

*Julia Quilter,\* Luke McNamara\*\* and Melissa Porter\*\*\**

**THE NATURE AND PURPOSE OF COMPLAINANT  
INTOXICATION EVIDENCE IN RAPE TRIALS:  
A STUDY OF AUSTRALIAN APPELLATE  
COURT DECISIONS**

ABSTRACT

This article reports the findings of a qualitative analysis of 102 Australian appellate court decisions involving conviction appeals from rape/sexual assault trials, where there was evidence that the complainant was intoxicated at the time of the alleged offence. We found little evidence that statutory provisions designed to break the traditionally assumed nexus between alcohol (and other drug) consumption and consent to sex are influencing trials. It appears to be the case that complainant intoxication evidence is still more likely to impede rather than support the prosecution's ability to prove the element of non-consent — because it is engaged by the defence to: suggest consent based on a 'loss of inhibition' narrative; and/or challenge the credibility of the complainant as a witness and the reliability of their account.

---

\* Professor, School of Law, University of Wollongong.

\*\* Professor, UNSW Law and Justice.

\*\*\* Research Assistant, School of Law, University of Wollongong.

## I INTRODUCTION

Alcohol and/or other drug ('AOD') consumption is strongly associated with sexual violence crimes,<sup>1</sup> including rape.<sup>2</sup> This is an association with direct implications for the ability of victims of sexual violence to obtain justice through complaint and criminal prosecution of the alleged offender.<sup>3</sup> Evidence that the complainant was intoxicated at the time of the alleged offence has long been recognised as one of the barriers to successful prosecution in rape trials — including because decision-makers can be influenced by an asserted or assumed nexus between intoxication and consent ('intoxication/consent nexus'), which has a long history.<sup>4</sup> As has occurred with many of the rape myths that have tradition-

---

<sup>1</sup> Studies have estimated that AOD consumption is a factor in some 50–80% of rapes: Tina Zawacki et al, 'Perpetrators of Alcohol-Involved Sexual Assaults: How Do They Differ from Other Sexual Assault Perpetrators and Nonperpetrators?' (2003) 29(4) *Aggressive Behavior* 366, 367; Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' (Trends and Issues in Crime and Criminal Justice No 291, Australian Institute of Criminology, 2 January 2005); Baroness Vivien Stern, *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 110–11; Andrea Finney, 'Alcohol and Sexual Violence: Key Findings from the Research' (Findings No 215, Home Office (UK), 15 March 2004) 2; Antonia Abbey, 'Alcohol's Role in Sexual Violence Perpetration: Theoretical Explanations, Existing Evidence and Future Directions' (2011) 30(5) *Drug and Alcohol Review* 481; Kathryn Graham et al, "Blurred Lines?" Sexual Aggression and Barroom Culture' (2014) 38(5) *Alcoholism: Clinical and Experimental Research* 1416.

<sup>2</sup> We use the term 'rape' generally in this article noting that some jurisdictions (such as New South Wales) have changed the name of the primary sexual violence offence to 'sexual assault': see, eg, *Crimes Act 1900* (NSW) s 61I.

<sup>3</sup> We locate this article (and the larger project of which it is a part) in the context of a body of socio-legal criminalisation research that attempts to evaluate the operational effects of progressive criminal law reform — designed to address the historical inadequacies of the justice system's response to gendered violence, including domestic and family violence, and sexual violence. For a recent example, see Heather Douglas, *Women, Intimate Partner Violence, and the Law* (Oxford University Press, 2021).

<sup>4</sup> Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (Trends and Issues in Crime and Criminal Justice No 344, Australian Institute of Criminology, 15 August 2007) 3–4; Anna Carline, Clare Gunby and Stuart Taylor, 'Too Drunk To Consent? Exploring the Contestations and Disruptions in Male-Focused Sexual Violence Prevention Interventions' (2018) 27(3) *Social and Legal Studies* 299; Heather D Flowe and John Maltby, 'An Experimental Examination of Alcohol Consumption, Alcohol Expectancy, and Self-Blame on Willingness To Report a Hypothetical Rape' (2018) 44(3) *Aggressive Behavior* 225, 226; Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report, Australia's National Research Organisation for Women's Safety, March 2018).

ally hampered justice for victim-survivors of sexual violence,<sup>5</sup> law-makers have attempted to legislate for the disruption of this problematic approach to complainant intoxication. In Australia, most jurisdictions have added a provision to the element of non-consent in the offence of rape that seeks to reorient the significance of complainant intoxication away from carrying an assumption of consent, and towards being characterised as evidence of *non-consent*.<sup>6</sup>

In Australia, little attention has been paid to the nature and impact of intoxication evidence in rape trials, including the operation of provisions which purport to shape how complainant intoxication evidence can impact rape trials.<sup>7</sup> Filling this gap in the

---

<sup>5</sup> Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Commissioned Report, September 2017); Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (Report, 30 April 2015); Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018); Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019); Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

<sup>6</sup> All Australian jurisdictions (except Queensland and Western Australia) have adopted provisions on the relationship between complainant intoxication and consent. See, eg: *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(e). Although not the focus of this article, legislation (whether general or specific to sexual offences) excludes or limits the ability of rape defendants to raise exculpatory evidence of their own intoxication. For example, s 61HK(5)(b) of the *Crimes Act 1900* (NSW) expressly provides that a defendant's intoxication cannot be taken into account in determining whether the fault element for sexual assault is proved (ie knowledge that the other party was not consenting). See also: *Criminal Code 2002* (ACT) s 33; *Criminal Code Act 1983* (NT) s 43AU; *Criminal Code Act 1899* (Qld) s 348A; *Criminal Law Consolidation Act 1935* (SA) ss 268(2)–(3); *Criminal Code Act 1924* (Tas) s 14A; *Crimes Act 1958* (Vic) s 36B. In Western Australia the Court of Appeal held that for the purpose of the mistake of fact defence in s 24 of the *Criminal Code Act Compilation Act 1913* (WA), intoxication cannot be taken into account when assessing the reasonableness of the defendant's belief: *Aubertin v Western Australia* (2006) 33 WAR 87, 96–7 [44] (McLure JA, Roberts-Smith JA agreeing at 89 [1], Buss JA agreeing at 103 [72]).

<sup>7</sup> The Victorian Law Reform Commission's report on Sexual Offences in 2004 briefly discussed a selected instance in which a trial judge's directions appeared not to follow the approach to complainant intoxication evidence expected by s 36(2)(e) of the *Crimes Act 1958* (Vic): Victorian Law Reform Commission, *Sexual Offences* (Final Report No 78, July 2004) 353–4 [7.44]–[7.45]. However, the Commission did not undertake any further detailed or systematic analysis, and their recommendations did not touch on this issue. A 2016 study by Emma Henderson and Kirsty Duncanson included an examination of two cases where there was evidence of complainant intoxication, and found that rape myths continue to exert influence despite Victoria's statutory provisions on consent and jury directions: Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional

research literature is essential because court proceedings are a critical phase in the criminal justice system's response to rape victims, and the practices and outcomes of trials have wider communicative effects and influences on decisions made at key attrition points (ie reporting, police investigation and prosecution decisions). Given the frequency with which rape is associated with intoxication, it is essential to evaluate whether existing rules (and practices) on intoxication evidence contribute to the delivery of justice to sexual violence victim-survivors.<sup>8</sup>

As the first stage in a larger empirical examination of intoxication evidence in rape trials,<sup>9</sup> this article engages with appellate judgments as a valuable source for gaining insights about how complainant intoxication evidence features in rape trials.<sup>10</sup>

---

Consent Narratives in Rape Trials?' (2016) 39(2) *University of New South Wales Law Journal* 750, 769–73. See also: Rachael Burgin, 'Communicating Consent: Narratives of Sexual Consent in Victorian Rape Trials' (PhD Thesis, Monash University, 2019); Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456. In respect of New Zealand, see Sarah Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26(3) *New Zealand Universities Law Review* 614; McDonald (n 5). Recently, both the New South Wales Law Reform Commission and Victorian Law Reform Commission have considered complainant intoxication evidence, including recommendations for a new jury direction that it should not be assumed that a person consented because that person consumed alcohol or other drugs: New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) 175 [8.119]; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 441 [20.48] (*Improving the Justice System Response to Sexual Offences*). For the implementation of these recommendations in New South Wales see *Criminal Procedure Act 1986* (NSW) s 292E(b). In Victoria, while the amending Bill has been passed to implement this change by inserting s 47G(c) into the *Jury Directions Act 2015* (Vic), the new provision has not yet come into force: see *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

<sup>8</sup> The catalyst and foundation for this study was an Australian Institute of Criminology funded study of intoxication and the criminal law: Julia Quilter et al, *'Intoxication' and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks* (Report, Criminology Research Advisory Council, May 2018) (Grant: CRG 20/14–15).

<sup>9</sup> The project, 'Intoxication Evidence in Rape Trials: A Double-Edged Sword?', is funded by an Australian Research Council Discovery Project grant (DP200100101). See 'DP200100101: University of Wollongong (Funded by Australian Research Council)', *Australian Research Council* (Web Page) <<https://dataportal.arc.gov.au/RGS/Web/Grants/DP200100101>>. This project responds to the call for 'greater and more systematic' empirical research '[g]iven the discrepancy between community attitudes about sexual offending and sexual offence legislation': Natalia Hanley et al, 'Improving the Law Reform Process: Opportunities for Empirical Qualitative Research?' (2016) 49(6) *Australian and New Zealand Journal of Criminology* 546, 560.

<sup>10</sup> Jonathan Crowe and Bri Lee have previously analysed rape trial appellate decisions in their study of the mistake of fact excuse in Queensland rape and sexual assault law: See Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1.

Part II of this article discusses legislative guidance on complainant intoxication in Australia. Part III outlines the research design of this study. Part IV considers the meaning of ‘intoxication’ and discusses the relevance and implications of the different ways complainant intoxication evidence is presented at trial. Part V analyses the significance of complainant intoxication evidence for the Crown’s ability to prove non-consent and the complainant’s perceived credibility and reliability.

## II BACKGROUND

### *A Legislative Guidance on Complainant Intoxication*

Since 1980, multiple legislative amendments have been made in all Australian jurisdictions,<sup>11</sup> including to: (1) substantive offence definitions (eg a broader definition of sexual intercourse and changes to fault elements);<sup>12</sup> (2) criminal procedure and evidentiary rules, with the aim of addressing the influence of rape myths (eg removing mandatory corroboration warnings, jury directions on delay in complainant reporting, and jury directions on differences in complainant evidence);<sup>13</sup> and, (3) protect victims from system abuse (eg rape shield laws which restrict the use of sexual reputation and history evidence,<sup>14</sup> and provisions for evidence to be given by alternative means such as audio-visual link).<sup>15</sup> The barrier to justice for complainants presented by intoxication was not a focus of early reform or research attention during the 1980s in Australia. However, in the 1990s, reformers and researchers began to pay more attention to the question of intoxication.

In 1991, as part of the first attempt to articulate a positive conception of consent, Victoria passed the *Crimes (Rape) Act 1991* (Vic), amending the *Crimes Act 1958* (Vic). The new provisions included, for the first time in Australia, an express statement about the relevance of complainant intoxication evidence.<sup>16</sup> In its current form, s 36(2)(e) provides that ‘[c]ircumstances in which a person does not consent to an act include ... the person is so affected by alcohol or another drug as to be incapable of consenting to the act’.<sup>17</sup>

<sup>11</sup> Australian Women Against Violence Alliance, ‘Sexual Violence: Law Reform and Access to Justice’ (Issues Paper, 17 May 2017) 12–13; Victorian Law Reform Commission, *Sexual Offences* (Interim Report, 8 May 2003) 145 [4.4].

<sup>12</sup> See, eg, *Crimes Act 1900* (NSW) ss 61HA, 61HK.

<sup>13</sup> See, eg, *Jury Directions Act 2015* (Vic) ss 52, 54D.

<sup>14</sup> See, eg, *Evidence Act 1929* (SA) s 34L.

<sup>15</sup> See, eg, *Evidence Act 1939* (NT) s 21A(2).

<sup>16</sup> *Crimes Act 1958* (Vic) s 36(d), as amended by *Crimes (Rape) Act 1991* (Vic) s 3.

<sup>17</sup> *Crimes Act 1958* (Vic) s 36(2)(e). The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) was passed in the Victorian Parliament on 30 August 2022 and received assent on 6 September 2022. This Act implements a number of the recommendations contained in the Victorian Law Reform Commission’s 2021 report, *Improving the Justice System Response to Sexual Offences* (n 7). This includes replacing s 36(2)(e) of the *Crimes Act 1958* (Vic) with an identical

In New South Wales, the landmark *Heroines of Fortitude* report<sup>18</sup> was the first study to recognise questioning about AOD use as a problematic feature of rape trials.<sup>19</sup> The report found that 60% of complainants were asked questions about drinking on the day of the offence, and 44% about their drinking/drug use habits.<sup>20</sup> This was the third most common theme of questioning after lying (84%)<sup>21</sup> and lack of resistance (70%).<sup>22</sup> However, this aspect of complainants' experiences in criminal trials was not analysed in detail and no specific recommendations were made.

By the mid 2000s, New South Wales considered further statutory reform based on the Victorian model of a legislated positive definition of consent, including identifying the complainant's intoxication as a vitiating factor.<sup>23</sup> This type of provision was first added to the *Crimes Act 1900* (NSW) by the *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* (NSW): 'The grounds on which it may be established that a person does not consent to a sexual activity include ... if the person has sexual intercourse while substantially intoxicated by alcohol or any drug'.<sup>24</sup> On 1 June 2022, a new version of this provision (which closely resembles the Victorian provision) came into operation with the commencement of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), which overhauled the New South Wales law on proving non-consent.<sup>25</sup> Section 61HJ(1)(c) of the *Crimes Act 1900* (NSW) now states: 'A person does not consent to a sexual activity if ... the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity'.<sup>26</sup>

---

provision to be located in a new s 36AA(1)(g): see *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5. The commencement date of the new provision is subject to proclamation, or alternatively on 30 July 2023, if it does not come into operation before that date: at s 2.

<sup>18</sup> New South Wales Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Report, November 1996).

<sup>19</sup> See *ibid* 161–3.

<sup>20</sup> *Ibid* 161.

<sup>21</sup> *Ibid* 169.

<sup>22</sup> *Ibid* 170.

<sup>23</sup> Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 34, 37–8.

<sup>24</sup> *Crimes Act 1900* (NSW) s 61HA(6)(a), as inserted by *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* (NSW) sch 1 item 1. In 2018 the relevant section was moved to *Crimes Act 1900* (NSW) s 61HE(8)(a) (since repealed).

<sup>25</sup> The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) was the Government's response to the New South Wales Law Reform Commission (n 7).

<sup>26</sup> Our recent transcript analysis of Victorian rape trials, including the operation of Victoria's complainant intoxication provision, suggests that the change in wording in New South Wales is unlikely to have any discernible effect on the role of complainant intoxication evidence in proving the element of non-consent: see Julia Quilter et al, 'Intoxication Evidence in Rape Trials in the County Court of Victoria: A Qualitative Study' (2022) 46(2) *University of New South Wales Law Journal* (forthcoming).

The following Australian legislatures have also added provisions on complainant intoxication to legislation on consent.

State/Territory	Content of Provision
Australian Capital Territory	'[A] person does not consent to an act ... if the person ... is incapable of agreeing to the act because of intoxication'. <sup>27</sup>
Northern Territory	'Circumstances in which a person does not consent to sexual intercourse ... include circumstances where ... the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing'. <sup>28</sup>
South Australia	'[A] person is taken not to freely and voluntarily agree to sexual activity if ... the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity'. <sup>29</sup>
Tasmania	'[A] person does not freely agree to an act if the person ... is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required'. <sup>30</sup>

In Queensland and Western Australia, statutory provisions on the meaning of consent/non-consent contain no reference to complainant intoxication.<sup>31</sup> These two states are still included in the present study because their inclusion may yield insights about the significance (or otherwise) of the presence or absence of an

<sup>27</sup> *Crimes Act 1900* (ACT) s 67(1)(g), as amended by *Crimes (Consent) Amendment Act 2022* (ACT) s 5.

<sup>28</sup> *Criminal Code Act 1983* (NT) s 192(2)(c).

<sup>29</sup> *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d).

<sup>30</sup> *Criminal Code Act 1924* (Tas) s 2A(2)(h).

<sup>31</sup> *Criminal Code Act 1899* (Qld) s 348; *Criminal Code Act Compilation Act 1913* (WA) s 319(2). In 2020 the Queensland Law Reform Commission considered whether s 348 should be amended to include an express reference to situations where the complainant is affected by alcohol or another drug. The Commission concluded that no such change was required because such situations are already sufficiently addressed by the fact that 'section 348(1) requires that "consent" be given "by a person with the cognitive capacity to give the consent"' — and that this provision already 'allows evidence that the complainant was ... affected by alcohol or drugs to be taken into account by a trier of fact when considering whether a complainant had the cognitive capacity to give consent': Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) vii, 122 (emphasis in original). In 2022 the Queensland Women's Safety and Justice Taskforce recommended that a provision on complainant intoxication should be added to the s 348(2) list of circumstances in which consent cannot be freely and voluntarily agreed, as part of an expanded list modelled on s 61HJ of the *Crimes Act 1900* (NSW): see Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experience across the Criminal Justice System* (Report No 2, 1 July 2022) vol 1, 216. The Law Reform Commission of Western Australia is currently undertaking a review of sexual offence and consent laws, and a final report is due in July 2023: 'Project 113: Sexual Offences',

express reference to complainant intoxication in statutory guidance on the meaning of consent and non-consent.

### III RESEARCH DESIGN

#### A *Aims*

The primary objective of the study on which this article reports was to investigate what recent Australian appellate court decisions reveal about how evidence of complainant intoxication operates in rape trials. Specifically:

1. How is ‘intoxication’ defined in the courtroom and what types of evidence are relied upon to establish complainant intoxication?
2. For what purpose(s) is complainant intoxication considered relevant?
3. What is the visibility and impact of statutory provisions which attempt to shape the manner in which intoxication evidence influences the conduct of rape prosecutions?

#### B *Method*

The study dataset consists of all decisions of the highest criminal appellate court in each state and territory<sup>32</sup> and the High Court of Australia in the period from 2010–19 involving an appeal against conviction on a rape charge<sup>33</sup> and where intoxication of the complainant formed part of the evidence in the case (n = 102).<sup>34</sup> A full

---

*WA.gov.au* (Web Page, 13 September 2022) <<https://www.wa.gov.au/government/publications/project-113-sexual-offences>>; John Quigley and Simone McGurk, ‘Two Major Reviews To Examine WA’s Sexual Offence Laws’ (Media Statement, Government of Western Australia, 8 February 2022).

<sup>32</sup> Australian Capital Territory Court of Appeal, New South Wales Court of Criminal Appeal, Northern Territory Court of Criminal Appeal, Queensland Court of Appeal, South Australian Court of Appeal, Tasmanian Court of Criminal Appeal, Victorian Court of Appeal and Western Australian Court of Appeal.

<sup>33</sup> Rape charges for the purpose of this study relates to the primary rape offence (or its aggravated version) in each Australian state/territory: *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) ss 61I, 61J; *Criminal Code Act 1983* (NT) s 192; *Criminal Code Act 1899* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) s 185; *Crimes Act 1958* (Vic) s 38; *Criminal Code Act Compilation Act 1913* (WA) ss 325–6.

<sup>34</sup> With respect to this dataset, the case of *R v Lazarus* involved two New South Wales Court of Criminal Appeal decisions. The first one, *Lazarus v The Queen* [2016] NSWCCA 52 (*‘Lazarus (2016)’*), resulted in a retrial being ordered, and the second one, *R v Lazarus* (2017) 270 A Crim R 378 (*‘Lazarus (2017)’*), involved an appeal by the Crown against an acquittal, which was dismissed. For the purposes of the case numbers reported in this article, this case has been counted just once. Likewise, any case with a related High Court appeal has only been counted once.



list of the cases is contained in the Appendix. A ten-year timeframe constitutes a significant review period, during which the relevant provisions relating to intoxication have been in operation.

To ensure a comprehensive inclusion of all publicly available judgments handed down in the review period (whether reported or not), the primary mechanism for identification of relevant cases was online searching using the web-based open access Australasian Legal Information Institute ('AustLII') database.<sup>35</sup> Secondary searches were conducted using LexisNexis and BarNet Jade and relevant court websites.<sup>36</sup> We searched each of the nine Australian jurisdictions in turn, for the identified time frame. The primary search term was 'intoxication', with variations employed to maximise search accuracy.<sup>37</sup> Search results were filtered to ensure that the case involved: a charge of rape (alone or with other charges); and evidence of intoxication of the complainant in some way.<sup>38</sup>

The collected cases were then subjected to qualitative content analysis drawing on an approach developed in previous research on intoxication evidence in criminal matters.<sup>39</sup> We analysed the cases in relation to three factors: (1) types of evidence of intoxication before the court; (2) language used to define/describe intoxication; and, (3) purpose(s) for which complainant intoxication was engaged.

### C Limitations

In a context where opportunities for empirical analysis of how rape trials are conducted are limited, appellate judgments are an accessible data source (being public domain documents) that offer valuable insights into selected trial phenomena — in this case, complainant intoxication evidence. In addition, appellate court decisions are

an authoritative voice of 'knowledge' on the nature and relevance of intoxication for criminal law purposes, and ... deserving of scholarly attention. Their public pronouncements are designed not only to influence future criminal

<sup>35</sup> See 'All Databases', *AustLII* (Web Page) <<http://www.austlii.edu.au/databases.html>>.

<sup>36</sup> See: 'Lexis Advance<sup>®</sup>', *LexisNexis* (Web Page) <<https://www.lexisnexis.com.au/en/products-and-services/lexis-advance>>; 'Home', *BarNet Jade* (Web Page) <<https://jade.io/>>. For an example of the case database available on court websites, see 'CaseLaw', *Supreme Court Library Queensland* (Web Page) <<http://www.sclqld.org.au/caselaw/>>.

<sup>37</sup> Search terms used in combination with 'intoxication' included 'victim' and 'offence element'. Alternative search terms were used to pick up cases where intoxication was in issue even if the word was not used in the judgment (eg 'drugs', 'alcohol' and 'intoxicating substances').

<sup>38</sup> In some instances, the word 'intoxication' (or a variation) was used in a case, but a closer review confirmed that it did not involve complainant intoxication evidence. These cases were excluded.

<sup>39</sup> Quilter et al (n 8); Julia Quilter and Luke McNamara, 'The Meaning of "Intoxication" in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170.

law enforcement and court room practices, but also to communicate with and educate the wider community about the significance of alcohol and drug use for the criminal law.<sup>40</sup>

Nonetheless, we acknowledge that a study based on appellate judgments has limitations. First, appellate court decisions are not representative of criminal trials generally. Conviction appeals are, by definition, cases in which the defendant was found guilty at trial, and so the study sample does not include cases in which the accused was acquitted at trial.<sup>41</sup> Secondly, the contents of appellate court judgments are shaped, to a large extent, by the appeal grounds and the submissions and arguments of counsel, as well as by the stylistic preference of their judicial authors. For example, not all judgments contain extracts of transcripts from witness examination and cross-examination, and/or the trial judge's directions. It is important to recognise that appellate judgments offer only a partial window into how complainant intoxication evidence features in rape trials.<sup>42</sup>

The sample size provides a robust basis for qualitative analysis, noting that it represents all conviction appeals during the review period that met the criteria for inclusion in the study.

#### D Overview of Cases

**Table 1: Conviction Appeals in Australian Courts in Rape Cases Involving Complainant Intoxication Evidence, 2010–19**

Jurisdiction	Number of Cases
Australian Capital Territory	3
New South Wales	20
Northern Territory	1
Queensland	21
South Australia	16
Tasmania	3
Victoria	27
Western Australia	11
<b>Total</b>	<b>102</b>

<sup>40</sup> Luke McNamara et al, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43(1) *Monash University Law Review* 148, 150.

<sup>41</sup> Our sample of appellate decisions does include two Crown appeals against an acquittal: *Lazarus* (2017) (n 34); *R v Wait* [2011] SASFC 91 ('*Wait*').

<sup>42</sup> For the purpose of the larger project of which this study is a part (see above n 9), the authors have been given access to trial transcripts for a sample of rape trials in two Australian jurisdictions to date. In addition, we plan to undertake interviews with prosecutors and defence counsel who have rape trial experience.

Before turning to outline the main findings of this qualitative study, we offer a brief overview of some of the features of the cases in this dataset. Table 1 summarises the number of cases per jurisdiction. Most of the complainants were female (93%). All but two<sup>43</sup> of the defendants were male (98%). In 79% of cases, the location of the alleged rape was a home or other private location (such as a hotel room, office or boat). The remaining cases were in a variety of public places (such as a park, alley or nightclub toilet) and five of the rapes occurred in taxis.<sup>44</sup> Alcohol was the intoxicating substance in 89% of cases, either alone or in combination with other drugs. Eleven cases involved drugs only. Conviction appeals were upheld in 27% of cases.<sup>45</sup>

#### IV DEFINING, EVIDENCING AND DESCRIBING ‘INTOXICATION’

From the cases in this study’s dataset, we identified six sources of evidence about the complainant’s intoxication:

1. self-assessment by the complainant;
2. witness or defendant observation;
3. police observation;
4. CCTV footage (and other technology);
5. blood alcohol concentration (‘BAC’); and
6. expert evidence about AOD effects.

---

<sup>43</sup> The case of *R v O’Loughlin* [2011] QCA 123 (‘*O’Loughlin*’) involved a female defendant and the case of *R v C, J* [2015] SASFC 100 involved two defendants, including one who was female.

<sup>44</sup> An additional case involved a taxi driver; however, the defendant drove the taxi to his house, took the complainant inside to sexually assault her, and then put her back into the taxi to take her home: *R v Rahmanian* [2010] SASC 137 (‘*Rahmanian*’).

<sup>45</sup> *Lazarus* (2017) (n 34) was not included in this calculation, since it resulted in appellate confirmation of an acquittal, rather than the overturning of a conviction. Nor was the case of *Wait* (n 41), which involved a successful Crown appeal against a judge directed trial verdict of acquittal. We did include three cases in which the court upheld a conviction appeal against a rape conviction, and substituted a verdict of guilty to a lesser offence: *MM v The Queen* [2018] NSWCCA 158 (‘*MM*’); *Arroyo v The Queen* [2010] NTCCA 9 (‘*Arroyo*’); *R v Vecchio* [2016] QCA 71 (‘*Vecchio*’). We have not attempted to analyse the relationship (if any) between the approach to complainant intoxication evidence and the outcome of the appeal. In a number of instances, an appeal against conviction was upheld on grounds unrelated to evidence of the complainant’s intoxication.

### A Complainant Self-Assessment

It was common for complainants to give evidence about the level of their own intoxication. There was considerable diversity in terms of how complainants explained (or how they were invited by counsel to explain) their level of intoxication. A number of these approaches were familiar and predictable, such as the complainant's attempts to remember and describe the *volume of alcohol* consumed. For example: 'she had drunk three cans of a vodka energy drink, a Midori and a "Cowboy shot"'.<sup>46</sup> A variation to this approach was evidence about the *period of time* over which alcohol was consumed. For example: 'She had been drinking (champagne) for many hours'.<sup>47</sup>

During examination-in-chief or cross-examination, a number of complainants were asked to (retrospectively) rate their level of intoxication at the time in question on a scale of one to 10. For example: 'By the time you went to bed, if nought is not intoxicated at all and 10 is very intoxicated, on that scale of nought to 10 how affected by alcohol did you feel'.<sup>48</sup> The complainant answered: 'I'd say, yeah, nine, eight or nine'.<sup>49</sup> As we have explained elsewhere,<sup>50</sup>

[a]lthough NRSs [numerical rating scales] are widely regarded as valid as a self-report mechanism for assessing pain,<sup>51</sup> their use for the self-assessment of intoxication levels is more contentious, particularly for criminal law purposes.<sup>52</sup>

While there is evidence of NRSs having some utility in assessing generic *degrees* of intoxication,<sup>53</sup> such scales are insensitive to the wide spectrum of alcohol and other drug effects covered by the term 'intoxicated'. The World Health Organization's

---

<sup>46</sup> *Sharma v The Queen* [2011] VSCA 356, [5]. See also: *Knezevic v Western Australia* [2017] WASCA 97, [30] ('Knezevic'); *Omot v The Queen* [2016] VSCA 24, [70] ('Omot'); *R v Fuller* [2015] SASCFC 71, [20] ('Fuller'); *Day v The Queen* [2017] NSWCCA 192, [10]; *R v De Silva* [2018] QCA 274, [8].

<sup>47</sup> *Singh v Western Australia* [2012] WASCA 262, [10] ('Singh'). See also: *R v Butler* [2011] QCA 265, [4]; *Rahmanian* (n 44) [11]; *Ganiji v The Queen* [2019] NSWCCA 208, [21].

<sup>48</sup> *Fuller* (n 46) [20].

<sup>49</sup> *Ibid.* See also: *Vecchio* (n 45) [7], [21]; *Jones v The Queen* [2010] NSWCCA 117, [16]; *Cook v Western Australia* [2010] WASCA 241, [23] ('Cook').

<sup>50</sup> See Quilter and McNamara (n 39) 181.

<sup>51</sup> See Mark P Jensen and Paul Karoly, 'Self-Report Scales and Procedures for Assessing Pain in Adults' in Dennis C Turk and Ronald Melzack (eds), *Handbook of Pain Assessment* (Guilford Press, 3<sup>rd</sup> ed, 2010) 19, 26–7.

<sup>52</sup> Quilter and McNamara (n 39) 181.

<sup>53</sup> Sarah Callinan, 'Alcohol's Harm to Others: Quantifying a Little or a Lot of Harm' (2014) 3(2) *International Journal of Alcohol and Drug Research* 127, 132; Elizabeth Manton et al, 'Alcohol's Harm to Others: Using Qualitative Research to Complement Survey Findings' (2014) 3(2) *International Journal of Alcohol and Drug Research* 143, 146.

*International Classification of Diseases, Tenth Revision*<sup>54</sup> recognises that intoxication is not a single-symptom condition and that the signs and dysfunctional behaviour upon which a diagnosis may be based can include, ‘disturbances in the level of consciousness, cognition, perception, affect, or behaviour that are of clinical importance’.<sup>55</sup> It follows that NRSs are likely to be an unhelpful guide to the nuanced and discrete intoxication-related issues on which a criminal court may be required to adjudicate — including whether the complainant consented, or whether their testimony is reliable.

Another noteworthy feature of the cases in this study’s dataset was the diversity of language used by complainants to describe their level of intoxication. Colloquial language is often used in everyday communication to convey intoxication, or degrees thereof — such as ‘drunk’, ‘pissed’, ‘wasted’ or ‘legless’.<sup>56</sup> Despite the relative formality of the courtroom and the criminal trial, colloquial language was used often in many of the cases in the dataset. For example: ‘heaps intoxicated’;<sup>57</sup> ‘a little bit tipsy’;<sup>58</sup> ‘pretty drunk’;<sup>59</sup> ‘a little bit stoned’;<sup>60</sup> and ‘out of it’.<sup>61</sup> Complainants also used a variety of other phrases and analogies to describe their recollection of how intoxicated they were at the time. For example: ‘I was jelly I guess’;<sup>62</sup> ‘felt paralysed’;<sup>63</sup> ‘everything was like a dream’, ‘completely fucked off’;<sup>64</sup> ‘felt like [she] was dying’;<sup>65</sup> ‘wobbly’;<sup>66</sup> ‘felt like a rag doll’;<sup>67</sup> ‘happy drunk’;<sup>68</sup> and ‘really like chilled and light’.<sup>69</sup>

Sometimes, understandably, complainants struggled to find the language to convey how they felt at the relevant time. For example, ‘I, I was drunk yeah, and I was

<sup>54</sup> World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (1993) <<https://apps.who.int/iris/bitstream/handle/10665/37108/9241544554.pdf>>.

<sup>55</sup> Ibid 49 [G2].

<sup>56</sup> See Harry Gene Levine, ‘The Vocabulary of Drunkenness’ (1981) 42(11) *Journal of Studies on Alcohol* 1038.

<sup>57</sup> Fuller (n 46) [20].

<sup>58</sup> *Ewen v The Queen* (2015) 250 A Crim R 544, 558 [57] (‘Ewen’).

<sup>59</sup> *R v MCS* [2018] QCA 184, [16] (‘MCS’); *Paite v Tasmania* (2019) 30 Tas R 73, 94 [74] (‘Paite v Tasmania’).

<sup>60</sup> *DJK v Tasmania* [2017] TASCRA 17, [71] (‘DJK v Tasmania’).

<sup>61</sup> *R v Cashion* (2013) 115 SASR 451, 453 [9] (‘Cashion’).

<sup>62</sup> *Lazarus* (2017) (n 34) 382 [13].

<sup>63</sup> *Di Giorgio v The Queen* [2016] VSCA 335, [8] (‘Di Giorgio’).

<sup>64</sup> *Vecchio* (n 45) [10].

<sup>65</sup> *R v Duckworth* [2016] 1 Qd R 297, 312 [38].

<sup>66</sup> *R v Bevinetto* [2019] Qd R 320, 324 [9] (‘Bevinetto’).

<sup>67</sup> *Hofer v The Queen* [2019] NSWCCA 244, [137] (‘Hofer’).

<sup>68</sup> *Arroyo* (n 45) [23].

<sup>69</sup> *DJK v Tasmania* (n 60) [71].

pretty out of it I guess and just very I don't know, drunk is the only way I can think to describe it.<sup>70</sup> Some complainants turned to descriptions of their motor skills or physical capacity to perform (or fail to perform) certain functions. Many were everyday things such as the ability to walk, talk, dance or text (where typographical errors were used to indicate intoxication).<sup>71</sup> Other functions included an ability to 'enter the gate security code and use the key',<sup>72</sup> or being 'so drunk that she could not hold the cigarette in her lips'.<sup>73</sup> At times, complainants tried to convey their level of intoxication through perceived links with mental effects and sensations, for example: 'out of it',<sup>74</sup> "getting really dizzy" ... and feeling sleepy',<sup>75</sup> and 'in and out of consciousness'.<sup>76</sup>

### B *Third Party Observation*

A number of cases involved evidence from witnesses other than the complainant about the complainant's apparent level of intoxication. This evidence related to the their level of intoxication at various points including: prior to the rape (evidence from witnesses or the defendant); at the time of the sexual intercourse (typically evidence from the defendant), or afterwards (evidence from police, medical professionals or witnesses/friends/family). Third party evidence from witnesses and defendants tended to employ similar methods of intoxication assessment and articulation to those discussed above in relation to complainants. In doing so, their evidence focused on: observable behaviours of the complainant (rather than how the complainant was 'feeling'); and/or descriptions of the number of drinks consumed by the complainant (particularly when the witness had been drinking with the complainant), including the period during which they had been drinking. These witnesses usually placed reliance on adjectival descriptions. For example, one witness noted that the complainant was 'buzzed and having a good time but with her wits about her'.<sup>77</sup>

Another version of third party evidence was an account of the amount of alcohol consumed by the witness and the complainant, where they had been drinking together at a similar rate.<sup>78</sup> This was coupled with an account of how intoxicated the witness felt and an assumption/assertion that the complainant must have been

---

<sup>70</sup> *Lazarus (2017)* (n 34) 382 [18].

<sup>71</sup> *Agresti v The Queen* (2017) 13 ACTLR 1, 6 [17] ('*Agresti*'); *Lazarus (2017)* (n 34) 382 [15]–[16]; *Rosenburg v The Queen* [2016] NSWCCA 292, [21] ('*Rosenburg*'); *Paite v Tasmania* (n 59) [6].

<sup>72</sup> *R v Teece* [2019] QCA 246, [24] ('*Teece*').

<sup>73</sup> *Hofer* (n 67) [18].

<sup>74</sup> *Vecchio* (n 45) [8].

<sup>75</sup> *Knezevic* (n 46) [31].

<sup>76</sup> *Hofer* (n 67) [7].

<sup>77</sup> *MAM v Western Australia* [2018] WASCA 35, [20] ('*MAM*').

<sup>78</sup> See *Lazarus (2016)* (n 34) [42].

feeling the same way.<sup>79</sup> The latter step is, of course, problematic, including because of what is known about individual differences in the effects of AOD consumption. In some cases, witnesses and defendants seemed to be regarded as having ‘standing’ or some kind of lay expertise to offer opinions about the complainant’s level of intoxication.<sup>80</sup> Yet, in doing so, witnesses tended to fall back on motor skill-focused clichés of how a ‘drunken’ person may act (such as whether they were stumbling or slurring their words);<sup>81</sup> or physical and mental capacities including ‘slumped against a brick wall’ and ‘very disoriented and unresponsive’.<sup>82</sup>

A small number of cases included evidence from police officers — typically where the officer had observed the complainant in the aftermath of the rape. For example, in *MAM v Western Australia*,<sup>83</sup> Martin CJ noted that ‘Detective Senior Constable Geary, who attended upon the complainant when she arrived at the police station ... described her condition at that time as “considerably disorientated”, and from his observation, intoxicated’.<sup>84</sup> In another case, the police officer who attended shortly after the rape at the complainant’s house said that ‘she appeared “very intoxicated” and was “having trouble verbalising”, but she gave him a coherent account of what she said had happened’.<sup>85</sup> The officer also reported that ‘she appeared intoxicated but was sobbing and distressed’.<sup>86</sup> Such cases appear to involve an implied recognition of the ‘expertise’ of police in assessing intoxication. However, research suggests that police may be less adept at such assessments than is often presumed.<sup>87</sup>

### C Technology

In some cases, evidence that the complainant was intoxicated took the form of CCTV video footage from around the time in question — such as from cameras inside or outside a bar, on the street or in a taxi. For example:

The Crown relied upon the CCTV footage showing the complainant at the rear door before leaving through it with the appellant and what the Crown submitted the jury would infer from her movements at that time, including her momentary stagger and her leaning on the wall for support, as to her state of intoxication.<sup>88</sup>

<sup>79</sup> Ibid.

<sup>80</sup> For an example of this type of evidence being presented in court, see *Vecchio* (n 45) [21].

<sup>81</sup> See, eg, *ibid* [20], [24].

<sup>82</sup> *Wan v The Queen* [2019] NSWCCA 86, [9] (*‘Wan’*).

<sup>83</sup> *MAM* (n 77).

<sup>84</sup> *Ibid* [22].

<sup>85</sup> *Paite v Tasmania* (n 59) 107 [122].

<sup>86</sup> *Ibid* [139]. See also *Omot* (n 46) [45].

<sup>87</sup> Lauren A Monds et al, ‘Police as Experts in the Detection of Alcohol and Other Drug Intoxication: A Review of the Scientific Evidence within the Australian Legal Context’ (2019) 38(2) *University of Queensland Law Journal* 367, 388.

<sup>88</sup> *Lazarus* (2016) (n 34) [41].

In another case, the Crown relied on a video recording taken of the offending and placed a ‘heavy emphasis on the depictions of the complainant in the ... [v]ideo, suggesting at one point that he was “like a lifeless object”’.<sup>89</sup>

In some cases, the relevant ‘technological’ evidence was a record of text messages sent by the complainant during the relevant time (namely, before or just after the rape). In these instances, reliance was placed on the combination of the content of the message and the prevalence of spelling errors (or failure to correct predictive text errors) to support the assertion that the complainant was intoxicated. For example, in one case the complainant texted a friend (who was not out with her), ‘shooters, I am rebut fucked likeg [sic] need to go home’.<sup>90</sup>

In addition to what is known about the dangers of regarding CCTV images as objective evidence of truth,<sup>91</sup> in the context of rape trials, these findings prompt a question: how does the trier of fact assess the relevance of footage of a person’s physical appearance on a CCTV video (or their impaired texting capacity) to important questions such as whether the Crown has proven the element of non-consent? We return to this question in Part V below.

#### D *Biological Detection and Expert Evidence*

BAC testing has become recognised as a high-quality method of assessing intoxication, widely used by legislatures for the purpose of defining intoxication-based driving offences. By contrast, BAC evidence was rare in the rape cases in this study’s dataset, but it did feature in some cases as a form of evidence about the complainant’s intoxication.<sup>92</sup>

While cautious about extolling the virtue of BAC as a qualitatively ‘better’ form of intoxication evidence (noting that it ‘works’ in the driving context because BAC levels have been legislatively endorsed and widely accepted as proxies for deemed impairment of driving capacity) — we note that a flow-on effect of the absence of BAC evidence in most cases in our study is that expert medical/pharmacological evidence was also generally absent. To put that another way, one of the apparent benefits of having BAC readings admitted as evidence is that, in such cases, an expert was more likely to be called to interpret the BAC evidence and express a view about a person’s capacities at that level of intoxication. In the cases we reviewed, expert evidence was more readily called when intoxication was by way of

---

<sup>89</sup> *Wan* (n 82) [38]. See also: *Tabbah v The Queen* [2017] NSWCCA 55, [166] (*‘Tabbah’*); *Vecchio* (n 45) [49]; *MM* (n 45) [46]; *MAM* (n 77) [28]; *Rosenburg* (n 71) [55].

<sup>90</sup> *Agresti* (n 71) 6 [16].

<sup>91</sup> Althea Gibson, ‘On the Face of It: CCTV Images, Recognition Evidence and Criminal Prosecutions in New South Wales’ (PhD Thesis, University of Technology Sydney, April 2017) 10.

<sup>92</sup> *R v Makary* [2019] 2 Qd R 528, 537 [22] (*‘Makary’*); *Keogh v The Queen* [2018] VSCA 145, [23] (*‘Keogh’*); *Rosenburg* (n 71) [27]; *Tabbah* (n 89) [80].



drugs (eg doxylamine).<sup>93</sup> Further, where an expert opinion was sought and admitted, the expert evidence related primarily to the implications of intoxication for a complainant's memory and the reliability of their evidence.<sup>94</sup>

For example, in one case, a pharmacologist gave evidence that at BACs 'from 0.14 percent and certainly above 0.2 percent, memory fragmentation, whereby a memory of an event is only partial, can occur'.<sup>95</sup> In another, the doctor who conducted the forensic examination of the complainant gave evidence that the estimated level of intoxication (BAC in the range of 0.12–0.36 percent) 'could have affected the higher parts of the brain including judgment and memory and that this would lead to fragmented memory but not reconstruction'.<sup>96</sup> In other cases, the expert evidence stated that at the estimated BAC at the time in question (in the range of 0.13–0.165 percent) a 'reasonable degree of impaired concentration and decision making abilities can be expected',<sup>97</sup> and '[a]t a blood alcohol level of 0.184 a person unused to alcohol would lose visual perception, would have focusing difficulties and would have difficulty in comprehension'.<sup>98</sup> Later in this article, we return to the potential for such evidence to improve decision-making in rape trials.<sup>99</sup> In no case in this study's dataset did an expert express an opinion about the effect of any level of intoxication on the complainant's capacity to consent per se. However, in the case of *R v C, J*,<sup>100</sup> a pharmacologist was shown a video of the offending and opined that the complainant was

totally unresponsive to what was happening. Her eyes appeared closed, her arms and legs appeared not to move. In a normal sleep, the body would respond even if that person remained asleep. Her condition is inconsistent with a normal sleep.<sup>101</sup>

Expert evidence might explain the effects of certain drugs on cognitive capacities. For example, in *Wan v The Queen*,<sup>102</sup> a clinical and forensic toxicologist explained the effect of doxylamine:

It would have a significant effect on your cognitive capacity, on your ability to have communication in a meaningful way. It would have significant effect on your motor capability, maybe unable to walk around and stand upright. It would

---

<sup>93</sup> *Wan* (n 82).

<sup>94</sup> See below Part V(B).

<sup>95</sup> *Bandao v The Queen* [2018] NSWCCA 181, [18].

<sup>96</sup> *MCS* (n 59) [48].

<sup>97</sup> *Keogh* (n 92) [23].

<sup>98</sup> *Makary* (n 92) 537 [22].

<sup>99</sup> See below Part V.

<sup>100</sup> [2015] SASFC 100.

<sup>101</sup> *Ibid* [10].

<sup>102</sup> *Wan* (n 82).

have a significant effect [on] your ability to remember what happened while you were on this medication.<sup>103</sup>

However, in only one case did an expert's evidence even touch on consent, and the nature of that mention was that the expert 'could not venture an opinion as to whether that had deprived the complainant of the capacity to consent'.<sup>104</sup>

### E *Multiple Sources, Sometimes in Conflict*

Typically, the cases analysed involved a number of different sources of evidence. At times, these sources were in conflict — but not simply in ways that might be expected in an adversarial system (eg the complainant's versus defendant's version). For example, in *R v Vecchio*,<sup>105</sup> the complainant gave evidence that she was 'just so out of it',<sup>106</sup> yet other witnesses, including her mother, suggested that her level of intoxication was 'fine'.<sup>107</sup> Meanwhile, other witnesses, including one of the defendants, said the complainant was 'vomiting'<sup>108</sup> and 'kept passing out'.<sup>109</sup> While such variation is not unique to rape trials, given the imprecise and lay language in which intoxication evidence is framed, and the potential legal importance of such evidence, this compounds an already difficult task for juries.

### F *Judicial and Lawyers' Language*

Although not a form of evidence, the language in which lawyers and judges talk about intoxication is also an important part of the criminal trial (eg questions asked in examination and cross-examination, closing statements, summing up, and jury directions). To the modest extent possible via analysis of appellate court judgments, we also analysed the terminology used by judges and lawyers. This revealed that the tendency to express degrees of intoxication via imprecise and vernacular language was not limited to complainants and other witnesses. Trial judges, appeal judges, and sometimes lawyers, when attempting to say something meaningful about the degree of the complainant's intoxication, used language that was rarely illuminating. For example, 'the complainant became overwhelmed by alcohol',<sup>110</sup> the complainant was in an 'impaired state of consciousness',<sup>111</sup> and the complainant was 'inebriated at the time'.<sup>112</sup>

---

<sup>103</sup> Ibid [18].

<sup>104</sup> *Mitic v The Queen* [2011] VSCA 373, [24] ('*Mitic*').

<sup>105</sup> *Vecchio* (n 45).

<sup>106</sup> Ibid [8].

<sup>107</sup> Ibid [22], [23], [28], [39].

<sup>108</sup> Ibid [25], [41], [42].

<sup>109</sup> Ibid [41].

<sup>110</sup> *Costa v Western Australia* [2019] WASCA 200, [64] ('*Costa*').

<sup>111</sup> *Hofer* (n 67) [190].

<sup>112</sup> *MCS* (n 59) [169].

More common was the use of various adverbs in an attempt to capture and convey a sense of the *extent* of the complainant's intoxication, including 'extremely intoxicated',<sup>113</sup> 'very intoxicated',<sup>114</sup> 'noticeably intoxicated',<sup>115</sup> 'highly intoxicated',<sup>116</sup> 'grossly intoxicated',<sup>117</sup> 'heavily intoxicated',<sup>118</sup> and 'extreme intoxication'.<sup>119</sup> Although generally more refined than the colourful vernacular used by some witnesses, such phrases remain imprecise and opaque, and do not always align with relevant legislative language (such as 'so affected ... as to be incapable of consenting' in New South Wales and Victoria).<sup>120</sup> Where used by trial judges, such terms may simply add another layer of complexity and potential confusion, without meaningfully assisting in the task of translating intoxication evidence into a form required for relevant decisions.

### G Implications

Overall, our analysis of how complainant intoxication evidence is communicated in the courtroom suggests that juries (or judges in judge alone trials) will often be left with the formidable task of 'translating' the available evidence about the complainant's intoxication — and the language in which this information is summarised by lawyers and judges — into answers to important questions, How intoxicated was the complainant? Did it rise to the level expressed in the applicable legislation on complainant intoxication — '*so affected by alcohol or another drug as to be incapable of consenting/freely agreeing*' (Victoria, New South Wales and Northern Territory);<sup>121</sup> '*intoxicated ... to the point of being incapable of freely and voluntarily agreeing*' (South Australia);<sup>122</sup> '*so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required*' (Tasmania);<sup>123</sup> or '*incapable of agreeing to the act because of intoxication*' (Australian Capital Territory)?<sup>124</sup> Given the complainant's intoxication, could they have consented? Did they consent? In light of their intoxication, is the complainant a credible witness? Is the complainant's evidence reliable?

<sup>113</sup> *Singh* (n 47) [25]; *Fuller* (n 46) [5].

<sup>114</sup> *Paite v Tasmania* (n 59) 107 [120].

<sup>115</sup> *Di Giorgio* (n 63) [6].

<sup>116</sup> *MM* (n 45) [55].

<sup>117</sup> *Tabbah* (n 89) [166].

<sup>118</sup> *Agresti* (n 71) 36 [157]; *R v Crafter* [2019] SASFC 25, [9] ('*Crafter*').

<sup>119</sup> *Hofer* (n 67) [145].

<sup>120</sup> *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Crimes Act 1958* (Vic) s 36(2)(e).

<sup>121</sup> *Crimes Act 1900* (NSW) s 61HJ(1)(c) (emphasis added); *Criminal Code Act 1983* (NT) s 192(2)(c) (emphasis added); *Crimes Act 1958* (Vic) s 36(2)(e) (emphasis added).

<sup>122</sup> *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d) (emphasis added).

<sup>123</sup> *Criminal Code Act 1924* (Tas) s 2A(2)(h) (emphasis added).

<sup>124</sup> *Crimes Act 1900* (ACT) s 67(1)(g), as amended by *Crimes (Consent) Amendment Act 2022* (ACT) s 5.

These are difficult questions to answer, and our analysis suggests that the sorts of evidence about complainant intoxication that typically feature in rape trials are often poorly adapted to the task — both because of imprecision and the general absence of guidance about how intoxication affects cognitive functions like decision-making, consent formation, and memory. The exceptions to this situation of information deficit were the rare instances in which the available evidence about the complainant's intoxication included a BAC reading or estimate *and* expert evidence from a toxicologist or other scientific expert about the effects of intoxication at the level experienced by the complainant. However, as noted above,<sup>125</sup> even evidence of this sort did not touch on the specific issue of consent — which is a central point of contention in most rape trials.

In previous research on criminal trials more generally, we have shown that juries are often asked to make difficult decisions about the relevance of intoxication (including defendant intoxication where such evidence is admissible) based on 'common knowledge' rather than scientific evidence.<sup>126</sup> As explained by Mariana Valverde, common knowledge 'is not some kind of average of what people know. It is not descriptive but imperative; it is the knowledge we all ought to have.'<sup>127</sup> It is akin to the things we are all assumed to know about a subject.

Popular conceptions of intoxication, culturally embedded attitudes, as well as assumptions about the relationship between AOD consumption and 'availability' for sex, may be especially dangerous in rape trials given the long and entrenched history, and resilience, of myths and stereotypes about rape complainants.<sup>128</sup> These include cultural 'understandings' that alcohol consumption is indicative of an intention to engage in voluntary sex; men and women who consume alcohol are more likely to be interested in and willing to consent to sex, or easier to seduce; and that an intoxicated complainant is less credible.<sup>129</sup> If critical decisions in rape trials about whether a complainant was relevantly intoxicated are routinely made on the basis of imprecise evidence and 'common knowledge', what are the implications for the operation of legislation that is designed to break the intoxication/consent nexus, and recast complainant intoxication evidence as a strength (rather than a weakness) of the Crown case? It is to this question that Part V of this article turns.

---

<sup>125</sup> See Part IV(D) above.

<sup>126</sup> McNamara et al (n 40) 168; Quilter and McNamara (n 39) 174.

<sup>127</sup> Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003) 224.

<sup>128</sup> Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23.

<sup>129</sup> Emily Finch and Vanessa E Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16(4) *Social and Legal Studies* 591; Heather D Flowe and Anna Carline, 'Alcohol and Remembering Rape: Setting the Scene' in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Macmillan, 2021) 1, 7.

## V THE SIGNIFICANCE OF COMPLAINANT INTOXICATION EVIDENCE

Recognition that there may be a relationship between the complainant’s intoxication and the Crown’s obligation to prove non-consent has a long history. Traditionally, such evidence was most likely to *weaken* the Crown case because the (problematic) relationship that was evoked by such evidence was an assumed or asserted nexus between the complainant’s intoxication and the likelihood that they consented.<sup>130</sup> Legislation of the sort discussed in Part II of this article is designed to disrupt this traditional nexus — by recharacterising the significance that the court should attach to the complainant’s intoxication as not a ‘weakness’, but a potential *strength* of the Crown case. Far from being synonymous with consent, the trier of fact is invited to approach the complainant’s intoxication as evidence that they did *not consent*. What does this study’s dataset of appellate decisions reveal about whether this statutory recalibration of the significance of complainant intoxication evidence has been operationalised?

We approached this question via two of lines of inquiry (recognising that, depending on the appeal grounds, not all appellate judgments were equally illuminating on these matters). First, we read the appellate decisions for insights into how complainant intoxication evidence was positioned at trial — whether by the prosecutor, defence counsel or the judge. Secondly, we analysed the appellate judgments for what they revealed about how the appeal judges regarded complainant intoxication evidence.

### A Complainant Intoxication and Non-Consent

The following three main themes emerged from our analysis of appellate decisions in this study’s dataset.

#### 1 Intoxication/Consent Nexus Remains

First, despite the ‘corrective’ intentions behind provisions such as s 36(2)(e) of the *Crimes Act 1958* (Vic),<sup>131</sup> it is clear that defence lawyers in some cases continue to engage the intoxication/consent nexus; that is, they rely on evidence of the complainant’s intoxication to support an assertion that consent was present. For example, in one case, the defence submitted that ‘the complainant’s intoxication “has removed the complainant’s inhibitions, or inflamed her passion, or reduced her power of self-control”’.<sup>132</sup> In another case, the defendant complained that there was a misdirection on intoxication because

at no stage ... did the [trial] Judge address the critical question on the defence case which was whether the complainant had lost her inhibitions and was now

---

<sup>130</sup> See above n 4.

<sup>131</sup> See above Part II(A).

<sup>132</sup> *Makary* (n 92) 538 [31]. See also: *Ewen* (n 58) 576 [164]; *Collins v The Queen* (2018) 265 CLR 178, 184 [14].

either unwilling or unable, as a result of intoxication or for some other reason, to positively admit her conduct.<sup>133</sup>

In another, the submission was ‘that if the complainant could not remember other aspects of the evening, then it was reasonably possible that she had, in a waking state, consented to the sexual encounter with the applicant but had subsequently forgotten it’.<sup>134</sup>

## 2 *Inadequacies of Complainant Intoxication Statutory Provisions and Judicial Attitudes*

Secondly, these defence attempts are not necessarily in vain. None of the variously expressed statutory provisions on complainant intoxication completely foreclose such strategies. Further, the cases we analysed revealed that some judges — at both trial and appellate levels — remained open to assertions and submissions that attempted to frame the complainant’s intoxication as a weakness in the Crown case on non-consent, but we detected considerable variation. This was manifested in one of two ways: (1) adopting the view that an extremely high level of intoxication was required to suggest non-consent; or (2) embracing loss of inhibition (and, specifically, inclination to consent to sex) as one of the attributes of intoxication. Illustrating the first category, in the 2011 decision of *Mitic v The Queen*,<sup>135</sup> the Victorian Court of Appeal cited the following statement from the 1993 decision of *R v Francis*<sup>136</sup> from the Queensland Court of Appeal:

It is not correct as a matter of law that it is rape to have [sexual intercourse with] a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that that at least includes the case where the [intercourse] is consensual notwithstanding that the consent is induced by excessive consumption of alcohol. The critical question in this case was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not.<sup>137</sup>

To the extent that this passage appears to evoke the concept of ‘drunken consent’ — that is, the idea that consent ‘given’ while intoxicated may still qualify as consent — it may seem inconsistent with the tenor of Victoria’s statutory provision on complainant intoxication.<sup>138</sup> However, it is important to appreciate the high threshold set by s 36(2)(e) of the *Crimes Act 1958* (Vic) — ‘so affected ... as to

---

<sup>133</sup> *Crafter* (n 118) [71].

<sup>134</sup> *Cordeiro v The Queen* [2019] NSWCCA 308, [71] (‘*Cordeiro*’). This submission was rejected on appeal: at [72]. See also *Ewen* (n 58) 576 [164].

<sup>135</sup> *Mitic* (n 104).

<sup>136</sup> [1993] 2 Qd R 300.

<sup>137</sup> *Mitic* (n 104) [24], citing *R v Francis* [1993] 2 Qd R 300, 305 [30].

<sup>138</sup> *Crimes Act 1958* (Vic) s 36(2)(e).

be incapable of consenting<sup>139</sup> — which appears to leave considerable room for ‘drunken consent’ assertions. We return to this question below. A high threshold was also set in the Queensland case of *R v Teece*:<sup>140</sup>

While the complainant gave evidence of having consumed six drinks during the night and feeling tipsy, there was no evidence that her intoxication was such that she *passed out or could not control her actions*. Her evidence was that she decided to go to bed because she was tipsy, demonstrating, as the respondent submitted, an awareness of her state and level of comprehension.<sup>141</sup>

The second category is illustrated, for example, by a case in which the trial judge told the jury that ‘[i]t is a common experience that intoxication may reduce a person’s inhibitions, may cause them to be more relaxed and outgoing and, in certain circumstances, it may cause them to do things they would not do if they were not intoxicated’ — and the South Australian Court of Criminal Appeal found no fault in these directions.<sup>142</sup>

However, in other cases, appellate judges expressed scepticism about the viability of the defendant’s assertion that a highly intoxicated woman had consented to having sex with him.<sup>143</sup> The Tasmanian case of *Paite v Tasmania*<sup>144</sup> provides an illustration of the range of judicial opinions on the relevance of complainant intoxication evidence that still exist — on this occasion, within the same bench. The majority rejected a line of argument that relied on the intoxication/consent nexus:

What is implicit in the appellant’s contentions is the suggestion that, perhaps affected by alcohol, the complainant agreed to sexual intercourse, but then quickly regretted her actions and made, and persisted with, a false complaint of rape. In our respectful opinion, it would be wrong to doubt the credibility of the complainant’s account based on a generalised notion that alcohol has such an effect. There was no evidence that alcohol may have affected the complainant in that way and, because of the way in which the trial was conducted, it was not a proposition which was put to her so as to give her an opportunity to respond to it.<sup>145</sup>

In the same appeal, the dissenting judge considered that evidence of the complainant’s intoxication should have led the jury to have reasonable doubt about whether the Crown had proven the element of non-consent:

---

<sup>139</sup> Ibid. Though note that in *Mitic* (n 104) there was no discussion of the potential relevance of s 36(2)(e).

<sup>140</sup> [2019] QCA 246.

<sup>141</sup> Ibid [24] (emphasis added).

<sup>142</sup> *Crafter* (n 118) [72], [77].

<sup>143</sup> *Makary* (n 92) 547 [71]; *Tabbah* (n 89).

<sup>144</sup> *Paite v Tasmania* (n 59).

<sup>145</sup> Ibid 108 [124] (Pearce J and Martin AJ).

Even making due allowance for the possibility that a combination of intoxication and distress could account for the complainant's behaviour and demeanour as she arrived at her residence and subsequently, the possibility of initial alcohol induced euphoria turning into ex post facto regret for her conduct looms in my mind sufficiently to raise a reasonable doubt as to her assertion of lack of consent.<sup>146</sup>

### 3 *Complainant Intoxication Statutory Provisions Not Utilised in Crown Cases*

Thirdly, to the extent that we could discern, with appellate judgments as our source material,<sup>147</sup> the relevant statutory provisions on complainant intoxication were not a prominent touchstone for how the Crown case on non-consent was presented. In fact, the cases in which intoxication was asserted as strong evidence of non-consent were instances in which the complainant was intoxicated to the point of being unconscious or asleep, or very nearly so. For example, in *R v Crafter* ('*Crafter*'),<sup>148</sup> the Crown argued that the complainant was 'unconscious, either asleep or passed out from the alcohol' when the rape commenced, and therefore was 'incapable of freely and voluntarily' consenting.<sup>149</sup> In *Cordeiro v The Queen*,<sup>150</sup> the Crown's position was that the complainant was unconscious, 'asleep and not alert and responding ... and was therefore unable to give consent'.<sup>151</sup> In another case, the complainant was described in terms which suggested she was nearly unconscious or asleep, for example, 'lolling back in the car seat with her eyes half-closed in a state of grossly compromised consciousness'.<sup>152</sup> In most Australian jurisdictions, evidence that the complainant was asleep or unconscious is a separate expressly listed statutory factor negating consent.<sup>153</sup>

In some cases, evidence of a complainant's intoxication was engaged by the Crown indirectly, in support of an old-fashioned (and, arguably, problematic) approach to proving non-consent: to explain the complainant's inability to physically resist. For example, '[t]he complainant gave evidence that, due to her level of intoxication, she

---

<sup>146</sup> Ibid 92 [59] (Estcourt J).

<sup>147</sup> The second phase of our larger project, based on analysis of trial transcripts, will allow deeper assessment of how Crown prosecutors engage complainant intoxication evidence in rape trials.

<sup>148</sup> *Crafter* (n 118).

<sup>149</sup> Ibid [82], [86].

<sup>150</sup> *Cordeiro* (n 134).

<sup>151</sup> Ibid [55]. See also *Bevinetto* (n 66) 326–7 [26].

<sup>152</sup> *Tabbah* (n 89) [166]. See also *Makary* (n 92) 546 [68].

<sup>153</sup> *Crimes Act 1900* (ACT) ss 67(1)(m)–(n); *Crimes Act 1900* (NSW) s 61HJ(1)(d); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(d).



was unable to “fight”, and simply leant back in the seat’ of the taxi where she was sexually assaulted.<sup>154</sup>

Our analysis raises a question as to what additional ‘benefit’ is being derived from the discrete complainant intoxication provisions that are a prominent feature of consent legislation in most Australian jurisdictions.<sup>155</sup> Unless they are being engaged in cases where the complainant was intoxicated, but not asleep or unconscious — and in their own right (as opposed to cases like *Tabbah v The Queen* (“*Tabbah*”)<sup>156</sup> where intoxication evidence operates indirectly to explain why the complainant did not act in the way traditionally expected of a ‘genuine’ rape victim) — their utility may be questionable. Worse, their existence on the statute books may give the mistaken impression that the concept of consent has been effectively ‘modernised’ and that the intoxication/consent nexus has been broken.

### B *Complainant Intoxication and Credibility/Reliability*

While our primary objectives in this study were to better understand the forms of evidence that are relied on in rape trials to establish the complainant’s intoxication, and whether such evidence was employed to engage relevant statutory guidance on the concept of consent (see Part I(A) above), we also sought to identify other ways in which complainant intoxication evidence might impact on the conduct and outcome of rape trials. We hypothesised that the veracity of the complainant’s account of events might be challenged via assertions that intoxication renders a person a less credible and reliable witness due to AOD-related memory impairment.<sup>157</sup> We found that this strategy was employed by the defence in a number of cases — revealing another way in which complainant intoxication evidence can be engaged to the Crown’s disadvantage. The typical focus centered on another asserted nexus: intoxication and impaired memory. For example, in *DJK v Tasmania*,<sup>158</sup> the defence closing address included the following:

How much did the cannabis, on someone who’s 20 kilos less, affect her ability to recall, her ability to know what was happening to her that night? What effect did it have on her, and is that something that you can use or that you certainly

---

<sup>154</sup> *Tabbah* (n 89) [26] (emphasis in original). See also *Hofer* (n 67) [191], where the Crown relied on the level of intoxication to prove non-consent by noting that the ‘incontestable evidence that the applicant had plied each of these young women with alcohol evinced his intent, from the outset, to reduce their capacity for resistance’.

<sup>155</sup> Although we did not attempt systematic cross-jurisdictional comparative analysis, we did not observe significant differences in how complainant intoxication evidence was treated across Australia’s eight jurisdictions, irrespective of the presence (or form) or absence of a statutory provision on complainant intoxication.

<sup>156</sup> *Tabbah* (n 89).

<sup>157</sup> Analysis of the cases in our dataset was concerned with qualitative assessments of a complainant’s credibility, rather than technical applications of the rules governing the admissibility of credibility evidence. See, eg, *Evidence Act 1995* (Cth) pt 3.7.

<sup>158</sup> *DJK v Tasmania* (n 60).

need to as far as my address to you is, consider in terms of whether you can believe the account that she gave.<sup>159</sup>

In *Crafter*, the defence closing address stated:

Of course, the other effect of alcohol, and this members of the jury if you like, could I commend to you as deserving of your critical attention in this case, is the effects of alcohol on the capacity of people to remember.

Now there is some evidence in this case from [the complainant] that even she recognised that on other occasions when she had been drinking it would have an impact on her memory. She conceded that she understood the concept of blacking out, and that is a very important issue in this case members of the jury, because during the course of the evidence and in particular the evidence of [the complainant], you might have heard numerous answers where in response to questions put, not only by me, but more particularly by the learned prosecutor, their answers were ‘I can’t remember’. ‘I can’t remember’. My learned instructing solicitor went through part of the transcript. I suggest there was at least 80 times where her answers were ‘I can’t remember.’ ‘I don’t remember’. Now there is nothing insidious or wrong about that as such, because you would all know members of the jury that if you drink alcohol to a certain point, the memory is impacted and sometimes can be impacted to the point where you genuinely do not remember what you said or did the night before.

... So bringing it home to [the complainant] when she gives her evidence here the [sic] two days ago, she may well have been telling you what she believed to be the absolute truth. It is your job to determine not whether she was telling you what she believed to be the truth, but to determine whether what she was telling you was accurate or reliable such that you can act upon it beyond a reasonable doubt.

... So your job in this case is to look very carefully at her evidence, particularly with respect to the allegation that she wasn’t consenting, and to determine whether it is accurate and reliable to the point where you can act on it beyond a reasonable doubt. It is not the defence case, it was never put to her at any stage that she was lying. I mean obviously if you thought she was lying that would be the end of it but it’s not the defence case she was lying. It’s the defence case that what she says and where she tries to suggest she was not consenting, you shouldn’t accept that and you should at least have a reasonable doubt about it.<sup>160</sup>

Note that the asserted effects of alcohol are supported not by expert evidence, but by common knowledge, which the jury is taken to already hold. The apparent legitimacy of this approach was endorsed by the trial judge in the same case:

---

<sup>159</sup> Ibid [75].

<sup>160</sup> Ibid [74].

It is common experience that intoxication can have an adverse bearing on a witness's recollection of events. It is also a common experience that intoxication can affect a person's subsequent recall of relevant events. Because intoxication can affect or alter a person's state of mind, the intoxication of a witness is relevant to your consideration of their evidence and your assessment of their credibility and most importantly, their reliability.<sup>161</sup>

This case was not atypical, but nor was it necessarily representative of the judicial approaches we observed in terms of the credibility and reliability implications of a complainant's intoxication. We identified three approaches in the appellate judgments we examined. First, some judges endorsed the proposition that intoxication necessarily impacts adversely on a witness' reliability and credibility, and that it is important to direct the jury to this effect.<sup>162</sup> In the South Australian case of *R v Daniel*,<sup>163</sup> Sulan J (with whom David J agreed) concluded that:

In my view, the direction failed to adequately instruct the jury that, in considering the reliability of the complainant's evidence, and whether they could be satisfied beyond reasonable doubt of the appellant's guilt upon her evidence, her state of intoxication was relevant. It was relevant to her perception, and to her recall of the events. It was also relevant, when considering her credibility.

In restricting his direction to the question of whether the complainant might have lost her inhibitions, but has now forgotten, or is now unwilling to admit her conduct, the trial judge failed to give a sufficient direction about the relevance of the complainant's state of intoxication.<sup>164</sup>

In *Costa v Western Australia*,<sup>165</sup> the Western Australian Court of Appeal observed that '[t]he complainant's limited recollection of the events ... and her memory being

<sup>161</sup> Ibid [72].

<sup>162</sup> Although s 165 of the Uniform Evidence Law, which deals with unreliable evidence and warnings to the jury, makes no express reference to intoxication or AOD effects, s 165(1)(c) is sufficiently broad in its terms as to include intoxication under 'evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like': *Evidence Act 1995* (Cth) s 165(1)(c); *Evidence Act 2011* (ACT) s 165(1)(c); *Evidence Act 1995* (NSW) s 165(1)(c); *Evidence (National Uniform Legislation) Act 2011* (NT) s 165(1)(c); *Evidence Act 2001* (Tas) s 165(1)(c); *Evidence Act 2008* (Vic) s 165(1)(c). See, eg, *R v Moffatt [No 3]* [1999] NSWSC 233, [80]. The *Victorian Criminal Charge Book* contains a summary of 'non-listed categories' of unreliable evidence recognised by the case law, including '[e]vidence of a witness who was alcohol or drug-affected at time of the events, whether voluntarily or by the alleged actions of the accused (*R v Maple* [1999] VSCA 52; *Hudson v The Queen* [2017] VSCA 122)': Judicial College of Victoria, *Victorian Criminal Charge Book* (online at 28 August 2022) Part 4: Evidentiary Directions, '4.22 Unreliable Evidence Warning' [4.22.21].

<sup>163</sup> (2010) 207 A Crim R 449 ('*Daniel*').

<sup>164</sup> Ibid 462 [50]–[51] (Sulan J, David J agreeing at [112]).

<sup>165</sup> *Costa* (n 110).

in “pictures”, provides grounds for approaching the complainant’s evidence with some caution’.<sup>166</sup>

In a second ‘intermediate’ category were judgments which adopted the position that, while relevant to assessing the veracity of their account, a complainant’s intoxication should not be given undue weight or be regarded as determinative. For example, in *Bakshi v The Queen*,<sup>167</sup> the Victorian Court of Appeal characterised the fact that the complainant was ‘obviously affected by alcohol on the night in question’ as evidence ‘that might be thought to cast some doubt upon the complainant’s credibility’,<sup>168</sup> but pointed to other ‘significant features of the complainant’s account which gave her evidence a ring of truth’.<sup>169</sup>

In some cases, we identified a third approach: evidence of the complainant’s intoxication was regarded as having the potential to make them *more* credible and reliable, because it could explain ‘flaws’ in their account. For example, in *Tabbah* the New South Wales Court of Criminal Appeal said that

although cross-examination of the complainant was firm and extensive, no ‘knock-out blow’ was landed. In particular, many of the inconsistencies and gaps in recollection on her part could be amply explained by her gross intoxication, the evidence for which came from many sources: the complainant herself, Ms Hart, the second taxi driver, the finding of the shoe on the garbage bin, and the CCTV from the second taxi.<sup>170</sup>

In another case, the South Australian Court of Criminal Appeal said:

[T]he issues surrounding the reliability of the complainant’s evidence were not sufficient to preclude satisfaction of the appellants’ guilt to the requisite standard. They were matters to be considered in assessing whether the charges had been proved to the requisite standard, but did not *per se*, preclude a finding of guilt. Further, the inconsistencies identified on the evidence could all be explained by the complainant’s youth, *intoxication at the time*, sense of shame, his fear of not being believed, and the nature of the ordeal he had endured as a teenage boy of 14 years of age.<sup>171</sup>

*R v Cashion*<sup>172</sup> was another South Australian Court of Criminal Appeal decision, addressing the appellant’s ground of appeal that the complainant’s evidence was

---

<sup>166</sup> Ibid [213].

<sup>167</sup> [2018] VSCA 83.

<sup>168</sup> Ibid [87].

<sup>169</sup> Ibid [84]. See also: *Omot* (n 46); *Roberts v The Queen* (2012) 226 A Crim R 452; *Cook* (n 49); *Rosenburg* (n 71) [47]; *Duckworth* (n 65); *Keogh* (n 92); *Fuller* (n 46).

<sup>170</sup> *Tabbah* (n 89) [169]. See also: *MCS* (n 59) [169]; *O’Loughlin* (n 43); *Hofer* (n 67).

<sup>171</sup> *R v Compton* (2013) 237 A Crim R 177, 219 [162] (emphasis added).

<sup>172</sup> *Cashion* (n 58).

‘so lacking in detail’,<sup>173</sup> so as to produce a reasonable doubt as to the reliability and credibility of her evidence. The Court held that

[t]he appellant’s criticism of C’s testimony concerning the offences of rape fails to have regard to C’s evidence that she was seriously affected by drugs given to her by the appellant. C testified that the appellant and David Cashion had given her alcohol and cannabis with pills crushed on top. She was carried into the bedroom by the appellant.<sup>174</sup>

One of the possible explanations for the diversity of approaches we have described here is that, as noted above, rape trials (and appeals) rarely have the benefit of expert evidence on AOD effects. This is a significant omission — particularly given that there is an emerging body of literature which suggests that ‘common knowledge’ conceptions of the intoxication/memory relationship may be inaccurate.<sup>175</sup> Intoxication due to AOD use can have widely varying effects on the encoding and recall of memory, depending heavily on the type(s) or combination of drugs involved and the degree of intoxication.<sup>176</sup> Alcohol is the drug that has been most widely researched in relation to its effects upon memory, and the available scientific literature broadly indicates that intoxication can impact upon the *completeness* of an individual’s memory but does not appear to decrease the *correctness* of the information that is reported.<sup>177</sup> A recent study specifically involved participants encoding a hypothetical rape scenario while they were either sober or alcohol intoxicated.<sup>178</sup> The authors reported that while intoxication decreased the completeness of the participants’ recall, there were no alcohol-related effects on recall errors and no evidence that intoxicated women were more prone to incorporating misleading information into their statements.<sup>179</sup>

---

<sup>173</sup> Ibid 457 [31].

<sup>174</sup> Ibid 457 [33].

<sup>175</sup> See, eg, Heather D Flowe et al, ‘Impact of Alcohol on Memory: A Systematic Review’ in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Macmillan, 2021) 33.

<sup>176</sup> Ibid 51.

<sup>177</sup> See Theo Jores et al, ‘A Meta-Analysis of the Effects of Acute Alcohol Intoxication on Witness Recall’ (2019) 33(3) *Applied Cognitive Psychology* 334, 340. See also Lilian Kloft et al, ‘Hazy Memories in the Courtroom: A Review of Alcohol and Other Drug Effects on False Memory and Suggestibility’ (2021) 124(1) *Neuroscience and Biobehavioral Reviews* 291, 298.

<sup>178</sup> Heather D Flowe et al, ‘An Experimental Examination of the Effects of Alcohol Consumption and Exposure to Misleading Postevent Information on Remembering a Hypothetical Rape Scenario’ (2019) 33(3) *Applied Cognitive Psychology* 393.

<sup>179</sup> Ibid 405. See also Heather D Flowe et al, ‘Alcohol and Remembering a Hypothetical Sexual Assault: Can People Who Were under the Influence of Alcohol During the Event Provide Accurate Testimony?’ (2016) 24(8) *Memory* 1042.

## VI CONCLUSION

There is still much to be learned about how intoxication evidence operates in rape trials and whether the objectives of statutory reform directed at breaking the AOD consumption/assumed consent nexus are being achieved.<sup>180</sup> The insights presented in this article — based on analysis of Australian appellate court decisions over a 10-year period — suggest that there may be a considerable gap between aspiration and reality when it comes to attempts to transform complainant intoxication from a common barrier to conviction (and a contributor to distress and disappointment for victim-survivors) to a component of a strong Crown case. The larger project of which this article is a part of began with the working hypothesis that complainant intoxication evidence may be a ‘double-edged sword’ — *capable* of supporting the Crown case in relation to proof of non-consent, but also a potential basis for the defence to challenge the veracity of the complainant’s account. In this way, we anticipated that the gains delivered by statutory corrections on the intoxication/consent nexus might be counterweighted by assumptions (uninterrupted by statutory reform) about an intoxication/unreliability (impaired memory) nexus.

The findings from this study of appellate decisions offer support for this hypothesis, although not consistently or universally across the 102 cases in the dataset. In conclusion, we offer five observations.

First, provisions like s 36(2)(e) of the *Crimes Act 1958* (Vic) do not appear to have deterred defence strategies based on the problematic traditionally assumed nexus between intoxication and consent. In short, it is still the case that complainant intoxication evidence can loom as a Crown case *weakness*.

Secondly, there is little evidence that Crown Prosecutors are relying on these statutory provisions to position complainant intoxication evidence as a *strength*. In the cases we examined, the complainant’s AOD consumption was most likely to feature in the Crown’s case on non-consent where the evidence was that the complainant was AOD-affected to the point of being asleep or unconsciousness. It is *these states* that are unambiguously regarded as incompatible with consent (as

---

<sup>180</sup> Effective 1 June 2022, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) sch 2 sub-div 3 added a new direction related to complainant intoxication to the *Criminal Procedure Act 1986* (NSW). Section 292E(b) now provides for the following direction: ‘It should not be assumed that a person consented to a sexual activity because the person — ... consumed alcohol or another drug’. Under a new s 292, the trial judge *may* give this direction (and other directions relate to consent) ‘(a) if there is a good reason to give the consent direction, or (b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction’. The Victorian Law Reform Commission has recommended the adoption of a similar direction: *Improving the Justice System Response to Sexual Offences* (n 7) ch 20. It remains to be seen how this direction will be used in sexual assault trials in New South Wales, and whether it contributes to eroding the traditionally assumed nexus between AOD consumption or intoxication and consent to sex.

they should be),<sup>181</sup> but it follows that complainant intoxication *per se* may not often be considered for its capacity to evidence non-consent, notwithstanding statutory guidance about its relevance.

Thirdly, our analysis detected another way in which complainant intoxication evidence can be engaged so as to challenge the Crown's case: by suggesting that it weakens the witness's credibility and/or reliability. On this issue we were struck by the range of appellate court approaches — from endorsement of the view that an intoxicated complainant's evidence has inherent reliability deficits, to more careful and nuanced assessment of what intoxication means for the complainant's credibility and reliability. Given that this is *not* a matter on which legislatures have provided statutory guidance, it would be desirable if appellate courts endeavoured to do so, with a view to achieving greater case-to-case consistency, and alignment with what is known in the scientific and social scientific literature about AOD effects on memory and recall.

Fourthly, without wanting to oversimplify the nature of the problems that still surround complainant intoxication in rape trials, there does appear to be a relationship between the *form* which evidence of the complainant's intoxication usually takes, and the continuation of problematic assertions and assumptions about how such evidence should be read and applied. Lay self-assessment, colloquial and imprecise descriptions, observation of demeanour and motor functionality — evidence in these terms is typically not well adapted to fair and sound interpretation of what a complainant's intoxication *means* for determining the accused's criminal responsibility. Ironically, it can exacerbate rather than neutralise intoxication-related rape myths by requiring triers of fact to default to 'common knowledge' about the implications of AOD consumption when answering crucial trial questions including consent and reliability. The solution is not simply to hand over decisions about the nature and significance of intoxication evidence to experts, but it seems likely that judges and juries would be aided if expert evidence about AOD effects was more consistently admitted in rape trials, and that this be reflected in the guidance offered by appellate courts.<sup>182</sup>

Finally, the analysis of cases undertaken for this study provides another reminder that broader cultural questions around masculinity, and entitlement to sex in particular, need to be asked and confronted. Our dataset reveals a disturbing variety of contexts

---

<sup>181</sup> In the cases in this study, this applied equally in those jurisdictions that have a specific statutory provision on asleep or unconscious, and those that do not.

<sup>182</sup> An option worthy of further consideration is an amendment to s 79 of the Uniform Evidence Law setting out that 'specialised knowledge' includes a reference to specialised knowledge of AOD effects on memory; that is, an approach that mirrors the treatment of 'specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)': *Evidence Act 1995* (Cth) s 79(2)(a); *Evidence Act 2011* (ACT) s 79(2)(a); *Evidence Act 1995* (NSW) s 79(2)(a); *Evidence (National Uniform Legislation) Act 2011* (NT) s 79(2)(a); *Evidence Act 2001* (Tas) s 79(2)(a); *Evidence Act 2008* (Vic) s 79(2)(a).

in which men took advantage of highly intoxicated women to have sex. It seems inconceivable that anyone could have thought the woman would be consenting in the circumstances, such as: asleep in bed (where there was no previous relationship); out on the street late at night and heavily intoxicated; and drunk, disoriented and vomiting in a park. Related to previous findings about the predatory use of alcohol by men,<sup>183</sup> we note the absolute opportunism displayed in many of these cases — in which men felt entitled to sex with vulnerable women. No amount of ‘perfecting’ the statutory rules or appellate jurisprudence governing rape trials can be expected to transform attitudes and behaviours that have long and embedded histories, but this should not deter continued reform efforts to deliver justice to victims of sexual violence.

---

<sup>183</sup> Liz Wall and Antonia Quadara, ‘Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts’ (ACSSA Issues No 18, Australian Centre for the Study of Sexual Assault, 2014); Liz Kelly, Jo Lovett and Linda Regan, ‘A Gap or a Chasm? Attrition in Reported Rape Cases’ (Research Paper No 293, 2005). The dataset for this study contained a number of cases demonstrating such behaviour. See, eg: *Hofer* (n 67) [135]; *Cordeiro* (n 134) [26].



## APPENDIX A

A *Australian Capital Territory*

*O'Rafferty v The Queen* [2014] ACTCA 35  
*Agresti v The Queen* [2017] ACTCA 20; (2017) 13 ACTLR 1  
*Aroub v The Queen* [2018] ACTCA 13

B *New South Wales*

*Jones v The Queen* [2010] NSWCCA 117  
*Ewen v The Queen* [2015] NSWCCA 117; (2015) 250 A Crim R 544  
*Jeffreys v The Queen* [2015] NSWCCA 132  
*KA v The Queen* [2015] NSWCCA 111; (2015) 251 A Crim R 308  
*Darby v The Queen* [2016] NSWCCA 164  
*Lazarus v The Queen* [2016] NSWCCA 52  
*Rosenburg v The Queen* [2016] NSWCCA 292  
*R v Lazarus* [2017] NSWCCA 279; (2017) 270 A Crim R 378  
*Day v The Queen* [2017] NSWCCA 192  
*Bell v The Queen* [2017] NSWCCA 207  
*Tabbah v The Queen* [2017] NSWCCA 55  
*Bandao v The Queen* [2018] NSWCCA 181  
*MM v The Queen* [2018] NSWCCA 158  
*Mulholland v The Queen* [2018] NSWCCA 299; (2018) 100 NSWLR 477  
*Wan v The Queen* [2019] NSWCCA 86  
*Smith v The Queen* [2019] NSWCCA 162  
*Hofer v The Queen* [2019] NSWCCA 244  
*Rao v The Queen* [2019] NSWCCA 290  
*Cordeiro v The Queen* [2019] NSWCCA 308  
*Xu v The Queen* [2019] NSWCCA 178  
*Ganiji v The Queen* [2019] NSWCCA 208

C *Northern Territory*

*Arroyo v The Queen* [2010] NTCCA 9

D *Queensland*

*R v Almotared* [2011] QCA 128  
*R v Butler* [2011] QCA 265  
*R v O'Loughlin* [2011] QCA 123  
*R v Elomari* [2012] QCA 27  
*R v Lee* [2012] QCA 239  
*R v McGuire* [2013] QCA 290  
*R v Burton* [2014] QCA 37  
*R v Bonner* [2015] QCA 80  
*R v Davidson* [2015] QCA 30  
*R v Duckworth* [2016] QCA 30; (2016) 256 A Crim R 537; [2016] 1 Qd R 297

*R v Vecchio* [2016] QCA 71  
*R v Collins* [2017] QCA 113; (2017) 266 A Crim r 564 ; [2018] 1 Qd R 364  
*R v Schafer* [2017] QCA 208  
*R v Bevinetto* [2018] QCA 219; [2019] 2 Qd R 320  
*R v RBA* [2018] QCA 338  
*R v De Silva* [2018] QCA 274  
*R v Makary* [2018] QCA 258; [2019] 2 Qd R 528  
*R v MCS* [2018] QCA 184  
*R v Sollitt* [2019] QCA 44  
*R v Butterworth* [2019] QCA 94  
*R v Teece* [2019] QCA 246

#### E *South Australia*

*R v Rahmanian* [2010] SASC 137  
*R v Daniel* [2010] SASCFC 62; (2010) 207 A Crim R 449  
*R v Bazan* [2010] SASCFC 50; (2010) 272 LSJS 522  
*R v Higgs* [2011] SASCFC 108; (2011) 111 SASR 42  
*R v Sierke* [2011] SASCFC 53  
*R v Wait* [2011] SASCFC 91  
*R v Compton* [2013] SASCFC 134; (2013) 237 A Crim R 177  
*R v Cashion* [2013] SASCFC 14; (2013) 115 SASR 451  
*R v Fuller* [2015] SASCFC 71  
*R v C, J* [2015] SASCFC 100  
*R v Perara-Cathcart* [2015] SASCFC 103  
*R v Kennedy* [2017] SASCFC 170  
*R v Moores* [2017] SASCFC 95; (2017) 268 A Crim R 106; (2017) 128 SASR 340  
*R v Partington* [2018] SASCFC 113; (2018) 132 SASR 11  
*Ekisa v The Queen* [2019] SASCFC 159  
*R v Crafter* [2019] SASCFC 25

#### F *Tasmania*

*Wilson v Tasmania* [2017] TASCCA 11  
*DJK v Tasmania* [2017] TASCCA 17  
*Paite v Tasmania* [2019] TASCCA 5; (2019) 30 Tas R 73

#### G *Victoria*

*R v Simon* [2010] VSCA 66  
*Halamboulis v The Queen* [2011] VSCA 449  
*Khan v The Queen* [2011] VSCA 286  
*Mitic v The Queen* [2011] VSCA 373  
*Neal v The Queen* [2011] VSCA 172; (2011) 213 A Crim R 190; (2011) 32 VR 454  
*Sharma v The Queen* [2011] VSCA 356  
*Sibanda v The Queen* [2011] VSCA 285; (2011) 213 A Crim R 303; (2011) 33 VR 67  
*NJ v The Queen* [2012] VSCA 256; (2012) 229 A Crim R 448; (2012) 36 VR 522  
*Roberts v The Queen* [2012] VSCA 313; (2012) 226 A Crim R 452

*Niaros v The Queen* [2013] VSCA 249  
*Rana v The Queen* [2014] VSCA 198  
*Theodoropoulos v The Queen* [2015] VSCA 364; (2015) 257 A Crim R 390; (2015) 51 VR 1  
*Cox v The Queen* [2015] VSCA 28  
*Wahi v The Queen* [2015] VSCA 132  
*Jurj v The Queen* [2016] VSCA 57  
*Omot v The Queen* [2016] VSCA 24  
*Di Giorgio v The Queen* [2016] VSCA 335  
*Van Der Zant v The Queen* [2016] VSCA 138  
*Inia v The Queen* [2017] VSCA 49  
*Gul v The Queen* [2017] VSCA 153  
*Bullmore v The Queen* [2017] VSCA 41  
*Keogh v The Queen* [2018] VSCA 145  
*Bakshi v The Queen* [2018] VSCA 83  
*Howard v The Queen* [2018] VSCA 273  
*Perryman v The Queen* [2019] VSCA 252  
*Jacobs (a Pseudonym) v The Queen* [2019] VSCA 285  
*Bolton v The Queen* [2019] VSCA 21

#### H *Western Australia*

*Cook v Western Australia* [2010] WASCA 241  
*Miles v Western Australia* [2010] WASCA 93  
*Johnston v Western Australia* [2010] WASCA 121  
*Narkle v Western Australia* [2011] WASCA 160  
*Grubisic v Western Australia* [2011] WASCA 147; (2011) 210 A Crim R 457; (2011) 41 WAR 524  
*Singh v Western Australia* [2012] WASCA 262  
*Munmurrie v Western Australia* [2013] WASCA 167  
*Knezevic v Western Australia* [2017] WASCA 97  
*MAM v Western Australia* [2018] WASCA 35  
*Costa v Western Australia* [2019] WASCA 3; [2019] WASCA 200  
*KNY v Western Australia* [2019] WASCA 89