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Interviewing witnesses: Do investigative and evidential
requirements concur?

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Abstract

This paper examines the use of video recorded police interviews with witnesses for both investigative and court evidential purposes. How current police interviewing practices that use the cognitive interview may present as evidence, the ability of video recorded investigative interviews to be evidentially sufficient, and the effectiveness of these interviews as evidence are examined. As with any significant change, the move towards this method of evidence presents challenges. However, using this video record as evidence will ensure the best evidence is preserved and the jury has access to a transparent record that is more accurate and complete than previously experienced. Concerns over any extra time taken must be taken into account but also balanced against the likely long term benefits, not only in fairness to the proceedings but also by easing the process for victims and witnesses.

Key words: Witness, investigative interview, evidence, special measures, video

Interviewing witnesses: Do investigative and evidential requirements concur?

Witnesses are central to many criminal cases, indeed, some have argued they provide the most critical evidence in court (Kebbell & Milne, 1998; Zander & Henderson, 1993). Consequently considerable attention has been paid to eliciting reliable and detailed information from witnesses during interview (Milne & Bull, 1999). Traditionally, witnesses provide their accounts at two separate phases of the criminal justice process, firstly during the investigation and later when giving evidence during criminal proceedings. The separation of these phases has meant that the interview can be tailored to meet either investigative or evidential needs. However, advances in technology and attempts to improve the judicial process for witnesses have changed this process (e.g. Criminal Justice System, 2007). Under certain circumstances legislation in many developed nations allows for the video recorded¹ interview of the witness made during the investigation to be used as his or her evidence-in-chief at trial. In this paper we discuss the challenges for the criminal justice system of trying to make one interview meet both investigative and evidential purposes. Advances in effective police interviewing strategies are outlined and evaluated with regards the implications of presenting evidence elicited in this manner in court.

Advances in investigative interviewing

The purpose of the investigation is to establish what, if any, criminal offending has taken place and the identity of those who may be culpable for that offending (Kebbell & Wagstaff, 1997). To achieve this goal police seek information from a number of sources including witnesses and a successful interview can be conceptualized as one where the evidence elicited is accurate and complete. Until recently, commonly accepted practice was for an officer, who had

received minimal training in this process, to produce a hand written statement from information elicited during interview considered relevant to the investigation (Milne & Bull, 1999). After being endorsed by the witness, the statement was used as the basis for investigative decision making and potential evidence the witness would give in court.

Over the past thirty years however, psychological research enhancing the understanding of how the interview process can affect a witness's memory recall of events, have led to advancements in police practices in many jurisdictions. Of particular importance are the findings that memory is fallible and retrieval is a reconstructive process that can be influenced by questioning and interviewer behavior (see Baddeley, Eysenck, & Anderson, 2009). Influential work by Elizabeth Loftus and her colleagues demonstrated just how easy it is to contaminate eyewitness memory through the use of subtly leading questions such as "did you see the red car?" (e.g. Loftus, Miller, & Burns, 1978; Loftus & Palmer, 1974). Open questions such as "tell me what happened..." are generally considered the best type of questions to use because they encourage a detailed and unrestricted answer and are therefore less likely to influence the witness (see Milne & Bull, 1999). As a general proposition, as questions become more specific, responses become less accurate (Kebbell & Wagstaff, 1999). Open questions (e.g. if the witness previously mentioned an 'attacker' - 'describe your attacker'), specific-closed questions (e.g. if the witness previously mentioned a 'shirt' - 'what colour was his shirt?'), and yes/no questions (e.g. 'was he carrying anything') can all have a dramatic influence on the accuracy of witness answers (e.g. Lipton, 1977; Loftus & Palmer, 1974).

Fisher and Geiselman pioneered methods of enhancing memory recall and police practices with their development of the cognitive interview (Fisher & Geiselman, 1992). The original cognitive interview (CI) constituted four mnemonics in the form of instructions for the

witness. The report everything instruction requires the witness to tell all without editing anything out (including partial memories and memories they are unsure about). Mental reinstatement of context helps the witness recall by placing them back mentally in the physical and emotional context using a series of verbal instructions. The reinstate context and report everything mnemonics are based on the encoding specificity principle which theorize that the greater the feature overlap between encoding and retrieval conditions the more effective the retrieval (Tulving & Thomson, 1973). The other two mnemonics use multiple and varied retrieval techniques derived from the multicomponent view of a memory trace that different information may be retrieved from memory using different retrieval pathways (e.g. Tulving, 1974). These techniques include asking the witness to change temporal order of reporting (e.g. backwards recall) and change perspectives (e.g. from another person's viewpoint).

Field testing of the CI led refinements by including a structure for the interviewer to follow, appropriate communication skills and additional mnemonics (see Fisher, Geiselman, & Raymond, 1987; Fisher & Geiselman, 1992). Encouraging free narrative recall through open-ended questioning, not interrupting, and structuring the interview according to the witness's memory of events are integral to the CI. A meta-analysis showed similar accuracy rates for the CI (85%) to comparison control interviews (81%), with the CI conditions eliciting an average of 41% more correct details (Kohnken, Milne, Memon, & Bull, 1999).

Technological advances also mean that police are moving away from producing a written statement from the interview in favour of video recording (Criminal Justice System, 2007; Schollum, 2006). Barristers Heaton-Armstrong and Wolchover (1992) were one of the first to argue that written statements are mistakenly treated by the criminal justice system as a verbatim record of interview:

There is a certain coyness on the part of most officers, when asked how they "took" a statement, in admitting that the narrative was obtained by questioning. The fiction is perpetuated that for the most part statements are the product of straight dictation. p 161

The production of a written statement involves the officer filtering through the information generated during the interview and deciding what should and should not be included in the statement. The cognitive demands of this task make it susceptible to distortion at many stages and the resulting statement is an abridged and often inaccurate version of what was said at interview (Kohnken, 1995; Milne & Shaw, 1999). This limitation is illustrated by the work of Kohnken, Thurer, and Zoberbier (1994) who found statements written by the interviewer immediately after the interview contained only about two thirds of the information reported by the witness. Lamb, Orbach, Sternberg, Hershkowitz, and Horowitz (2000) examined twenty child interviews and found the interviewer's 'verbatim' notes were missing 25% of the forensically relevant details elicited by the witness. Also, in an attempt to control the flow of information the interviewer may use more closed and leading questions to the detriment of accuracy (Westera, Kebbell & Milne, 2010). For these reasons a number of psychological and linguistic professionals have also criticized the reliance on this method for lacking legitimacy and transparency (Milne & Shaw, 1999; Rock, 2001; Shepherd, 1999). Indeed, the fact that a statement is presented to give a coherent narrative of the event may mask limitations in the witness's recall. For instance, Sanders, Creaton, Bird, and Weber (1997) found that many witnesses with intellectual disabilities appeared far more competent in their statements than in fact they actually were. Acknowledging these difficulties, many police services are moving towards video recording witness interviews to improve the quality of information for investigations (e.g. Criminal Justice System, 2007; Schollum, 2006).

Whilst undoubtedly with significant merits, particularly with regards transparency, this change to video recorded witness interviews has not been without difficulties. Investigators who

once had a manageable and chronologically-ordered statement now struggle to deal with a large amount of information recorded in a less structured format (Westera et al., 2010). Changes in legislation now mean prosecutors, defence counsel and judges are seeing the raw product of the interview for the first time.

When investigations and trials meet

Traditionally, a witness gives evidence in chief orally in court before the accused by answering questions from a prosecutor about their recollection of events. The witness is then cross-examined by defence counsel who attempts to raise doubt and highlight inconsistencies and generally discredit the witness' account (Danet, 1980). To clarify any issues brought-up during cross-examination, the witness may then answer further questions from the prosecutor during re-examination. In an attempt to improve the court process for witnesses (especially complainants), many jurisdictions are moving towards allowing their video interview to be used as their evidence-in-chief. First introduced for child witnesses, this process has been expanded to include other types of witnesses such as those deemed 'vulnerable' (e.g. people with learning disability) and those deemed 'intimidated' (e.g. victims of sex offences; Criminal Justice System, 2007; Advisory Group on Video Recorded Evidence, 1989; Mahoney, McDonald, Optican, & Tinsley, 2007). The interview generated during the investigation is typically the same one that is used as evidence bringing police interviewing practices under the scrutiny of the courts. What is of practical significance here is how well an initial police interview can meet both investigative and evidential purposes? Indeed, the term is investigative interviewing and not evidential interviewing. In an attempt to answer this question the following main considerations will be examined; – (i) reliance on the written statement, (ii) the rules of evidence, (iii) the effectiveness of the evidence, and (iv) the impact of the process on victims and witnesses.

Reliance on the written statement

Despite the previously discussed shortcomings, the written statement still plays a central role in the judicial process. The statement is relied on to outline the witness's evidence, for prosecutorial and judicial decision making, and as a memory refresher for the witness before trial months or sometimes years after it was made (Heaton-Armstrong & Wolchover, 1992).

Inconsistencies between the written statement and the witness's oral evidence, although hardly surprising given the previously mentioned issues, may be used to discredit the witness during cross-examination. A move towards more accurate witness testimony requires an understanding that the written statement is not the verbatim record it was previously assumed to be. With the absence of the interviewer filtering and ordering the information, the video record may be more difficult to comprehend due to the additional detail and the witness recalling their account as they remember it which may not be in a succinct and logical manner. In addition video evidence may be more time consuming to review before trial, but this should be tempered with savings in time further through the process from better decision making as a result of better evidence as discussed further below.

Rules of evidence

Arguably both investigative and evidential processes form part of the same criminal justice system seeking to hold accountable those who commit offences without punishing those who are innocent. Nevertheless, difficulty arises because each process has a different purpose and is governed by different rules resulting in the value of information provided by the witness being assessed by different measures. During the investigation phase, relevance of the information may be unknown so a catch-all approach is required where information is gathered in an attempt to form a complete picture as to what has happened. The investigator is privy to all

the information available to determine whether any suspect is charged. When a suspect is charged the rules of evidence determine what is and is not presented before court. The best evidence principle is one such rule and prefers the court to receive the highest quality of evidence available to enhance the “truth finding process” (Mahoney et al., 2007).

In England, Wales and New Zealand and presumably other jurisdictions, this is a central test for decisions to use the video as evidence (Criminal Justice System, 2007; Mahoney et al., 2007). If interviewed appropriately, there can be little doubt that the video record is the best evidence available from the witness in terms of both accuracy and completeness. The record is transparent and captures everything said and done by both the witness and the interviewer, allowing for the detection of inappropriate interviewing methods. The interview is also conducted more contemporaneous to the offence when the witness is less likely to be susceptible to the effects of forgetting than when at trial, which can often be months and sometimes years later (see Baddeley et al., 2009). Using the record made nearer the time of offending also minimises the risk of memory distortions through exposure to co-witnesses, the media and other extraneous sources (e.g. Loftus & Banaji, 1989; Gabbert, Memon, & Allen, 2003). Additionally the video may act as an effective memory refresher for the witness allowing them to give better evidence in cross-examination and re-examination. Video recording the interview also allows for effective decision making by both the prosecutor and defence counsel as both parties are fully aware of the witness’s exact evidence. In turn this can have benefits to the courts in terms of the laying of appropriate charges and early resolutions. Potentially higher quality evidence that can be reviewed by the defence team, rather than them speculating on how a witness will perform, may result in more guilty pleas and deliver a benefit in terms of time taken in court.

However, the best evidence principle must also be balanced with the requirements of relevance and admissibility (Mahoney et al., 2007). Relevance is determined by the relationship of the evidence to the facts given the circumstances of each case. As a general rule it is the ‘tendency to prove or disprove anything that is of consequence in determining the proceeding’ (Mahoney et al., 2007). Some of the information the witness provides during the scoping exercise of the investigation, may be irrelevant to criminal proceedings. The evidence may also be deemed inadmissible if its probative value is outweighed by the risk that it will have an “unfairly prejudicial effect on the proceeding” or “needlessly prolong the proceeding” (Mahoney et al., 2007).

Admissibility was an issue primarily dealt with through editing when child interviews were introduced to the courts. A review of all trials involving child witnesses in England and Wales over a 20 month period found 27% of video interviews used as the child’s evidence required editing (Davies, Wilson, Mitchell, & Milsom, 1995). The average length of interview was 30.36 minutes. However, further difficulty arises with adults because children are typically prone to errors of omission by providing shorter responses to questions and not giving as much detail (e.g. Lamb et al. 2000; Marin, Holmes, Guth, & Kovac, 1979). Interviews with adults are typically longer, for example in 2009 the average length of video recorded interviews with adult witnesses at the Wellington Police Station in New Zealand was 116 minutes (personal communication with Detective Deborah Braun). The extra time and free narrative format of adult interviews may lead to concern about relevance and admissibility and “needlessly prolong” proceedings. Whether the time taken to play a video interview as evidence-in-chief varies from the time taken to give evidence orally is not known, nor is it known how the different modes affect cross-examination times. Further, peripheral information not typically rendered in oral

evidence is often subject to cross-examination (Davies et al., 1995). This situation may be avoided if the evidence in chief is more complete as is likely the case with a detailed contemporaneous account. It is also still possible that a more detailed and accurate account as provided by a video recording may lead to more inconsistencies in a 'live' cross examination if there is a long delay between investigation and trial.

The legislative interpretation of what is relevant is relational to the facts of the case. Whereas an ideal investigative approach is to 'report everything', thereby increasing the likelihood of accessing different information using different retrieval pathways in memory (Fisher & Geiselman, 1992). Strict rules of relevance therefore may inhibit a witness's ability to give an accurate and complete as possible account. To achieve best evidence perhaps a broader interpretation is required allowing the ability to accurately ascertain the facts to determine relevance.

One persistent factor is that despite training, interviewers of adult witnesses tend to more readily use closed and leading questioning rather than open questions (e.g. Clarke & Milne, 2001; Clifford & George, 1996). This can lead to greater inaccuracies that previously remained hidden in the written statement process, and could result in the video interview being ruled inadmissible. Interestingly, lawyers also tend to use closed and sometimes leading rather than open questions (Danet & Bogoch, 1980; Kebbell, Deprez, & Wagstaff, 2003), as do specially trained child interviewers (e.g. Cederberg, Orbach, Sternberg, & Lamb, 2000; Lamb, Sternberg & Esplin, 2000). Ironically, any concerns about the overly long interviews and additional irrelevant information, may be due to the use of appropriate open questioning techniques which enhance the accuracy and completeness of the information.

Effectiveness of the evidence

If the interview satisfies the rules of evidence the next consideration is whether it is likely to be effective evidence. Ultimately the adversarial system was designed to establish the 'truth' via two different sides presenting their arguments, however effectiveness of both parties is measured by the ability to influence the jury (Danet, 1980). For prosecutors, it has been argued the purpose of questioning the witness is to provide the jury with information the prosecutor already knows, in fact they are discouraged from asking questions that they do not know the answer to (Danet, 1980; Evans, 1994). Questioning is about the presentation of evidence rather than just the eliciting of complete and accurate information. Using the police interview reduces the ability of prosecutors to elicit the evidence in a persuasive way such as emphasizing important aspects of the evidence, forewarning against negative evidence and using repetition (Voss, 2005). However, discussion about effectiveness of presentation of evidence must be bound by the ability for the evidence to enhance effective decision making by the jury in establishing the 'truth'. Two issues arise from this: how the method of presentation and how the interview format affect the persuasiveness of the evidence.

The introduction of using child witness video interviews as evidence in the 1980's and 90's provides some insight into the effectiveness of using a video as evidence. Four years after implementation, a review of prosecutions with child witnesses in England and Wales found no differences in guilty verdicts or guilty pleas when evidence was given by video interview compared to live (Davies et al., 1995). There was no empirical support for concerns by judges and barristers that the children would lack preparedness for cross-examination, false allegations would not be detected, and the method was less impactful than live evidence. This research is

supported by other experimental and field studies suggesting using video testimony does not diminish the effectiveness of the child's evidence (see Davies, 1999, for a review).

Only a few experimental studies have examined the effectiveness of using video interviews of adults as evidence when compared to live evidence. Kemp, Towell, Pearson, Wright, Donnelly, Woods et al. (1986) found mock juror's ability to recall testimony of a witness to a mugging did not vary between live and video conditions. Taylor and Joudo (2005) used mock juries to examine how different modes of evidence affect perceptions of adult rape complainant testimony. Closed circuit television was compared to pre-recorded video and live evidence for eighteen different mock juries. Mode of presentation did not affect individual juror's pre-deliberation ratings of complainant credibility or the accused person's guilt. Guilt ratings and verdict after deliberation did not vary between conditions, although in this study juries were only allowed to deliberate for one hour resulting in sixteen hung juries. In comparison Landstrom, Granhag, and Hartwig (2005) found that individual mock jurors gave higher ratings for appearance in terms of eloquence and pleasantness of an adult witness to an accident in the live condition than in the video condition. However, they found no differences in jurors' judgments about the quality of the testimony or ability to assess veracity. Interestingly, participants incorrectly believed they had a better memory for the live than the video testimony. Further research and ongoing evaluation is required to explore this area before any firm conclusions can be drawn, but these findings suggest that using the video may not reduce the effectiveness of the evidence.

In England and Wales the introduction of video recorded interviews as evidence for adults has raised some concerns about the format of the police interviews (which usually follow

the CI format). Reviewers of the use of special measures with vulnerable adult victims made the following comment:

To ensure that video interviews result in the witness giving their best evidence care needs to be taken to make sure they are clear, of good quality and edited properly to make sure they are focused and not too long. We received some adverse comments from the judiciary and prosecutors in relation to the quality of the video interviews, to the effect that they were on occasions too long. The preamble and other formalities in particular, whilst necessary, can substantially lengthen the recording and distract attention from the important aspect of the evidence (p.27, Criminal Justice Joint Inspection, 2009)

The Stern Review which examined how rape complaints are managed by public authorities in England and Wales made similar criticisms about the ‘quality’ of police interviews and transferability into the court room (Stern, 2010). Interestingly, many of these criticisms appear to target what psychological research suggests are good interviewing practices. Building rapport and explaining the interview process at the beginning of the interview, and using open questions to encourage detailed long free narratives are considered by many experts as the cornerstone to interviewing best practice (e.g. Powell, Fisher, & Wright, 2005).

The limited studies on the effectiveness of the CI as evidence suggest the presence of the CI mnemonics alone is unlikely to affect perceptions on the accuracy of witness testimony (Kebbell, Wagstaff, & Preece, 1998; Westera et al., 2010). Drawing from research into witness factors affecting accuracy and credibility judgments, jurors use detail as a strong indicator of accuracy and CI have been shown to contain more detail (Bell & Loftus, 1989a, 1989b; Kohnken et al., 1999). Following a storytelling narrative is also considered important in assisting juror’s make credibility judgments and may be more prominent in the CI due to the emphasis on open questions (Snow, Powell, & Murfett, in press). The CI uses a witness-centric approach to explore the account according to how the witness remembers it, potentially resulting in a less logically structured narrative. This format may conflict with prosecutor perceptions that clarity and coherence are essential components to persuasive evidence (Davies, Hoyano, Keenan, Maitland

& Morgan, 1999). However, the witness on video freely recounting events nearer to the time of the offending may lead to more spontaneous and graphic detail and emotion than examination in the formal court environment. Gruesome evidence like this may be more persuasive by inducing heightened emotional responses in jury members (Bright, Goodman, & Delahunty, 2006). Jurors are only likely to use questioning as a gauge for adult witness accuracy when highly leading (Castelli, Goodman, & Ghetti, 2005; Ruva & Byrant, 2004).

Juror judgments about witness accuracy and credibility are also affected by confidence of the witness, consistency of information, and emotion congruent with juror expectations (Berman, Narby, & Cutler, 1995; Kaufmann, Drevland, Overskeid, & Magnussen, 2003; Wells, Lindsay, & Ferguson, 1979). Examining how these features differ in a CI when compared to other interview formats would provide more insight into the usefulness of the CI as evidence. Further research is also required into how change of temporal order and change of perspectives may affect perceptions of testimony, although in practice these techniques are seldom used (Dando et al., in press; Kebbell, Milne & Wagstaff, 1999).

One suggested means of making the video interview serve both investigative and evidential purposes is for police interviewers to adapt their approach to fit with evidential needs. This suggestion is problematic because interviews are critical for gaining enough quality and quantity of information to solve the case and advance to prosecution (Fisher et al., 1987). During the investigation it is simply not known what information the witness has and its relevance. Nor is it known, how the information is stored in the witness's memory and what retrieval process will help them access the memory effectively. Failure to interview effectively may also result in criticism from experts and risk the interview becoming inadmissible.

Responsiveness to victims and witnesses

Importantly, the judicial system is becoming more responsive to the needs of witnesses, especially victims and the effect of the process of giving evidence has on them. Reviews of legislation introduced for vulnerable witnesses in England and Wales suggests most complainants would like the option of using their video interview as their evidence (Burton et al., 2006; Hamlyn, Phelps, Turtle, & Sattar, 2004). Using this method means the complainant may only have to recount the full details of what occurred once, thereby likely reducing the trauma of the judicial process. From late 2010 adult victims of serious sex offences in these countries will have automatic admissibility of their video interview as their evidence in chief (Government Equalities Office, 2010).

Of course as previously mentioned an offender on seeing the video recorded evidence may decide to plead guilty. One study found testifying in a trial was one of four significant predictors of PTSD symptoms in adult survivors of child rape, and another that having a civil lawsuit pending was one of three predictors of depression among adult victims (Epstein, Saunders, & Kilpatrick, 1997; Mackey, Sereika, Weissfeld, & Hacker, 1992). Thus, reducing the likelihood of having to give evidence seems a worthy goal in itself. A further benefit might be a reduction in the potential to intimidate victims and witnesses. If an offender knows that a pre-recorded evidence-in-chief exists he or she may feel less inclined to intimidate the potential witness.

Conclusion

Through providing the opportunity to use an adult witness's video interview as their evidence in chief, legislators have signaled the desire to improve the fairness of the judicial process and reduce trauma to victims and other types of witness. As with any significant change,

the move towards this method of evidence will present challenges as new processes are developed and the system adapts. However, using this video record as evidence will ensure the best evidence is preserved and the jury has access to a transparent record that is more accurate and complete than previously experienced. Concerns over any extra time taken due to the nature of the video record, must be balanced against the likely long term benefits, not only in fairness to the proceedings but also by easing the process for victims and witnesses whatever their age.

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*The views expressed in this article are those of the authors and do not necessarily represent those of the New Zealand Police

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Footnotes

¹In this article video recording refers to interviews that are both visually and auditory recorded by electronic medium