. Memories are psychological representations and are unlike other recording media. This belief that memory is like a video is strongly refuted in contemporary memory research.

Also noteworthy is the belief strongly held by Class 1 (.9 likelihood endorsement) that memories of childhood sexual abuse are likely to contain at least some truth. As noted, above, traumatic memories and memories of intense emotional experiences are as error-prone as memories of neutral events<sup>31</sup> and as such, follow the same patterns of forgetting and distortion.

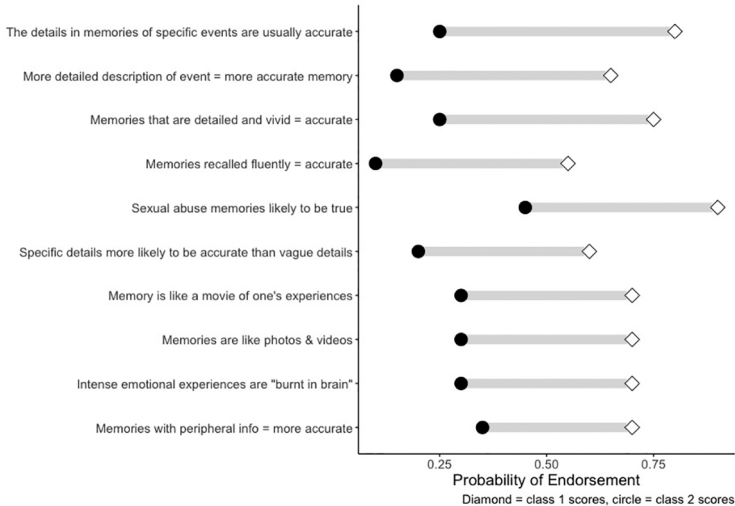
<sup>28</sup> C. Wells, C.M. Morrison and M.A. Conway, “Adult recollections of childhood memories: What details can be recalled?” (2014) 67(7) Q. J. Exp. Psychol. 1249.

<sup>29</sup> S.A. Christianson, “Emotional stress and eyewitness memory: a critical review” (1992) 112(2) Psychol. Bull. 284.

<sup>30</sup> M.A. Conway and C.W. Pleydell-Pearce, “The construction of autobiographical memories in the self-memory system” (2000) 107(2) Psychol. Rev. 261.

<sup>31</sup> R.J. McNally, *Remembering Trauma* (Cambridge, MA, US: Belknap Press/Harvard University Press, 2003).

Broadly then, response patterns held by Class 1 were not in line with the current scientific understanding of memory, and as such, the beliefs held by group one were termed The Common Sense Memory Belief System (CSMBS). Beliefs held by Class 2, were, in contrast, more supported by scientific evidence, as such these beliefs were termed The Scientific Memory Belief System (SMBS). The two belief systems are characterised by a constellation of beliefs and despite some minor agreement, they are, in the most part, the opposites of each other. Or, in other words, many common-sense beliefs are contradicted by beliefs based on scientific research.<sup>32</sup>



**Figure 2. Top 10 items with the largest difference in endorsement. Diamond points indicate Class 1 (majority public and police), circles indicate Class 2 (majority memory researchers). Higher probability of endorsement means higher probability that an individual in the group will agree with the item.**

## The effect of the CSMBS on police decision-making in rape investigations

The findings of Akhtar et al.'s study suggest that police officers are likely to rely on the CSMBS when making assessments of complainants' autobiographical memories across all crime types. However, we consider that the influence of the CSMBS on officers' assessments of autobiographical memory is likely to be heightened in rape cases because the complainant's account is often the sole or key piece of evidence indicating that a rape has taken place.<sup>33</sup> As a result, officers are likely to base their decisions about how to proceed with a case largely on the

<sup>32</sup> See S. Akhtar et al., "The 'common sense' memory belief system and its implications" (2018) 22(3) *Int. J. Evid. Proof* 289 for a comprehensive discussion.

<sup>33</sup> K. Hohl and E.A. Stanko, "Complaints of rape and the criminal justice system: fresh evidence on the attrition problem in England and Wales" (2015) 12(3) *European Journal of Criminology* 324, 337; K. Ask, "A survey of police officers' and prosecutors' beliefs about crime victim behaviors" (2009) 25(6) *Journal of Interpersonal Violence* 1132, 1145.



information provided in the autobiographical account,<sup>34</sup> and their decisions are likely to be influenced by their perception of the genuineness of the complaint.<sup>35</sup>

Where the complainant's account does not accord well with the features of the CSMBS officers are more likely to conclude that the complaint lacks credibility, or that it is false. This is because many of the beliefs that make up the CSMBS are contradicted by scientific evidence, leading to faulty judgements of memory-based evidence. This parallels findings from McMillan and Thomas<sup>36</sup> study in which they reported that officers were more likely to doubt the complainant's account when it lacked detail or contained inconsistencies. This is concerning because research has shown that doubts about the credibility and reliability of the victim's account can negatively affect the investigative effort expended by police<sup>37</sup> and increase the likelihood that a case will fail to proceed further through the criminal justice system.<sup>38</sup> Such a belief system is also likely to perpetuate the "culture of scepticism"<sup>39</sup> which is thought by some to exist amongst police officers towards rape complaints, and may go some way to explain the police decision-making which contributes to the high rate of attrition in rape cases which is known to occur at the police investigation stage.<sup>40</sup>

## Commissioner of Police of the Metropolis v DSD

While it was previously the case that crime victims had little recourse against the police if officers decided not to pursue the complaint, or against the CPS if they decided not to prosecute, an increased acknowledgement of the rights of crime victims, both domestically<sup>41</sup> and internationally,<sup>42</sup> has led to advances in this area. Victims can now seek a review of decisions not to prosecute under the Victims' Right to Review Scheme<sup>43</sup>; bring a claim against the police in negligence in limited

<sup>34</sup> Barrett and Hamilton-Giachritsis, "The victim as a means to an end: detective decision-making in a simulated investigation of attempted rape" (2013) 10 *Journal of Investigative Psychology and Offender Profiling* 200, 206.

<sup>35</sup> J. Lovett and L. Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* (London: Child and Women Abuse Studies Unit, London Metropolitan University, 2009), p.49; K. Hohl and E.A. Stanko, "Complaints of rape and the criminal justice system: fresh evidence on the attrition problem in England and Wales" (2015) 12(3) *European Journal of Criminology* 324, 337.

<sup>36</sup> L. McMillan and M. Thomas, "Police interviews of rape victims: tensions and contradictions" in M. Horvath and J. Brown (eds), *Rape: Challenging contemporary thinking* (Devon: Willan Publishing, 2009).

<sup>37</sup> M.A. Alderden and S.E. Ullman, "Creating a more complete and current picture: examining police and prosecutor decision-making when processing sexual assault cases" (2012) 18(5) *Violence Against Women* 525, 527; HMIC/HMCPSP, *Without consent* (London: HMIC, 2007); J.M. Brown, C. Hamilton and D. O'Neill, "Characteristics associated with rape attrition and the role played by scepticism or legal rationality by investigators and prosecutors" (2007) 13(4) *Psychology, Crime and Law* 355, 356.

<sup>38</sup> HMIC, *Crime recording: making the victim count* (London: HMIC, 2014), p.74; E. Darwinkel, M. Powell and P. Tidmarsh, "Improving police officers' perceptions of sexual offending through intensive training" (2013) 40(8) *Criminal Justice and Behavior* 895, 896; L. Ellison and V.E. Munro, "Taking trauma seriously: critical reflections on the criminal justice process" (2017) 21(3) *International Journal of Evidence and Proof* 183, 189.

<sup>39</sup> L. Kelly, J. Lovett and L. Regan, *A gap or a chasm? Attrition in reported rape cases*, Home Office Research Study No.293 (London: HMSO, 2005), p.83.

<sup>40</sup> J. Temkin and B. Krahe, *Sexual assault and the justice gap: a question of attitude* (Oxford: Hart Publishing, 2008), p.18; Lovett and Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* (London: Child and Women Abuse Studies Unit, London Metropolitan University, 2009); Barrett and Hamilton-Giachritsis, "The victim as a means to an end: detective decision-making in a simulated investigation of attempted rape" (2013) 10 *Journal of Investigative Psychology and Offender Profiling* 200, 201; L. Kelly, *A research review on the reporting, investigation and prosecution of rape cases* (London: HMCPSP, 2002), p.15.

<sup>41</sup> For example, in the *Code of Practice for Victims of Crime* (London: Ministry of Justice, 2015).

<sup>42</sup> For example, in EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

<sup>43</sup> The Court of Appeal decision in *Christopher Killick* [2011] EWCA Crim 1608; [2012] 1 Cr. App. R. 10 prompted the introduction of the Victims' Right to Review Scheme by the CPS in 2013. In 2015 the National Police Chiefs' Council (NPCC) introduced a Victims' Right to Review Scheme applicable to police decisions not to prosecute.

circumstances<sup>44</sup>; and hold the police to account for investigative failures through complaints made via internal police complaints mechanisms, investigations conducted by the Independent Office for Police Conduct,<sup>45</sup> and references made to the Parliamentary and Health Service Ombudsman.<sup>46</sup> With such increased attention being paid to the interests of crime victims also comes an increased appetite to understand the way in which key criminal justice decision-makers reach the decisions that may affect those interests. It is in this respect that research such as that done by Akhtar et al. may prove particularly useful.

The importance of developing a deeper understanding of police decision-making in rape cases is also heightened following the Supreme Court's decision in *DSD*, in which the Court concluded that crime victims could successfully claim against the police where police investigative failures amounted to a breach of their human rights. As we show in our analysis below, we consider that it is likely that the CSMBS identified by Akhtar et al. underpinned the problematic police decision-making identified in that case. With a deeper understanding of the basis upon which such investigative failures are likely to arise it is anticipated that police forces will be better able to mitigate the risk of future failures by challenging officers' reliance on problematic belief systems through training. Research done in this area may also prove useful to those representing litigants in future cases by providing markers against which to identify patterns in police decision-making which may help to convince the Court that the threshold for liability set in *DSD* has or has not been met.

*DSD* was an appeal by the Commissioner against a finding in the High Court<sup>47</sup> in favour of two victims of John Worboys, who is considered to have committed more than 100 drug and alcohol assisted rapes and sexual assaults between 2002–2008 while working as a black cab driver in the London area. Worboys' modus operandi was to offer female passengers an alcoholic drink which he had laced with other intoxicants, as part of a ruse that he was celebrating a financial windfall. Upon accepting the drink his passengers would often lose consciousness and it was then that Worboys would sexually assault or rape them.

The two respondents in *DSD*, *DSD* and *NBV*, had been awarded declarations and damages in the High Court against the police under ss.7 and 8 of the Human Rights Act 1998 (HRA), on the basis that failures in the investigation of their

Guidance on the CPS scheme can be found at [https://www.cps.gov.uk/sites/default/files/documents/publications/vrr\\_guidance\\_2016.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/vrr_guidance_2016.pdf) [Accessed 19 July 2019] and on the NPCC scheme at [http://operationresolve.co.uk/media/1370/np\\_guidance\\_on\\_police\\_victim\\_right\\_to\\_review\\_feb\\_2.pdf](http://operationresolve.co.uk/media/1370/np_guidance_on_police_victim_right_to_review_feb_2.pdf) [Accessed 19 July 2019].

<sup>44</sup>In *Hill v Chief Constable of West Yorkshire* [1988] Q.B. 60; [1987] 2 W.L.R. 1126 the House of Lords held that the general duty owed by the police to suppress crime did not carry with it a private law duty in negligence towards individual members of the public, and that it would be contrary to the public interest to impose such a duty on the police for mistakes made in their investigation of crime. While this has at times been interpreted as a general immunity against claims brought in negligence against the police, the Supreme Court in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] 2 W.L.R. 595 made it clear that that officers do not have a blanket immunity against actions brought in negligence. For a discussion of *Robinson* see R. Gladwin-Geoghegan and S. Foster, "Police liability in negligence: immunity or incremental liability?" (2018) 23(1) *Coventry Law Journal* 38.

<sup>45</sup>The Independent Office for Police Conduct (IOPC) replaced the Independent Police Complaints Commission in January 2018. The IOPC oversees the police complaints system in England and Wales. Information on the IOPC can be found at <https://www.policeconduct.gov.uk> [Accessed 19 July 2019].

<sup>46</sup>References to the Ombudsman must be made via the victim's MP. The right to make a complaint to the Ombudsman is provided by Code 9.4 of the *Code of Practice for Victims of Crime* (London: Ministry of Justice, 2015). Information on the Ombudsman can be found at <https://www.ombudsman.org.uk/> [Accessed 19 July 2019].

<sup>47</sup>*DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (Admin).

respective complaints amounted to breaches of art.3 of the European Convention on Human Rights (ECHR).

Although the text of art.3 sets down a negative obligation upon states to prohibit state-inflicted torture or inhuman or degrading treatment or punishment, the European Court of Human Rights (ECtHR) has also interpreted art.3 as placing ancillary positive obligations upon states. In *MC v Bulgaria*<sup>48</sup> the applicant complained that the Bulgarian State's response to her complaint of rape amounted to a breach of her human rights under arts 3, 8, 13 and 14 because Bulgarian domestic law and practice did not provide effective protection against rape, and that the authorities had not properly investigated her complaint.<sup>49</sup> The ECtHR found that there had been a violation of the Bulgarian State's positive obligations under arts 3 and 8 and concluded that states have a positive obligation under arts 3 and 8 to "enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."<sup>50</sup>

In *DSD* the Supreme Court recognised that there was a clear line of Strasbourg authority which had interpreted art.3 as placing a duty on states to properly investigate complaints of serious criminal violence,<sup>51</sup> and that such an approach was necessary to effectively protect the rights enshrined in the article.<sup>52</sup> Unanimously dismissing the Commissioner's appeal, the Supreme Court followed the Strasbourg jurisprudence and held that the positive obligation to effectively investigate rape complaints applied whether the perpetrator of the rape was a state actor or a private citizen,<sup>53</sup> and that the obligation could be breached by serious systemic and/or operational failings in the police investigation.<sup>54</sup> This last point proved to be an area of significant disagreement amongst the Justices deciding the case, with two of the five (Lords Hughes and Mance) preferring to limit the scope of the judgment to exclude operational failings by individual officers.

The decision in *DSD* does not spell out exactly how bad the police failures need to be in order to meet the "egregious and significant" threshold set down by Lord Kerr,<sup>55</sup> but simple errors or isolated omissions will not suffice.<sup>56</sup> That said, there is no requirement that an applicant must show that *but for* the failures the outcome of the investigation would have been successful.<sup>57</sup>

In the High Court Mr Justice Green had extensively detailed the interconnected serious systemic and operational errors apparent in the police investigations of *DSD* and *NBV*'s complaints,<sup>58</sup> and his analysis gives a good indication of the types of failures that are likely to satisfy in future cases. In his judgment Mr Justice Green highlighted that officers had failed to follow up obvious evidential leads such as speaking with independent witnesses, checking CCTV footage to identify Worboys' taxi, and in *NBV*'s case, that officers had failed to search Worboys'

<sup>48</sup> *MC v Bulgaria* [2005] 40 E.H.R.R. 20; 15 B.H.R.C. 627.

<sup>49</sup> *MC v Bulgaria* [2005] 40 E.H.R.R. 20 at [109]; 15 B.H.R.C. 627.

<sup>50</sup> *MC v Bulgaria* [2005] 40 E.H.R.R. 20 at [153]; 15 B.H.R.C. 627.

<sup>51</sup> For a summary of ECtHR jurisprudence demonstrating the extent of the positive obligation see *O'Keefe v Ireland* (2014) 59 E.H.R.R. 15 at [144]–[152]; 35 B.H.R.C. 601.

<sup>52</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895 at [24].

<sup>53</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895 at [62].

<sup>54</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895 at [58].

<sup>55</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895 at [29].

<sup>56</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895 at [29].

<sup>57</sup> J. Rogers, "Liability for egregiously bad police investigations" (2018) 6 *Archbold Review* 6, 6.

<sup>58</sup> *DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 at [243]–[313].

address and car following his arrest. A culture of scepticism was also identified as underpinning much of the police decision-making in these cases. This had led officers to inappropriately discount aspects of the information provided by the complainants and inadequately challenge the conflicting accounts offered by Worboys. Officers were also found to have inadequate training and supervision, particularly in dealing with drug and alcohol induced rapes and sexual assaults, and to have insufficiently utilised intelligence sources, such as police databases, which would have been likely to have expedited Worboys' apprehension and arrest.

Although officer reliance on the CSMBS was not explicitly highlighted by the courts considering the case, or by the Independent Police Complaints Commission in their report of the police inquiry into allegations against Worboys,<sup>59</sup> a close analysis of the case reports and the IPCC report suggests that reliance on the CSMBS is likely to have played a significant role in the police decision-making that led to the serious investigative failures.

The general air of scepticism demonstrated by officers towards DSD's account centred on her inability to remember what had happened to her, and her presentation at the police station following the attack in a drunken and/or drugged state.<sup>60</sup> Similarly, NBV's inability to remember details of the attack against her, and her unusual behaviour captured on CCTV as she left Worboys' cab, had led officers to consider that there were inconsistencies in her allegation.<sup>61</sup> Indeed, the very methods used by Worboys to subdue his victims had meant that DSD and NBV were unable to provide the detailed, vivid and fluent memory accounts which officers relying on the CSMBS were likely to expect, and this undoubtedly added to the investigative malaise demonstrated by officers dealing with their complaints. Unfortunately, this was so despite the fact that the features of the cases that led officers to question the complainants' credibility (i.e. the gaps in their memory) were entirely consistent with their accounts of having been drugged by Worboys.

The significance of the decision in *DSD* cannot be understated. The fact that the domestic courts have confirmed that victims of rape can seek redress under the HRA 1998 for failures in the police's investigation of their complaints is a substantial advance to the rights of this group of victims, and has the potential to place their interests more squarely at the heart of policing objectives in this area.<sup>62</sup> That said, the Justices in *DSD* were mindful to place strict limits on the applicability of the decision by setting a high threshold for qualifying police failures. This, along with other limiting factors such as the one-year time limit within which to raise a claim,<sup>63</sup> and the relatively low level of compensation available,<sup>64</sup> means that

<sup>59</sup> Independent Police Complaints Commission, *Commissioner's report: IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* (London: IPCC, 2010).

<sup>60</sup> *DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (Admin) at [255]–[257], [278], [292].

<sup>61</sup> *DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 at [308], [263]–[264]; Independent Police Complaints Commission, *Commissioner's report: IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* (London: IPCC, 2010), p.10.

<sup>62</sup> See Lord Kerr's dicta in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11; [2018] 2 W.L.R. 895 at [71].

<sup>63</sup> Human Rights Act 1998 s.7(5)(a).

<sup>64</sup> J. Rogers, "Liability for egregiously bad police investigations" (2018) 6 *Archbold Review* 6, 8; K. Harrison, "Commissioner of Police of the Metropolis v DSD—case comment" (2018) 2 *Journal of Personal Injury Law* C69, C74. Also note that in the High Court *DSD* and *NBV* were awarded damages in the sums of £22,250 and £19,000 respectively.

the courts are unlikely to be inundated with cases argued on the basis of the principles set down in *DSD*.

## Conclusion

Arguably the real legacy of *DSD*, and the other cases which may seek to follow it, will be the impact that such highly publicised human rights breaches will have on the willingness of future rape victims to engage with the criminal justice process. Any increase in the perceived lack of procedural fairness in the police's treatment of rape complaints is likely to negatively affect the willingness of rape victims to come forward and make a complaint to the police, particularly when this is accompanied by concerns that the police may not believe their account of what has happened to them.<sup>65</sup> To the extent that the flawed police decision-making in cases like *DSD* is attributable to the CSMBS we should look to work with officers to challenge their reliance on this memory belief system. We propose that specific training from memory researchers is needed for police, particularly those officers who are required to make decisions that will affect the likelihood of a rape case continuing through the criminal justice system. The benefits of training and exposure to memory-based materials can clearly be seen in the analysis detailed above, where we see that the probability of memory researchers holding the SMBS increase with age and presumably then, experience working with and being exposed to, scientific studies of memory. By training the relevant police officers, we can hope to reduce the risk of failing those rape victims who do make a complaint to the police, and to avoid the litigation which may otherwise deter further victims from bringing their rapes to the police's attention.

**Table 1. Questionnaire sub-topics and associated statements**

Sub-Topic	Items
1 Memory is generally accurate	<p>People often accurately remember emotions and feelings</p> <p>People generally remember what happened even though some details may be forgotten, and some remembered inaccurately</p> <p>People often remember the thoughts they had during a specific experience</p> <p>Despite some forgetting and occasional errors memory is generally accurate</p> <p>The details in memories of specific events are usually accurate</p>
2 The more details the more accurate the memory	<p>A memory that has few details is likely to be inaccurate</p> <p>A memory that is recalled fluently is likely to be accurate</p> <p>A memory that is recalled with a lot of vivid and specific details is highly likely to be accurate</p> <p>Highly specific details are more likely to be accurate than details that are less specific</p> <p>A memory that is recalled hesitantly, with lots of going back and double takes, is likely to be inaccurate</p> <p>The more detailed the description of a memory the more accurate the recollection</p> <p>Memories containing peripheral information, e.g. surroundings and background details, are more likely to be accurate</p>

<sup>65</sup> As recognised by Mr Justice Green in *DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 at [275]. See also J. Jordan, *The word of a woman: police, rape and belief* (London: Palgrave, 2004); Kelly, *A research review on the reporting, investigation and prosecution of rape cases* (London: HMCPSI, 2002), p.17.

Sub-Topic	Items
3 Memories can be false	<p>People can come to remember events that never occurred</p> <p>Over time memories deteriorate and can become less accurate</p> <p>Memories of traumatic memories may contain details that are false</p> <p>It is possible for a highly vivid, very specific, detail in an account of a memory to be wholly false</p>
4 Memory is like a video	<p>Memories are like photographs or videos</p> <p>Memory is like a movie of one's experiences</p> <p>Memory is like a filing cabinet in which each document records a specific memory</p>
5 Emotional intensity and accuracy	<p>Experiences that feature very strong emotions are more accurately remembered than experiences in which emotions were moderate or weak</p> <p>Memories of emotionally negative experiences are more accurately remembered than memories of neutral and positive experiences</p>
6 Trauma and memory	<p>Traumatic experiences can be repressed for many years and then recovered</p> <p>When someone recalls a memory of childhood sexual abuse, or perhaps a series of such memories, it will usually be the case that there is at least some truth to their recall</p> <p>Memories can be forgotten over many years, even decades, but later remembered again</p> <p>Memories of traumatic experiences can be kept out of mind</p> <p>When a number of people all recall being (separately) abused by a particular individual or group of individuals, the likelihood that the abuse occurred is greatly increased</p>
7 Childhood memory	<p>Memories from childhood are as accurate as memories from other ages</p> <p>Children's memories are less accurate than adult's memories</p>
8 Durability and reliving trauma	<p>Memories of intense emotional experiences are "burnt in the brain" and are therefore remembered in detail for long periods of time</p> <p>Traumatic memories come to mind in the form of "flashbacks"</p> <p>A "flashback" of a traumatic memory causes a re-living of the remembered event</p>