

2019

CRIME IN
THE INTIMATE
SPHERE:
ISSUES IN
EVIDENCE

WORKSHOP REPORT



ABOUT THE WORKSHOP

TITLE

Crime in the Intimate Sphere: Issues in Evidence

CONVENORS

Dr Caitlin Goss

Dr Jason Chin

Prof Heather Douglas FASSA

DATE AND PLACE

5 - 6 December 2019

Supreme Court of Queensland, Brisbane.

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OVERVIEW

The Crime in the Intimate Sphere: Issues in Evidence workshop was held at the Supreme Court of Queensland in Brisbane on 5 and 6 December 2019.

The workshop drew together practitioners and researchers from a range of disciplines, including law, psychology, and social work, in order to obtain a diverse range of perspectives in considering evidence issues in domestic and family violence (DFV) cases.

DFV is recognised as a significant social issue in Australia. However, this workshop attempted to bring greater attention to an area which has received comparatively less scholarly consideration: how to get the best evidence before the courts in DFV cases. The workshop was organised into six thematically-grouped sessions, and was conducted informally so as to encourage open discussion of the issues. To do so, we assembled the following experts:

- His Honour Justice Applegarth (Supreme Court of Queensland)
- Dr Jason Chin (University of Sydney)
- Dr Victoria Colvin (University of Wollongong)
- Joseph Crawfoot (Counsel Assisting the Northern Coroner for Queensland)
- Tracey De Simone (Office of the Child and Family Official Solicitor, Department of Child Safety, Youth and Women, Queensland)
- Professor Heather Douglas (University of Queensland)
- Professor Jeremy Gans (University of Melbourne)
- Dr Jane Goodman-Delahunty (Charles Sturt University)
- Professor Leigh Goodmark (University of Maryland)
- Dr Caitlin Goss (University of Queensland)
- Professor David Hamer (University of Sydney)
- Dr Bridget Harris (Queensland University of Technology)
- Professor Blake McKimmie (University of Queensland)
- Professor Bronwyn Naylor (RMIT University)
- Detective Inspector Mike Newman (Queensland Police Service)
- Ben Power (barrister, Queensland Bar)
- Zoe Rathus AM (Griffith University)
- Nick Rushworth (Brain Injury Australia)
- Julie Sarkozi (Women's Legal Service)
- Professor Nan Seuffert (University of Wollongong)
- Associate Professor Stella Tarrant (University of Western Australia)
- Professor Julia Tolmie (University of Auckland)
- Dr Danielle Tyson (Deakin University)
- Her Honour Magistrate Nerida Wilson (Northern Coroner for Queensland)

WORKSHOP OUTPUTS

SESSION 1

NAVIGATING THE COURT ROOM IN DOMESTIC VIOLENCE CASES: SETTING THE SCENE

The first session provided important context for the broader discussion of the workshop. Two of the speakers, Julie Sarkozi and Tracey De Simone, currently work as practicing lawyers and were able to provide valuable insight into the reality of working on DFV cases, as well as strategies currently implemented to improve responses to DFV. These presentations effectively grounded the discussion in the reality of women's experiences with the legal system, which are invariably complex, and frequently negative.

Julie Sarkozi's presentation highlighted shortcomings in DFV investigation and prosecution, including that police investigations often don't capture the full context or overall dynamic of the relationship. Mistakes in the early stages of an investigation can have far-reaching consequences for victims, including putting them at greater risk of future assault. This session also provided insight from Tracey De Simone into child safety investigations of situations involving DFV. In particular, the importance of child safety practitioners framing violence as the result of the perpetrator's actions rather than the result of the victim remaining in the abusive relationship was highlighted. This is especially relevant

where Child Safety reports are used in other contexts, such as Family Court and criminal law proceedings.

Alongside these important contextual presentations, this session also included Nick Rushworth's presentation on traumatic brain injury (TBI) in the context of DFV, providing an insight into the complex challenges that often accompany DFV. Despite the lack of research into TBI in the DFV context, a substantial proportion of both DFV perpetrators and victims are affected by these injuries. To improve responses to DFV, TBI must not only be incorporated into screening processes, but backed up by additional service provision.

This session highlighted the continuing importance of examining and improving existing practices, as well as the need for additional research into emerging areas, particularly relating to the impact of traumatic brain injury on both victims and perpetrators of DFV.

SESSION 2

BUILDING CASES AND GATHERING THE BEST EVIDENCE

The second session dealt with how evidence is collected in DFV cases. A recurring theme in this session was how legal responses to DFV frequently fail women, and can in fact expose victims to further assault and secondary victimisation. Professor Leigh Goodmark's presentation provided a useful international point of comparison, outlining elements of the approach to prosecuting DFV cases in the United States. The no-drop prosecution policies of many states, which encourage or require prosecutors to pursue cases regardless of the victim's cooperation or preference, contribute to the many barriers victims of DFV face in pursuing justice. There was a particular focus in this presentation on the way in which such policies can have a profoundly negative impact on the victims they should be serving.

This session also featured an in-depth exploration of a case investigated by the Northern Coroner for Queensland, presented by Magistrate Nerida Wilson and Joseph Crawfoot. This provided an opportunity to delve into many shortcomings in the legal response to DFV, including missed opportunities to gather the best evidence. The presentation focussed primarily on missed evidence arising from the initial incident of DFV itself, and in the ensuing police response. Had more of these opportunities been taken, the victim in this case, who ultimately died as a result of her abuse, may have been effectively protected.

The session then moved to consider the prosecution stage of a case, with Dr Victoria Colvin providing insight into the process of determining whether a case proceeds to trial. The current two-step approach, which focuses on evidence gathering and the public interest, has many shortcomings and largely fails to adequately involve the victim in this highly consequential decision.

SESSION 3

UNDERSTANDING THE VICTIM DEFENDANT: THE ROLE OF EXPERT EVIDENCE

This session exhibited a range of approaches to considering the position of DFV victims who kill their abusive partners in self-defence. The first presentation from Associate Professor Stella Tarrant, Professor Julia Tolmie and Professor Heather Douglas opened the session by contemplating a new approach to utilising social entrapment evidence which would provide much needed context to women's experiences of abuse and limited safety options. The evidence admitted in these cases generally fails to provide adequate information about the reality of abused women's situations. Such evidence should be provided from an intersectional perspective to help juries understand the structural inequality women face.

This session also included a close analysis of Victorian data on cases where DFV victims kill their abusive partners from Dr Danielle Tyson and Professor Bronwyn Naylor, which highlighted a range of shortcomings in the legal system and trial practice. These shortcomings include limited use of the available DFV provisions and expert witnesses being restricted to forensic psychologists and psychiatrists. The shortcomings are likely to have contributed to unfavourable outcomes for the women charged with these crimes.

Justice Applegarth of the Supreme Court of Queensland also contributed to this session, providing insight into what makes

a good expert witness from the perspective of the court. He suggested that well-prepared, independent experts who can communicate clearly and comprehensibly to the jury present the best evidence.

One of the primary outcomes from this session was a recognition of the need to increase the number of expert witnesses able to present evidence in these cases. Possible solutions to this challenge might include the creation of a panel of expert witnesses able to present evidence in these cases, as well as the provision of training to experts about giving effective, useful, impartial evidence.

SESSION 4

PSYCHOLOGY AND DOMESTIC VIOLENCE: EXPERT EVIDENCE AND SCHEMAS


This session continued the focus on expert evidence, with a particular emphasis on psychological evidence. Dr Jane Goodman-Delahunty's presentation discussed the challenge of false assumptions held by members of the public, and errors in community knowledge and expectations. In particular, experts and lay people have been shown to have significantly different expectations of how memory works, which can impact how jury members perceive a victim's recollection of their abuse.

Expert evidence can play a crucial role dispelling these misconceptions. This may include evidence specific to the victim in the case, where expertise is applied directly to the case facts in order to provide context about the victim's specific situation, as well as social framework evidence, which consists of general psychological findings designed to be educative and provide a framework to understand the case. In order to provide the most effective evidence, experts should be well-prepared, present counter-intuitive evidence early, explain why there is no contact between the expert and the victim if that is the case, and make links to the facts of the case in presenting evidence.

Professor Blake McKimmie then built on this detailed examination of expert evidence by considering problems with


jury perceptions of evidence, particularly stereotypes juries rely on in making decisions about cases. Stereotypes juries hold about consensual sex and rape may be triggered where the facts of the case are perceived to match one of these stereotypes, and can significantly impact the way juries assess cases. In order to counter the impact of these stereotypes, a range of promising strategies may be adopted. These may include judicial instructions to juries, additional education for jury members, and even altering the order in which pieces of information about a case are presented so that the case no longer aligns neatly with jury stereotypes.

Finally, this session also presented an innovative plan from Dr Jason Chin to pre-record modules of expert evidence that may be utilised in expert evidence cases. Such an approach would address some of the challenges raised earlier in the workshop, including the shortage of properly qualified experts available to give evidence in DFV cases, particularly in remote areas. These modules may also be useful in addressing common misconceptions and misunderstandings about the dynamics of DFV. While the proposed modules would not be tailored to the facts of the case, much expert evidence about DFV does not vary much between cases, and this evidence could therefore still serve an important purpose. However, there may also be a range of



challenges in developing and producing these modules, including the cost of production, and the fact that the accused would not have an opportunity to personally cross-examine the expert.

The discussion of this presentation tackled these challenges, and raised a range of possible modifications to this approach, including framing the modules as educative information to be provided by the court, rather than as evidence for one side. Overall, this session highlighted the crucial role psychological expert evidence can play in DFV cases, and the importance of ensuring this evidence is available, and effectively conveyed to the jury.



SESSION 5

TENDENCY EVIDENCE: CASE LAW AND CHALLENGES

This session focused on the challenges in DFV cases arising from tendency evidence rules, and highlighted the complexity of this area of the law. In his presentation, Ben Power explored key case law in considering the challenges of determining admissibility of propensity evidence as proof of sexual interest. A particular challenge arises where a piece of evidence may be used both as 'bad character' propensity evidence or as contextual relationship evidence.

Evidence may be excluded as inadmissible propensity evidence even where it can also be viewed as context or relationship evidence, as it may be viewed as too prejudicial to the defence.

However, despite the importance of the propensity rule in safeguarding fairness for the accused, the strict application of this rule can result in highly relevant evidence being excluded from trial, highlighting the difficulty in balancing these opposing interests.

Next, Professor David Hamer considered potential reforms to propensity evidence rules, specifically in the context of child sexual abuse offences. Such principles can also be applied to DFV offences. In summary, the proposed reforms presume significant probative value for propensity evidence in child sexual offence cases, and lower the standard so that the probative value of the evidence must only 'outweigh', rather than 'substantially outweigh', the prejudicial risk to the defendant. However, while reform to this

area of the law is warranted, there are problems inherent in the proposed reforms, particularly that they may result in cases where different propensity rules must be applied to different pieces of evidence, creating additional, unnecessary procedural complexity. Further, the focus only on child sexual assault offences is misguided, and a broader approach would be more effective in achieving effective reform.

Dr Caitlin Goss then discussed the challenges of utilising social framework expert evidence in DFV cases, in the context of the common knowledge rule in the common law of evidence. Courts in common law jurisdictions have adopted slightly different approaches in different cases; in some cases, the courts have permitted expert psychological evidence only where it relates to an abnormal psychological state. This means that in order to admit psychological evidence which may provide social context for a victim's conduct and dispel jury misconceptions about victims and victim behaviour, there is a tendency to paint victims as abnormal, rather than someone responding in a normal way to an abnormal situation. Despite the problems inherent in this approach, alternatives, such as allowing psychological evidence where it is established that there is an incorrect prevailing social perception on an issue, may in fact be harder to satisfy than the common knowledge rule.

SESSION 6

EMERGING ISSUES AND PROMISING PRACTICES IN DOMESTIC VIOLENCE CASES

The final session of the workshop built upon the existing knowledge and outlined some emerging issues and practices in DFV cases.

First, Dr Bridget Harris investigated the emerging prominence of body-worn video camera (BWVC) footage in DFV trials. BWVC evidence is held, by proponents, to have a range of positive impacts, including: strengthening evidential cases; improving the likelihood of guilty pleas and convictions; reducing resources expended during investigations; improving police accountability and confidence in police and procedural justice; and reducing victim court appearances and secondary victimisation. However, BWVC footage also has a range of limitations and weaknesses which have been inadequately addressed. Significantly, the camera's perspective, and victims' expressions of trauma, which often contrast with societal expectations about 'ideal victim' presentation, are likely to influence how such footage is interpreted. Further research into the role of this evidence is needed, particularly as reliance of BWVC footage in these cases grows.

Finally, the workshop heard from Detective Inspector Mike Newman about promising training techniques for sexual assault police investigators, designed by practitioners and researchers. The aim of the training course was to improve

policing techniques and increase meaningful outcomes for survivors. The course included bias awareness training and was found to be successful in significantly changing police perceptions about sexual assault cases, including the view that barriers to proceeding with a case are the victim's fault. While the training course had positive impacts on the investigators' perceptions and practices, further research is required to investigate whether the course is having a meaningful impact on survivors' experiences when interacting with police.

CONCLUSIONS

Across two days, the workshop prompted interesting discussion about evidence in domestic violence cases, and resulted in a range of suggestions for reform.

One idea which was supported by many attendees was the possibility of providing training to expert witnesses to improve their ability to provide useful evidence in domestic violence cases. This is necessary due to challenges in finding expert witnesses in such cases, which include a lack of appropriately qualified witnesses, and an unwillingness among experts to testify.

Alongside more formal possibilities for training, the workshop also raised the possibility of increasing opportunities for information exchange, for example by compiling resources useful to experts in this field. Further research and consideration would be required to determine what kind of materials would be most beneficial in this area. Another suggestion was the creation of a panel of experts who can give evidence in this area, given that finding experts to appear in domestic violence cases is often challenging.

A final idea for further research and collaboration was to hold events with a broader range of participants, including judges, lawyers, mock jurors, and potentially even survivors if this could be arranged in an appropriate manner. The purpose of these events would be to obtain a wide range of perspectives, including from those directly dealing with DFV evidence, to determine what improvements are required to this area of the law and how they can be achieved.

While this workshop brought together a wide range of experts and a substantial volume of knowledge, there is nonetheless a need for far more research into this aspect of DFV cases. As noted by multiple attendees, this work is still considered an emerging issue in some spheres, underscoring the need for continued and increased attention. It is hoped that the special journal issue that will be produced from the workshop contributions will go some way to raising awareness of this issue and prompting such further research.