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This Briefing Paper focuses on the importance of complainant testimony in achieving just outcomes in rape trials. The authors undertake a comparative analysis of rape trials, and the types of information elicited during police interviews with complainants, to that provided during evidence-in-chief at trial. The study's findings indicate that current approaches during trials may lead to potentially important information being excluded. The authors highlight the need for further research into whether pre-recorded interviews with complainants may assist in jury deliberations.



Dr Ruth Delaforce  
Editor  
CEPS Research Fellow

## Using video recorded police interviews to get the full story from complainants in rape trials

Dr Nina Westera, Professor Mark Kebbell & Dr Rebecca Milne

### Background

Despite many reforms over the last thirty years targeted at improving outcomes in rape cases, the number of reported cases in Western countries that result in conviction have not increased (see Daly & Bouhours, 2010; the five countries examined were Australia, England, Wales, Canada and the United States.) In these types of cases a scarcity of independent evidence corroborating the complaint makes it difficult for the prosecution to reach the evidential threshold of proof beyond reasonable doubt. This is especially the case with the common defence of consent, where jurors must make an assessment about the behaviour of both parties in determining whether consent was given, and if the defendant was aware of the absence of consent. The defendant's right to silence means jurors are often left only with the complainant's evidence as the basis for deliberations. Improving the completeness and reliability of complainant evidence may therefore assist jurors to reach just decisions. One under-utilised legal reform that provides an opportunity to improve the quality of the complainant's evidence is the use of the complainant's video recorded police interview made during the investigation, as the basis for their evidence at trial (referred to in this paper as video-recorded evidence). In this mode of evidence, the video interview is played to the jury in the presence of the complainant during prosecutor elicited evidence in chief; this is then followed by supplementary questions from the prosecutor and cross-examination by defence counsel.<sup>1</sup>

There are three main reasons why video-recorded evidence may improve the overall quality of complainant evidence:

- The negative effects of delay on memory suggest the 'fresher' account in the video interview will contain more detailed information, and is also less likely to be influenced by distortions that occur over time;
- Recommended police practice is to use the cognitive interview which promotes more complete memory recall by encouraging the complainant to control the interview and provide an account in their own words, time and order. Open questions

<sup>1</sup> This alternative way of evidence, previously reserved for children and those suffering from an intellectual impairment, is now available in New Zealand, the Northern Territory of Australia, England, Wales and Norway.

that facilitate more elaborate recall are used to generate narrative responses that also provide more detailed information. This approach is in contrast to prosecutor controlled testimony that favours short answer responses for presentation reasons. These shorter responses may result in key information being missed that can later be used to discredit the complainant at trial; and

- The interview is likely to be conducted in a less stressful environment than the formal courtroom. In addition to aiding the concentration required for memory recall, the interview environment may make the complainant more comfortable disclosing potentially traumatising and embarrassing, but evidentially important, details about the alleged offending.

These qualities of the video interview could improve the probative value of the complainant's evidence by increasing the information available about whether consent was given, or perceived to be given. For example, allowing more detail about who said what in conversations the complainant had with the alleged offender about consent, rather than just an overview of those conversations. Extra information may also help to overcome the negative effects of 'rape myths' that jurors often hold. Rape seldom meets stereotypes that involve a stranger who physically overpowers a resisting complainant. Research suggests that when these stereotypes are not met, the jury may perceive the complainant as behaving counter-intuitively or unreasonably, and is therefore blameworthy (Temkin & Krahé, 2008). Providing the jury with extra information that helps to explain the complainant's behaviour may mitigate the negative effects of these 'rape myths.' For example, the complainant explaining that she did not physically resist the alleged offender because she was concerned that this would cause the level of violence to escalate.

## Present research and method

Until now, no research has examined how

video-recorded evidence differs from live evidence in chief (EIC) in the courtroom trial in rape, or in other cases. Without knowing the actual differences, there may be little incentive for prosecutors and judges to depart from a well-established practice of reliance on live evidence and instead increase the use of video-recorded evidence. The purpose of the present study was therefore to draw upon actual rape cases, comparing the content of the police interview of a complainant with the complainant's live EIC.

Over the course of one calendar year court documents for all adult female rape trials<sup>2</sup> were gathered from two metropolitan areas in New Zealand. Ten cases were gathered in total. In all cases, the prosecution did not apply to the court to seek leave to adduce video-recorded evidence despite legislation allowing this practice (Evidence Act 2006). In each case the transcripts for the complainant's video recorded police interview were compared with transcripts of the same complainant's live EIC. Question type, cognitive interview format and response length were coded to compare actual differences in police and prosecutor questioning and interviewing strategies. Also coded was the consistency of EIC with that of the police interview for details that related to what happened during the alleged sexual or violent offences specified in the indictments. For example, for an indictment of rape transcripts were coded for everything that happened from "he pushed me on the bed" to "he rolled over and fell asleep". Also coded were all details relevant to the defendant's *mens rea* leading up to the time of offending. For example, "Earlier in the evening I told him I didn't want him near me" was included even though it took place prior to the rape event as it may help to establish lack of consent. To specify the type of information, each detail

<sup>2</sup> Although there are different legal definitions, for the purpose of this study we use the term 'rape' to denote genital or anal penetration of one person by any part of another or by an object held or manipulated without consent. An 'adult' was defined as someone of or over the age of 18 years. Cases often contained both sexual and other indictments of violence.

was coded into one of five categories: (1) physical action (e.g., "he pushed me onto the bed"); (2) verbalization (e.g., "he asked me if he could continue"); (3) cognition (e.g., "if I didn't do what he said I knew I would get a hiding"); (4) emotion (e.g., "I was terrified"); and (5) person/object description (e.g., "I was wearing my underwear").

## Results and Discussion

When consistency between the police interview and EIC was examined, we found that over two thirds of the information central to establishing the alleged sexual and violent offending that was in the interview was later omitted from EIC (as illustrated in Figure 1). Detail contained in the interview was more likely to be omitted from EIC than provided by the complainant at trial in a consistent way for all the categories of detail measured (physical actions, verbalizations, emotions, cognitions and descriptions of people and surrounds)<sup>3</sup>. These findings support previous research that suggests the live evidence processes are detrimental to memory recall. Hence our findings suggest that if the video had been presented as evidence at trial, jurors would have received substantially more relevant information from the complainant on which to deliberate than live EIC provided by the complainant.

The probative value of the evidence is likely to be affected. For example, the loss of verbal details may increase ambiguity around the issue of consent. A short "I told him I didn't want to" may less clearly demonstrate the defendant's awareness of a lack of consent than the complainant reporting dialogue from a conversation with the defendant about her not wanting to have sex such as: I said "Stop touching me"; he said "I really want you, can I continue?"; I said "No. Stop it." As too might details about any physical resistance offered and details around the actual sexual acts.

The loss of these details in live EIC may

<sup>3</sup> An ANOVA with follow-up *t*-tests indicated this was significant ( $p < .001$ ).

### Details omitted or included in EIC compared to the police interview

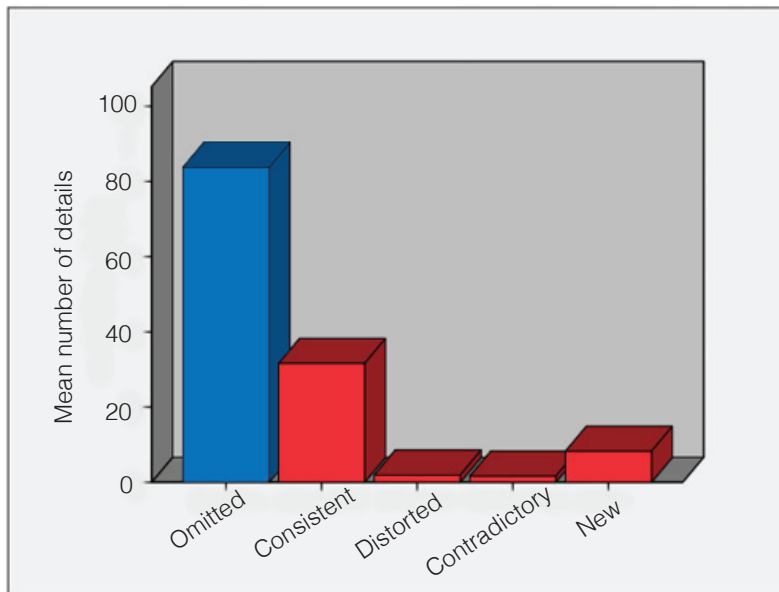


Figure 1

also lead to a missed opportunity to negate 'rape myths biases' held by jurors that operate against the complainant's credibility. Worryingly, details relevant to cognitions suffered the greatest loss and were virtually non-existent in live evidence. In explaining her own response, the complainant may help jurors to understand what might otherwise appear as counter-intuitive behaviour. For example, that the complainant complied because, due to prior experience, she believed that resisting the sexual assault would result in even more violent behaviour. Emotional details that were lost, such as the complainant's distress or fear and her perceptions of the defendant's anger or other emotions, could also make the evidence more convincing if included.

A small number of distortions and contradictions were found between live EIC and the interview. These inconsistencies and omissions expose the complainant to potentially damaging cross-examination that highlights the differences between what was said during the police interview and live EIC, and may undermine the complainant's credibility. This is concerning, because these anomalies are likely to be an artefact of the factors which influence memory recall in the current criminal justice process, rather than a

genuine reflection of the complainant's reliability.

The varying questioning strategies and interview techniques used by prosecutors and police are likely to contribute to the changes in recall found. Despite similar question types used by both police and prosecutors, interviewers elicited longer responses than prosecutors.<sup>4</sup> Most prominently, open questions asked by the interviewer produced responses five times longer than open questions asked by the prosecutor. Representative of their different training, cognitive interview techniques were commonly used by police but not at all by prosecutors. This difference in question response, and the recommended practice for prosecutors to control the complainant, are likely to contribute to the changes found in information given by the complainant. This 'quick fire' question and answer approach that is used by prosecutors is likely to interrupt the concentration of the complainant and result in less elaborate recall and reduced accuracy. In addition, the control exerted over the complainant is likely to restrict their answers to information requested by the prosecutor, so useful information that is

<sup>4</sup> An ANOVA with follow-up t-tests indicated this was significant ( $p < .01$ ).

not requested is potentially missed.

The marked decline of relevant information in 'live' EIC raises the question why do prosecutors avoid the use of video-recorded evidence? One reason prosecutors cite is that the video medium has less impact on jurors than the complainant live in the courtroom, a view which some empirical studies support but others do not. Another reason cited by prosecutors is a concern that the long narratives in the interview may reduce the impact of the evidence for jurors. The lack of systematic examination of this issue makes it an important area for future research. If the narrative format in the interview does reduce the coherence of the account, it could be more cognitively demanding to process. Hence, jurors may more readily rely on their expectancies to process the information rather than doing so systematically, to the detriment of effective decision making. On the other hand, the additional information and the free narrative format may make the video more closely resemble a story and, in turn, be more convincing. Finally, like most groups, prosecutors may be reticent to adopt new practices, especially when unaware of the scientific evidence that suggests video-recorded evidence enhances completeness of evidence, as highlighted by this study (for further discussion on the reasons see Westera, Kebbell & Milne, 2012).

### Conclusions

This study examined what difference it would make to rape complainant evidence if video-recorded evidence was used instead of live evidence in chief at trial. The findings suggest that jurors would receive three times more information about the central elements of the offending if the police video interview was presented as evidence. This additional information may improve probative value of the complainant's account and help provide an explanation for the complainant's behaviour that might otherwise appear counter-intuitive. It is hoped that this study will generate further discussion about the potential of video-recorded evidence to improve just outcomes in rape cases.



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## About the Authors

**Dr Nina Westera** is a Research Fellow for the the ARC Centre of Excellence in Policing and Security (CEPS). Nina recently completed her PhD through CEPS and the Griffith School of Applied Psychology on how to improve investigations and prosecutions of sexual assault cases through interviewing practices.

**Mark Kebbell** is a Chief Investigator for the ARC Centre of Excellence in Policing and Security (CEPS) and Professor for the School of Psychology at Griffith University in Brisbane, Australia. As a forensic psychologist, Mark's research interests include investigative interviewing and devising effective, legal and ethical ways of eliciting accurate accounts from victims, witnesses and suspects.

**Dr Rebecca Milne** is a Reader in Forensic Psychology at the Institute of Criminal Justice Studies at the University of Portsmouth England. A chartered forensic psychologist and scientist and Associate Fellow of the British Psychological Society, Rebecca is an Associate Editor of the *International Journal of Police Science and Management* and is on the editorial boards for the *Journal of Investigative Psychology and Offender Profiling* and the *British Journal of Forensic Practice*.

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## ARC Centre of Excellence in Policing and Security

M10\_3.01  
Mt Gravatt Campus  
170 Kessels Road  
NATHAN QLD 4122  
Ph: 07 3735 6903  
Fax: 07 3735 1033

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