



COMPLAINANT CREDIBILITY & GENERAL EXPERT WITNESS TESTIMONY IN RAPE TRIALS: EXPLORING AND INFLUENCING MOCK JUROR PERCEPTIONS

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Amongst the most commonly cited problems facing prosecutors in rape cases is the tendency of defence lawyers to portray the normal behaviour of women as 'unusual' or inconsistent with a genuine complaint (Ellison 2005; Freckelton 1998). Delay in reporting an assault is often presented as suspicious (Bronitt 1998; Brereton 1997), as is a complainant's lack of physical resistance / injury during an attack (Ehrlich 2001; Lees 1996; Temkin & Krahe 2008). In addition, it has been suggested that complainants who appear calm whilst recounting events at trial may fail to convince jurors of their victimisation (Taylor & Joudo 2005). But to the extent that such characteristics act as triggers for disbelief, they are problematic. Many sexual assault victims never report offences, and many more will delay reporting, often for significant periods (Clay-Warner & Burt 2005). Many victims offer no physical resistance and suffer no serious physical injury (Du Mont & White 2007); and many react to rape by exhibiting extreme calm, often as a conscious - or unconscious - coping strategy (Petрак & Hedge 2002).

Reforms under the Sexual Offences Act 2003 notwithstanding, in rape trials in England and Wales, it is largely a matter for the jury to determine the absence of complainant consent and to assess the reasonableness of any belief in consent harboured by the

defendant. In other jurisdictions where the jury plays a similarly central function, most notably the US, prosecutors have sought to overcome these defence strategies by introducing evidence designed to 'educate' jurors on the impact of rape and the complex, disparate reactions of victims both during and post-assault (Boeschen et al 1998). In 2006, the Office for Criminal Justice Reform proposed something similar in England and Wales (Home Office 2006). The fate of these proposals is still being debated, but the initiative is based on two assumptions: (i) that certain behavioural cues on the part of the complainant (including courtroom demeanour, delayed reporting and failure to resist) adversely impact upon jurors' perceptions of credibility; and (ii) that expert testimony offers a useful vehicle for addressing these shortcomings in jurors' understandings.

This ESRC funded project (RES-000-22-2374) sought to evaluate the basis of these claims. In addition, it sought to evaluate the suggestion, made by some in response to the Government's proposals (Criminal Bar Association 2006; Wolchover & Heaton-Armstrong 2008), that providing guidance via an extended judicial instruction at the end of the trial would offer an equally - if not more - effective alternative to expert evidence.

Summary of Key Findings

- **Concerns regarding the limits of current public understanding as to what constitutes a 'normal' reaction to sexual victimisation appear to be merited**
- **Many jurors were influenced by expectations regarding the instinct to fight back, the compulsion to report immediately and the inability to control one's emotions**
- **Many jurors additionally harboured unrealistic expectations regarding the association of sexual assault and physical injury (including genital trauma)**
- **Jurors who received educational guidance were less likely to consider the fact of a 3 day delay before reporting, or a calm demeanour, as necessarily problematic**
- **Jurors often failed to connect the guidance on the feasibility of a 'freezing response' with non-stranger rape scenarios, and no impact could be discerned as a result of education in terms of expectations of complainant resistance / injury**
- **Jurors responded in broadly similar ways regardless of whether the guidance was presented by an expert near the start of the mock trial or by a judge at the end**

Method

As the Contempt of Court Act 1981 prohibits research with 'real' jurors, a simulation was undertaken. 9 different mini-trial scenarios were scripted and reconstructed by actors and barristers in front of an audience of mock jurors. Across these, key facts and role-players remained constant, but variables were introduced. In three of the trials, the complainant displayed signs of bruising and scratching and reported the attack immediately, but was emotionally flat

experience of counselling rape survivors) gave testimony that was well-supported by research literature and general in nature. Without purporting to vouch for the complainant's veracity, he emphasised that some victims of rape may appear calm, delay reporting or fail to resist for a range of reasons, and during cross-examination he specifically conceded that one such reason may be on account of her having fabricated the allegation. In the remaining trials, no such educational guidance was provided.

Basic Mock Trial Scenario

The complainant and defendant were work colleagues who both attended a farewell reception for a fellow employee. The complainant accepted the defendant's offer of a lift home and invited him inside for a drink. They enjoyed a glass of wine and some coffee as they chatted in the kitchen. A few hours later, as the defendant made to leave, the two kissed in the hallway. It is the Crown's case that the defendant then tried to initiate sexual intercourse with the complainant, touching her on the breast and thigh, and that the complainant made it clear that she did not consent to this touching by telling the defendant to stop and pushing away his hands. It is the Crown's case that the defendant ignored these clear protestations and raped the complainant. When the defendant was later questioned by the police he admitted that he had had sexual intercourse with the complainant, but said that all sexual contact between them was entirely consensual.

and calm during testimony. In another three of the trials, the complainant again displayed signs of bruising and scratching post-assault – this time, she was visibly upset during testimony but waited three days after the incident before reporting to police. In the final set of three trials, the complainant reported the assault immediately and was visibly upset during testimony but displayed no signs of physical injury, and sought to explain her lack of resistance on the basis that she had 'frozen' during the attack. Procedural variables were also introduced to cut across these substantive scenarios so that in each sub-set of three, the extent to which jurors were provided with educational guidance differed. In some trials, an extended judicial instruction (drafted in the balanced tone that was outlined and approved of by the Court of Appeal in *R v Doody* [2008] EWCA Crim 2394) informed jurors about the different emotional reactions that victimisation might elicit, the reasons why a complainant may delay reporting, or fail to resist physically during an attack. In other trials, this information was provided by an expert called by the prosecution and cross-examined by the defence. This expert (who was a chartered clinical psychologist with

Each reconstruction lasted approximately 75 minutes and was observed simultaneously by 24-26 volunteer participants from the local community (recruited by a market research company). Having observed the trial simulation, jurors were separated into three different juries to reach a unanimous, or failing that majority, verdict. These deliberations, which lasted up to 90 minutes, were recorded, transcribed and analysed. Prior to embarking on deliberations, jurors were provided with a questionnaire and asked to answer a few preliminary questions regarding their initial verdict preference. At the close of deliberations, a more extensive questionnaire was issued, which asked participants for their views in regard to the deliberative process, the group verdict, and the relevance of the variables under analysis (delay, resistance and demeanour), as well as the perceived value of the expert testimony / judicial instruction. While the deliberations provided the key source of data for the present study, findings from the questionnaires have been used to test and triangulate hypotheses arising therefrom.

Outline of Key Findings

The Impact of Delay, Demeanour and Non-Resistance without Education

Our findings support concerns regarding the limits of current public understanding as to what constitutes a 'normal' reaction to sexual attack, and its possible implications in terms of juror assessments of complainant credibility. Despite being relatively short, the three day delay between assault and report presented in trial scenarios proved to be a significant stumbling block for many jurors, who were adamant that their instinctive reaction would have been to phone the police immediately and were unwilling to countenance any other response. The significance attached to timing was reinforced in trials involving an immediate report, since here this lack of delay was used to promote a positive assessment of the complainant's account, being referred to by jurors as 'supporting evidence.' It was apparent, however, that the issue of timing would be viewed differently depending on the circumstances – in trials in which the complainant claimed to have 'frozen' during the attack, her action in immediately contacting the police often prompted consternation and jurors questioned whether a genuine victim in this position would not have been more likely to turn first to a friend or family member.

Likewise, in regard to demeanour, it was clear that participants were often perplexed by the calmness exhibited by the complainant during her testimony in trial scenarios. The majority of jurors expected a visible display of emotion – and for the defendant's presence in the courtroom to provoke a more pronounced reaction. While 'calm' was the adjective most commonly employed, some jurors used descriptors with more negative connotations, such as 'cold' and 'calculating'. Jurors suggested that the calm complainant had been coached and that her testimony was 'too precise' – a concern not raised in the other trial scenarios, despite the fact that the content of her evidence was unchanged. Jurors rarely discussed the significance of the complainant's calm demeanour and only one juror offered an explanation that related to the trauma of rape, suggesting that she may have deliberately detached from the situation to describe events in a 'factual way'. At the same time, there were some jurors who – though not disputing

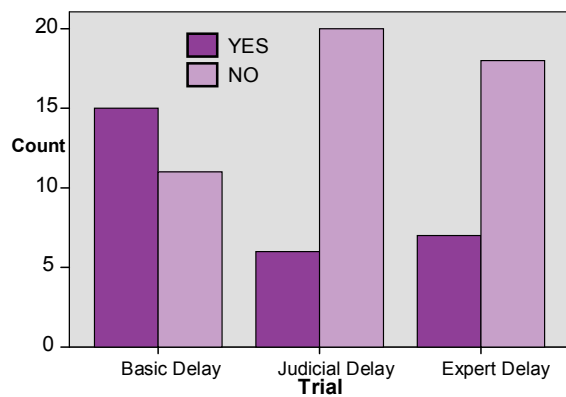
the expectation of emotional distress on the part of the complainant – were quick to caution against giving such demeanour too much probative weight, on the basis that a tearful complainant may simply be giving a 'good performance' designed to manipulate sympathy from others.

Despite being directed that the use of force is not a requirement of the law of rape, in scenarios in which the complainant showed no signs of physical injury, jurors routinely emphasised the significance of this to their not guilty verdicts. There was a strong belief that a 'normal' response to sexual attack would be to struggle physically, and jurors' comments were often accompanied by demanding expectations in regard to a woman's capacity to inflict defensive injury upon her attacker. While there were some jurors who were more receptive, in principle, to the idea that a woman might freeze during a sexual attack, and so be unable to offer physical resistance, for many, the credibility of this claim only held in cases where the perpetrator was unknown to the victim. Moreover, for those who were willing to accept that a woman might freeze, even in the face of an acquaintance, expectations often transferred to signs of internal / vaginal trauma, since 'if she really froze, there would have been physical damage down there.' In those scenarios in which there was some bruising and scratching upon the complainant, many jurors continued to expect higher levels of injury. Jurors went to considerable lengths to provide alternative explanations for how such bruising may have been incurred, ranging from accidental injury, a consequence of consensual sexual activity, or self-infliction. Though grounded in conjecture, these accounts held persuasive sway in the jury room, suggesting that participants required the complainant to exhibit injuries that were both serious and unambiguously attributable to deliberate infliction of unwanted violence.

Overall, while jurors in the no-education condition paid lip-service to the notion that 'different people will react differently' to traumatic experiences, such as rape, assumptions regarding the instinct to fight back, the compulsion to report immediately and the inability to control one's emotions continued to influence their deliberations.

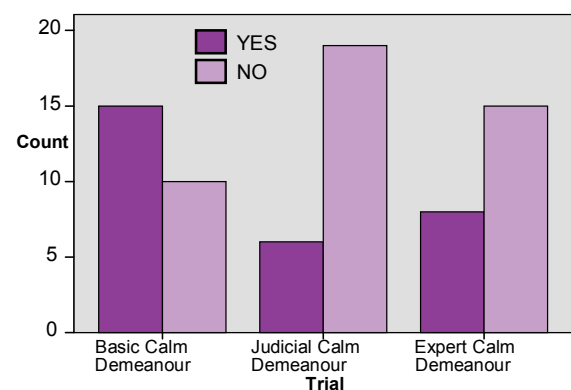
The Impact of Delay, Demeanour and Non-Resistance with Education

Jurors who received educational guidance were significantly more likely to state that they were untroubled by the three day delay in the trial scenarios, and to question more generally the significance that could reasonably be attached to the timing of a rape complaint. While jurors in the no-education condition tagged the complainant's response 'odd,' 'strange' and 'disturbing', few in the education condition expressed either surprise or consternation at her delayed reporting. As one put it, for example, 'the fact that she went three days is neither here nor there to me;' meanwhile, another declared that 'whether she waits three days, three months or three years, you can't use that to say that it was or wasn't rape.' This shift was reflected in questionnaire responses. As illustrated below, while 58% (n=15) of jurors in the no-education condition reported that it would have made a difference to their deliberations if the complainant had reported the assault to the police sooner, this fell to 23% (n=6) amongst jurors who had received judicial instruction and 28% (n=7) of those who were exposed to expert testimony.



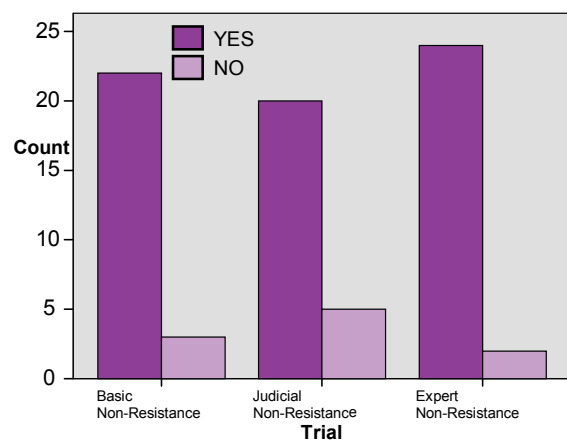
Would it have made any difference to you in your deliberations if Jane had reported the alleged assault to the police sooner?

Jurors exposed to guidance detailing the reasons why a rape victim may appear calm when communicating her experiences made fewer references to the complainant's demeanour, and there were marked differences in the way this issue was approached. Educated jurors were far more likely to offer thoughts on what, other than fabrication, could reasonably account for the complainant's lack of emotionality, and in so doing, they often drew upon the guidance provided in court. Although some (approximately one-sixth) continued to support a more negative assessment, the overall tenor of contributions suggested that those who had received education displayed a greater understanding of emotional reactions to rape and were more willing to accept that a 'genuine' victim could exhibit few signs of visible distress whilst testifying in court. While 60% (n=15) of jurors in the no-education condition said that it would have influenced their decision if the complainant had been more obviously distressed when giving her testimony, only 24% (n=6) of jurors who received judicial instruction, and 35% (n=8) of jurors who were exposed to expert testimony shared this view [see graph below]. In addition, when asked to rate (on a 1-5 scale) the importance of the educational guidance to their conclusions, few jurors regarded the information about the range of victim reactions unimportant and follow-up comments showed that many found it valuable.



Would it have made any difference to you in your deliberations if Jane had been more distressed/upset when giving her testimony?

By contrast, in regard to non-resistance, we were unable to identify any clear impact upon deliberations as a result of educational guidance. Most jurors continued to expect the complainant to offer physical resistance and / or to have sustained injury as a result of the defendant's use of force against her. As one put it, for example – 'it's instinct, if you've got a hand free, you'd grab for his eyes or his face or anything.' Meanwhile, others emphasised that 'it's very easy to bruise a lady' in order to express their disbelief at the claim that she could have been sexually penetrated without consent and received no corroborating physical or vaginal injuries. Again, the questionnaire data yielded consistent results – as illustrated in the graph below, when asked whether it would have made any difference to their deliberations if the complainant had shown signs of physical injury after the alleged assault, 88% (n=22) of jurors in the no-education condition answered in the affirmative, compared to 80% (n=20) of those who received judicial instruction and 92% (n=24) of those who were exposed to expert testimony.



Would it have made any difference to you in your deliberations if Jane had shown signs of physical injury after the alleged assault?

Significantly, jurors often failed to connect the 'freezing' response described by the complainant, and explained in the educational guidance, with the type of acquaintance rape under review. Educated jurors continued to hold that such a response would be credible only in situations where the attacker was unknown to the victim. As one put it, 'this is going to sound terrible, but I don't know how much shock you would go into where there had been no violence prior...in rape cases where women don't know their attackers and they've got a knife or they are very violent, that's where women go into shock and freeze.' A number of explanations may be offered to account for the apparent inefficacy of the guidance on this issue of complainant non-resistance. It is possible that expectations of force, injury and resistance are so deeply ingrained that attempts to disavow jurors of them through education in the rape trial are likely to meet with limited success. At the same time, it is possible that some adjustments to the content of the guidance would have ensured a more pronounced impact. While previous research has suggested that a positive influence can only be secured in this context through evidence/instruction that links general claims drawn from the research literature to the case at hand (Brekke & Borgida 1988), it is possible – though further research is required to test this – that general testimony/instruction that specifically addresses the feasibility of a freezing response in situations of acquaintance rape may still have an impact. Given the concerns that have been raised in relation to the introduction of specific expert testimony in rape cases – including the risks of creating a 'battle of experts' (Temkin & Krahe 2008; Council of Circuit Judges 2006), improper 'oath-helping' (Friedland 1989) or usurping the jury's fact-finding function (Vidmar & Schuller 1989) – there are reasons to opt for a more minimalist and general approach, certainly where it can be shown to fulfil an educative function without adverse prejudice to the accused.

Judicial Instruction versus Expert Testimony: The Relevance of Means of Delivery

Jurors responded in broadly similar ways to the educational guidance, regardless of whether it was presented by an expert near the start of the mock trial or by the judge towards the end. Given the impossibility, in the present study, of replicating the parallel stages of a real trial that may last for days or weeks, the exact significance of this finding is unclear. There is, however, reason to suspect – although we have not tested it here – that the guidance may have greatest impact when general expert testimony and judicial instructions are utilised together, rather than in the alternative (Lewis 2006).

Methodological Note

The method used in this research offers an improvement on that used in many previous mock studies. The trial stimuli were more detailed and engaging than the brief vignettes or video extracts that are often used. In addition, participants were members of the public rather than student samples, were required to undertake group deliberations rather than provide individual evaluations, and were tasked to reach a verdict rather than rate levels of responsibility. In the scripting of the trial scenario, efforts were made (and consultations undertaken) to ensure increased realism (e.g. by avoiding leading questions during examination-in-chief and including in counsel's closing speeches, as well as the judicial instruction, guidance as to the legal tests to be applied). The actors who undertook the roles of complainant and defendant were of comparable age and levels of physical attractiveness, and role-players remained constant across the study. At the same time, the limits of this experimental methodology must be borne in mind. Our participants knew that, ultimately, nobody's fate held in the balance. In addition, the trial reconstruction was obviously streamlined in terms of its duration and the levels of evidence that were presented. The periods of delay and disruption that typify criminal court proceedings were absent, jury size was reduced to an average of eight members, and the time for jury deliberation was limited to 90 minutes. While these limitations do mean that it would be inappropriate to make uncritical or automatic extrapolations to the real jury room, it is important also not to over-state the significance of these limitations, particularly bearing in mind the present inability to conduct research with jurors in England and Wales. There was ample evidence in the present study of jurors taking their role seriously despite its mock nature, commenting on the consequences of their verdict for the parties involved and remarking at the close of deliberations on the stress the process had caused them. In addition, previous research testing for a verdict impact as a consequence of role-playing has produced inconclusive results. Similarly, research on the relevance of jury size is contested, and there are some indications that 'real' jurors may not have needed much longer to deliberate. Moreover, while the weight of evidence presented to our jurors was reduced, its substantive content was not necessarily far removed from that in a real rape trial in which competing narratives from complainant and defendant, coupled with relevant medical or forensic reports are often central.

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