Analysis of the Cross-Examination of Complainants and Defendants within Rape Trials

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Abstract

Research continues to raise concerns over the treatment of rape complainants at trial, despite the numerous criminal justice reforms implemented in the last two decades. Attention has been paid to the difficulties of giving evidence, particularly during cross-examination, for those complainants whose allegations reach Crown Court. Despite this, little empirical research has been conducted into how cross-examination operates in practice for complainants. Moreover, an understanding of how defendants are cross-examined is absent within scholarly literature. This thesis provides a contribution towards addressing these significant apertures in knowledge and socio-legal research in this field. The role and conduct of cross-examination for complainants and defendants will be critically examined. This study uses trial observations and contemporaneous field notes of eighteen rape trials, to provide an in-depth understanding of how cross-examination operated in practice for complainants and defendants in these trials. The central themes developed from the observations of the complainants and defendants' cross-examinations are, 'welfare considerations', 'expectations of behaviour', 'sexual history', and 'impugning credibility'.

This thesis argues that the complainants and defendants were robustly and fairly examined on their evidence. Many positive practices were observed, some of which reflected the 'best evidence' model of cross-examination. These positive practices appeared to safeguard the welfare of complainants and defendants. Most notably, barristers and judges demonstrated sensitivity towards complainants, and were willing to adapt cross-examination for them. There was, however, scope for a wider and more consistent adoption of the positive practices observed, particularly for the defendants in these trials. Amidst the largely positive cross-examination practices observed, certain poor practices and questioning strategies were also identified.

It will be argued that the potential difficulties individual complainants and defendants experience must be acknowledged within cross-examination. They must be afforded with 'fair treatment' and given an opportunity to provide their best evidence. A new model of cross-examination, termed the 'fair treatment model'

(FTM), is advanced to address these issues. This thesis argues that a FTM of cross-examination that embraces the principles of the best evidence model, and goes further by incorporating the other positive practices identified, is required. Proposals for change are advanced, and informed by the research findings, which seek to regulate questioning strategies and implement wider welfare safeguards with the aim of ensuring a holistic notion of 'fair treatment'. The model can be used to evaluate, guide, and improve future cross-examinations within rape trials.

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Contents

Chapter One: Introduction

1.0 Introduction

Cross-examination is a central feature of the criminal trial in England and Wales. It is a procedure that allows the evidence of adverse witnesses to be examined by the opposing party. Despite declarations that cross-examination is 'the greatest legal engine for discovering the truth',[1] the procedure often faces criticism. The functioning of cross-examination and the conduct of barristers are of principal concern, particularly within rape trials. The treatment of rape complainants during cross-examination receives continual scrutiny. Notwithstanding the centrality of cross-examination during rape trials, and within the debates surrounding how these trials are conducted, few academics have conducted empirical research into how it operates in practice. Moreover, an understanding of the procedure for defendants on trial for rape is absent within the literature. This thesis aims to critically examine the role and conduct of cross-examination within rape trials for complainants and defendants, and does so empirically using trial observations to provide new evidence. This evidence supports the thesis argument that the cross-examinations observed mostly provided the complainants and defendants with an opportunity to give their best evidence, which was robustly and fairly examined. Though, areas for improvement are also identified. In addition, the scholarly and theoretical literature on cross-examinations within rape trials requires some realignment, given the evidence of change produced within this thesis.

1.1 Why Research Cross-Examination within Rape Trials

The criminal justice system's (CJS) response to rape within England and Wales continues to be scrutinised. The Government of the United Kingdom (UK), in its commitment to tackle violence against women and girls (VAWG), recognises that improvements must be made in how the CJS is responding to rape and other VAWG

[1] Wigmore J.H, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Volume 5, Little Brown 1940) 29 cited within Keane A, 'Towards a Principled Approach to the Cross-Examination of Vulnerable Witnesses' (2012) Criminal Law Review 407.

crimes.[2] Research within this area is expansive, exploring issues including under-reporting, attrition, attitudes, and poor treatment of complainants by criminal justice professionals. Of particular concern is the 'justice gap', a term coined to reflect the aperture between low conviction rates in comparison to the high levels of reporting of rape, and even higher number of cases never reported.[3] The current conviction rate for rape within England and Wales is calculated as 4.9% of all recorded cases.[4] Conviction rates between 2015-2016 and 2016-2017, when calculated from the starting point of cases reaching trial, stood at 57.9% and 57.6% respectively.[5] These figures include all offences of rape, including against children and adults.[6] Moreover, performance figures 'cannot tell the whole story'.[7] Some research has found that conviction rates are higher in rape cases than other serious offences.[8] Despite this, points of attrition for rape cases, from the police stage to trial, and why it occurs, have been a prominent concern within literature.[9]

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[2] HM Government, *Ending Violence against Women and Girls Strategy 2016-2020* (HM Government March 2016).

[3] Temkin J and Krahé B, *Sexual Assault and The Justice Gap: A Question of Attitude* (Hart Publishing 2008).

[4] This reflects the most recent figures for all recorded rapes between 2017-2018. At the time of data collection for this PhD research, the conviction rate stood at 7.3% (2016-2017). HMICFRS, Rape Monitoring Group Digests (28 August 2019) <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 04 December 2019.

[5] CPS, Violence Against Women and Girls Crime Report 2015-2016 (CPS 2016); HMIC, Rape Monitoring Group Digests (2017) <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 03 June 2018.

[6] Sexual Offences Act 2003 s.1 and s.5.

[7] HMIC, Rape Monitoring Group Digests (2017)<https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 03 June 2018.

[8] Thomas C, Are Juries Fair? (London: Ministry of Justice 2010) 47.

[9] Lovett J, *Rape in the 21st Century: Old Behaviours, New Contexts and Emerging Patterns* (ESRC End of Award Report 2007); Brown J.M, Hamilton C, and O'Neill D, 'Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors (2007) 13(4) Psychology, Crime and Law 355; Hester M and Walker S-J, 'Rape Investigation and Attrition in Acquaintance, Domestic Violence and Historical Rape Cases' (2016) Journal of Investigative Psychology and Offender Profiling 1.

Once cases reach trial, concerns about the treatment of complainants, particularly by defence barristers during cross-examination, have been raised.[10] Media reports of rape trials in the UK highlight this, suggesting that complainants face humiliating and distressing questioning.[11] Of particular media concern was the treatment of Frances Andrades, who gave evidence of historic indecent assault and rape against her former teacher at trial.[12] Frances described cross-examination as being 'raped all over again'.[13] Moreover, reports of high profile cases seem to reveal a division in some public opinion. For example, the recent re-trial of professional footballer, Ched Evans, prompted some concerning public opinions on social media. The complainant was characterised as a liar, who should face prosecution, and whose anonymity was repeatedly and unlawfully compromised.[14] Others have suggested the trial was a 'throwback to the last century' and would deter future victims from reporting.[15] While it is essential that the experiences of complainants are heard, it is equally important

[10] Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds) *Feminist Perspectives on Evidence* (Cavendish 2000); Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 269-354; Stern V, *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* (Home Office 2010); Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) Feminist Criminology 298; Smith O, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave MacMillan 2018).

[11] Dixon H, 'Frances Andrade's Suicide 'Could and Should' Have Been Prevented' *The Telegraph* (10 April 2014) <https://www.telegraph.co.uk/news/uknews/law-and-order/10757838/Frances-Andrades-suicide-could-and-should-have-been-prevented.html> Accessed: 03 June 2018.

[12] Dixon H, 'Frances Andrade's Suicide 'Could and Should' Have Been Prevented' *The Telegraph* (10 April 2014) <https://www.telegraph.co.uk/news/uknews/law-and-order/10757838/Frances-Andrades-suicide-could-and-should-have-been-prevented.html> Accessed: 03 June 2018.

[13] Dixon H, Frances Andrade's Suicide 'Could and Should' Have Been Prevented, *The Telegraph* (10 April 2014) <https://www.telegraph.co.uk/news/uknews/law-and-order/10757838/Frances-Andrades-suicide-could-and-should-have-been-prevented.html> Accessed: 03 June 2018.

[14] Bingham J and Harley N, 'Victims' Groups Cry Foul as Footballer Ched Evans is Cleared of Raping a Teenager After Complainant's Sexual History is Put Before Court' *The Telegraph* (15 October 2016) <https://www.telegraph.co.uk/news/2016/10/14/footballer-ched-evans-cleared-of-raping-teenager-after-two-week/>.

[15] Bingham J and Harley N, 'Victims' Groups Cry Foul as Footballer Ched Evans is Cleared of Raping a Teenager After Complainant's Sexual History is Put Before Court' *The Telegraph* (15 October 2016) <https://www.telegraph.co.uk/news/2016/10/14/footballer-ched-evans-cleared-of-raping-teenager-after-two-week/> accessed: 03 June 2018.

that defendants are tried on the evidence presented in court, and not public opinion. The not guilty verdicts, in this case and others, are not necessarily a reflection on factual innocence of the defendants. Instead, acquittals may reflect the jury's inability to be 'sure' on any of the elements of the offence of rape, based on the admissible evidence presented, given the high standard of proof demanded in criminal cases.

Robust research, spanning over thirty years, has utilised interviews with complainants and legal practitioners, and trial observations to examine the complainant's experiences of the trial process.[16] In particular, feminist research has been invaluable in providing understanding of this area and prompting numerous criminal justice reforms to redress concerns.[17] Within the last two decades, reforms have been implemented, which together aim to promote privacy and dignified treatment for complainants and ensure accurate jury fact-finding.[18] Examples of these reforms include, the provision of Special Measures, judicial directions about misconceptions of rape and restrictions on the admissibility of sexual history evidence.[19] Following statutory reform, it is now presumed complainants will provide pre-recorded evidence-in-chief.[20] Therefore, for many complainants, their cross-examinations will be central to their experiences of court.[21] It is essential that the conduct of cross-

[16] Adler Z, *Rape on Trial* (Routledge 1987); Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996); Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002); Temkin J and Krahé B, *Sexual Assault and The Justice Gap: A Question of Attitude* (Hart Publishing 2008); Smith O, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave MacMillan 2018).

[17] For an overview see, Zydervelt S, Zajac R, Kaladelfos A, and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 2.

[18] Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998); Judicial College, *The Crown Court Compendium, Part 1: Jury and Trial Management and Summing Up* (December 2018).

[19] Youth Justice and Criminal Evidence Act 1999, s.17(4); Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 20-1; Youth Justice and Criminal Evidence Act 1999, s.41.

[20] Youth Justice and Criminal Evidence Act 1999, s.22(A).

[21] In the near future, vulnerable and intimidated witnesses will be able to pre-record their cross-examinations, under the Youth Justice and Criminal Evidence Act 1999 s.28. This follows the

examination within rape trials is researched and continually evaluated to ensure the process is conducted fairly and properly.

It has been suggested that the cross-examination tactics of defence barristers have improved since the 1980s and 1990s, but some problems remain.[22] Over the last two decades, the complainants' experiences of the process have been regarded as negative and harmful, amounting to secondary victimisation.[23] However, further empirical research is required to assess whether these claims reflect current practices. Very few studies have examined how cross-examination is operating in practice, particularly in light of recent reforms and policy initiatives. Moreover, research has not addressed how defendants are cross-examined. It remains unclear whether prosecution barristers use similar tactics to challenge a defendant's evidence. Filling these significant gaps in knowledge, by examining how cross-examination is currently being conducted for complainants and defendants, will enhance the current debate on the rape trial process. This thesis will examine existing theories on cross-examination and feminist theoretical perspectives on the responses to rape and criminal justice reform, which the present study will also enrich.

1.2 Definitions

Within this thesis, the terms 'complainant' and 'defendant' are deliberately adopted. As this research contributes towards understanding how the CJS responds to rape, specifically during the criminal trial, decisions on terminology were made with this

successful pilots of s.28 procedures within Liverpool, Leeds and Kingston-Upon-Thames, for child witnesses. The s.28 scheme continues to operate for child witnesses within these courts. In addition, since 03 June 2019, a pilot of s.28 has been conducted for all complainants of sexual offences in these Crown Courts. HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 57; Baverstock J, *Process Evaluation of Pre-Recorded Cross-Examination Pilot (Section 28)* (Ministry of Justice, 2016).

[22] Smith O, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave MacMillan 2018) 235.

[23] Ellison L, 'Witness Preparation and the Prosecution of Rape' (2007) 27 Legal Studies 171, 175; Hunter G *et al*, *Out of the Shadows: Victims' and Witnesses' Experiences of Attending the Crown Court,* (Victim Support 2013) 22; Wheatcroft J.M, Wagstaff G.F, and Moran A, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276.

context in mind. Throughout the literature, other terms adopted include, 'victim' or 'survivor', and 'suspect', 'perpetrator' or 'offender'. Evidence suggests that the trial process can be traumatising for those alleging rape, resulting in re-victimisation.[24] In this context, the term 'victim' has been regarded as appropriate, since 'survivor' implies full recovery.[25] However, the term 'victim' has been criticised for its emphasis on passivity and helplessness.[26] Others prefer using 'survivor', a term derived from the anti-rape movement, because it is more empowering.[27] Jordan further explains that the terms 'victim' and 'survivor' are not discrete or consecutive states, but can be 'parallel and simultaneous positions'.[28]A contemporary approach has been to adopt the term 'victim-survivor', to redress the problems with the singular terms.

Using the terms 'victim' and 'survivor', in the context of the criminal justice process, has been criticised for implying a presumption that the 'suspect' or 'defendant' is guilty.[29] This presumption could also arise with using the words 'perpetrator' and 'offender'. This study specifically focuses upon cross-examination, which is a central feature within a criminal trial where the accused's legal guilt is being determined. The legal status of the person alleging rape and the accused are central, and are best

[24] Ellison L, 'Witness Preparation and The Prosecution of Rape' (2007) 27(2) Legal Studies 271, 271; Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 2.

[25] Horvath M.A.H and Brown J, 'Setting the Scene: Introduction To Understanding Rape' in Horvath M.A.H and Brown J (Eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing 2009) 5; Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 2.

[26] Jordan J, 'From Victim to Survivor – and from Survivor to Victim: Reconceptualising the Survivor Journey' (2013) 5(2) Sexual Abuse in Australia and New Zealand 48, 49.

[27] Cook K, 'Rape Investigation and Prosecution: Stuck in the Mud?' (2011) 17(3) Journal of Sexual Aggression 250, 250; Kelly L and Radford J, 'Nothing Really Happened: The Invalidation of Women's Experiences of Sexual Violence' (1990) 10(30) Critical Social Policy 39, 40.

[28] Kelly L and Radford J, 'Nothing Really Happened: The Invalidation of Women's Experiences of Sexual Violence' (1990) 10(30) Critical Social Policy 39, 40; Jordan J, 'From Victim to Survivor – and from Survivor to Victim: Reconceptualising the Survivor Journey' (2013) 5(2) Sexual Abuse in Australia and New Zealand 48, 49.

[29] College of Policing, 'Review of the Terminology 'Victim/Complainant' and Believing Victims at The Time of Reporting' (February 2018) para 2.1 and 2.2

represented with the terms 'complainant' and 'defendant'.[30] For this study, the term 'complainant' is preferred because it clearly distinguishes their position within the case, as the person who has allegedly been victimised. This also avoids the negative implications associated with treating complainants as 'just a witness' within proceedings.[31]

Throughout this thesis, references are sometimes made to complainants as 'she' and defendants as 'he'. The data for this doctoral research includes female rape complainants and male defendants. The literature reviewed within this thesis discusses issues, which reflect this gender difference. This is not intended to exclude the experiences of men, who can also be victims of rape. Research into rape, and other violence, against men and boys is also important and should be included within the wider debate on sexual violence. When speaking of 'rape' the legal definition is adopted, since this research focuses on the rape trial where the defendant's guilt is determined using the legal definition stated within s.1 Sexual Offences Act 2003. The definition of rape will be outlined and discussed within chapter three.

1.3 The Research Objectives

The overarching aim of this doctoral thesis is to understand and critically examine how cross-examination is currently conducted, in practice, for complainants and defendants within rape trials. To achieve this overarching research aim, three research objectives have been developed:

(1) Investigate how cross-examination operates in practice, including the questioning strategies adopted by counsel.

(2) Examine how cross-examination practices impact the interests of complainants and defendants.

[30] As explained within, Stern V, *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* (Home Office 2010) 24.

[31] Cook K, 'Rape Investigation and Prosecution: Stuck in the Mud?' (2011) 17(3) Journal of Sexual Aggression 250, 256; Gregory J and Lees S, *Policing Sexual Assault* (Routledge 1999) 186.

(3) Consider whether any modifications are required to improve the conduct of cross-examination for complainants and defendants, and set out reform proposals.

It is important to highlight that a linguistic analysis to disentangle courtroom talk, from the question format to dialogue accessories, is beyond the scope of this doctoral thesis. However, these aspects of the talk involved in cross-examination will be exemplified within the use of data extracts. Instead, this study focuses on the content of questioning and other practices involved, such as the use of Special Measures and judicial intervention.[32] The empirical findings will be analysed against the similar and distinct interests of complainants and defendants, which will be outlined throughout this thesis. Subsequently, improvements to cross-examinations practices will be considered, with these interests in mind. Integrating consideration for defendants alongside complainants within this field, and addressing the gaps in knowledge identified above, ensures this research provides a valuable and original contribution to socio-legal research. As this study focuses on cross-examination, which is a legal procedure influenced by legislation, case law and legal principles, in practice or 'action', the nature of this research is socio-legal.[33] Socio-legal research draws upon social sciences, including the disciplines of sociology, criminology and psychology, to guide its methods.[34] The research objectives of this study will be achieved using trial observations. The research methodology will be outlined in detail within Chapter Four, where the guidance from social sciences will become apparent.

1.4 Thesis Structure

This first chapter has provided an introduction to the thesis, by outlining the importance of research in the chosen field, definitions of key terminology and the research objectives. Chapter two examines the theory of cross-examination. Without this foundation, investigating the conduct of cross-examination within rape trials would be difficult. The chapter establishes the purpose and nature of cross-examination within criminal trials in England and Wales. The legal norms, including legislation and case law, that influence and restrict the conduct of cross-examination

[32] As discussed within Chapters Five, Six and Seven at sections 5.1.1, 6.1.1 and 7.2.1.

[33] Banakar R and Travers M, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) xii.

[34] Banakar R and Travers M, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 5.

will be outlined. The existing literature describing how cross-examination operates and the conduct of barristers will be critically discussed. This literature presents a 'traditional' theory of cross-examination, which embodies flamboyant and zealous advocacy where barristers adopt persuasive and manipulative tactics to 'play to the jury'.[35] A competing theory of cross-examination, termed the 'best evidence' approach, will be presented. This contemporary model focuses on hearing accurate and reliable evidence from witnesses, which requires barristers to adapt their traditional cross-examinations practices.[36] The limitations of the best evidence and traditional cross-examination theories will be critically examined. As a result, this thesis will advance an alternative theory, termed the 'fair treatment model', using the study's empirical findings. To summarise, this model rejects the negative practices associated with traditional cross-examinations, while incorporating and furthering the principles of the best evidence model, by embracing a broader range of reforms including welfare, attitudinal and training measures.

Chapter three is a review of the existing literature, including empirical research on central aspects of law and policy relating to rape trials. The central themes within this literature will be critically examined, which include: sexual history evidence, rape myths, manipulative and aggressive cross-examination tactics, and the impact cross-examination has on complainants. The prevailing scholarly claims about the nature of cross-examination within rape trials will be assessed. Defence barristers' tactics and complainants' experiences of cross-examination are the primary focus within this chapter. This results from the general absence of research on defendants within rape trials, including prosecution barristers' tactics and defendants' experiences of cross-examination. Throughout this chapter, the apertures in knowledge amid existing literature are highlighted.

Chapter Four outlines the methodology utilised for this doctoral research, including the theoretical perspective adopted. The qualitative approach and the chosen method

[35] As discussed within Chapter Two. Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929.

[36] As discussed within Chapter Two. Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 184-185.

of trial observations will be justified and explained. It will be demonstrated that observations are a valuable and infrequently utilised method within research into rape trials and cross-examination. The methods adopted for sampling, data collection, and data analysis will be detailed. Central methodological and ethical considerations will also be discussed, to establish how this study maintains research quality and integrity.

Chapters Five and Six present the empirical findings from the trial observations. The central themes emerging from the observations will be discussed separately for the complainants and defendants, within chapters five and six respectively. The broad themes developed from both cross-examinations are welfare considerations, standards of expected behaviour, sexual history, and impugning credibility. Together, these themes provide an understanding of how cross-examination is operating and the questioning strategies involved. Within these themes, distinct findings emerged for complainants and defendants. The findings will be analysed using the traditional and best evidence theories, which will highlight the limitations of these models. With this, the values of the fair treatment model will be identified and applied to the cross-examinations of the complainants and defendants.

Chapter Seven brings together the empirical findings on the complainants and defendants cross-examinations for further examination. Direct like-for-like comparisons are generally difficult, since complainants and defendants are differently situated within the trial. With this in mind, Chapter Seven will critically discuss the central research findings further, in order to advance reforms that seek to improve cross-examination. For this analysis, the traditional and best evidence models will be used as interpretive tools, reinforcing that a fair treatment approach is required. The range of reforms advanced would be embraced by a FTM of cross-examination.

Chapter Eight is the final chapter of this thesis. This chapter establishes whether the overarching research aim and the three research objectives have been achieved. The limitations of the study and areas for important future research will also be addressed. Final conclusions will be drawn based on the research findings. It will be argued that the complainants and defendants were robustly and fairly examined on their evidence. Amidst the largely positive cross-examination practices observed, certain problematic practices and areas for improvement are identified. Some of the problematic practices

observed reflect a traditional cross-examination approach and do not fit within the fair treatment theory advanced in this thesis. It will be argued, that addressing these areas would provide the complainants and defendants with fair treatment and a greater opportunity to give their best evidence. The best evidence model, while useful, does not address all of the positive and poor practices identified by this study. It is argued that a holistic fair treatment model of cross-examination is required to address this gap. This model can be used to evaluate, guide, and improve future cross-examinations within rape trials.

Chapter Two: The Theory of Cross-Examination

2.0 Introduction

This chapter examines the role of cross-examination within the adversarial criminal trial process in England and Wales. The existing literature describing how cross-examination operates and the conduct of barristers will be examined. This will present a traditional theory of cross-examination, which will be critically analysed. Subsequently, a competing model of cross-examination will be presented. This contemporary theory of cross-examination, termed the best evidence approach, places restrictions on traditional cross-examination practices. The limitations of the best evidence model will be identified. As a result, it will be argued that an alternative fair treatment model of cross-examination is required. This model will be introduced within this chapter, and its characteristics will be explored as the empirical research findings are discussed within the thesis.

2.1 The Purpose of Cross-Examination

A comprehensive understanding of cross-examination is important, before its actual operation can be critically examined within the rape trial context. In simple terms, each party typically calls the witnesses they rely upon to give evidence in court. The party will firstly question their witness to establish the witness's evidence, known as evidence-in-chief. Cross-examination will follow, where the opposing party questions the witness.[37] Generally, all witnesses must undergo cross-examination.[38] The first party can then re-examine their witness, on new matters arising out of cross-examination only.[39] While evidence-in-chief, cross-examination, and re-examination involve questioning witnesses they have distinct functions. The purpose of cross-examination has been summarised as eliciting supporting evidence for the cross-

[37] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.1.

[38] There are three exceptions set out in common law, see Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.7.

[39] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.60.

examiner's case, weakening the witness's evidence-in-chief, and impeaching the witness's credibility.[40] As cross-examination involves questioning adverse witnesses, the cross-examiner will oppose some, or all, aspects of the witness's evidence-in-chief. Where evidence is disputed, counsel must 'put their case' in cross-examination, and make the dispute plain.[41] This means putting the cross-examiner's version of events to a witness.[42] If cross-examiners fail to do so, the witness's evidence is seen as accepted and the barrister cannot later contradict their evidence or impeach their credibility.[43] This principle is based on the belief that it is unjust to obstruct witnesses from the opportunity to explain matters and defend their character.[44]

Literature traditionally describes cross-examination in terms of 'challenge' and 'testing'.[45] As cross-examination can elicit helpful evidence and weaken adverse evidence, this challenge may adopt different forms. Stone maintains that cross-examination can be constructive or destructive.[46] Although it appears entirely possible for a cross-examination to be both, these approaches will be discussed distinctly for explanatory purposes. Cross-examination is traditionally understood as 'destructive'.[47] This view parallels with understandings of adversarial trials as

[40] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.5; McPeake R, *Advocacy* (18th Edn, OUP 2016) 168-172.

[41] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.8; McPeake R, *Advocacy* (18th Edn, OUP 2016) 165.

[42] Hoyano L, 'Putting the Case in Every Case' (2018) Counsel 18.

[43] McPeake R, *Advocacy* (18th Edn, OUP 2016) 165; *R v Wood Green Crown Court, ex parte Taylor* [1995] Crim LR 879; Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.8.

[44] *Browne v Dunn* (1893) 6 R 67, para 76-77.

[45] Black M.R, 'Cross Examination: The Greatest Legal Engine for the Discovery of Truth: A Comparative Analysis of the American and English Rules of Cross-Examination', (1988) 15 Southern University Law Review 397; Dennis I, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) Criminal Law Review 255; Doak J, 'Confrontation in the Courtroom: Shielding Vulnerable Witnesses From the Adversarial Showdown' (2000) 5(3) Journal of Civil Liberties 296; Keane A, 'Towards a Principled Approach to the Cross-Examination of Vulnerable Witnesses' (2012) Criminal Law Review 407, 407.

[46] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 137.

[47] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 2.

combative.[48] Stone explains that destructive cross-examinations seek to 'destroy' or 'weaken' adverse evidence, to prevent the jury from accepting it.[49] Broadly, this could negatively affect the welfare of those being cross-examined and their ability to provide coherent and accurate evidence, as barristers seek to 'break' them.[50] In contrast, constructive approaches intend to build on the examiner's own case by eliciting helpful responses from witnesses, such as new or alternative meanings and facts.[51]

In theory, constructive and destructive approaches are advantageous for both parties, despite their different duties. The prosecution is burdened with proving their case to the criminal standard, 'so the jury are sure of the defendant's guilt'.[52] Where defence witnesses and defendants give evidence, eliciting helpful evidence for the prosecution or weakening the defence case will assist in overcoming the burden of proof.[53]As the defence usually do not need to prove anything,[54] defence counsel may primarily demonstrate weaknesses in a witness's testimony to create reasonable doubt in the prosecution's case.[55] Eliciting helpful evidence that strengthens the defence case may

[48] Ellison L, 'Cross-Examination in Rape Trials' (1998) Criminal Law Review 605.

[49] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 168; Ellison L, 'Witness Preparation and The Prosecution of Rape' (2007) 27(2) Legal Studies 171, 177.

[50] This depiction of cross-examination has been presented within, Smith O. and Skinner T., 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology 298, 311; Wheatcroft J.M and Woods S, 'Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence' (2010) 14(3) E. & P. 187, 191; Ellison L, 'Cross-examination in Rape Trials' (1998) Criminal Law Review 605; Burman M, 'Evidencing Sexual Assault: Women in The Witness Box' (2009) 56(4) Probation Journal 379, 383.

[51] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 157; Ellison L, 'Witness Preparation and The Prosecution of Rape' (2007) 27(2) Legal Studies 171, 175.

[52] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 5-1 to 5-3.

[53] Doak J and McGourlay C, *Evidence in Context* (3rd Edn, Routledge 2012) 16.

[54] With the exception of the defence of insanity and statutory exceptions that place legal burdens of proof and evidential burdens of proof on the defence.

[55] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 170.

also create this doubt.[56] The strength of evidence is believed to rest upon its reliability, accuracy and credibility, and how effectively it is communicated.[57] Roberts and Zuckerman explain that cross-examiners will attempt to undermine these standards in a witness's testimony, where necessary and relevant.[58] Equally, cross-examiners may attempt to demonstrate that their case meets these standards.

Cross-examination questioning is not limited to matters in evidence-in-chief.[59] However, questions must examine facts within a witness's own possession, which means non-experts cannot draw inferences from their observations.[60] Witnesses can be asked about matters 'sufficiently relevant' to facts in issue and their credibility.[61] Matters are relevant if they prove or disprove a fact in issue directly or indirectly.[62] As defined in *DPP v Kilbourne*, 'evidence is relevant if it is logically probative or disprobative of some matter which requires proof'.[63] Where witnesses are cross-examined on issues not directly relevant to the case, their answers must be taken as final, under the 'rule of collateral finality'.[64] Case law also makes clear that advocates are not free to examine irrelevant matters.[65] This, as Roberts explains, prevents

[56] As explained within, Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 60; Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 170.

[57] Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 346-348

[58] Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 346; Westera N *et al*, 'Sexual Assault Complainants on the Stand: A Historical Comparison of Courtroom Questioning' (2017) 23(1) Psychology, Crime and Law 15, 18.

[59] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.11.

[60] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-examination?' (2016) 20(3) E. & P. 183, 185.

[61] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F1.11; Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 123.

[62] McPeake R, *Evidence* (16th Edn, OUP 2012) 6.

[63] *DPP v Kilbourne* [1973] AC 729, para 756 cited within Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F1.11; *O'Brien (Respondent) v Chief Constable of South Wales Police (Appellant)* [2005] UKHL 26, para 3.

[64] Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 352.

[65] *R v Ejaz* [2005] EWCA Crim 805, para 10; *O'Brien (Respondent) v Chief Constable of South Wales Police (Appellant)* [2005] UKHL 26, para 3.

wasting time on immaterial matters, protects witnesses from being ambushed and ensures that the correct weight is placed on the essential issues in a case.[66] Relevant questions must also be legally admissible and comply with evidential rules. These rules regulate a variety of evidence, including bad character, hearsay, and a complainant's sexual history in sexual offence cases, for example. Other guidance regulates the conduct of barristers during the trial and cross-examination. The Bar Standards Board (BSB) regulates the conduct of counsel and provides a code for practising barristers to follow.[67] Within this guidance, the BSB prohibits advocates from asking questions 'merely to insult, humiliate or annoy a witness'.[68] In addition, barristers must not advance facts they know to be untrue or misleading. [69]

2.2 The Conduct of Cross-Examination

Theoretical literature has advanced some of the general principles, regarding the manner, style and questioning techniques, for an effective cross-examination within adversarial trials. Together, these scholarly discussions present a traditional cross-examination approach, which will now be explained and analysed. It is important to recognise that this traditional approach may not necessarily reflect how cross-examination is conducted in practice for trials in England and Wales.

2.2.1 Controlling Cross-Examination

Control is regarded as the most fundamental principle for an effective cross-examination.[70] Unlike ordinary rules of conversation, cross-examination follows a strict question and answer format with counsel asking the questions and the witness answering them.[71] Barristers are pervasively advised to 'control the witness' during cross-examination.[72] This control helps barristers advance their own position and

[66] Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 352.

[67] Bar Standards Board (25 September 2011) <https://www.barstandardsboard.org.uk/about-bar-standards-board/what-we-do/> accessed: 07 August 2018.

[68] Bar Standards Board 2018 RC7.1.

[69] Bar Standards Board 2018 RC3.1.

[70] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 152.

[71] Matoesian G.M, *Reproducing Rape: Domination through Talk in the Courtroom* (Polity 1993) 107-108, Ellison L, 'Witness Preparation and the Prosecution of Rape' (2007) 27 Legal Studies 171, 173.

[72] McPeake R, *Advocacy* (18th Edn, OUP 2016) 165-166.

undermine the opposition's case, by ensuring witnesses are unable to repeat their unfavourable evidence.[73] To ensure barristers remain in control, they are cautioned against asking questions without knowing or foreseeing the answers.[74] If this arises, barristers are advised to 'tread lightly' at first and keep control by using closed questions.[75] Akin to this, literature describes cross-examination as traditionally following two important rules: 'tell, do not ask' and 'lead, lead, lead'.[76] Numerous question types are utilised to achieve this and exert control. Principally, leading questions, which directly or indirectly suggest the answer sought, are permitted and widely used in cross-examination, but not for evidence-in-chief.[77] Some barristers have argued that leading questions are essential for an effective cross-examination, as they allow witnesses to be challenged and controlled.[78] Other restrictive questioning types, including closed, tagged and forced choice, such as 'yes or no' questions, are also encouraged. Open questions may also feature where advocates deem them appropriate.[79] However, barristers traditionally caution against long and open questions, as they are seen to invite long responses from witnesses, which may include unfavourable evidence.[80] Shorter questions are considered advantageous, as jurors purportedly perceive witnesses, who evade these questions, unfavourably.[81]

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[73] McPeake R, *Advocacy* (18th Edn, OUP 2016) 165; Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 932.

[74] McPeake R, *Advocacy* (18th Edn, OUP 2016) 174.

[75] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 135; McPeake R, *Advocacy* (18th Edn, OUP 2016) 174.

[76] McPeake R, *Advocacy* (18th Edn, OUP 2016) 165; Pratt T, 'The Ten Commandments of Cross-Examination' (2003) 53 (3) AFDCC Quarterly 257, 263-264.

[77] Leading questions are permissible in limited circumstances, including introductory questions or questions on undisputed matters, Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F6.13 and F7.12.

[78] Stone M, *Cross-Examination in Criminal Trials* (3rd Edn, Tottel Publishing 2009) 153; Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931-932.

[79] McPeake R, *Advocacy* (18th Edn, OUP 2016) 165-6.

[80] McElhaney J, 'Persuasive Cross-Examination' (2009) 95(4) ABA Chicago 21, 23; Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 932.

[81] McPeake R, *Advocacy* (18th Edn, OUP 2016), 175.

2.2.2 Traditional Advocacy

Henderson has notably explained that traditionally cross-examination is viewed as an opportunity for 'persuasion and advocacy'.[82] Her research demonstrates how barristers view cross-examination as a method for testing evidence, challenging witnesses, advancing the examiner's case, and preventing best evidence.[83] Thus, barristers would use controlling suggestive questions and treat cross-examination as a third speech by commenting on evidence.[84] With this, leading questions are regarded as unrestricted, until becoming oppressive, because it is assumed honest witnesses are not suggestible.[85] The theoretical literature similarly describes the conduct of barristers, particularly defence barristers, in this manner whereby their advocacy is manipulative, aggressive, and destructive.[86] Flamboyant advocacy is traditionally regarded as 'the main avenue for success', with aggressive cross-examination being commonplace.[87] To prevent witnesses from giving complete, accurate and coherent answers, barristers are thought to adopt compound questions, repetitive and rapid questioning, non-literal language, intimidating and antagonistic tones and mannerisms.[88] Some barristers have claimed to 'size up' their witnesses and adapt

[82] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931; Henderson E, 'Best Evidence or Best Interests? What does the Case Law say about the Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 184.

[83] Henderson E, 'Best Evidence or Best Interests? What does the Case Law say about the Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 184.

[84] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931-933.

[85] Henderson E, 'Best Evidence or Best Interests? What does the Case Law say about the Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 188

[86] Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M. and Ellison L., *Feminist Perspectives on Evidence,* (Cavendish, 2000).

[87] Doak J and McGourlay C, *Evidence in Context* (3rd Edn, Routledge 2012).

[88] Ellison L., 'Witness Preparation and the Prosecution of Rape' (2007) 27 Legal Studies 171, 177; Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (eds), *Feminist Perspectives on Evidence* (Cavendish 2000) 43-44; Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11 E. & P. 1, 20; Morley I, *The Devil's Advocate: A Short Polemic on how to be Seriously Good in Court* (2nd Edn, Sweet and Maxwell 2009).

their cross-examination style based on the type of witness.[89] They suggest argumentative witnesses face a more aggressive cross-examination than timid witnesses.[90] This 'sizing up' could be influenced by other characteristics of witnesses and defendants, aside from their attitudes, including their age, gender or appearance. However, there is currently an absence of research that supports this assumption.

2.2.3 Critical Discussion

The traditional cross-examination approach appears to be somewhat nuanced. Theoretical literature also discusses and promotes the use of cross-examination tactics that conflict with the strict traditional approach, explained above. For example, the use of short questions with simple and non-patronising language, and avoiding cross-examining at length have been encouraged within U.S adversarial trials.[91] This advice is rooted in the belief that cross-examination must be engaging and comprehensible for the jury.[92] Barristers are encouraged to be firm and respectful to witnesses.[93] Together, these traditional strategies establish some cohesion with the best evidence approach, which will be discussed shortly, albeit within different justifications. The encouragement towards simplified cross-examinations and adopting a courteous manner could be for tactical gain; namely persuading the jury of, and engendering their empathy towards, the cross-examiner's case. Such efforts to play to the jury, as Henderson suggests, are typical of traditional cross-examinations.[94] Simplified and courteous cross-examination may assist in safeguarding the wellbeing of witnesses, and ensure they can provide complete, accurate and coherent evidence. However, some barristers have previously claimed that it is not their brief to be sensitive in

[89] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 Journal of Law and Society 219, 230.

[90] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 Journal of Law and Society 219, 230.

[91] Pratt T, 'The Ten Commandments of Cross-Examination' (2003) 53(3) AFDCC Quarterly 257, 269.

[92] Pratt T, 'The Ten Commandments of Cross-Examination' (2003) 53(3) AFDCC Quarterly 257, 269.

[93] McPeake R, *Advocacy* (18th Edn, OUP 2016) 163.

[94] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

cross-examination and suggest 'it's no holds barred' when defending.[95] Though, this may not reflect current practices or opinions today.

A persistent feature of traditional cross-examinations is the leading and restrictive nature of questioning. Despite being permissible in cross-examination,[96] leading questions are potentially problematic. Research demonstrates that people agree to leading questions either out of fear, confusion, laziness, or a general psychological inclination to please others.[97] Leading and closed questions may also negatively affect the completeness and accuracy of a particular witness's evidence.[98] This affect is not limited to vulnerable witnesses and children, as research shows adult witnesses are suggestible and experience difficulties with traditional cross-examination questions.[99] For example, prolix questions and perplexing language are regarded as confusing for

[95] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 Journal of Law and Society 219, 230.

[96] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018), para F7.12

[97] Keane A and Fortson R, 'Leading Questions: A Critical Analysis' (2011) Criminal Law Review 280, 283-284; Plotnikoff J and Woolfson R, *Measuring Up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings* (NSPCC, 2009) 110.

[98] Ellison L and Wheatcroft J, '"Could You Ask Me That In A Different Way Please?" Exploring The Impact of Courtroom Questioning and Witness Familiarisation on Adult Witness Accuracy' (2010) 11 Criminal Law Review 823; Westera N.J, Kebbell M.R, and Milne R, 'Interviewing Rape Complainants: Police Officers' Perceptions of Interview Format and Quality of Evidence' (2011) 25(6) Applied Cognitive Psychology 917, 918; Westera N *et al*, 'Sexual Assault Complainants on The Stand: A Historical Comparison of Courtroom Questioning' (2017) 23(1) Psychology, Crime and Law 15, 16; Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49.

[99] Henderson E, 'Did You See The Broken Headlight? Questioning The Cross-Examination of Robust Adult Witnesses' (2014) Archbold Review 4, 5; Wheatcroft J.M and Woods S, 'Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence' (2010) 14(3) E. & P. 187; Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49; Kebbell M and Johnson S, 'Lawyers' Questioning: The Effect of Confusing Questions on Witness Confidence and Accuracy' (2000) 24 Law and Human Behaviour 629.

non-vulnerable witnesses.[100] Defendants have expressed similar difficulties, and struggle with the formality and complex language used.[101] The development of traditional cross-examination to include leading and restrictive questioning appears to overlook the negative implications these features may have on the interests of witnesses and defendants. While Henderson found some barristers and judges continue to view cross-examination in the traditional capacity of 'persuasion and advocacy', others have acknowledged that there are problems with this approach.[102] Importantly, the Court of Appeal recognises that traditional cross-examination styles can be problematic for witnesses and defendants, particularly if they are vulnerable.[103] The Court of Appeal has recently advanced restrictions on the traditional approach, and encourages an alternative best evidence approach, which will now be analysed.

2.3 Limiting Traditional Cross-Examinations

The Court of Appeal has made it clear that judges should take an active role in managing proceedings and restraining improper questioning.[104] This position has been endorsed within the Criminal Procedure Rules (CrimPR), Criminal Practice Directions (CrimPD) and Equal Treatment Bench Book.[105] As such, a cultural shift towards a best evidence approach to cross-examination appears to be emerging. Case

[100] As discussed within: Wheatcroft J.M and Ellison L, 'Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy' (2012) 30(6) Behavioral Sciences and The Law 821; Keane A, 'Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-Professionalisation' (2012) 16(2) E. & P. 175, 176.

[101] Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (CJA, 2015) 8 and 19-20.

[102] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 936-938 and 946.

[103] *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 45. Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2 and 3E.4; Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-29.

[104] *R v Jonas* [2015] EWCA Crim 562 para 31; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) F7.10.

[105] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.1; Judicial College, *The Equal Treatment Bench Book* (February 2018).

management rules state that the court has a duty to facilitate the participation and evidence giving of witnesses and defendants.[106] It is clear that all witnesses and defendants 'should be enabled to give the best evidence they can'.[107] Moreover, the Court of Appeal has stated that trial judges have a particular duty to ensure that the content and style of questioning enables vulnerable witnesses and defendants to give accurate complete and coherent evidence.[108] Accordingly, this means 'departing radically from traditional cross-examination' for vulnerable witnesses and defendants.[109] In specified circumstances, modifications to traditional cross-examination practices have been advanced, with the aim of enabling witnesses and defendants, particularly if vulnerable, to give their best evidence. These modifications will now be examined.

2.3.1 Restrictions on 'Putting the Case'

As previously explained, barristers are required to 'put their case' to witnesses in cross-examination.[110] Keane suggests that 'putting the case' can amount to asking about 'factual matters and circumstances…that support the examiner's case or undermine the witness' or 'punch line questions' that put the adverse allegations to the witness.[111] An example of the latter, taken from *Edwards*, includes '[he] did not punch you in the tummy, did he?'[112] Circumstances may arise where trial judges place restrictions on how barristers 'put their case'.

For children and other vulnerable witnesses, trial judges can 'dispense with the normal practice and impose restrictions' on advocates when putting their case, if there

[106] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9.

[107] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4

[108] *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 44 and 51.

[109] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[110] See Chapter Two at section 2.2.

[111] Keane A, 'Towards a Principled Approach to the Cross-Examination of Vulnerable Witnesses' (2012) Criminal Law Review 407, 415.

[112] *R v Edwards* [2011] EWCA Crim 3028 para 28.

is a risk of misunderstanding, distress, or compliance with leading questions.[113] This does not result in advocates being dispensed from putting their case.[114] Instead, counsel must avoid questions that put their case in a traditional and confrontational manner. Counsel can put the 'essential elements' of their case to vulnerable witnesses and defendants, using non-leading and simple questions.[115] As observed in *Barker*, defence counsel were able to effectively 'put their case' to a four year old complainant that she was untruthful, through the use of short and simple questions.[116] Moreover, *Farooqi* broadly declared that the 'dated formulaic use of the word put' is not integral or necessary to ensure fairness.[117] Accordingly, the habit of assertion is not 'true cross-examination', and has its place within closing speeches.[118]

Matters that would ordinarily be 'put to' a witness, such as inconsistencies in their evidence, can be adduced using agreed facts and in closing speeches.[119] These limitations ensure that the defence case and relevant material is 'fully and fairly' ventilated, without confrontation or causing unnecessary distress and confusion.[120] However, barristers must first consider whether a vulnerable witness can deal with these matters.[121] Where these modifications are necessary, they must be well

[113] *R v Barker* [2010] EWCA Crim 4; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[114] *R v RK* [2018] EWCA Crim 603 para 27.

[115] *R v Barker* [2010] EWCA Crim 4.

[116] *R v Barker* [2010] EWCA Crim 4

[117] *R v Farooqi* [2013] EWCA Crim 1649 para 46; Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.14.

[118] *R v Farooqi* [2013] EWCA Crim 1649 para 46; Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.14.

[119] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4; *R v Wills* [2011] EWCA Crim 1938 para *39; R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064.

[120] *R v YGM* [2018] EWCA Crim 2458 para 24.

[121] Where questions can be carefully adapted, witnesses should be examined on these matters. This provides witnesses with an opportunity to respond and enables their evidence to be tested. The Advocates Gateway, Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court Toolkit 1 (December 2016); ICCA, 'Advocacy and The Vulnerable: National Training Programme: The 20 Principles of Questioning (The Council of the Inns of Court 2019) 4

defined.[122] It is considered best practice for judges to direct jurors about these modifications, before cross-examination is conducted and during the summing up.[123] Where these limitations are required and imposed, this does not necessarily compromise a fair trial. For example, in *Edwards*, the 5-year-old complainant alleged being punched by her stepfather.[124] Before the trial, it was agreed that cross-examination must be modified, but the judge intervened several times during cross-examination when questioning became tagged and leading. On appeal, the appellant argued that counsel was wrongly restricted and this gave the impression that the complainant's interests outweighed the defendant's right to a fair trial. It was held that the modifications were necessary because of the complexity of the case and defence counsel was able to put their case; accordingly the trial was fair. Henderson's research found legal personnel agree that 'putting their case', in a manner that employs leading questions, suggestion, and commentary, is not useful advocacy.[125] Though, some barristers have express reluctance to abandon this practice.[126]

Scholars have traditionally described cross-examination as lengthy, where barristers examine peripheral matters in minute detail.[127] Yet, criminal trials must be conducted 'efficiently and expeditiously', with evidence being heard in the 'shortest and clearest

<http://www.icca.ac.uk/wp-content/uploads/2019/05/20-Principles-of-Questioning.pdf> accessed: 25 July 2019.

[122] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[123] *R v YGM* [2018] EWCA Crim 2458 para 21 and 26; *R v Wills* [2011] EWCA Crim 1938 para 34; Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 10-5 Evidence of Children and Vulnerable Witnesses 10-19 to 10-20.

[124] *R v Edwards* [2011] EWCA Crim 3028.

[125] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 940-941.

[126] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 940-941.

[127] Hohl K and Conway M.A, 'Memory As Evidence: How Normal Features of Victim Memory Lead to The Attrition of Rape Complaints' (2017) 17(3) Criminology and Criminal Justice 248, 252; Burman M, 'Evidencing Sexual Assault: Women in The Witness Box' (2009) 56(4) Probation Journal 379, 383.

way'.[128] To achieve this, judges must manage the trial and cross-examination.[129] As stated in *Ejaz*, judges may enforce time limits on cross-examination, when questioning is prolix and repetitive.[130] Lord Justice Dyson also reiterated that 'it is no part of the duty of counsel to put every point of the defendant's case (however peripheral) to a witness' or excessively cross-examine on matters not really in issue.[131] Similarly, it was held in *Jonas* that judges could limit cross-examination questioning in multi-handed trials, to prevent repetitive questioning on matters co-defending counsel have already addressed.[132] These restrictions are regarded as compatible with a fair trial, unless unfairness plainly results.[133]

2.3.2 Responding to Distress and Providing Support

Research shows that complainants within rape trials do become upset and distressed during cross-examination.[134] This is not exclusive to rape trials, as other witnesses find cross-examination upsetting and stressful.[135] However, within sexual offence trials, the nature of offending and subject matter of questioning may be uniquely challenging for complainants.[136] The Court of Appeal recognises the possibility of sexual offence complainants 'reliving their experiences through their evidence', which causes distress.[137] In these circumstances, judges are encouraged to provide

[128] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.15.

[129] *R v B (Ejaz)* [2005] EWCA Crim 805 para 16; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3A: Case Management.

[130] *R v B (Ejaz)* [2005] EWCA Crim 805, para 10 citing *R v Kalia* (1974) 60 Cr App R 200; *R v McFadden* (1967) 62 Cr App R 187.

[131] *R v B (Ejaz)* [2005] EWCA Crim 805, para 10; *R v Kalia* (1974) 60 Cr App R 200.

[132] *R v Sandor Jonas* [2015] EWCA Crim 562.

[133] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.15; *R v B (Ejaz)* [2005] EWCA Crim 805.

[134] Victim Support *At Risk, Yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (2013) 42; Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 22.

[135] Fielding N.G, 'Lay People in Court: The Experience of Defendants, Eyewitnesses and Victims' (2013) 64(2) The British Journal of Sociology 287, 291-297.

[136] See Chapter Three for a discussion.

[137] *R v SG* [2017] EWCA Crim 617, para 58.

breaks during cross-examination, to allow 'witnesses to return better able to give evidence'.[138] In *Pipe*, it was held that judges could stop cross-examination when complainants become too distressed to continue.[139] In these circumstances, remaining matters can be placed before the jury with agreed facts.[140] Prior to stopping cross-examination, the defence in *Pipe* had examined the complainant on the central elements of their case. Therefore, there are limitations on when cross-examination should be stopped, to ensure a fair trial. The CrimPD also suggest regular breaks during trials are desirable for vulnerable defendants, to assist with their concentration.[141]

In addition to these modifications, an Independent Sexual Violence Advisor (ISVA) and a Witness Service representative can support complainants and other witness when they give evidence.[142] ISVAs provide independent support to complainants, which can vary from non-therapeutic emotional support to providing updates on case progression.[143] However, ISVAs cannot discuss evidence or provide legal advice.[144] At trial, ISVAs are believed to provide instrumental support to complainants, where they otherwise may have felt unable to attend.[145] ISVAs can work alongside the Witness Service, a court-based service that provides 'emotional and practical advice and information' to victims and witnesses giving evidence at trial.[146] In contrast, vulnerable defendants and those with communication difficulties may be provided a

[138] *R v SG* [2017] EWCA Crim 617, para 56.

[139] *R v Stephen Pipe* [2014] EWCA Crim 2570.

[140] *R v Stephen Pipe* [2014] EWCA Crim 2570.

[141] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4 and 3G.10.

[142] Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements* (Home Office 2017) 15.

[143] Hester M. and Lilley S.J, *More than Support to Court: ISVAs in Teeside* (University of Bristol in association with the Northern Rock Foundation 2015) 3-6.

[144] Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements* (Home Office September 2017) 10.

[145] Hester M. and Lilley S.J, *More than Support to Court: ISVAs in Teeside* (University of Bristol in association with the Northern Rock Foundation 2015) 13.

[146] Home Office, *The Role of the Independent Sexual Violence Adviser: Essential Elements* (Home Office 2017) 17.

support worker or 'appropriate companion' to provide assistance, where an intermediary is not available.[147]

2.3.3 Further Modifications to Cross-Examination

In the landmark case of *Barker*,[148] it was held that the court must adapt to the individual needs of children and vulnerable witnesses.[149] Modified cross-examinations are encouraged for child witnesses, where barristers adopt short and simple questions that put the 'essential elements' of their case to witnesses.[150] A series of decisions have followed, endorsing the *Barker* position, to safeguard best evidence.[151] These cases further assert that barristers may need to depart from traditional cross-examination techniques for children and other vulnerable witnesses.[152] These techniques include over-rigorous questioning, repetition, direct challenge, jumping in chronology, failing to sign post topics, tagged questions, leading questions, non-literal language, complex language, compound questions, and commentary.[153] Where these restrictions are necessary to enable a witness's understanding and best evidence, judges have a duty to ensure barristers comply with these limitations.[154] Case law has regarded cross-examination as 'most effective' and 'powerful' with these modifications.[155] While these cases predominately consider

[147] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F.12

[148] [2010] EWCA Crim 4.

[149] This approach has been endorsed within Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-11 to 2-12.

[150] *R v Barker* [2010] EWCA Crim 4 para 42.

[151] *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064 para 45; *R v W and M* [2010] EWCA 1926 para 29*; R v Wills* [2011] EWCA Crim 1938, para 21*; R v F* [2013] EWCA Crim 424 para 25.

[152] *R v Jonas* [2015] EWCA Crim 562 para 31; *R v Wills* [2011] EWCA Crim 1938; *R v Edwards* [2011] EWCA Crim 3028; *R v RL* [2015] EWCA Crim 1215.

[153] As documented within Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-30 to 2-33; ICCA, 'Advocacy and The Vulnerable: National Training Programme: The 20 Principles of Questioning (The Council of the Inns of Court 2019).

[154] *R v Wills* [2011] EWCA Crim 1938, para 34.

[155] *R v Wills* [2011] EWCA Crim 1938, para 39*; R v Dinc* [2017] EWCA Crim 1206.

vulnerable witnesses, the Court of Appeal and Practice Directions confirm that these modifications extend to vulnerable defendants.[156]

Case law has also recommended other procedural changes, to assist in modifying cross-examination for vulnerable witnesses and defendants. Ground Rules Hearings (GRH) are now required in intermediary cases, and considered best practice in vulnerable witness, vulnerable defendant and multi-handed cases.[157] GRHs are also required in cases where sexual history evidence applications are made.[158] Within GRHs, trial judges make directions, with the assistance of counsel, about the conduct of the trial and cross-examination to ensure fair treatment and participation.[159] At GRHs, ground rules will be set regarding the conduct of cross-examination, including the style of questioning, duration of cross-examination, and the topics that can and cannot be covered.[160] This will ensure cross-examination questions are developmentally appropriate for witnesses and defendants, and encourage best evidence.[161]

A number of Special Measures are available to assist vulnerable and intimidated witnesses, and vulnerable defendants, in giving their best evidence.[162] Of particular note, the Court of Appeal has addressed the role and use of intermediaries for vulnerable witnesses and defendants in cross-examination. Intermediaries are regarded as valuable for ensuring witnesses can effectively communicate and

[156] *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 40; *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 para 225 and 226*;* Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[157] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(7); *R v YGM* [2018] EWCA Crim 2458 para 21; *R v Jonas* [2015] EWCA Crim 562 para 41

[158] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD V Evidence 22A.

[159] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(7)

[160] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(7); The Advocates Gateway, *Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court: Toolkit 1* (The Council of the Inns of Court, 2016).

[161] Professor David Ormerod QC and David Perry QC (eds) 'Part D: Procedure' in *Blackstone's Criminal Practice* (OUP 2018) Section D14 Special Measures and Anonymity Orders D14.51.

[162] Special Measures are discussed within sections 5.1.1, 6.1.1 and 7.2.1.

participate in proceedings.[163] They may also assist judges in making appropriate decisions regarding the style and content of questioning during GRHs. Trial judges may require cross-examination questions to be submitted in writing at GRHs for consideration.[164] Advocates may consult intermediaries when formulating their questions.[165] However, there are a number of limitations with appointing intermediaries, particularly for vulnerable defendants. For instance, the statutory provisions and eligibility criteria for appointing an intermediary differ between vulnerable witnesses and defendants.[166] Additionally, as Henderson describes, 'an unfortunate two tier system' has developed in the provision of intermediaries.[167] Currently, only vulnerable witnesses have access to registered intermediaries and a matching service through the Witness Intermediary Scheme (WIS).[168] Vulnerable defendants must, therefore, rely upon unregistered intermediaries.[169] However, the High Court has ruled that refusing vulnerable defendants access to the WIS and registered intermediaries, breaches equality of arms with vulnerable witnesses.[170]

In practice, the number of registered and unregistered intermediaries is relatively low.[171] As Henderson explains, many have other professional roles, restricting their

[163] *R v Barker* [2010] EWCA Crim 4, para 42.

[164] Professor David Ormerod QC and David Perry QC (eds) 'Part D: Procedure' in *Blackstone's Criminal Practice* (OUP 2018) Section D14 Special Measures and Anonymity Orders D14.48.

[165] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3F.2.

[166] The CrimPD suggest the use of intermediaries for defendants will be 'rare', Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F: Intermediaries 3F.11 to 3F.18, citing *R v Cox [2012] EWCA Crim 549*; *R v Yahya Rashid* [2017] EWCA Crim 2, para 84. This is critically discussed within sections 6.1.1 and 7.2.1.

[167] Henderson E, '"A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales" (2015) E. & P. 154, 157.

[168] The features of the Witness Intermediary Scheme have been clearly set out within, *R (on the application of OP) v Secretary of State for Justice* [2015] 1 Cr. App. R 7.

[169] Criminal Practice Direction Amendment No.7 [2018] EWCA Crim 1760, Para 3F.5

[170] *R (on the application of OP) v Secretary of State for Justice* [2015] 1 Cr. App. R 7; Professor David Ormerod QC and David Perry QC (eds) 'Part D14: Special Measures and Anonymity Orders' in *Blackstone's Criminal Practice* (OUP 2018) para D14.44.

[171] Henderson E, '"A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales" (2015) E. & P. 154, 157. The CrimPD suggest there is a

availability to attend criminal court proceedings.[172] Therefore, only a small proportion of vulnerable witnesses and defendants may be able to benefit from an intermediary.[173] Where intermediaries are required but are unavailable for vulnerable defendants, trial judges must adapt the trial process.[174] Moreover, the provision of Special Measures does not diminish the court's inherent responsibility for ensuring a fair trial and enabling the effective participation of witnesses and defendants.[175]

In 2016, the Inns of Court College of Advocacy and Bar Council launched the Vulnerable Witness Training Programme (VWTP).[176] The programme aims to provide all advocates with an understanding of how to question vulnerable people.[177] The VWTP comprises of three hours face-to-face training using a case study of a Crown Court trial, which allows advocates to develop their skills in conducting GRHs and submitting questions in writing.[178] Attendees learn practical ways of cross-

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'scarcity of intermediaries', Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F: Intermediaries 3F.5

[172] Henderson E, '"A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales" (2015) E. & P. 154, 157.

[173] Henderson E, '"A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales" (2015) E. & P. 154, 157.

[174] *R v Cox* [2012] EWCA Crim 549 para 29 to 30.

[175] *R v Cox* [2012] EWCA Crim 549 para 29 to 30; *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 para 199; Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-22.

[176] The Bar Council, Bar Council Launches Vulnerable Witness Advocacy Training (14 November 2016) <https://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/november/bar-council-launches-vulnerable-witness-advocacy-training/> accessed: 24 July 2019. Other publications have reported the launch date as September 2017, including: Professor David Ormerod QC and David Perry QC (eds) 'Part D: Procedure' in *Blackstone's Criminal Practice* (OUP 2018) Section D14 Special Measures and Anonymity Orders D14.51; HM Government, *Victims Strategy* (Cm 9700, September 2018) 34.

[177] The Inns of Court College of Advocacy, 'Advocacy and The Vulnerable (Crime)'<https://www.icca.ac.uk/advocacy-the-vulnerable-crime/> accessed: 24 July 2019; The Inns of Court College of Advocacy, 'Advocacy and The Vulnerable: National Training Programme: The 20 Principles of Questioning (The Council of the Inns of Court 2019).

[178] Eight hours of preparation is also required, where advocates must watch short films, read the case study, learn the twenty principles of questioning and prepare their questioning for the case study in advance. Following the face-to-face training, advocates must watch a series of short films and

examining vulnerable witnesses to comply with ground rules and protect their client's interests.[179] Advocates critically analyse their own questioning and learn from others.[180] Although the Ministry of Justice has not yet made the VWTP compulsory,[181] the Court of Appeal has warned that advocates will only be competent to act in vulnerable witness cases with this training.[182]

The Advocate's Gateway also provides a range of toolkits, which have been endorsed as best practice when questioning vulnerable people in court.[183] Advocates and judges must stay informed with best practice, as specified in *YGM*.[184] In addition, presiding judges within rape trials must have 'sex tickets'. For this, judges must complete the Judicial College's Serious Sexual Offence Seminar (SSOS) once every three years.[185] As stated by the Ministry of Justice, the seminar equips judges with knowledge of current law and practice, allows judges to 'share judicial experiences and identify issues of concern', ensures the trial process is 'fair and appropriate to the needs of all parties and witnesses' and 'enables judges to try [sexual offence] cases with sensitive

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complete a form to receive accreditation. As outlined within, Lincoln's Inn 'Vulnerable Witness Training' <https://www.lincolnsinn.org.uk/members/education-training/vulnerable-witness-training/> accessed: 24 July 2019

[179] The Law Society, 'Advocacy and the Vulnerable Training Sessions' (16 August 2018) <https://www.lawsociety.org.uk/practice-areas/a/advocacy/advocacy/advocacy-and-the-vulnerable-training-sessions/> accessed: 24 July 2019

[180] The Law Society, 'Advocacy and the Vulnerable Training Sessions' (16 August 2018) <https://www.lawsociety.org.uk/practice-areas/a/advocacy/advocacy/advocacy-and-the-vulnerable-training-sessions/> accessed: 24 July 2019

[181] Hoyano L, 'Why We Should All Take The Vulnerable Witness Training Programme' (2018) Criminal Bar Quarterly 17

[182] *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228, 226; *R v Yahya Rashid* [2017] EWCA Crim 2, 80.

[183] The Advocates Gateway, Toolkits <https://www.theadvocatesgateway.org/toolkits> accessed: 27 July 2019; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D: Vulnerable People in the Courts 3D.7.

[184] R v YGM [2018] EWCA Crim 2458, para 21.

[185] HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 60; Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473, 474 to 475.

and confidence'.[186] The seminar covers issues of substantive law, procedural and evidential issues, and contextual matters relating to the nature and impact of sexual offending.[187] The three-day course includes lectures, delivered from a variety of experts, interactive group work, and mock trials.[188] In relation to vulnerable witnesses in rape cases, a short lecture on section 28 hearings is provided, alongside training on GRHs and intermediaries. Judges also keep abreast with developments to the Equal Treatment Bench Book, which has recently been reviewed and addresses 'special measures and related adjustments [as a] heightened topic'.[189] As HHJ Peter Rook QC explains, judges have a professional responsibility to keep up-to-date with developments in law.[190] They may attend multidisciplinary seminars and conferences, covering a range of issues for awareness raising purposes.[191]

During interviews conducted in 2013, some judges and barristers expressed concern with the Court of Appeal's restrictions; they viewed persuasion and advocacy as principal functions of cross-examination that they were 'brought up with'.[192] While traditional advocacy may have been the approach barristers were previously taught,

[186] The Disclosure Team from the Ministry of Justice has provided this information in personal correspondence with the researcher on 02 August 2019, documented within Appendix Nine. A request was sent to the Judicial College for further information about what current judicial training involves, in the area of sexual offences and vulnerable witnesses, which was subsequently handled under the Freedom of Information Act (FOIA).

[187] Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473, 475 to 476.

[188] As Rumney and Fenton explain, the delivery of the Serious Sexual Offences Seminar is continually adapted in its content and delivery. Therefore, changes may have occurred in recent years. Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473,477.

[189] The Disclosure Team from the Ministry of Justice has provided this information in personal correspondence, documented within Appendix Nine.

[190] Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473, 475.

[191] Judges receive updates via regular e-alerts through the digital Learning Management System (LMS), which is accessible to the judiciary at all times. The Disclosure Team from the Ministry of Justice has provided this information in personal correspondence with the researcher, documented within Appendix Nine.

[192] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 937-8 and 940-1.

the training available demonstrates this is not the position today. The VWTP and SSOS have been deemed successful.[193] However, some suggest that further training on dealing with vulnerable witnesses, specifically in rape cases, is required.[194] It is argued that more time is needed within the SSOS for practical training relating to s.28 procedures and GRHs.[195] The training has been criticised for lacking an evidence-based approach, and for not extending to non-vulnerable witnesses.[196] Some scholars are also concerned about the implementation of the best evidence approach among advocates.[197]

The traditional understanding of cross-examination, as Henderson asserts, is not supported with legal authority.[198] Cross-examination has been regarded as 'a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story'.[199] Therefore, this emphasis on eliciting accurate, complete, and coherent evidence has been longstanding.[200] Henderson argues that the recent decisions of the Court of Appeal, particularly *Barker*, simply extend the ordinary rules of cross-examination and reiterate the court's longstanding

[193] The Inns of Court College of Advocacy, 'Advocacy and The Vulnerable: National Training Programme: The 20 Principles of Questioning (The Council of the Inns of Court 2019) 3; Hunter G, Jacobson J and Kirby A, *Judicial Perceptions of the Quality of Criminal Advocacy* (ICPR, June 2018) iv <https://www.sra.org.uk/documents/sra/research/criminal-advocacy.pdf> accessed: 27 July 2019; HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 60; Rumney P.N.S and Fenton R.A, 'Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473, 478 to 480.

[194] HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 61-62.

[195] HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 61-62.

[196] Cooper P *et al*, 'One Step Forward and Two Steps Back? The '20 Principles' for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) E. & P. 392.

[197] Plotnikoff J and Woolfson R, Dispensing With The 'Safety Net': Is The Intermediary Really Needed During Cross-Examination?' (2017) Archbold Review 6, 9.

[198] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 934.

[199] *Mechanical & General Inventions Co Ltd v Austin* [1935] A.C 346 para 359 and 360; *R v Kalia* (1974) 60 Cr. App. R. 200 cited within Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929.

[200] As argued within Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183.

vision for a 'reliability focused best evidence approach'.[201] From her analysis of case law, Henderson maintains that cross-examination is an investigative opportunity that must not feature forensically unsafe tactics.[202]

2.3.4 Critical Discussion

To suggest that the developments in cross-examination practices since *Barker*, are 'a logical extension of the ordinary rules' of cross-examination,[203] understates their significance. These cases go beyond existing rules for cross-examination, by advocating for new procedural changes, including the VWTP, GRHs, and the use of intermediaries. The best evidence theory, premised on decisions including *Barker*,[204] is significant for challenging many problematic traditional cross-examination strategies. This contemporary understanding of cross-examination enhances the quality of evidence and experiences of the process. However, the best evidence approach does not fully address some important issues.

It appears the best evidence approach, and changes in attitudes towards cross-examination, predominately consider the needs of children and vulnerable people.[205] As previously discussed, the best evidence model recognises that all witnesses and defendants 'should be enabled to give the best evidence they can'. [206] It is acknowledged that while vulnerable witnesses and defendants have distinctive access to provisions that assist them in giving their best evidence, many other people may

[201] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 183 and 185.

[202] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 947.

[203] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 18, 183 and 185.

[204] *R v Barker* [2010] EWCA Crim 4.

[205] Also argued within, Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds), *Addressing Vulnerability in Justice Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

[206] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

require assistance.[207] Trial judges must take 'reasonable' steps to facilitate the participation of all witnesses and defendants, which includes enabling their best evidence and ensuring they comprehend proceedings.[208] This necessitates the early identification of a witness or defendant's needs, so that the trial process can be adapted.[209] However, the case law and legal guidance, described above, primarily endorses modifications to meet the needs of children and vulnerable people.

Moreover, some disparities in the implementation of best evidence safeguards emerge between vulnerable witnesses and defendants. Case law appears more restrictive in providing vulnerable defendants with best evidence safeguards. For example, it is maintained that the use of intermediaries for defendants during an entire trial 'will be very rare'.[210] Further, the infrastructure for identifying needs and statutory provisions for Special Measures sharply contrast between defendants and witnesses. There are some examples where the Court of Appeal has broadly condemned traditional practices for all witnesses.[211] However, the series of decisions following *Barker* do not clearly extend other best evidence provisions to 'robust' adult witnesses and defendants.[212] The term 'robust' is often used to describe 'ordinary' adults who are not 'vulnerable' by definition.[213] A universal definition of 'vulnerability' has not been

[207] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2.

[208] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[209] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[210] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F: Intermediaries 3F.12 to 3F.11 to 3F.13, citing *R v Cox [2012] EWCA Crim 549*; *R v Yahya Rashid* [2017] EWCA Crim 2, para 84.

[211] For example, the traditional practice of commenting on evidence has been condemned within, *R v Farooqi* [2013] EWCA Crim 1649.

[212] *R v Barker [2010] EWCA Crim 4; R v W and M [2010] EWCA 1926; R v Wills [2011] EWCA Crim 1938; R v F [2013] EWCA Crim 424; R v Cokesix Lubemba and JP [2014] EWCA Crim 2064.*

[213] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 189.

established.[214] In law, the YJCEA 1999 regards a person under eighteen, with physical disability, mental disorder or significant impairment to intelligence and social functioning as 'vulnerable', for the purposes of Special Measures.[215] Revisions to the Act make specific reference to sexual offence cases in relation to Special Measures,[216] which appears to acknowledge the vulnerability of complainants in these cases.[217] Furthermore, the CrimPD regards anyone who is 'likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case' as vulnerable.[218] The Equal Treatment Bench Book also suggests that a person subjected to factors, including domestic violence and sexual abuse, is considered vulnerable within the CJS.[219] This view appears to contrast slightly with the position adopted within case law, which will now be discussed.

Within *SG* the complainant was deemed 'mature and articulate', although became distressed.[220] Breaks were taken, and the defence advocate was required to prepare a list of his remaining questions for the judge's approval. The Court of Appeal held that the complainant had no difficulty understanding the questions, and therefore should not have been treated as vulnerable.[221] Breaks were considered sufficient in enabling the complainant to recover, so cross-examination could have continued in the 'normal way'.[222] It was held that a balance must be struck between allowing defendants to

[214] Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-5; HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 49, para 4.10.

[215] Youth Justice and Criminal Evidence Act 1999, s.16

[216] Youth Justice and Criminal Evidence Act 1999 s.17(4) and s.22A.

[217] HH Peter Rook QC explains that there is a tendency to refer to s.16 witnesses as 'vulnerable' and s.17 witnesses as 'intimidated'. However, s.17(4) includes sexual offence complainants, simply by virtue of the offence and without them having to demonstrate any specific needs. Accordingly, they are recognised as vulnerable and intimidated witnesses. HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 50, 4.16 to 4.17.

[218] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.1; HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 48, para 4.9.

[219] Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-5.

[220] *R v SG* [2017] EWCA Crim 617, para 53.

[221] *R v SG* [2017] EWCA Crim 617, para 58

[222] The Court of Appeal recognised that requiring advocates to submit a list of questions for judicial approval would be exceptional, where a complainant understands the questions. *R v Dinc* [2017] EWCA Crim 1206 citing *R v SG* [2017] EWCA Crim 617.

properly challenge a witness's evidence and ensuring witnesses can give their best evidence.[223] Accordingly, it seems that robust witnesses and defendants will experience a traditional cross-examination approach, where there is no risk of misunderstanding or acquiescence. Moreover, the cross-examination of vulnerable witness and children are considered 'markedly different' in approach, compared to adults.[224]

A central justification for best evidence modifications to cross-examination for vulnerable witnesses and defendants is that traditional questioning techniques risk acquiescence and confusion.[225] With this, 'robust' adults are considered capable of withstanding traditional cross-examination tactics. However, as previously indicated, evidence shows adults are also suggestible and have difficulty with traditional questioning styles.[226] Adult witnesses and defendants have described their experiences of cross-examination as stressful.[227] These difficulties may be exacerbated with the intimidating, and potentially unfamiliar, courtroom environment.[228] In these circumstances, describing non-vulnerable adult witnesses and defendants as 'robust', and expecting them to withstand traditional styles of questioning, is questionable. Moreover, witnesses and defendants may have difficulties, which do not meet the statutory definition of vulnerability,[229] but negatively affect their best evidence when faced with traditional tactics. This further

[223] *R v SG* [2017] EWCA Crim 617.

[224] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 10-18.

[225] As explain within *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 40.

[226] Henderson E, 'Did You See The Broken Headlight? Questioning The Cross-Examination of Robust Adult Witnesses' (2014) Archbold Review 4, 5; Wheatcroft J.M and Woods S, 'Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence' (2010) 14(3) E. & P. 187; Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49; Kebbell M and Johnson S, 'Lawyers' Questioning: The Effect of Confusing Questions on Witness Confidence and Accuracy' (2000) 24 Law and Human Behaviour 629.

[227] Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (CJA 2015).

[228] As discussed within: Zajac R. and Cannan P, 'Cross-Examination of Sexual Assault Complainants: A Developmental Comparison' (2009) 16(1) Psychiatry, Psychology and Law' 236, 238.

[229] The Youth Justice and Criminal Evidence Act 1999 s.16. and s.33(A)(2) and s.33 (BA).

supports Henderson's suggestion for extending the best evidence approach to all witnesses.[230] This must equally apply to 'robust' defendants.

There are further limitations with the best evidence model, when considering rape trials. The model does not address or ameliorate other questioning strategies critiqued within existing empirical studies and literature. This includes questions that inquire into the parties' sexual history, encourage rape myths and re-victimise complainants.[231] Moreover, Henderson examines the best evidence model using case law, without conducting empirical research into cross-examination practices. By contrast, this thesis will critically analyse actual cross-examinations, using the two existing theories as interpretive tools. This will highlight whether the best evidence theory is being adopted in practice.

2.3.5 A 'Fair Treatment' Approach

In light of the boundaries of the best evidence model described above, a new model of cross-examination will be advanced within this thesis. This model will be supported by the empirical findings and termed the 'fair treatment model'. It captures the features of a best evidence approach, and develops it further. Features of cross-examination will be identified, which at present the best evidence model does not explicitly embrace. For example, this will include welfare checks, introductory remarks, and curtailing complex questioning for 'robust' complainants and defendants. Observations will identify existing best evidence features, including the provision of Special Measures and breaks to alleviate distress, which will equally be embraced under a fair treatment approach. Some traditional styles of cross-examination will also be observed and rejected under the FTM.

A fair treatment approach will be theorised for all rape complainants and defendants. The model supports consideration of the difficulties individual complainants and defendants experience, irrespective of their vulnerability or robustness. As such, the dichotomy that witnesses and defendants are either 'robust' or 'vulnerable' is

[230] Henderson E, 'Bigger Fish to Fry: Should the Reform of Cross-examination be Expanded Beyond Vulnerable Witnesses?' (2015) E. & P. 83.

[231] See Chapter Three for a discussion of the literature examining these issues.

regarded as problematic. It is important to account for their general emotional wellbeing, which may be exacerbated from going through the criminal justice process, in addition to any communication needs that must be met with specific modifications. Currently, the Equal Treatment Bench Book requires judges to have 'an awareness of "where a person is coming from" in terms of background, culture and special needs' and appreciate the courtroom is a daunting environment.[232] Steps have been advocated to dispel anxieties, such as providing information and advice, avoiding legal jargon and inappropriate remarks.[233] Empirical findings from the present study will identify additional cross-examination practices that can be implemented to ensure fair treatment of complainants and defendants.

Before identifying features of the FTM, it is important to clarify what is meant by 'fair treatment' and 'fairness' in this context. For this model, 'fair treatment' is defined in accordance with existing legal guidance. 'Fair treatment' is a principle that judges must follow.[234] As outlined in the Equal Treatment Bench Book, it does not require uniformity in how complainants and defendants are treated.[235] The principle is closely aligned with 'equality', whereby people are treated 'equally in comparable situations'.[236] The Bench Book makes clear that everyone in criminal proceedings must be 'fairly treated, fully heard, and fully understood'.[237] Accordingly, steps must be taken to alleviate any disadvantages, which may arise due to 'personal attributes'.[238] Under the FTM, steps to alleviate general anxieties for complainants and defendants are also required. Awareness among legal personnel of the individual circumstances and experiences of complainants and defendants is essential.

[232] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4.

[233] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5.

[234] Judicial College, *The Equal Treatment Bench Book* (February 2018) 3.

[235] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[236] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[237] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[238] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

In addition, the FTM, and its definition of 'fairness', is informed by the relational procedural justice theory.[239] Procedural justice, in summary, is about maintaining quality and fairness in procedures and how people are treated.[240] This theory, first developed in the 1970s, is informed by the elements of 'respect', 'trust' and neutrality'.[241] While these elements are important across the criminal justice process, they may not be fully satisfied during cross-examination. For example, as defence advocates represent a defendant's interests, 'neutrality' will not be fulfilled during a complainant's cross-examination. In developing the fair treatment model, the element of 'respect' is particularly important and must be advocated in cross-examination.[242] For rape complainants, sensitive, polite and dignified treatment is essential.[243] Respect, under this theoretical framework, means demonstrating regard to their individual interests and rights.[244] It also refers to upholding a high quality of 'interpersonal treatment' between individuals and legal personnel during cross-

[239] Tyler T and Lind E.A, 'A Relational Model of Authority in Groups' in M.P. Zanna M.P (ed) *Advances in Experimental Social Psychology* (Diego: Academic Press 1992).

[240] Wemmers J and Cyr K, 'What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation' (2006) 2(2) Applied Psychology in Criminal Justice 102, 108; McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice (2018) Social and Legal Studies 1, 11-12; Kelly L, Lovett J and Regan L, *A Gap or Chasm? Attrition in Reported Rape Cases* (Home Office Research 293, February 2005) 88.

[241] Other theories of procedural justice include the element of 'voice', which is considered compatible with the relational model. Wemmers J and Cyr K, 'What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation' (2006) 2(2) Applied Psychology in Criminal Justice 102, 108.

[242] Similarly, this element is particularly emphasised within the relational model of procedural justice. Wemmers, J, *Victims in the Criminal Justice System* (Kugler 1996) 68.

[243] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice (2018) Social and Legal Studies 1, 11-12; Kelly L, Lovett J and Regan L, *A Gap or Chasm? Attrition in Reported Rape Cases* (Home Office Research 293, February 2005) 84 and 87. The Council of Europe also recognises that the courts must 'promote the provision of sensitive and knowledge assistance' for complainants in sexual offence or domestic violence cases, Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence* (Council of Europe, 2012)

[244] Wemmers, J, *Victims in the Criminal Justice System* (Kugler 1996); Tyler T, Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform (1997) 45 The American Journal of Comparative Law 871.

examination.[245] This means advocates and judges should treat complainants in a friendly manner, show an interest in them, and be considerate.[246] Some barristers have suggested they do not have an explicit obligation towards complainants, beyond treating them with basic courtesy.[247] Under the FTM, complainants and defendants must receive respectful and dignified treatment. As argued by Elias, the concept of 'respect' engenders imagery of the CJS operating with 'calmness and care'.[248]

Moreover, the FTM must be informed by the strict legal definition of 'fairness', where cross-examination and the trial process must comply with common law, statute, and human rights. Importantly, defendants must receive a fair trial.[249] A defendant has a 'minimum right' to 'examine or have examined witnesses against him'.[250] Cross-examination is an integral method in fulfilling this within trials in England and Wales. In examining the notion of 'fairness' and analysing ECtHR case law, Trechsel identifies paradox where a fair trial is upheld when specific minimum rights are breached.[251] Trechsel persuasively argues that fairness is a changing and 'vague concept' but must extend beyond individual rights of a defendant.[252] A fair trial can

[245] Tyler T and Lind E.A, 'A Relational Model of Authority in Groups' in M.P. Zanna M.P (ed) *Advances in Experimental Social Psychology* (Diego: Academic Press 1992) cited within Wemmers J and Cyr K, 'What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation' (2006) 2(2) Applied Psychology in Criminal Justice 102, 107-108.

[246] Wemmers, J, *Victims in the Criminal Justice System* (Kugler 1996) 129.

[247] Smith T, 'The Zealous Advocate in the 21st Century: Concepts and Conflicts for the Criminal Defence Lawyer' (Thesis, University of the West of England, 2010) 284.

[248] Elias S, *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, 2018) 158.

[249] European Convention on Human Rights, Article 6(1); Human Rights Act 1998, Protocol 1, Article 6(1).

[250] European Convention on Human Rights, Article 6(3)(d); Human Rights Act 1998, Protocol 1, Article 6(3)(d).

[251] Trechsel S, 'The Character of the Right to a Fair Trial' in Jackson J and Summers S (Eds) *Obstacles to Fairness in Criminal Proceedings* (Hart 2018) 23-26.

[252] Trechsel S, 'The Character of the Right to a Fair Trial' in Jackson J and Summers S (Eds) *Obstacles to Fairness in Criminal Proceedings* (Hart 2018) 35. In addition, Kennedy *et al* argue that fairness is a broad concept that must meet the interests of the accused and complainant. Kennedy J, Easteal P and Bartels L, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35 Women's Studies International Forum 334, 335.

be regarded as 'cluster of rights', rather than a 'defendant-centric' concept.[253] Furthermore, case law and CrimPR assert that fairness must involve respect and consideration of the interests of complainants, witnesses, and the public.[254] The ECtHR states that while the interests of complainants are not explicitly addressed under Article 6, their rights to privacy and security must be considered and balanced against the defence.[255] Balancing these interests in sexual offence cases is considered important, as proceedings can be an ordeal for complainants and they must be protected from harm.[256]

This clustering and balancing of interests is evident through practices adopted in England and Wales. For example, while defendants have a minimum right to examine witnesses, they are preventing from personally cross-examining complainants in sexual offence trials.[257] Complainants within rape trials can use screens and live links during cross-examination, preventing a traditional confrontation with the accused without unfairness.[258] Moreover, the Lord Chief Justice, in his ruling in *Farooqi*, suggested that the 'fairness principle operates both ways'.[259] While this related to the specific issue of 'putting the case', case law has discussed the principle of fairness

[253] Trechsel S, 'The Character of the Right to a Fair Trial' in Jackson J and Summers S (Eds) Obstacles to Fairness in Criminal Proceedings (Hart 2018) 23; Bowden P, Henning T and Platter D, 'Balancing Fairness to Victims, Society and Defendants in The Cross-Examination of Vulnerable Witnesses An Impossible Triangulation?' (2014) 37 Melbourne University Law Review 539, 558.

[254] *Doorson v Netherlands* (1996) 22 EHRR 330, para 70. The CrimPR also state that to fulfill the overriding objective to deal with cases justly, the interests of witnesses, victims and jurors must be respected. Criminal Procedure (Amendment) Rules 2019, Part 1: The Overriding Objective, CrimPR 1.1(2)(b), (2)(d).

[255] *Doorson v Netherlands* (1996) 22 EHRR 330, para 70; *PS v Germany* (2003) 36 EHRR 61 para 22. As discussed within: Hoyano L, 'Striking A Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' [2001] Crim L.R 948, 955.

[256] *SN v Sweden* (2004) 39 EHRR 13 para 47, O-112; *Baegen v Netherlands* (1996) 23 EHRR 330 ECtHR para 77.

[257] Youth Justice and Criminal Evidence Act 1999 s.34.

[258] *C v Sevenoaks Youth Court* [2009] EWHC 3088; Youth Justice and Criminal Evidence Act 1999 s.17(4)

[259] *R v Farooqi* [2013] EWCA Crim 1649 para 112.

and balancing interests in other contexts.[260] The President of the Queens Bench Division asserted that judges '…must balance, on the one hand, the needs and welfare of the complainant and, on the other, the legitimate interests of the defendant'.[261] Cross-examination practices that safeguard these seemingly competing interests will not necessarily result in a 'zero sum' game.[262] As Ashworth and Redmayne cogently explain, both parties have the same interest in fair and dignified treatment, and accurate-fact-finding.[263] It is not in the interests of justice for witnesses, or defendants, to be subjected to intimidating or confusing cross-examinations.[264]

Accordingly, fair treatment must involve notions of equality, dignity, and balancing interests. A FTM would also oppose problematic cross-examination practices that fall short of violating legal rights. For example, the absence of introductory remarks for defendants will not render their trial unfair. However, to ensure fair treatment these practices will be encouraged. Under this holistic model, all complainants and defendants should be provided with an opportunity to give their best evidence, under conditions that promote equality and respect for their individual experiences and needs. Cross-examination should be conducted within an environment where intimidation, confusion, stereotypes, irrelevant and inadmissible evidence, are absent. The research findings will inform recommendations for improving cross-examination, which will be advanced under the FTM.

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[260] Examples include, *R v A* (No 2) [2001] UKHL 25, para 5 and 38; *R v Edwards* [2011] EWCA Crim 3028 para 26; *R v Stephen Hamilton* [2014] EWCA Crim 1555, para 62; *R v Brown (Milton)* [1998] 2 Cr.App.R 364, 371; *AG Reference* (No.3 of 1999) [2001] 2 A.C 91, 118.

[261] *R v Stephen Hamilton* [2014] EWCA Crim 1555, para 62.

[262] This means that measures implemented during the trial, which protect the interests and rights of one party, do not detract from the interests and rights of the other. Ellison L and Munro V.E, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2016) E. & P. 1, 55; Kennedy J, Easteal P and Bartels L, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35 Women's Studies International Forum 334, 335; Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds) Addressing Vulnerability in Justice *Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 110.

[263] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

[264] Judiciary of England and Wales, *Review of Efficiency in Criminal Proceedings by the Rt Hon Sir Brian Leveson President of the Queen's Bench Division* (Judiciary of England and Wales, January 2015) 70

2.4 Models of The Criminal Justice Process

This chapter has outlined some of the important features and objectives of cross-examination, discussed within the literature. This must be placed within a broader understanding of the CJS's priorities. Packer's 'crime control' and 'due process' models of the criminal process are prominent in providing this understanding.[265] These theoretical models have competing value systems that strive for priority in the criminal justice process.[266] These models are neither 'good nor bad', nor do they exist in pure forms.[267] The crime control model prioritises the repression of crime, and requires efficient and reliable pre-trial fact-finding.[268] In contrast, a due process model appreciates the possibility of error, and values formal justice.[269] 'Barriers' are placed throughout the criminal process to protect an accused person, which ensures a defendant's legal guilt is established based on lawfully obtained evidence.[270] Cross-examination of witnesses could, therefore, be broadly described as a due process consideration. Restricting cross-examination on a defendant's bad character could also be due process barriers, as they protect the accused. Other practices may reflect a crime control stance. For example, preventing defendants from personally conducting cross-examination may encourage complainants to support prosecutions, strengthening the prospect of convictions.

These models are not without their limitations.[271] A central limitation is that the models fail to consider complainants and the under-reporting of crime. Roach sought to address this by creating two additional models, the 'punitive model of victims'

[265] Packer H.L, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 154.

[266] Packer H.L, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 154.

[267] Packer H.L, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 153; Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 40.

[268] Packer H.L, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 158-159, 161.

[269] Packer H.L, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 163.

[270] Packer H.L, *The Limits of the Criminal Sanction* (Stanford University Press 1968)163; Roach K, 'Four Models of the Criminal Process' (1999) 89(2) The Journal of Criminal Law and Criminology 671, 682.

[271] For a discussion of these limitations see, Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44; Macdonald S, 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes' (2008) 11(2) New Criminal Law Review 257.

rights' and 'non-punitive model of victims' rights'.[272] The latter focuses on the prevention of crime and restorative justice.[273] The former resembles the crime control model, but places demand on protecting the rights of complainants.[274] However, both sets of models represent a 'clash' of interests between the complainant and defendant, which Ashworth and Redmayne note is a problematic depiction.[275] They maintain that improving the position of complainants at trial will not diminish a defendant's position.[276] For example, statutory Special Measures prevent intimidation and enable complainants to give their best evidence.[277] Ashworth and Redmayne argue, defendants have no genuine interest in complainants giving unreliable evidence or feeling intimidated, therefore a clash does not exist that requires balancing.[278] While this is true, it could be problematic if similarly situated parties are not given the same protections, for example, if vulnerable defendants are unable to use Special Measures. Moreover, the Court of Appeal has talked of 'balancing' interests when modifying cross-examination practices for vulnerable witnesses.[279] Therefore, a 'clash' of interests may arise at an individual case level.[280]

[272] Roach K, 'Four Models of the Criminal Process' (1999) 89(2) The Journal of Criminal Law and Criminology 671.

[273] Roach K, 'Four Models of the Criminal Process' (1999) 89(2) The Journal of Criminal Law and Criminology 671, 707.

[274] Roach K, 'Four Models of the Criminal Process' (1999) 89(2) The Journal of Criminal Law and Criminology 671, 701.

[275] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 43-44.

[276] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 43.

[277] Youth Justice and Criminal Evidence Act 1999 s.16(5); Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (London, HO 2004); Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS, April 2012); Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 118.

[278] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

[279] *R v Stephen Hamilton* [2014] EWCA Crim 1555, para 62.

[280] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

2.5 Conclusion

There is broad consensus within the literature that cross-examination involves testing the evidence of adverse witnesses and strengthening the cross-examiners' case. Thus, cross-examination can involve constructive and destructive techniques. Beyond this, cross-examination is described in diverging ways, and two broad conceptualisations emerge: the 'traditional' approach and 'best evidence' model.[281] A traditional cross-examination can be summarised broadly as involving controlling and suggestive questioning techniques for persuasion, which prevent witnesses giving their best and most reliable evidence, with minimal judicial intervention. Often cross-examination is described and criticised in this capacity. The best evidence approach requires modifications to traditional cross-examinations. Shortcomings of the existing models are apparent, including their failure to consider actual cross-examination practices. An alternative 'fair treatment model' is advanced to address their theoretical limitations. This thesis assesses how rape trial cross-examinations are operating in practice, using the existing models of cross-examination as interpretive tools. From this, the fair treatment model will be advanced fully, and supported with this study's empirical findings. Before this, the following chapter will critically review the existing literature on rape trials practices, including cross-examination.

[281] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 184; Henderson E, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Discuss Judicial Management of The Cross-Examination of Vulnerable People' (2016) Criminal Law Review 181, 182; Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 935.

Chapter Three: Cross-Examination Within Rape Trials
A Literature Review

3.0 Introduction

In this chapter, the theory of cross-examination is applied to rape cases. Cross-examination has previously been described as bullying, humiliating, intimidating and distressing for rape complainants.[282] It has also been described as re-traumatising and amounting to a secondary assault that can be worse than the rape itself.[283] It has also been claimed that rape complainants are effectively put on trial to determine the guilt of the defendant.[284] While every rape trial will contextually differ, there are themes emerging from the existing literature, which underpin concerns about the treatment of rape complainants during cross-examination. The literature is largely theoretical and highly critical of the treatment of complainants, thus is somewhat limited in scope and may not reflect current practices. Further, defendants may also have negative experiences of cross-examination and encounter aggressive or manipulative prosecution tactics. However, empirical research has not been conducted in this area. Exploration and analysis of the central themes emerging from the existing literature will be provided, to assess these wider claims about cross-examination within rape trials. This chapter critically reviews the arguments on the use of sexual history evidence and rape myths, and the manner in which cross-examination is conducted. Before this, the definition and nature of rape will be examined. This will assist the analysis of the cross-examination techniques employed by defence counsel to create doubts in the constituent elements of the offence, and how the prosecution proves the offence.

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[282] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 31; Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds) *Feminist Perspectives on Evidence* (Cavendish 2000) 43-44.

[283] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 36; Adler Z, *Rape on Trial,* (Routledge 1987) 14; Wheatcroft J.M, Wagstaff G.F, and Moran A, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276.

[284] For discussion see, Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 Journal of Law and Society 219, 220; Adler, Z., *Rape on Trial,* (Routledge 1987) 102.

3.1 The Definition of Rape

The definition of rape has evolved over time. Following successful feminist reform efforts,[285] the law now recognises marital rape and men can be victims of rape.[286] Non-consensual penile penetration of the mouth and anus are now included within the *actus reus* of rape, and a statutory definition of consent is provided.[287] The current law also replaces the old defence of honest belief in consent by requiring the defendant's belief in consent to be reasonable.[288] These legislative reforms are reflected within section 1 of the Sexual Offences Act (SOA) 2003, summarised below.

(1) A person (A) commits an offence if:
   (a) He intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
   (b) (B) does not consent to the penetration, and
   (c) (A) does not reasonably believe that (B) consents.
(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps (A) has taken to ascertain whether (B) consents.

The statutory definition of consent is met when a person 'agrees by choice, and has the freedom and capacity to make that choice'.[289] It is always for the prosecution to prove each of the three elements of rape under s.1(1) to the criminal standard.[290] This standard is now phrased as 'the prosecution proves its case if the jury…are sure that the defendant is guilty' as specified within the Crown Court Compendium,[291] and was the terminology adopted by legal personnel within the present study. This

[285] Brown J.M and Walklate S.L, *Handbook on Sexual Violence* (Routledge 2012) 256-257.

[286] As discussed within: Temkin J, *Rape and The Legal Process* (2nd edn, OUP 2002) 55-147; Brown J.M and Walklate S.L, *Handbook on Sexual Violence* (Routledge 2012) 256-258.

[287] As discussed within: Temkin J, *Rape and The Legal Process* (2nd edn, OUP 2002) 55-147; Brown J.M and Walklate S.L, *Handbook on Sexual Violence* (Routledge 2012) 256-258.

[288] Following from *DPP v Morgan* (1975) 2 All ER 347.

[289] Sexual Offences Act 2003, s.74.

[290] Sexual Offences Act 2003.

[291] Judicial College, Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 5-1.

terminology has been criticised for implying 100% certainty.[292] However, the Judicial College explains that 'being sure' has the same meaning as 'beyond reasonable doubt'.[293] This high standard of proof demands the absence of any 'reasonable' doubt, and does not strictly require 100% certainty of a defendant's guilt. However, there are evidential presumptions that a complainant does not consent and a defendant cannot reasonably believe she consented in circumstances set out in the SOA 2003.[294] Examples of these circumstances include a complainant is unconsciousness, involuntary intoxicated, or subjected to violence.[295] It will be for the prosecution to demonstrate these circumstances occurred. The defendant can then rebut the presumption by adducing sufficient evidence to raise an issue as to whether the complainant consented or he reasonably believed they did.[296] Following this, it is for the prosecution to prove the complainant did not consent and the defendant did not have a reasonable belief.[297] However, s.76 SOA sets out two circumstances in which a conclusive presumption that a complainant did not consent, and no reasonable belief in consent can be established.[298] It is recognised that these presumptions operate on rare occasions.[299]

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[292] Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) Feminist Criminology 298, 310.

[293] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 5-1 to 5-3.

[294] The Sexual Offences Act 2003, s.75 requires the defendant to know about these circumstances for the evidential presumption to be applicable. Therefore, if the defendant does not accept that these circumstances occur they will become a fact in issue.

[295] Sexual Offences Act 2003, s.75(2)(a)-(f).

[296] Sexual Offences Act 2003, s.75(1).

[297] If a defendant does not point to evidence to rebut these presumptions, the jury must presume the complainant did not consent. McPeake R, *Advocacy* (18th Edn, OUP 2016) 26-27.

[298] These circumstances are where 'the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act' or 'the defendant intentionally induced the complaint to consent to the relevant act by impersonating a person known personally to the complainant', as stated under Sexual Offences Act 2003, s.76.

[299] The CPS states that 'prosecutors should note that in practice the evidential presumptions very rarely apply'. CPS, 'Rape and Sexual Offences Guidance - Chapter 3: Consent' <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent> accessed: 20 June 2016.

It is suggested that the SOA 2003 intended to assist jury deliberations by providing a definitional structure of rape and consent.[300] A defendant is also reportedly held to greater account because an honest but unreasonable belief is no longer permissible. [301] Although, defendants are not accountable for proving they had belief in consent, or that it was reasonable. Reasonable belief in consent is not a purely objective test, as the jury must consider all the circumstances to determine if a belief was genuinely held and was reasonable.[302] Concern has been expressed that this test can be interpreted broadly, which invites jurors to scrutinise a complainant's behaviour. [303] Finch and Munro suggest there is no boundary on what circumstances can be considered, and this creates scope for stereotypes to influence decisions about what is reasonable. [304] More recently, Ellison and Munro found that mock jurors suggest various behaviours, from accepting a lift to sharing a goodnight kiss, are indirect indicators of willingness to have sex, from which a defendant could reasonably believe consent was given.[305] Barristers have suggested it is not difficult to show a defendant's belief is reasonable.[306] To do this, barristers have reportedly drawn upon

[300] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 303-304; Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 240.

[301] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 307.

[302] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 20-16 para 11 to 13.

[303] Larcombe W *et al*, 'I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law (2016) 25(5) Social and Legal Studies 611.

[304] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 308.

[305] Ellison L and Munro V.E, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 791.

[306] Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 248.

stereotypes and focused largely on the complainant's behaviour.[307] Mock jury research has provided some indication that a defendant's reasonable belief in consent can be readily established, where mock jurors interpret the term broadly.[308]

3.1.1 Defining Consent Further

The crux of many, although not all, rape trials will be the issue of consent.[309] The statutory definition of consent is a choice contingent upon 'freedom and capacity'. This is believed to make the term consent much clearer than previous legislation, which provided no definition of consent.[310] The Court of Appeal has stated that there is no requirement for a complainant to demonstrate or communicate her lack of consent.[311] Moreover, the prosecution do not need to prove the complainant told the defendant she was not consenting, or that there was any violence, threats or a struggle.[312] Prosecutors regard proving an absence of consent as the most difficult aspect of prosecuting rape.[313] To assist, prosecutors ask the police to seek corroborating evidence to help prove non-consent and strengthen the case against the suspect.[314] Although not a legal requirement, this corroboration can include evidence of physical injury and evidence from witnesses. Where corroborating evidence is

[307] Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 247.

[308] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 316-318; Ellison L and Munro V.E, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 791

[309] As Saunders explains consent and reasonable belief in consent, will not inevitably be the pivotal issue in rape cases, as her empirical research demonstrates penetration is often disputed. Saunders C.L, 'Rape as 'One Person's Word Against Another's: Challenging the Conventional Wisdom' (2018) 22(2) E. & P. 161, 175.

[310] CPS, *Policy for Prosecuting Cases of Rape* (CPS 2012) 6. <https://www.cps.gov.uk/sites/default/files/documents/publications/rape_policy_2012.pdf> accessed 28 May 2018.

[311] *R v Malone* [1998] 2 Cr. App. R 447.

[312] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 20-9 and 20-15 para 7.

[313] CPS, *Policy for Prosecuting Cases of Rape* (CPS 2012) 7.

[314] CPS, *Policy for Prosecuting Cases of Rape* (CPS 2012) 7.

lacking, these cases are deemed more difficult to prosecute and often fail to progress beyond the investigatory stage.[315]

The Crown Prosecution Service (CPS) have articulated that a choice, made with freedom and capacity, is context-dependant and requires consideration of numerous circumstantial factors, such as the complainant's maturity, gifts, or promises provided by the defendant, and the position of power held by the defendant.[316] As previously explained, the SOA 2003 acknowledges within s.75 and s.76 that circumstances arise where a complainant's choice may be or is constrained.[317] However, the Court of Appeal in *Doyle* drew a distinction between 'reluctant but free exercise of choice' and 'unwilling submission due to fear'.[318] In relation to capacity, the Court of Appeal has recognised that capacity to consent may evaporate before a complainant becomes unconscious through voluntary consumption of alcohol or drugs.[319] It has also been acknowledged that a person may behave differently than if they are sober but consent given is still valid consent.[320] Determining capacity in such situations is 'left to the common sense of the jury'.[321]

Existing literature suggests potential inadequacies with the legal position on consent. The circumstances under sections 75 and 76 are considered narrow.[322] The exhaustive circumstances are said to ignore other potential coercive strategies of offenders, including threats other than violence and voluntary intoxication short of

[315] CPS, *Policy for Prosecuting Cases of Rape* (2012) 7.

[316] CPS, 'What is Consent?' <https://www.cps.gov.uk/publications/equality/vaw/> accessed: 23 June 2016.

[317] The term 'may' is used because the law does not automatically recognise a lack of consent under section 75 circumstances, as it does under section 76.

[318] *R v Doyle* [2010] EWCA Crim 119.

[319] *R v Bree* [2007] EWCA Crim 804.

[320] *R v Kamki* [2013] EWCA Crim 2335.

[321] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 20-22 para 8 citing *R v Hysa* [2007] EWCA Crim 2056.

[322] As discussed within: Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 244.

unconsciousness.[323] MacKinnon argues that legal constructions of non-consent ignore other forms of coercion that may operate, such as financial dependence upon the perpetrator or appeasing potential abuse.[324] These forms of coercion are not explicitly recognised within the statutory provisions, under s.75 and s.76. MacKinnon also suggests the law, in the United States (U.S), fails to recognise the difference between consenting to and wanting sex, as many women let sex happen.[325] She argues that the legal understanding of consent as a choice is fiction.[326] Her argument is underpinned by the view that gender inequality plays out within the law on rape, and questions whether a choice to have sex can be mutual and enthusiastic when the parties are not social equals.[327] Despite these criticisms, the contemporary definition of consent is relatively wide, and is not restricted to force and violence. Section 75 and 76 provide recognition of other forms of coercion, including verbal threats or involuntary intoxication. Furthermore, Finch and Munro explain that s.74 puts a focus on the context in which the choice to have intercourse is made.[328] Therefore, there is scope for jurors to consider a variety of circumstances that may constrain a complainant's choice.[329]

Although the definition of consent is framed using familiar terms, it has been argued that not everyone will hold a shared understanding of 'freedom' and 'capacity'.[330] Barristers have warned that this may result in inconsistent decision making among

[323] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 305; The issues surrounding voluntary intoxication and consent have been discussed within: Rumney P and Fenton R.A, 'Intoxicated Consent in Rape: Bree and Juror Decision-Making' (2008) 71(2) The Modern Law Review 27.

[324] MacKinnon C.A, *Women's Lives, Men's Laws* (Harvard University Press 2005) 244.

[325] MacKinnon C.A, *Women's Lives, Men's Laws,* (Harvard University Press 2005) 243-244.

[326] MacKinnon C.A, *Women's Lives, Men's Laws,* (Harvard University Press 2005) 243.

[327] MacKinnon C.A, *Women's Lives, Men's Laws* (Harvard University Press 2005) 243.

[328] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 306.

[329] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 306.

[330] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 316.

jurors.[331] This also purportedly leaves jurors with broad scope to interpret that a complainant consented.[332] Finch and Munro demonstrated that mock jurors evaluated a complainant's capacity to consent when heavily intoxicated differently.[333] Some argued that as long as the complainant remained conscious, she had capacity, but others disagreed.[334] Thus, leaving the issue of capacity to consent to the jury, as advocated in *Hysa*,[335] may be problematic, as some mock jurors adopt extremely narrow definitions of what incapacity looks like, in the absence of guidance.[336] The Crown Court Compendium sets out judicial directions on the elements of rape, including the meaning of consent, for the jury.[337] However, Ellison and Munro found that mock jurors, when directed that consent is the 'freedom and capacity to make a choice', ignore these important elements in their deliberations and use 'questionable standards to determine consent'.[338] Overall, the findings from mock jury research provide some support that the definition of consent may be problematic for real jurors.

3.1.2 Gender and Rape

It is known that women are the primary victims of rape, with men more likely to commit rape than be raped.[339] Feminist scholars have long argued that rape is about

[331] Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 241.

[332] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 309.

[333] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 314.

[334] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 314.

[335] *R v Hysa* [2007] EWCA Crim 2056.

[336] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 314.

[337] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 20-18 to 20-20.

[338] Ellison L and Munro V.E, ''Telling Tales': Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 212.

[339] MacKinnon C.A, *Toward a Feminist Theory of The State* (Harvard University Press1989) 176; Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone 1996) 322 and 359; Jordan J, *The*

power and control over women, an expression of inequality.[340] Feminists have also advanced that gender is a social and political construction rather than a biological distinction, meaning male and female victims of rape are regarded as unequal and subordinate to the power of their rapist.[341] The UK government has seemingly recognised violence against women as a manifestation of gender inequality and a human rights violation by signing the 'Istanbul Convention' in 2012.[342] Historically, women who deviated from passive norms were believed to precipitate rape.[343] It is argued that these norms have developed from patriarchal narratives, which embody female passivity, male dominance, and female precipitation of rape.[344] A detailed discussion of these issues is beyond the scope of this thesis. However, the role of gender is an important factor when analysing the literature on rape trials and cross-examination. In particular, the following discussion on rape myths, and their influence on legal decision-making, inherently involves issues of gender, social attitudes towards women and girls, stereotypes about rape, and victim blaming attitudes.

3.2 Rape Myths

The historical origins of 'rape myths' are well documented in literature.[345] The definition of the term has evolved over time. Rape myths were first established as

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Word of a Woman? Police, Rape and Belief (Palgrave Macmillan 2004) 2. Between 2016-2017, only 11% of all reported offences of rape were against males. HMIC, *Rape Monitoring Group Digests* (2017) <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 03 June 2018.

[340] MacKinnon C.A, *Toward a Feminist Theory of The State* (Harvard University Press 1989) 182; Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone, London 1996) 359.

[341] MacKinnon C.A, *Toward a Feminist Theory of The State* (Harvard University Press 1989) 178; MacKinnon C.A, *Women's Lives, Men's Laws* (Belknap 2005) 240-241.

[342] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The Domestic Abuse Bill will ratify the convention in the UK.

[343] Brownmiller S, *Against Our Will: Men, Women and Rape* (Martin Secker and Warburg 1975) 354

[344] Brownmiller S, *Against Our Will: Men, Women and Rape* (Martin Secker and Warburg 1975); Smart, C, *Feminism and The Power of The Law* (Routledge, 1989) 26-30; Bourke J, *Rape: A History from 1860 to the Present* (Virago Press 2007) 21-49.

[345] See: Brownmiller S, *Against Our Will: Men, Women and Rape* (Martin Secker and Warburg 1975); Bourke, J., *Rape: A History from 1860 to the Present* (Virago Press 2007) 21-49; Smart C, *Feminism and The Power of The Law* (Routledge 1989) 26-32.

'prejudicial, stereotyped and false beliefs about rape, rape victims, and rapists'.[346] This was later qualified to 'generally false beliefs'. [347] More recently rape myths were characterised as 'descriptive or prescriptive beliefs about rape … that serve to deny, downplay or justify sexual violence that men commit against women'.[348] Examples embodying the recent recognition that myths can be prescriptive or descriptive include, 'women should fight their attackers' and 'genuine rape victims fight their attackers'. The addition of prescriptive beliefs is considered important because they are treated as generalizable truths when they are simply normative beliefs.[349] As Lonsway and Fitzgerald highlight, variations of this definition have been adopted within the wider literature.[350] There is no exhaustive number of rape myths and a myth can be captured by a number of different statement formulations. Bohner *et al* explain that rape myths have the purpose of either blaming the victim, exonerating the rapist, dismissing claims of rape as untrue, and placing rape as something that happens to 'certain types of women'.[351] An example from each respective type of myth would include 'women who are drunk invite rape', 'once men are sexually aroused they cannot stop themselves', 'false allegations are very common', and 'men do not get raped'.[352] Others have identified different categories of myths,[353] often for

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[346] Burt M, 'Cultural Myths and Supports for Rape' (1980) 38(2) Journal of Personality and Social Psychology 217, 217.

[347] Lonsway K and Fitzgerald L, 'Rape Myths: In Review' (1994) 18 Psychology of Women Quarterly 133,134.

[348] Gerger H *et al*, 'The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and Validation in German and English' (2007) 33 Aggressive Behaviour 422, 425.

[349] Conaghan J and Russell Y, 'Rape Myths, Law and Feminist Research: 'Myths about Myths'?' (2014) 22 Feminist Legal Studies 25, 34.

[350] Lonsway K.A and Fitzgerald L.F, 'Rape Myths: In Review' (1994) 18 Psychology of Women Quarterly 133, 134.

[351] Bohner G *et al*, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator' in Horvath M and Brown J (Eds) *Rape: Challenging contemporary thinking* (Willan 2009) 19.

[352] Adapted from the examples set out in: Bohner G *et al*, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator' in Horvath M and Brown J (Eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 19.

[353] Other categories of myths have also been established within: Torrey M 'When Will We Be Believed? Rape Myths and The Idea of A Fair Trial in Rape Prosecutions' (1991) 24(4) U.C. Davis Law Review 1013, 1025; Boux, HJ and Daum, CW 'At the Intersection of Social Media and Rape

the purpose of developing Rape Myth Acceptance (RMA) Scales, which are used to measure social beliefs about rape.[354] In addition, the 'twin myths' that 'unchaste women are more likely to consent to intercourse and are less worthy of belief' have also been recognised.[355] How the law regulates the use of a complainant's sexual history, implicated within some of these myths, will be discussed subsequently.

The contemporary definition of 'rape myths' does not require beliefs to be false. Reece, in seeking to show rape myths are not widespread, argued some beliefs on occasion may be verifiably true, so their status as myths must be dismissed.[356] However, it has been argued the label 'myth' is appropriate for these beliefs because they are true less frequently than believed.[357] As Lonsway and Fitzgerald made clear, the universal application of these stereotypical beliefs is more important than the truth-value of them.[358] Gerger also argued that these beliefs are wrong in the ethical

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Culture: How Facebook Postings, Texting and Other Personal Communications Challenge The Real Rape Myth in The Criminal Justice System' (2015) 150 Journal of Law, Technology and Policy 149, 155.

[354] Payne DL, Lonsway KA and Fitzgerald LF, 'Rape Myth Acceptance: Exploration of its Structure and its Measurement using the Illinois Rape Myth Acceptance Scale' (1999) 33 Journal of Research in Personality 27, 36-37; Gerger H *et al*, 'The Acceptance of Modern Myths About Sexual Agression Scale: Dvelopment and Validation in German and English' (2007) 33 Aggressive Behaviour 422, 425. For examples fitting Gerger's categorisation see: Bohner G, *et al*. 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator' in Horvath M and Brown J (Eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 22.

[355] The 'twin myths' were established in the Canadian Supreme Court case, *R v Seaboyer* [1991] 2 SCR 577, and have been acknowledged within *R v A* (No 2) [2001] UKHL 25, para 27.

[356] Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) Oxford Journal of Legal Studies 445, 454.

[357] Boux H.J and Daum C.W, 'At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge The Real Rape Myth in The Criminal Justice System' (2015) 150 Journal of Law, Technology and Policy 149, 155; also citing Franiuk R *et al*, 'Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case' (2008) 14 Violence Against Women 287, 289.

[358] Lonsway K and Fitzgerald L, 'Rape Myths: In Review' (1994) 18 Psychology of Women Quarterly 133, 135.

sense because they deny and belittle sexual violence against women.[359] Furthermore, the recent inclusion of prescriptive beliefs to the definition removes the requirement that they must be false. For example, it makes little sense to empirically verify the belief 'women should fight their attackers' as a social fact. Additionally, some descriptive beliefs, such as 'women unconsciously desire to be raped', can be difficult to verify.[360] Nonetheless, such prescriptive beliefs could equally be described as 'rape supportive attitudes'. Other rape myths are empirically false, such as 'genuine rape victims report immediately'.[361] Evidently, by manipulating the sentence structure many rape myths could be verified or falsified.[362]

Amid their robust critique of Reece's arguments, Conaghan and Russell suggest Reece failed to engage with the prescriptive aspect of myths and fundamentally adopted a convoluted definition of rape myths.[363] However, Reece responded by arguing that she disapproved of Gerger's definitional merging of falsity, moral wrongness, and the verifiability of these beliefs.[364] Under the ordinary meaning of the term myth, her argument about falsity is arguably logical, but it ignores the nature of these beliefs as generalisations that blame victims and exonerate offenders. Within the trial context, the falsifiability of rape myths is important. The Crown Court Compendium tackles some of the mistaken 'assumptions' about rape within suggested jury directions.[365] The assumptions addressed, as the Compendium notes, are not necessarily true in the court's experience.[366] The directions are drafted on the basis that people react differently to rape, and are worded in a neutral manner, which avoids

[359] Gerger H *et al*, 'The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and Validation in German and English' (2007) 33 Aggressive Behaviour 422, 423;

[360] Lonsway K and Fitzgerald L, 'Rape Myths: In Review' (1994) 18 Psychology of Women Quarterly 133, 135.

[361] Burrowes N, *Responding to the Challenge of Rape Myths in Court* (NB Research 2013) 6.

[362] Using the statements 'victims of rape resist their attackers' and 'all victims of rape resist their attackers', as examples, it is clear that the first statement can sometimes be true but the second statement is false because it is known victims do not always resist.

[363] Conaghan, J and Russell, Y, 'Rape Myths, Law and Feminist Research: 'Myths about Myths'?' (2014) 22 Feminist Legal Studies 25, 34.

[364] Reece H, 'Debating Rape Myths' (LSE Law, Society and Economy Working Papers 21/2014) 19.

[365] Judicial College, Crown Court Compendium (December 2018) 20-1 to 20-10.

[366] Judicial College, Crown Court Compendium (December 2018) 20-1.

threatening a fair trial. For example, the directions on distress state that, 'the presence or absence of emotion or distress when giving evidence does not provide a reliable indication of whether the person is telling the truth or not'.[367] To analyse the research findings, this thesis adopts the contemporary and broader definition of rape myths. However, it will be argued that only factually refutable myths could be regulated within cross-examination.

The term 'real rape' encompasses the belief that rape is carried out by a stranger using physical force or violence in an outdoor setting and is resisted by the victim who suffers injuries as a result.[368] It has been suggested that 'real rape' is the 'most damaging of all' myths.[369] Estrich differentiated 'real rape' from 'simple rape', which involves known parties and no injuries, weapons, or witnesses.[370] Real rape is considered clear-cut in terms of the lack of consent, whereas simple rape is more easily interpreted as sex.[371] Scholars have suggested that if a rape is 'clearly interpretable as violence' by featuring a stranger, injury or weapons it will be perceived as genuine rape by the CJS.[372] Others maintain that complainants who deviate from one or more of the defining features of 'real rape' are not viewed as genuine victims and their cases are likely to be treated less seriously.[373] Yet, victim surveys and crime reports have shown that the reality is that most rapes occur

[367] Judicial College, Crown Court Compendium (December 2018) 20-7.

[368] Estrich S, *Real Rape* (Harvard University Press, 1987).

[369] Rowson M, 'Corroborating Evidence, Rape Myths and Stereotypes: A Vicious Circle of Attrition' (2014) 6(2) Kaleidoscope Special Issue, The Interdisciplinary Postgraduate Journal of Durham University's Institute of Advanced Study 135, 136.

[370] Estrich S, *Real Rape* (Harvard University Press, 1987) 4.

[371] Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 242.

[372] Larcombe W., 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Fem Legal Studies 13, 132; Estrich S, *Real Rape* (Harvard University Press, 1987).

[373] Ellison L and Munro VE, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 783.

between known parties in private without the use of weapons, resistance, or resulting injury.[374]

3.2.1 Rape Myth Acceptance (RMA)

There exists a vast body of research that utilises RMA scales to establish the prevalence of these attitudes. Scholars have found relationships between RMA, demographics, and other attitudinal scales.[375] One key finding is that men have a higher acceptance of rape myths than women.[376] Although frequently found, this finding is not consistent across all studies.[377] Correlations have also been found between RMA and 'belief in a just world' (BJW), which is a theory relating to moral behaviour and assumes the world is a just place where people get what they deserve.[378] The BJW is regarded a manifestation of victim blaming to allow people to feel a sense of safety and control.[379] Rape myths are said to allow people to maintain

[374] Stern V, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office 2010); Home Office, *An Overview of Sexual Offending in England and Wales* (Ministry of Justice, Home Office and the Office of National Statistics, Statistics Bulletin 2013).

[375] As outlined within: Hockett J.M *et al*, 'Oppression Through Acceptance? Predicting Rape Myth Acceptance and Attitudes Toward Rape Victims' (2009) 15(8) Violence Against Women 877, 880.

[376] Hayes R.M, Lorenz K and Bell K.A, 'Victim Blaming Others: Rape Myth Acceptance and the Just World Belief' (2013) 8(3) Feminist Criminology 202, 211; McMahon S and Farmer GL, 'An Updated Measure for Assessing Subtle Rape Myths' (2011) 35(2) Social Work Research 71, 76-77; Schuller R.A and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252, 254.

[377] As explained within: Hockett JM *et al*, 'Rape Myth Consistency and Gender Differences in Perceiving Rape Victims- A Meta-Analysis' (2016) 22(2) Violence Against Women 139, 141.

[378] Hayes RM, Lorenz K and Bell KA, 'Victim Blaming Others: Rape Myth Acceptance and the Just World Belief' (2013) 8(3) Feminist Criminology 202; Egan R and Wilson JC, 'Rape Victims' Attitudes to Rape Myth Acceptance' (2012) 19(3) Psychiatry, Psychology and Law 345, 346. This correlation is not conclusive as found by, Hockett JM *et al*, 'Oppression Through Acceptance? Predicting Rape Myth Acceptance and Attitudes Toward Rape Victims' (2009) 15(8) Violence Against Women 877, 887.

[379] Hayes R.M, Lorenz K and Bell KA, 'Victim Blaming Others: Rape Myth Acceptance and the Just World Belief' (2013) 8(3) Feminist Criminology 202, 203.

their BJW, as they convince themselves they would not be victimised.[380] These studies are used as evidence that sections of society endorse rape myths.[381] It is argued that rape myths are contextually bound and are becoming subtler.[382] Therefore, RMA scales need to continually be developed, which is occurring.[383] A limitation within this body of research is the inconsistency in scale application. Some studies still adopt Burt's RMAS, which uses out-dated vocabulary,[384] and many use convenience samples of students for development and application of the scales.

3.2.2 The Use of Rape Myths during Cross-Examination

Defence barristers will seek to challenge and create doubt in a complainant's account. The way defence barristers create this doubt has been heavily criticised throughout the literature, since the 1980s onwards. This is particularly in reference to the use and influence of rape myths. Earlier research from Adler found that defence barristers cited rape myths to portray the complainant's behaviour as unusual and suspicious.[385] Adler also observed that some barristers conveyed complainants' characteristics and sexual behaviours as not typical or deserving.[386] Later, in 1993, Lees was puzzled to find complainants were questioned on their familiarity with sexual language,

[380] Shen F.X, 'How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform' (2011) 22 Columbia Journal of Gender and Law 1, 16.

[381] Hildebrand M.M, and Najdowski C.J, 'The Potential Impact of Rape Culture on Juror Decision Making: Implications For Wrongful Acquittals in Sexual Assault Trials' (2015) 78(3) Albany Law Review 1059.

[382] Payne D.L, Lonsway K.A and Fitzgerald L.F, 'Rape Myth Acceptance: Exploration of its Structure and its Measurement using the Illinois Rape Myth Acceptance Scale' (1999) 33 Journal of Research in Personality 27, 61; McMahon S and Farmer G.L, 'An Updated Measure for Assessing Subtle Rape Myths' (2011) 35(2) Social Work Research 71, 72-73; Conaghan J and Russell Y, 'Rape Myths, Law and Feminist Research: 'Myths about Myths'?' (2014) 22 Fem Leg Stud 25, 31.

[383] Lonsway K and Fitzgerald L 'Rape Myths: In Review' (1994) 18 Psychol.Women Q 133.

[384] For example: Hockett JM *et al*, 'Oppression Through Acceptance? Predicting Rape Myth Acceptance and Attitudes Toward Rape Victims' (2009) 15(8) Violence Against Women 877. McMahon S and Farmer G.L, 'An Updated Measure for Assessing Subtle Rape Myths' (2011) 35(2) Social Work Research 71.

[385] Adler Z, *Rape on Trial* (Routledge 1987) 102.

[386] Adler Z, *Rape on Trial* (Routledge 1987) 102.

menstruation, paternity of their children, and race of their previous sexual partners.[387] It was argued some defence barristers infer sexual connotations when questioning non-sexual behaviour, which avoids restrictions on sexual history evidence.[388] Previously, barristers reportedly questioned complainants on their clothing and alcohol consumption, to infer immorality and undermine their credibility.[389] Defence barristers, interviewed between 1995 and 1997 for Temkin's research, have explained that they would discredit complainants by condemning their behaviour, sexual character, and clothing.[390]

More recent studies have found that defence barristers continue to utilise rape myths during cross-examination.[391] In addition, an analysis of cross-examination transcripts from rape trials in Australia and New Zealand has found that questioning strategies have not changed since the 1950s, with rape myths frequently being invoked by defence barristers.[392] Zydervelt *et al* argued that contemporary cross-examinations infer rape myths by largely focusing on delayed reporting and the relationship

[387] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 134-138; Adler Z, *Rape on Trial* (Routledge 1987) 95-97, 143 and 152.

[388] However, these arguments were made prior to the regulation of sexual history through s.41 YJCEA 1999. Snow N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (Ed) *A Most Detestable Crime: New Philosophical Essays on Rapes* (OUP 1999) 252; Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 135-38. The issue of sexual history evidence will be discussed in detail within section 3.4 of this chapter.

[389] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 17, 135-138; Adler Z, *Rape on Trial* (Routledge 1987); Snow N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (ed) *A Most Detestable Crime: New Philosophical Essays on Rapes*, (OUP 1999) 252; Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219.

[390] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 231-235.

[391] Temkin J, Gray JM and Barrett J, 'Different Functions of Rape Myth Use in Court- Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205; Smith O, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave MacMillan 2018).

[392] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 15 and 17.

between the parties after the offence, than injury and resistance.[393] Furthermore, challenges to a complainant's credibility were conducted by questioning their personality, motives for their allegations, their relationship with the defendant, and sexual history with others.[394] While these findings are insightful, caution is required, as they may not reflect current cross-examination practices in England and Wales.

3.2.3 The Impact of Rape Myths and Schemas on Jurors

Society generally is thought to hold a range of stereotypical views about rape.[395] It is suggested that there is no reason to believe that jurors will have attitudes towards rape that differ from society.[396] Though, Professor Cheryl Thomas' forthcoming research is expected to counter the view that real jurors act upon these stereotypical views during their decision-making.[397] Meanwhile, existing empirical studies illuminate whether rape myths influence jurors, albeit to a limited degree. Adler's observations of rape trials conducted in 1987 found that convictions were lower when complainants did not report immediately or their sexual reputations were discredited during cross-examination.[398] An increase in conviction rate in cases with more 'real rape' characteristics was also found.[399] However, this is unsurprising given that stereotypical characteristics may yield corroborative evidence. Secondly, more recent

[393] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 12-13.

[394] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 12-14.

[395] End Violence Against Women, *Attitudes to Sexual Consent* (YouGov December 2018); Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 99-123; Amnesty International UK, *Sexual Assault Research Summary Report* (ICM 2005).

[396] Torrey M 'When Will We Be Believed? Rape Myths and The Idea of A Fair Trial in Rape Prosecutions' (1991) 24(4) U.C. Davis Law Review 1013, 1047.

[397] Professor Cheryl Thomas has been commissioned by the president of the Queen's Bench Division to conduct empirical research with real jurors. Interviews were conducted with over fifty jurors, and found that the vast majority of actual jurors do not believe rape myths and stereotypes. The findings will be published in Autumn 2019. HC Deb, 21 November 2018, vol 631, col344W; BBC, Rape Myths (BBC Law in Action, June 2019) <https://www.bbc.co.uk/sounds/play/m000671m>

[398] Adler Z, *Rape on Trial* (Routledge 1987), 115-120.

[399] Adler Z, *Rape on Trial* (Routledge 1987), 119-120.

studies have established that mock jurors are influenced by rape myths.[400] Studies using vignettes and RMA scales have shown mock jurors with high RMA perceived victims to be less credible and more blameworthy, and are likely to believe the defendant was not guilty.[401] Mock jurors have also expressed more negative views towards complainants from hearing her sexual history, which arguably demonstrates the prejudicial impact such evidence can have.[402] Trial simulations have also evidenced the use of myths in mock jury deliberations. Ellison and Munro conducted two mock-jury studies using different rape scenarios, discussed across numerous publications. One study considered the impact of resistance, delay, and demeanour. The other examined the impact of special measures and judicial guidance.

The extent myths were implicated within the deliberations was wide-ranging. In particular, Ellison and Munro found assumptions about resistance and injury to be 'so engrained they appear unshakable'.[403] Sexual miscommunication was another significant feature, whereby participants implicated the complainant as a sexual

[400] Dinos S, Burrowes N, Hammond K and Cunliffe C, 'A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?' (2015) 43(1) International Journal of Law, Crime and Justice 36; Finch E and Munro V.E, '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; Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201; Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202.

[401] Schuller R.A and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252, 259. For a review of some studies with these findings see, Hildebrand M.M, and Najdowski C.J, 'The Potential Impact of Rape Culture on Juror Decision Making: Implications For Wrongful Acquittals in Sexual Assault Trials' (2015) 78(3) Albany Law Review 1059, 1078.

[402] Schuller R.A and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252, 257-259.

[403] Ellison L and Munro V.E, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) The Brit. J. Criminol 363, 376; Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) E. & P. 299, 314.

gatekeeper and exonerated the defendant as unable to control himself.[404] The notion of gatekeeping was found by Finch and Munro in their mock jury study of intoxication and rape, whereby the complainant was held responsible for being raped by accepting alcohol and for not keeping an eye on her drink when covertly administered alcohol.[405] The researchers were surprised at how persistent participants were in focusing on the complainant's behaviour and attributing responsibility to her.[406] Ellison and Munro similarly observed that participants failed to discuss any mutual negotiations between the parties or the defendant's actions.[407] Some mock jurors challenged myths and prejudicial views during deliberations, although these were thought to have little impact.[408] The studies show that not all members of the public hold prejudicial views about rape. However, some of the mock jurors views are a cause for concern and it was concluded that stereotypical views influence mock jury deliberations.[409]

Rather than assessing the weight of each piece of evidence as it is heard in court, mock jurors are thought to construct stories about what happened and decide the most

[404] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 297.

[405] Finch E and Munro V, '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, 603-604.

[406] Finch E and Munro V, '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, 607. Similar findings and conclusions were found in their pilot study, see: Finch E and Munro VE 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45 Brit. J. Criminol 25.

[407] Ellison L. and Munro, VE, 'Of 'Normal Sex' and 'Real Rape'- Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 296.

[408] Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) E. & P. 299, 318; Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 209.

[409] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 209.

coherent narrative.[410] With this, they fill in evidential gaps despite being directed to only base their verdict upon the evidence presented.[411] For example, they provide their own explanations for complainant's bruising or delayed reporting.[412] Positioning devices have also been used. For instance, female jurors have insisted that they would have physically resisted.[413] Stereotypes are claimed to operate powerfully in story reconstruction, therefore any rape myths cited by counsel may have a lasting effect.[414] Jurors who endorse myths are believed to selectively rely upon evidence that is consistent with their established views and ignore evidence that is inconsistent with their 'schema'.[415] Defence barristers are thought to capitalise on the potential influence myths have on jurors, by citing them within cross-examination questions.[416]

3.2.4 Critical Discussion

Firstly, observational studies cannot offer definitive evidence into jury cognition. Therefore, explaining low conviction rates as a product of jury attitudes and acceptance of rape myths is somewhat speculative. Cases that are more aligned with the 'real rape' stereotype may offer greater corroboration for the juries to consider. As

[410] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 220-223*;* Temkin J and Krahé B, *Sexual Assault and The Justice Gap: A Question of Attitude* (Hart 2008) 49-50 and 65-67.

[411] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 220.

[412] Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) E. & P. 299, 318-319.

[413] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 206; Rumney P.N.S and Hanley N, 'The Mythology of Male Rape: Social Attitudes and Law Enforcement' in McGlynn C and Munro, V (Eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2011) 201.

[414] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 220-222.

[415] Hildebrand M.M and Najdowski C.J, 'The Potential Impact of Rape Culture on Juror Decision Making: Implications For Wrongful Acquittals in Sexual Assault Trials' (2015) 78(3) Albany Law Review 1059, 1077; Torrey M 'When Will We Be Believed? Rape Myths and The Idea of A Fair Trial in Rape Prosecutions' (1991) 24(4) U.C. Davis Law Review 1013, 1050.

[416] Rowson M, 'Corroborating Evidence, Rape Myths and Stereotypes: A Vicious Circle of Attrition' (2014) 6(2) Kaleidoscope Special Issue, The Interdisciplinary Postgraduate Journal of Durham University's Institute of Advanced Study 135, 137-138.

Estrich outlines, the nature of common 'simple' rapes makes securing corroboration difficult.[417] Therefore, the correlation Adler observed between high conviction rates and 'real rape' characteristics may be influenced by available corroboration, and not merely prejudicial jury attitudes.[418] Moreover, correlations between 'real rape' characteristics and convictions rates may not be found across the entire population of modern rape trials. Wolchover and Heaton-Armstrong have suggested that conviction rates would be skewed and significantly lower, if jurors were influenced by the real rape stereotype.[419] However, relatively 'high' conviction rates,[420] compared to other serious offences,[421] do not necessarily demonstrate that rape myths have little or no impact within jury deliberations. The views of actual jurors are unattainable, since the Contempt of Court Act 1981 upholds strict confidentiality over their deliberations.[422] Mock jury studies, therefore, assist in filling this aperture in knowledge. This extensively researched area demonstrates a relationship between mock jurors' acceptance of rape myths, their attributions of blame and responsibility, and verdicts.[423] Moreover, the prejudicial attitudes expressed by members of society, acting as jurors in mock jury research, cannot be overlooked.

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[417] Estrich S, *Real Rape* (Harvard University Press, 1987) 21.

[418] Adler Z, *Rape on Trial* (Routledge 1987) 119-120.

[419] Wolchover D and Heaton-Armstrong A, 'Rape Trials' (2010) 17 Criminal Law and Justice Weekly, 244.

[420] As described by, Wolchover D and Heaton-Armstrong A, 'Rape Trials' (2010) 17 Criminal Law and Justice Weekly, 244

[421] Research has found that conviction rates are higher in rape cases than other serious offences, including attempted murder and manslaughter. Thomas C, Are Juries Fair? (London: Ministry of Justice 2010) 47.

[422] Though, Professor Cheryl Thomas has been commissioned by the president of the Queen's Bench Division to conduct empirical research with real jurors. Interviews were conducted with over fifty jurors and the findings will be published in Autumn 2019. HC Deb, 21 November 2018, vol 631, col344W; BBC, Rape Myths (BBC Law in Action, June 2019) <https://www.bbc.co.uk/sounds/play/m000671m> accessed: 28 September 2019.

[423] Examples include: Stuart S.M, McKimmie B.M and Masseer B.M, 'Rape Perpetrators on Trial: The Effect of Sexual Assault-Related Schemas on Attributions of Blame' (2016) Journal of Interpersonal Violence 1; Schuller R.A, and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252; Finch E and Munro V.E, '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.

The vast majority of RMA studies adopt various methodologies, including vignettes, surveys using attitudinal scales, and focus groups. These studies do not capture trial practices, including cross-examination. Therefore, the prejudicial attitudes expressed by mock jurors are elicited without prompts from barristers' questioning. Arguably, this also shows the tenacity of rape myths among mock jurors. While these studies are insightful, trial simulations are considered a more effective method, as they reflect actual jury dynamics.[424] The artificial nature of these studies has led to concern that the findings do not reflect real jurors views and decision-making.[425] However, researchers maintain that mock jurors take their role seriously, despite the lack of real life consequences involved within simulated trials.[426] Importantly, mock jury research has not considered whether rape myths about offenders influence deliberations and assessments of defendants. Therefore, it cannot be assumed that rape myths operate one-dimensionally to disadvantage complainants. Additionally, it cannot be assumed that all members on jury panels will hold these prejudicial views, as Ellison and Munro found some mock jurors challenge rape myths during deliberations,[427] and that these views alone will influence actual jury decision-making.

However, defence barristers may anticipate that some jurors could be influenced by rape myths, and adopt lines of questioning to encourage such views.[428]As rape cases usually deviate from the real rape stereotype, the defence have a stronger advantage in

[424] Finch E and Munro V.E, 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research' (2008) 35(1) Journal of Law and Society 30, 47.

[425] For a brief discussion of this debate see, Finch E and Munro V.E, 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research' (2008) 35(1) Journal of Law and Society 30, 36.

[426] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 206; Finch E and Munro V.E, 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research' (2008) 35(1) Journal of Law and Society 30, 45 and 47.

[427] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202.

[428] As argued within: Rowson M, 'Corroborating Evidence, Rape Myths and Stereotypes: A Vicious Circle of Attrition' (2014) 6(2) Kaleidoscope Special Issue, The Interdisciplinary Postgraduate Journal of Durham University's Institute of Advanced Study 135, 137-138.

exploiting potential jury prejudices. Additionally, it is argued that some legal personnel hold prejudicial attitudes towards rape.[429] Therefore, cross-examination questioning may be directed at what they genuinely believe are weaknesses in the prosecution case. This argument may seem tenuous, considering barristers may not exclusively defend in rape cases. Moreover, the prosecution may also rely upon rape myths. Prosecution barristers could draw upon a complainant's visible distress, signs of injury, or prompt reporting, where permitting within their speeches to the jury. They may also adopt lines of questioning when cross-examining defendants that infer rape myths, exploit jurors' positioning devices and allow them to fill in the gaps. However, evidence of whether this occurs in practice, and the questioning strategies adopted for rape defendants, is currently not available.

Ellison and Munro have argued that eliminating jurors' reliance on schematically deliberating and using narratives is impossible and undesirable, because juries are used precisely because of their non-legalistic and common sense rationality.[430] The insights generated from mock jury studies indicate that schematic processing combined with the influence of rape myths may potentially result in unjust case outcomes for complainants.[431] To address this, prosecution barristers have been encouraged to use competing narratives that challenge rape myths,[432] and therefore benefit from schematic processing too. Jurors currently receive judicial directions, as set out within the Crown Court Compendium, which caution them against adopting assumptions about rape.[433] These directions may reduce the potential impact of rape

[429] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219; Lea S.J, Lanvers U, and Shaw S, 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43(3) Brit. J. Criminol, 583; Brown J.M, Hamilton C and O'Neill D, 'Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors (2007) 13(4) Psychology, Crime and Law 355.

[430] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 225.

[431] However, Professor Cheryl Thomas has conduct empirical research with real jurors, and found that the vast majority of actual jurors do not believe rape myths and stereotypes. The findings will be published in Autumn 2019. HC Deb, 21 November 2018, vol 631, col344W; BBC, Rape Myths (BBC Law in Action, June 2019) <https://www.bbc.co.uk/sounds/play/m000671m>.

[432] Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (NB Research: London 2013).

[433] Judicial College, Crown Court Compendium (December 2018) 20-1 to 20-10.

myths, as educational guidance for mock jurors has been shown to have some positive impact on their deliberations.[434] The potential for defence barristers to be discouraged from utilising rape myths during cross-examination will subsequently be considered against the current research findings.[435] This discussion will highlight how adopting the contemporary definition of rape myths, which is wide and not exclusive to factually refutable myths, may be problematic within the legal context.

3.4 The Use of Sexual History Evidence

Sexual history evidence is linked to the previous discussion on rape myths.[436] Such evidence is thought to prejudice the jury and humiliate the complainant.[437] Previously, sexual history evidence was admitted under common law.[438] Legislation was subsequently enacted to address concerns that irrelevant sexual history evidence was frequently admitted.[439] However, the legislation and its application still faced

[434] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) Legal Studies 201.

[435] As discussed within Chapter Seven at section 7.3.1.

[436] The term 'sexual history' evidence is also referred to as 'sexual behaviour' evidence within existing literature, and will be used interchangeably within this thesis.

[437] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002); Easton S, 'The Use of Sexual History Evidence in Rape Trials' in Childs M and Ellison L (eds) *Feminist Perspectives on Evidence* (Cavendish, 2000); Kennedy J, Easteal, P and Bartels L, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35(5) Women's Studies International Forum 334, 335-336.

[438] For a detailed discussion of the common law position, including these leading authorities, see: Temkin, J. 'Regulating Sexual History Evidence: The Limits of Discretionary Legislation' (1984) 33 International and Comparative Law Quarterly 942 citing *R v Cockcroft* (1870) 11 Cox C.C. 410; *R v Holmes* (1871) LR 1 CCR 334; *R v Riley* (1887) 18 QBD 481; *R v Greatbanks* (1959) Crim. L. R 450; *R v Tissington* (1984) 1 Cox C.C. 48.

[439] Sexual Offences (Amendment) Act 1976 s.2; Home Office, *Report of the Advisory Group on the Law of Rape* (Cmnd 6352, 1975); The legislation stipulated that sexual history with third parties was inadmissible but such evidence with the defendant could be admitted. Evidence with third parties was inadmissible for consent and credibility, unless the judge deemed exclusion unfair upon application.

criticism.[440] Further statutory reform has since followed, which will be considered below.

In 1998, the Home Office acknowledged unsatisfactory practices of admitting sexual history were occurring,[441] and subsequently section 41 (s.41) of YCJEA 1999 was enacted. The provisions placed a general ban on the defence from adducing evidence or questioning complainants about their sexual history with defendants or third parties.[442] Section 41 adopts a categories approach with exceptions to this general ban under s.41(3) and (5), summarised below.

(3)(a) The issue is not consent.

(3)(b) The issue is consent, and the sexual behaviour evidence occurred at or about the same time as the offence in question.

(3)(c) The issue is consent, and the sexual behaviour evidence is so similar,

(i) to the sexual behaviour of the complainant during the offence in question, or

(ii) to other sexual behaviour of the complainant that took place at or about the same time as the offence in question;

and, the similarity cannot reasonably be explained as a coincidence.

(5) The sexual behaviour evidence relates to evidence adduced by the prosecution and goes no further than necessary to rebut or explain that prosecution evidence

To admit sexual history evidence, judges must be satisfied that subsections (3) or (5) apply and that a refusal to give leave might result in an unsafe conclusion by the jury on any relevant issue in the case.[443] They must also be content that the evidence

[440] Temkin J, 'Sexual History Evidence: The Ravishment of Section 2' (1993) Criminal Law Review 3, 12; Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone, London 1996) 359.

[441] Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) para 9.64.

[442] The prosecution are free to admit such evidence under Youth Justice and Criminal Evidence Act 1999, s.41(1).

[443] Youth Justice and Criminal Evidence Act 1999, s.41(2).

relates to a specific instance of alleged sexual behaviour.[444] The purpose of admitting the evidence, under subsection (3), must not be to impugn the credibility of the complainant.[445] Section 41 was shortly qualified by the pivotal case of *R v A*,[446] which still holds precedent. The Supreme Court[447] in *A* was asked whether a sexual relationship between a defendant and complainant was 'relevant to the issue of consent so that the exclusion under s.41 contravened the defendant's right to a fair trial'.[448] Principally, the Lords read down s.41 (3)(c) to be compatible with section 3 of the Human Rights Act 1998.[449] Accordingly, the admissibility test for s.41 (3)(c) is whether the evidence is 'nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention'.[450] The judgment also clarified the interpretation of 'similar fact' under S.41 (3)(c) so that 'coincidence' did not strictly mean rarity or remarkability.[451]

3.4.1 The Implications of the Current Legal Position

The intention of s.41's structured approach and restriction on judicial discretion was to promote accurate fact-finding and privacy for complainants.[452] Parliament also intended to redress the myth that women have propensity to consent to previous sexual partners.[453] However, criticism surrounds the ability of s.41 to successfully protect complainants from having their sexual history adduced in court. Many have regarded s.41 as being generous to defendants, and open for wide interpretations.[454] It

[444] Youth Justice and Criminal Evidence Act 1999, s. 41(6).

[445] Youth Justice and Criminal Evidence Act 1999, s. 41(4).

[446] *R v A* (No 2) [2001] UKHL 25.

[447] This case was decided within the 'House of Lords', which is now known as the 'Supreme Court'.

[448] *R v A* (No 2) [2001] UKHL 25.

[449] *R v A* (No 2) [2001] UKHL 25.

[450] *R v A* (No 2) [2001] UKHL 25.

[451] *R v A* (No 2) [2001] UKHL 25.

[452] McGlynn C, 'Commentary on *R v A* (No 2)' in Hunter R.C, McGlynn C and Rackley E (Eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 21.

[453] As acknowledged by Birch D, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' (2003) Criminal Law Review 370, 373.

[454] Temkin J, 'Sexual History: Beware of the Backlash' (2003) Criminal Law Review 217, 224; Firth G, 'The Rape Trial and Sexual History Evidence: *R v A* and the (Un) Worthy Complainant' (2006)

is argued that gateway s.41(3)(a) provides substantial scope for sexual history evidence to be adduced, where the defence argue it is relevant to a defendant's reasonable belief in consent.[455] However, Birch contends that s.41 is unfairly restrictive for defendants.[456] Birch has argued that a continual or recent sexual relationship with the defendant forms part of the case background and explanatory evidence, which if excluded, leaves jurors with an incomplete and distorted story.[457] In response, Temkin suggested the prosecution establish the type of relationship from the outset, as the background to their case, and where disputed, other gateways could provide relief for defendants.[458]

The debate also extends to the impact of *R v A*. It has been argued that the ruling was modest.[459] Some judges suggest it remedies s.41's 'unworkability'.[460] However, others believe it has undermined s.41 by reinstating judicial discretion and the distinction between third parties and defendants.[461] It was initially feared that the ruling in *R v A* would be applied to broader circumstances than intended, particularly

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57(3) Northern Ireland Legal Quarterly 442, 447; Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 204 and 224.

[455] McGlynn C, Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence (2017) 81(5) The Journal of Criminal Law 367, 384-385.

[456] Birch D, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' (2003) Criminal Law Review 370, 370.

[457] Birch D, 'Rethinking Sexual History: Proposals for fairer Trials' (2002) Criminal Law Review 531; Birch D, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' (2003) Criminal Law Review 370.

[458] Temkin J, 'Sexual History: Beware of the Backlash' 2003 Criminal Law Review 217, 238.

[459] Birch DJ and Metcalfe NP, 'Evidence: Rape - Statutory Provision of Previous Sexual Relationship between Complainant and Defendant' (2001) Criminal Law Review 908, 911.

[460] Kibble N, 'Section 41: Youth Justice and Criminal Evidence Act 1999: Fundamentally Flawed or Fair and Balanced?' (2004) 4 Archbold News 6, 7.

[461] McGlynn C, 'Commentary on R v A (No 2)' in Hunter RC, McGlynn C and Rackley E (eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 226; Ellison L, 'Commentary on R v A (No 2)' in Hunter R.C, McGlynn C and Rackley E (eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 208; Firth G, 'The Rape Trial and Sexual History Evidence: *R v A* and The (Un) Worthy Complainant' (2006) 57(3) Northern Ireland Legal Quarterly 442, 453.

in relation to third party sexual history.[462] Assurances were provided from the Court of Appeal in *White* that it would take a special case to accommodate third party sexual history falling outside the explicit exceptions within s.41.[463] However, *Hamadi* later stated the ruling in *R v A* has broader importance, whereby s.41 must give way to a defendant's right to a fair trial.[464] McGlynn has criticised this decision, and argues it 'presumes that the defendant's interests take precedence' when considering fairness.[465] Feminist scholars, therefore, support additional reform, including statutory amendments for a clearer categories approach.[466] The Canadian approach, where judges weigh up probative value and prejudicial impact, has also been considered an alternative solution.[467]

The attitudes and rationale underpinning the decision in *R v A* have also been challenged. The Lords decided a previous sexual relationship is sometimes relevant to consent as a matter of 'common sense'.[468] Lord Steyn thought past choices may 'throw light on the complainant's state of mind'.[469] Such comments depict consent as an attitude, rather than a choice made on each occasion, which is somewhat at odds with Lord Steyn's later acknowledgement that consent is always given afresh.[470] Further, McGlynn suggests this common sense notion of relevance is based upon stereotypes that women have propensity to consent to, and are thus less likely to be

[462] Temkin J, 'Sexual History: Beware of the Backlash' (2003) Criminal Law Review 217, 240; Kelly L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/2006) 19.

[463] *R v White* [2004] EWCA Crim 946.

[464] *R v Hamadi* [2007] EWCA Crim 3048.

[465] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) The Journal of Criminal Law 367, 376.

[466] Temkin J, 'Sexual History: Beware of the Backlash' 2003 Criminal Law Review 217, 224; McGlynn C, Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence (2017) 81(5) The Journal of Criminal Law 367, 387-390.

[467] McGlynn C, 'Commentary on *R v A* (No 2)' in Hunter RC, McGlynn C and Rackley E (eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 227.

[468] *R v A* (No 2) [2001] UKHL 25.

[469] *R v A* (No 2) [2001] UKHL 25 para 31.

[470] *R v A* (No 2) [2001] UKHL 25 para 31.

raped by, their sexual partners.[471] However, some defend the judgment in *R v A*, for example, Spencer claims that feminists 'presumably accept that a person more readily consents to sex with her regular sexual partner than with others'.[472]

Subsequent case law demonstrates inconsistent approaches towards s.41, as appeals have successfully overturned judgments that followed s.41 strictly.[473] Judgements made by the Court of Appeal, in relation to sexual behaviour with the accused and third parties, have generated concern among scholars. For example, *Mukadi* successfully argued the complainant's actions of getting into a car with a different man before the alleged rape was relevant to consent.[474] Within the judgment, it was deemed this behaviour was sexual behaviour, and was relevant to her mind-set and 'would influence the jury'. [475] *Mukadi* is viewed as making a 'dangerous generalisation that consent is an attitude not a choice',[476] and illustrates the 'persistence of old-style attitudes to sexual history'.[477] From analysing recent case law, there is scant evidence of consent being viewed as a mind-set. Instead, *Mukadi* is relied upon for insisting the definition of sexual behaviour is a 'matter of common sense'.[478] *R v R* applied the decision in *A* to successfully argue that the complainant's sexual relationship with the appellant four months prior to the alleged rape was relevant to consent under s.41(3)(c).[479] This appeal caused concern for potentially

[471] McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) The Journal of Criminal Law 367, 369-371.

[472] Spencer J.R, 'Rape Shields and the Right to a Fair Trial' (2001) Cambridge Law Journal 452, 453.

[473] However, other cases have also ruled that sexual history is not relevant to issues of consent, belief in consent and motive to lie, with judges recognising where counsel simply sought to discredit the complainant. For example: *R v B* [2012] EWCA Crim 1235; *R v Mokrecovas* [2001] EWCA Crim 1644; [2002] 1 Cr. App. R. 20; [2001] Crim. L. R. 911; *R v TW* [2004] EWCA Crim 3103; [2005] Crim. L.R. 965 CA (Crim Div).

[474] *R v Mukadi* [2003] EWCA Crim 3765 para 16.

[475] *R v Mukadi* [2003] EWCA Crim 3765 para 16.

[476] Page F and Birch D.J, 'Evidence: Rape- Youth Justice and Criminal Evidence Act 1999 s.41' (2004) Criminal Law Review 374, 375-6.

[477] Kelly, L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/2006) 21.

[478] The Court of Appeal has considered the definition of sexual behaviour since, for example: *R v P* [2013] EWCA Crim 2331.

[479] *R v R* [2003] EWCA Crim 2754.

encouraging judges to admit evidence that occurred a significant time ago.[480] In contrast, previous sexual activity between the parties a week prior to the rape was inadmissible in *R v S*.[481] Kibble suggests this defendant was prevented from advancing his full story and the evidence is as much his sexual history as the complainant's.[482] The seemingly different approaches adopted by the Court of Appeal in *R v R* and *R v S*,[483] for example, may raise concern about the consistency of s.41 rulings in cases heard in Crown Courts. These cases provide some evidence that greater clarity in the wording of s.41 and statutory guidance for judges is potentially required. Though, as Hoyano explains, case law provides limited information on how sexual history evidence is used in actual trials, as the Court of Appeal only provides judgments on cases appealed by the defence.[484]

Research has examined the frequency sexual history is admitted and whether applications are being made correctly, albeit with conflicting results. The Ministry of Justice's recent review into completed CPS case files found 'section 41 is working as intended', as the vast majority of applications were not permitted in these rape cases.[485] Most recently, Hoyano found that prosecution and defence barristers largely believe s.41 is 'working in the interests of justice'.[486] Hoyano also found that only 18.6% of complainants were subjected to successful s.41 applications.[487] In contrast, research conducted by LimeCulture concluded that 'section 41 is not being delivered

[480] Kelly, L *et al*, Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials, Home Office Online Report 20/06, London: Home Office (2006) 19.

[481] *R v S* [2010] EWCA 1579, [2001] Crim L.R. 671.

[482] Kibble N, '*R v S*: Sexual Offences- Rape- Consent- Evidence of Complainant's Previous Sexual Relationship with Defendant Husband' (2011) Crim. L.R. 671,673.

[483] *R v R* [2003] EWCA Crim 2754; *R v S* [2010] EWCA 1579, [2001] Crim L.R. 671.

[484] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row' (Criminal Bar Association 2018) 2.

[485] Ministry of Justice, *Limiting The Use of Complainants' Sexual History in Sex Cases* (MoJ December 2017) 3 and 11.

[486] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 52-55

[487] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 52-55

as was intended'.[488] LimeCulture found the majority of complainant are cross-examined on their sexual history, and are not consistently informed that this would occur.[489] For this study, ISVAs were surveyed on the use of sexual history and s.41 applications, from their experiences in court. These findings rely upon the ISVAs recall of cases between April 2015 to April 2017 and their estimates, which are susceptible to inaccuracies. Moreover, this study did not consider whether the sexual history adduced was admissible in these cases. More robust research from Kelly *et al* (2003) found that applications were made in a quarter of the 236 tracked-cases, two thirds of which were successful.[490] From conducting 23 trial observations, they reported that sexual history often featured without formal applications or challenge from the prosecution or judges.[491] More recently, Temkin *et al* found four out of eight trials observed featured sexual history with third parties, some without s.41 applications being made.[492] Temkin *et al* observed three s.41 applications, and notes that the judges' instructions and restrictions were not followed in two of these cases.[493] The study found judges infrequently intervened to stop irrelevant sexual history. [494] However, these judges may not have intervened if successful s.41 applications were made during pre-trial hearings, which the researchers did not observe, or if the evidence was legally admissible.[495] There may also be reasons,

[488] LimeCulture, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: A Survey of Independent Sexual Violence Advisers (ISVAs)* (LimeCulture, September 2017).

[489] LimeCulture, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: A Survey of Independent Sexual Violence Advisers (ISVAs)* (LimeCulture, September 2017).

[490] Kelly, L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/2006) 28.

[491] Kelly, L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/2006) 45 and 47.

[492] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 213.

[493] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 213.

[494] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 213 and 221.

[495] For a discussion of the limitations of existing studies examining the operation of s.41, which includes the methodological limitations of observational research, see Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 20-46.

unknown to the researchers across these studies, which justify the late s.41 applications observed.[496] In addition, it is argued that observational studies often omit the multifaceted deliberations and cognition of judges and create an impression of blunt exercise of judicial discretion.[497] Kibble sought to explore judicial perceptions on relevance of sexual history and their views towards s.41 and *A* using scenario-based focus groups.[498] Kibble suggests his study shows judges carefully consider sexual history evidence.[499]

3.4.2 Critical Discussion

While insightful, Kibble's study is not without its methodological limitations. Judges do not exercise their discretion in an open group discussion and cases are often more complex than the four scenarios provided. Despite the judges' cautiousness and sensitivity in deciding to admit sexual history in Kibble's study, there is some limited evidence that sexual history rules are not always followed. For example, in Temkin *et al's* study, a judge 'reprimanded' a defence barrister for ignoring judicial rulings.[500] However, such action may be too late, as the jury will have heard the evidence and the complainant has already undergone humiliating and potentially prejudicial questioning.

Observational studies can only provide limited insight into the adherence of procedural rules for adducing sexual history. Scholars using trial observations have argued that s.41 applications are not always made in writing and are sometimes made

[496] As Hoyano explains, during Plea and Trial Preparation Hearings (PTPH) a timetable for s.41 applications may set out. As such, the parties and trial judge may agree to hear s.41 applications at trial. Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 39-40.

[497] Kibble N, 'Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases' (2008) 35 Journal of Law and Society 91, 95.

[498] Kibble N, 'Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases' (2008) 35 Journal of Law and Society 91.

[499] Kibble N, 'Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases' (2008) 35 Journal of Law and Society 91,101.

[500] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 213.

late.[501] As applications must be made within 14 days of disclosure of the material by the prosecution,[502] non-compliance of full prosecution disclosure may inevitably result in these delays. A difficulty with observational studies, including the current PhD research, is that it may not always be apparent whether decisions have been made prior to trial.[503] Barristers may sometimes agree the scope of questions and the contextual parameters of a case privately before trial, or within pre-trial and ground rules hearings.[504] Although the prosecution and defence have a duty to communicate what evidence they will agree and dispute at trial,[505] this approach arguably goes beyond the intentions of s.41, as it places a general ban on sexual history unless the judge grants leave.

Notwithstanding some unsatisfactory findings, Kelly *et al* found that judges understood s.41's purpose.[506] Kelly *et al* further explain that thirteen cases awaited the ruling in *R v A*, of which only four convictions were later quashed.[507] There have been other decisions made by the Court of Appeal where sexual history was deemed irrelevant to issues of consent, belief in consent, and motive to lie.[508] This arguably

[501] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 213.

[502] Criminal Practice Directions Amendment No.6 [2018] EWCA Crim 516, CPD 22A.1; Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.4(1)(b). At the time this study was conducted, the prescribed time limit for applications to be made was twenty-eight days, under Criminal Procedure Rules 2015, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.2(b).

[503] Baldwin J, 'Research on The Criminal Courts' in King R.D and Wincup E (eds.) *Doing Research on Crime and Justice* (OUP 2008) 245-246.

[504] GRHs are now required in cases where sexual history evidence applications are made, as stated within: Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD V Evidence 22A.

[505] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2(2).

[506] Kelly L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials.* (Home Office Online Report 20/2006) 2.

[507] Kelly L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials.* (London: Home Office Online Report 20/2006) 20.

[508] For example: *R v B* [2012] EWCA Crim 1235; *R v Mokrecovas* [2001] EWCA Crim 1644; [2002] 1 Cr. App. R. 20; [2001] Crim. L. R. 911; *R v TW* [2004] EWCA Crim 3103; [2005] Crim. L.R. 965 CA (Crim Div).

shows trial judges were not readily admitting sexual history. It is difficult to determine how often trial judges are wrongly admitting evidence, due to restrictions on prosecution appeals. The contextual nuances of cases render direct comparisons of their judgements difficult. The facts of every case and sexual history evidence will vary. Some judges have argued that this renders a strict categories approach unworkable; they therefore welcomed the judgment within *R v A*.[509] Sexual history evidence will sometimes be relevant, and a blanket ban would be detrimental to a defendant's fair trial. Thus, some form of regulation is required. There are, however, clear problems with the operation of s.41 that are recognised on both sides of the debate, which would suggest further legislative reform may be required. Scholars have suggested that this could include revisions to s.41's wording.[510] The issue of sexual history will be discussed further, in relation to the rape trials observed within the current study, within subsequent chapters of this thesis.

3.5 The Impact of Cross-Examination Tactics in Rape Trials

It is important to examine how the nature of cross-examination, as set out within Chapter Two, affects rape complainants. It has been asserted that the CJS and wider society 'silence' complainants.[511] How this reportedly occurs during cross-examination and the trial process will now be discussed. The term 'silencing' characterises the marginalisation of complainants in two different ways. Firstly when their experiences do not adhere to rape myths. Secondly, when they are subjected to cross-examination tactics, which prevent them from speaking of their alleged victimisation in their own way. This section will also consider enduring arguments that cross-examination renders complainants feeling as though they are put on trial

[509] Kibble N, 'Section 41 Youth Justice and Criminal Evidence Act 1999: Fundamentally Flawed or Fair and Balanced?' (2004) 4 Archbold News 6, 7.

[510] Temkin J, 'Sexual History: Beware of the Backlash' 2003 Criminal Law Review 217, 224; McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) The Journal of Criminal Law 367, 387-390.

[511] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 98; Stuart D, 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology October 1992) 97.

and have suffered further victimisation, which has been termed the second rape.[512] These claims will be examined by comparing cross-examination within other trial contexts. It is also important to consider any expressed positive experiences of cross-examination by rape complainants.

3.5.1 Silencing Complainants with Rape Myths

It is argued that complaints deviating from the 'real rape' are met with disbelief and are taken less seriously.[513] It has been asserted that many complainants are silenced and 'written off as liars' because their experiences fall outside of society's understanding of rape.[514] Arguably, this may result from defence barristers using rape myths during cross-examination and by jurors who are swayed by these myths. Women are thought to remain silent instead of pursuing allegations because they believe their experiences, which deviate from 'real rape', will not be believed.[515] Where cases are reported and reach court, acquittals for allegations that deviate from stereotypical expectations and 'real rape', are believed to marginalise complainants individually and as a group.[516] In contrast, Larcombe explains that a complainant's characteristics in the witness box determine whether she is silenced.[517] The Australian cases studied by Larcombe resulted in convictions, yet the complainants and their

[512] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 36; Adler Z, *Rape on Trial,* (Routledge 1987) 14; Wheatcroft J.M, Wagstaff G.F, and Moran A, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276

[513] Estrich S, *Real Rape* (Harvard University Press, 1987).

[514] Boux, HJ and Daum, CW 'At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge The Real Rape Myth in The Criminal Justice System' (2015) 150 Journal of Law, Technology and Policy 149, 163.

[515] Brown J and Horvath M.A.H, 'Do you believe her and is it real rape?' in Horvath M.A.H and Brown J (Eds) *Rape: Challenging Contemporary Thinking* (Collumption: Willan 2009) 332. However, there are many other reasons, documented within literature, explaining why delayed and under reporting occurs. See: Kelly L, Lovett J and Regan L, *A Gap or a Chasm: Attrition in Reported Rape Cases* (Home Office 2005) 42; Hohl K and Stanko E.A, 'Complaints of Rape and the Criminal Justice System: Fresh Evidence on The Attrition Problem in England and Wales' (2015) *European Journal of Criminology* 324, 327.

[516] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 155.

[517] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

accounts of rape deviated from the real rape stereotype.[518] These 'successful' complainants displayed self-assurance and took overt offence to the defence counsel's insinuations of contributory negligence, suspicion, blame, and immorality.[519] Larcombe suggests that a complainant's resistance to the barrister's reconstruction of the rape and moral inferences is important for being heard by the jury and to secure convictions.[520]

The manipulative questioning of defence barristers is said to provide an opportunity for complainants to demonstrate their resistance to the jury.[521] Withstanding the control and aggression of barristers while sticking to their story, without becoming angry or frustrated, is thought to display this resistance. Larcombe suggests that exhibiting resistance allows jurors, who are witnessing the second rape, to see what happened on the first occasion.[522] It is suggested that the majority of complainants do not hold the necessary attitudinal and linguistic qualities for a resistive performance; they are, therefore, silenced.[523]

3.5.1.1 Critical Discussion

As previously discussed, the arguments that rape myths have a substantial influence on verdicts, which silences complainants, are somewhat one-dimensional. To reiterate, cases with more 'real rape' characteristics may provide corroboration, such as injuries, for juries to consider.[524] The application of the CPS full code test means

[518] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

[519] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

[520] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

[521] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

[522] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

[523] Larcombe W, 'The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131.

[524] As discussed within section 3.2.4.

cases going to trial have a realistic prospect of conviction,[525] therefore these cases may feature some elements of 'real rape' or the complainant may be compelling for other reasons.[526] However, some evidence suggests that cases deviating from 'real rape' are less likely to be prosecuted.[527] Conversely, a recent study in Denmark found that some 'real rape' characteristics, including rape committed by a stranger and physical resistance by the complainant, did not significantly influence the likelihood of case progression.[528] Research, including this thesis, also shows that cases deviating from 'real rape' do reach court.[529] Moreover, these cases do result in convictions, thus the experiences of those complainants are being heard.

Larcombe's belief that a complainant displaying resistance and self-confidence in cross-examination leads to success is speculative for a number of reasons. Firstly, not all successful rape complainants will display these characteristics. It is possible that defendants will be convicted where complainants are not 'resistive and self-confident', and the allegations are removed from the 'real rape' stereotype. Observations from the present study, where 'unsuccessful' complainants were assertive and resistive during cross-examination, will subsequently be discussed.[530] The sample of successful complainants within Larcombe's study is also small. Thus, Larcombe's model of a successful rape complainant cannot be generalised to other cases. Additionally, suggesting that a complainant's resistance to the defence barrister's questions exemplifies her resistance during the alleged rape is also

[525] CPS, *The Code for Prosecutors* (CPS, January 2013) 6.

[526] For a discussion of the evidence showing that cases fitting the 'real rape' stereotype are more likely to be prosecuted see, Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 18-19.

[527] Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 18; Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on The Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328

[528] Hansen N.B *et al*, 'Are rape cases closed because of rape stereotypes? Results from a Danish police district' (2018) Nordic Psychology 1, 7-8.

[529] Hester M, *From Report to Court: Rape Cases and the Criminal Justice System in the North East* (University of Bristol in association with the Northern Rock Foundation 2013).

[530] As discussed within Chapter Five at section 5.1.3, five complainants displayed resistance during cross-examination. At this stage, it is important to highlight that these trials resulted in acquittals.

speculative. A binary effect may be produced, as the jury could assume that the complainant's resistance within the courtroom shows the complainant as strong willed and would have resisted the alleged rape. A complainant who resists by consistently sticking to her account of rape may improve her chances of 'success', as fewer ambiguities and discrepancies in her evidence are elicited for the jury to consider.

It is claimed that acquittals disqualify complainants' experiences of rape and silence them individually and collectively.[531] However, acquittals may not be the most accurate measurement of silence; confident and resistive complainants may equally feel silenced by the process. Larcombe also uses convictions as an indicator of 'successful' complainants, but this will not always amount to 'justice' for complainants.[532] McGlynn and Westmarland argue the meaning of justice is fluid, as it changes across time and circumstances for each individual complainant.[533] Their study found 'justice' embodies consequences, dignity, voice, prevention and connectedness for complainants.[534] Complainants have expressed that justice is not necessarily individualistic, in the sense of seeking a particular outcome for their own case, but is a broader concept and includes social justice, which means striving towards ending sexual violence in society through prevention and education.[535]

3.5.2 Silencing Complainants by the Structure of Cross-Examination

'Silencing' can be a term used to convey the physical silence complainants experience when giving evidence. It has been argued that rape complainants speak during cross-examination, but are not heard.[536] Within adversarial trials, barristers conduct cross-

[531] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 155.

[532] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1, 9.

[533] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1, 2.

[534] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1.

[535] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1, 18.

[536] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 137.

examinations by controlling the question topics.[537] This control, alongside the format and style of the questioning, arguably creates a natural authority over those being cross-examined.[538] This divide has been criticised as an expression of unequal power that prejudices rape complainants.[539] The basic structure of cross-examination and evidential rules are thought to prevent complainants providing their account in their own words.[540] Rape complainants have expressed their frustrations with controlling cross-examination and disappointment that they could not provide their story in full.[541] Rape complainants have been described as 'tools' of defence barristers to elicit information they require and to get their win, rather than being allowed to tell their story.[542] A complainant in Gregory and Lee's study recognised this when stating, "in rape cases you shouldn't end up being torn to shreds … that's because I'm a witness. I'm not really part of this. I mean it's all about me but I'm not part of it".[543]

As outlined in Chapter Two, the types of questions adopted by counsel are non-exhaustive and include closed, forced choice, leading, and tagged questions.[544] Ellison explains that questions during cross-examination shape and constrain a complainant's

[537] Doak J and McGourlay C, *Criminal Evidence in Context* (3rd Edn, Routledge 2012) 21-22.

[538] Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (eds) *Feminist Perspectives on Evidence* (Cavendish 2000) 43-44; Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 93.

[539] Snow N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (Ed) *A Most Detestable Crime: New Philosophical Essays on Rapes* (OUP 1999) 253; Matoesian G.M, *Reproducing Rape: Domination through Talk in the Courtroom*, (Polity 1993)

[540] Smart C, *Feminism and The Power of The Law* (Routledge, 1989) 33.

[541] Brown J.M and Walklate S.L, *Handbook on Sexual Violence* (Routledge 2012) 267; Pettitt B *et al, Out of the Shadows: Victims' and Witnesses' Experiences of Attending the Crown Court,* (Victim Support 2013) 5; Hunter G *et al*, *At Risk, Yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (Victim Support 2013) 20.

[542] Snow, N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (Ed) *A Most Detestable Crime: New Philosophical Essays on Rapes,* (OUP 1999) 255; Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) Feminist Criminology 298, 312.

[543] Gregory J and Lees S, *Policing Sexual Assault* (Routlege 1999) 186.

[544] Ellison L, 'Cross-Examination and The Intermediary: Bridging The Language Divide?' (2002) Criminal Law Review 114, 121.

evidence.[545] This arguably prevents complainants from providing their own version of events in their own way, thereby preventing meaningful participation at trial. Numerous studies have shown that there is a risk of acquiescence and hindrance of accurate recall when witnesses, including rape complainants, are subjected to these restrictive and leading cross-examination questions.[546] Additionally, earlier studies from other jurisdictions have highlighted that barristers have used a variety of traditional linguistic tactics and devices that exert control on complainants.[547] A notable example includes defence counsel's own silence following a complainant's answer to signal condemnation and disbelief in her evidence.[548] Taslitz also noted that the choice of words by counsel have subtle ways of undermining complainants.[549] For example, 'alleged rapist' rather than 'defendant' is thought to mock the complainant's account.[550] Repetitive questioning has also been used in U.S trials, which could be employed to antagonise, ensure complainants succumb to propositions or slow down

[545] Ellison L, 'Cross-Examination and The Intermediary: Bridging The Language Divide?' (2002) Criminal Law Review 114, 120.

[546] Keane A, 'Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-Professionalisation' (2012) 16(2) E. & P. 175, 177; Wheatcroft J.M and Ellison L.E, 'Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Accuracy' (2012) 30 Behav. Sci. Law 821; Kebbell M.R., 'Witness Confidence and Accuracy: Is a Positive Relationship Maintained for Recall under Interview Conditions? (2009) 9 Journal of Investigative Psychology and Offender Profiling 11; Wheatcroft J.M and Woods S, 'Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence' (2010) 14(3) Evidence and Proof 187; Ellison L and Wheatcroft J, '"Could You Ask Me That In A Different Way Please?" Exploring The Impact of Courtroom Questioning and Witness Familiarisation on Adult Witness Accuracy' (2010) 11 Crim. L.R. 823; Wheatcroft J, Wagstaff G and Kebbell M, 'The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy' (2004) Legal and Criminological Psychology 9(1) 83; Henderson E, 'Did You See The Broken Headlight? Questioning The Cross-Examination of Robust Adult Witnesses' (2014) Archbold Review 4.

[547] Matoesian G.M, *Reproducing Rape: Domination through Talk in the Courtroom* (Polity 1993); Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999).

[548] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 94; Matoesian G.M, *Reproducing Rape: Domination through Talk in the Courtroom* (Polity 1993) 139 and 145.

[549] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 91.

[550] Taslitz A.E, *Rape and The Culture of The Courtroom*, (New York University Press 1999) 91.

events to demonstrate the complainant's irrationality.[551] However, it is important to note that these findings are produced from analysis of court transcripts during the 1990s and from another jurisdiction. While insightful, these findings may not necessarily reflect current cross-examination practices in England and Wales.

Additionally, Ehrlich suggests that the control exerted during cross-examination allows counsel to influence and evaluate the evidence provided.[552] For example, Ehrlich illustrated how counsel reconstruct a complainant's claim that they were too scared to physically resist by questioning around specific events that rendered the complainant feeling scared, to show this as irrational and illogical.[553] When irrationality is implied, for example when asking complainants why they did not shout for help, complainants have declared their actions as 'dumb' or the 'best they could come up with'.[554] Ehrlich argues by accepting their reactions were irrational, under the pressure of cross-examination, this in turn marginalises their experiences of rape when in fact their responses were legitimate.[555] However, Ehrlich's conclusions are founded on an analysis of cross-examination transcripts from university tribunals and criminal trials within another jurisdiction. Therefore, these observations may not represent current cross-examination practices in England and Wales.

3.5.2.1 Critical Discussion

Although the structure of cross-examination may be consistent across trial contexts, as the following section will demonstrate, some practices discussed in the context of rape trials appear tactical. Some barristers within England and Wales have previously expressed views and justifications for their cross-examination techniques that reflect this.[556] For example, Temkin found some barristers adopt 'trapping' questioning

[551] Taslitz A.E, *Rape and The Culture of The Courtroom*, (New York University Press 1999) 90.

[552] Ehrlich S, *Representing Rape: Language and Sexual Consent* (Routledge 2001) 70.

[553] Ehrlich S, *Representing Rape: Language and Sexual Consent* (Routledge 2001) 75.

[554] Ehrlich S, *Representing Rape: Language and Sexual Consent* (Routledge 2001) 98-100, 107, 112.

[555] Ehrlich S, *Representing Rape: Language and Sexual Consent* (Routledge 2001) 107, 112.

[556] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219.

techniques that involve 'lulling her into a false sense of security'.[557] Many barristers claimed the tone of their questions would be a tactical choice for assessing the complainant.[558] One suggested, in dichotomous stereotypical terms, that if a complainant is a 'little mouse' the tone would be gentle but if she is a 'tarty woman' the tone would be firm.[559] However, caution is required, as studies examining the views of barristers, whether positive or negative, may not reflect actual cross-examination practices or the attitudes of barristers today.

Previous studies show that complainants have felt defence barristers were trying to trip them up or put words in their mouths, and found the process of cross-examination frustrating because they were unable to tell their story.[560] Changing the general structure of giving evidence, in cross-examination, so as to allow complainants free narrative may help reduce these feelings of frustration. However, this would compromise the purpose of cross-examination, as discussed within Chapter Two. Moreover, complainants have an existing opportunity for free narrative within their evidence-in-chief. Arguably, some complainants may not have the confidence to freely speak to a courtroom of strangers and may feel more comfortable answering yes or no questions that are traditionally regarded as controlling. Furthermore, free narrative may, in some cases, reduce a complainant's chance of 'success' as their accounts become muddied.[561] The controlling nature of cross-examination also prevents inadmissible evidence being heard, and allows each side to build a strong

[557] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 230.

[558] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 230.

[559] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 230.

[560] Pettitt B *et al*, *At Risk, Yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (Victim Support 2013); Hunter G *et al*, *Out of the Shadows: Victims' and Witnesses' Experiences of Attending the Crown Court* (Victim Support 2013) 20-22; Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 54; Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 31.

[561] Fielding N.G, 'Lay People in Court: The Experience of Defendants, Eyewitnesses and Victims' (2013) 64(2) The British Journal of Sociology 287, 304-305.

clear-cut case to reach the procedural truth.[562] Therefore, the frustrating feelings towards cross-examination by complainants may be an unfortunate by-product of the formal and controlling nature of questioning. More recent interviews with barristers have found that many are forthcoming with suggesting procedural changes to rape trials and cross-examination that will assist complainants.[563] For example, some have suggested that complainants could be allowed to use their own everyday language to describe sexual details, and could be given a greater sense of participation and input at trial.[564] These findings may coincide with the encouragement towards a best evidence cross-examination approach, previously discussed.[565] New empirical research is required to assess whether actual cross-examinations adhere to this approach, or if traditional practices still persist.

3.5.3 Re-Victimisation and Poor Treatment

A persistent theme discussed within literature is that cross-examination leads to the re-traumatisation of complainants, amounting to secondary victimisation.[566] Defence barristers are primarily deemed responsible for these negative consequences. Firstly, Ellison argues they conduct cross-examination in an aggressive and intimidating manner, and ask complainants intrusive and inappropriate questions.[567] Answering questions on personal and sexual matters, such as the act of penetration, and being

[562] Fielding N.G, 'Lay People in Court: The Experience of Defendants, Eyewitnesses and Victims' (2013) 64(2) The British Journal of Sociology 287, 304.

[563] Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 249.

[564] Carline A and Gunby C, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) Liverpool Law Review 237, 249.

[565] See Chapter Two at section 2.3.

[566] Wheatcroft J.M, Wagstaff G.F, and Moran A, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276; Brown J.M and Walklate S.L, *Handbook on Sexual Violence* (Routledge 2012) 265.

[567] Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds) *Feminist Perspectives on Evidence* (Cavendish 2000) 41.

required to recall events in detail, inevitably causes stress and embarrassment.[568] Further, cross-examination is deemed comparable to, and sometimes worse than, the rape itself.[569] Secondly, scholars argue defence barristers infer blame and rape myths during cross-examination, which can lead to secondary victimisation.[570] Thirdly, the controlling nature of cross-examination is believed to symbolise the second rape.[571] Parallels have been drawn between the physical act of rape that exerts control and power upon victims and the controlling nature of questioning.[572] This loss of control is considered particularly damaging for rape complainants, who need to feel empowered.[573] The psychological fragility of rape complainants is thought to hold potential for re-traumatisation, which can be aggravated by the 'gruelling test' that is cross-examination.[574]

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[568] Stuart D, 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology October 1992) 101; Kennedy J, Easteal P and Bartels L, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35(5) Women's Studies International Forum 334, 335.

[569] Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds) *Feminist Perspectives on Evidence* (Cavendish 2000) 41; Ellison L, 'Witness Preparation and the Prosecution of Rape' (2007) 27 Legal Studies 171, 171; Madigan L and Gamble N.C, *The Second Rape- Society's Continued Betrayal of the Victim* (Lexington Books 1991) 91-107; Stuart, D., 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology October 1992) 102.

[570] West D.J, *Sexual Crimes and Confrontations: A Study of Victims and Offenders* (Gower 1987) 200.

[571] Snow N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (ed) *A Most Detestable Crime: New Philosophical Essays on Rapes* (OUP 1999) 255.

[572] Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 93; Stuart D, 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology October 1992) 98.

[573] Snow N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (ed) *A Most Detestable Crime: New Philosophical Essays on Rapes* (OUP 1999) 255.

[574] Kennedy J, Easteal P and Bartels L, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35(5) Women's Studies International Forum 334, 336.

Critical comparisons have been made between the nature of a rape complainant's cross-examination and other trial contexts. It is claimed that the focus on the rape complainant's behaviour and character in cross-examination does not occur for other victims.[575] Hypothetical examples, which draw upon other crimes, are used to support such arguments. For example, it is often argued that a victim of a robbery would not be asked why they did not fight back and submitted to being victimised by handing over their valuables.[576] Studies have also explored attributions of blame in rape trials compared to other crimes. Of the few studies conducted in this area, the research findings are divided. Bieneck and Krahé found that a perpetrator is blamed less in rape cases than robbery, and victims are blamed more in rape than robbery cases.[577] Factors, such as intoxication and the victim-perpetrator relationship, also had different affects in rape and robbery.[578] However, other studies report that complainants are blamed more in theft and robbery scenarios than rape.[579] As such, it is unclear whether rape complainants are at a greater disadvantage than other complainants, regarding judgements of blame.

In addition, comparative empirical research has examined the cross-examinations of rape complainants and witnesses in other trial contexts. Although these studies are uncommon, they provide a useful contextual perspective. Similarities between the

[575] Raitt, F.E., 'Independent Legal Representation for Complainants in Rape Trials' in McGlynn C and Munro V.E (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2011) 272.

[576] Box S, *Power, Crime, and Mystification* (Tavistock Publication 1983) 314; Adler Z, *Rape on Trial* (Routledge 1987) 54.

[577] Bieneck S and Krahé B, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There A Double Standard?' (2011) 26(9) Journal of Interpersonal Violence 1785,1790.

[578] Bieneck S and Krahé B, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There A Double Standard?' (2011) 26(9) Journal of Interpersonal Violence 1785, 1794.

[579] Kanekar S *et al*, 'Causal and Moral Responsibility of Victims of Rape and Robbery' (1985) 25 Journal of Applied Social Psychology 622; Brems C and Wagner P, 'Blame of Victim and Perpetrator in Rape Versus Theft' (1994) 134 Journal of Social Psychology 363 cited within, Bieneck S and Krahé B, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There A Double Standard?' (2011) 26(9) Journal of Interpersonal Violence 1785, 1787.

cross-examinations of complainants in rape and assault trials have been found.[580] For instance, complainants in both trials had their character examined and their behaviour was portrayed as unusual.[581] Brereton urged that the contextual difference between assault and rape cross-examinations should not distract from the significant structural similarities across the cross-examinations.[582] Brereton hints that cross-examination is potentially more traumatic for rape complainants, due to the intimate nature of the offence, but reiterates that cross-examination is equally problematic for assault complainants due to broader systemic factors of the adversarial trial process.[583] As Brereton's comparative analysis uses transcripts of trials conducted between 1989 and 1991 in another jurisdiction, the relevance of these findings are arguably limited. However, Fielding's recent research also exemplifies the structural similarities of cross-examination across violent offences in England and Wales, as barristers use similar tactics for witnesses and defendants, from repetition to 'surprise questions'.[584] Equally, problems with cross-examination have been reported among witnesses and defendants in a variety of cases. For example, research suggests legal conventions and trial talk are confusing for witnesses and defendants.[585] Some complainants and witnesses in other cases also suggest that cross-examination made them feel like a criminal and disbelieved.[586]

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[580] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 259.

[581] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 244.

[582] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 254 and 259.

[583] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 259.

[584] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 126-127 and 174-175.

[585] Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (Criminal Justice Alliance, 2015) 18-19; Fielding, N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 176-177.

[586] Hunter G *et al*, *Out of the Shadows: Victims' and Witnesses' Experiences of Attending the Crown Court* (Victim Support 2013) 22; Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (Criminal Justice Alliance, 2015) 18-19.

Cross-examination is believed to place a greater focus on a complainant, by scrutinising her behaviour and character, than the defendant.[587] Consequently, this focus creates feelings among complainants that they are on trial.[588] Furthermore, Ehrlich found that defendants use linguistic phrases that mitigate and obscure their agency, thereby shifting focus away from his actions and behaviour onto the complainant.[589] Feminist literature also suggests that cross-examination amounts to pornography of the alleged rape, by turning it into sex.[590] This is believed to disqualify a complainant's experience of rape, and also result in the complainant's body becoming the focus and a sight of sexuality.[591] However, very limited empirical research has been conducted into whether defendants are similarly scrutinised on their behaviour in cross-examination. To date, one study has examined transcripts from the cross-examination and evidence-in-chief of rape complainants and defendants, by focusing on the question types adopted.[592] Akin to Brereton's earlier findings, Kebbell *et al* concluded that both parties are examined in similar ways. For example, both parties faced complex question types, which potentially impair accuracy of recall and are difficult to answer.[593] They also concluded that cross-examination was more restrictive and featured heavily leading questions, in comparison to evidence-in-chief, for both parties.[594] This is perhaps unsurprising, considering the opposing nature of

[587] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 8.

[588] Wheatcroft J.M *et al*, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276; Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 32; Hunter G *et al*, *Out of the Shadows: Victims' and Witnesses' Experiences of Attending the Crown Court,* (Victim Support 2013) 22.

[589] Ehrlich S, *Representing Rape: Language and Sexual Consent* (Routledge 2001).

[590] Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone 1996) 334.

[591] Smart C, *Feminism and The Power of The Law* (Routledge, 1989) 39.

[592] Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49.

[593] Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49, 55.

[594] Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49, 54-55.

these questioning procedures.[595] Kebbell *et al* also compared the findings for the complainants and defendants, and found that complainants endure more questions than defendants.[596]

3.5.3.1 Critical Discussion

Terms, such as the second rape, are used by complainants to describe their experiences and cannot be overlooked.[597] It could be suggested that complainants may be influenced by verdict bias and perceive their experiences negatively when convictions are not obtained.[598] However, convictions are not always the most important outcome for complainants.[599] Some complainants who are 'successful' may feel injustice, and perceive their treatment during cross-examination negatively.[600] Dignified treatment during cross-examination is important, and will help some

[595] For a discussion, see Chapter Two at section 2.1.

[596] Kebbell M.R, Deprez S, and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49, 57.

[597] Wheatcroft JM *et al*, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276; McDonald, E 'From "Real Rape" to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform' (2014) 45 Victoria U. Wellington L. Rev. 487, 504; Victim Support, *Women, Rape and the Criminal Justice System* (Victim Support 1996).

[598] Kebbell *et al* acknowledged their small sample is biased as not all complainants approached wanted to participate and they expected that their sample would express positive treatment because of the high conviction rate, see Kebbell M.R, O'Kelly C.M.E and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 117. Different potential sources of biases are discussed within: Podsakoff P.M, MacKenzie S.B, Lee J-Y, Podsakoff NP, 'Common Method Biases in Behavioral Research: A Critical Review of the Literature and Recommended Remedies' (2003) 88(5) Journal of Applied Psychology 879, 882.

[599] See, McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1; Larcombe W, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 Feminist Legal Studies 27, 40.

[600] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1, 9 and 11-12. Some 'successful' complainants still perceived their treatment by the police negatively, Temkin J, 'Reporting Rape in London: A Qualitative Study' (1999) 38(1) The Howard Journal of Criminal Justice 17.

complainants feel some sense of justice.[601] Although complainants have expressed feeling angry, embarrassed, and dissatisfied with their experience of cross-examination,[602] there is some evidence that these experiences are not universal. High levels of satisfaction have also been found among complainants.[603] Kebbell *et al* found 73.3% were confident the system treats victims fairly and with respect.[604] There was, unsurprisingly, significantly less satisfaction with the defence barrister, in comparison to the judges and prosecution barristers.[605] Together the findings from this study were used to conclude that the treatment of rape complainants has improved.[606] However, there are some methodological limitations with this study, which the authors acknowledge. For instance, their sample of nineteen complainants is small and biased because not all women they approached wanted to participate.[607] Nonetheless, the study still provides valuable insight into the experiences of some rape complainants. To some extent, the findings falsify the view that rape complainants always receive negative treatment in court, but more research is required.

As outlined within Chapter Two, cross-examination is necessary for testing the complainant's account of rape and putting the defence case to the complainant. With this, questions may be of a personal or intimate nature that causes embarrassment or

[601] McGlynn C and Westmarland N, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice' (2018) Social and Legal Studies 1, 11-13.

[602] For brief discussion see, West D.J, *Sexual Crimes and Confrontations: A Study of Victims and Offenders* (Gower 1987) 201; Stuart D, 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology, October 1992) 100.

[603] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111.

[604] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 116.

[605] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 115.

[606] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 118.

[607] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 117.

distress. The act of rape is degrading and humiliating,[608] therefore answering questions about events may reproduce these feelings. To reduce the stress of giving evidence, statutory Special Measures have been introduced for complainants, and other vulnerable and intimidated witnesses.[609] However, the success and efficiency of some of these measures has been questioned.[610] These concerns will be comprehensively discussed within subsequent chapters.[611] Moreover, Special Measures do not protect complainants from distressing questioning.

The private nature of many rape cases means the complainant and defendant will usually be the only people who can provide an account of events during the alleged rape. This may, to some extent, explain why significant focus is placed on the complainant during cross-examination. Trials are typically described as boiling down to 'one word against the other',[612] which implies complainants and their accounts are central. However, Saunders compellingly argues this depiction of rape cases, while universally adopted, is not clearly defined and is empirically inaccurate.[613] In the literal sense, a complainants' and defendants' account will not usually be the *only* evidence available.[614] However, the complainant and defendant may be the only direct witnesses to the alleged rape, and can shed light on whether intercourse occurred and was consensual.[615] While other evidence may be available in these cases,[616] the

[608] Kennedy J, Easteal P and Bartels L, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35(5) Women's Studies International Forum 334, 336.

[609] Youth Justice and Criminal Evidence Act 1999, s.17.

[610] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11 E. & P. 1, 7 and 21; Kebbell MR *et al*, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14(1) Psychiatry, Psychology and Law 111, 113 and 118.

[611] These concerns are discussed within sections 5.1.1, 6.1.1 and 7.2.1.

[612] Burrowes N, *Responding to the Challenge of Rape Myths in Court* (NB Research: London 2013) 12; Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 1.

[613] Saunders C.L, 'Rape as 'One Person's Word Against Another's: Challenging the Conventional Wisdom' (2018) 22(2) E. & P. 161.

[614] Saunders C.L, 'Rape as 'One Person's Word Against Another's: Challenging the Conventional Wisdom' (2018) 22(2) E. & P. 161, 168.

[615] Saunders C.L, 'Rape as 'One Person's Word Against Another's: Challenging the Conventional Wisdom' (2018) 22(2) E. & P. 161, 171.

complainant's account will be of central importance. Where consent is disputed, the focus upon the complainant's account is unavoidable, as consent is seen under law as a choice belonging to the complainant and must be given freely. However, there is comparatively little scholarly discussion or research into how defendants are being cross-examined. In particular, research has not indicated the extent to which a defendant's behaviour and actions, including how he ascertained consent, is scrutinised by the prosecution.

Snow recognises that there is an absence of research indicating defence barristers are harsher towards rape complainants, but suggests there is 'plenty anecdotal evidence…of more abusive questioning' than most other crimes.[617] However, anecdotal evidence is not a robust means of proving this, and carefully conducted comparative research is required. Research does indicate that cross-examination is structured similarly for complainants, witnesses and defendants across different trials.[618] Questioning styles, from leading questions to repetition, are not only problematic for rape complainants.[619] Cross-examination of complainants and defendants may equally feature closed and leading questions, which may have a similar detrimental effect on the accuracy of their responses.[620] However, while analysing the structure of cross-examination is insightful, this will not necessarily determine whether complainants suffer harsher examination or sequential negative treatment.

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[616] S Saunders C.L, 'Rape as 'One Person's Word Against Another's: Challenging the Conventional Wisdom' (2018) 22(2) E. & P. 161, 174-176.

[617] Snow N.E, 'Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims' in Burgess-Jackson K (Ed) *A Most Detestable Crime: New Philosophical Essays on Rapes* (OUP 1999) 253.

[618] Kebbell M.R, Deprez S and Wagstaff G.F, 'The Direct and Cross-Examination of Complainants and Defendants in Rape Trials: A Quantitative Analysis of Question Type' (2003) 9 Psychology, Crime and Law 49.

[619] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 126-127 and 174-175.

[620] For a discussion of the effects of different questioning styles see, Westera N.J, Kebbell M.R and Milne B, 'Losing Two Thirds of the Story: A Comparison of the Video-Recorded Police Interview and Live Evidence of Rape Complainants' (2013) 4 Criminal Law Review 290, 294-295.

A quantitative analysis of question types, which shows practices for complainants and defendants are similar, does not account for the context of questioning, which may have different implications for each party. For instance, Brereton found that assault complainants and rape complainants have been asked about their alcohol consumption during cross-examination.[621] Brereton argues that these questions implied that assault complainants provoked trouble and were aggressive, whereas rape complainants were presented as losing their inhibitions and took undue risks by drinking.[622] It is argued that this suggests they brought the offence upon themselves, and were undeserving victims.[623] Brereton explains that the rape complainants were presented as 'sexually provocative risk takers' whose morality was suspect, whereas, assault complainants were presented troublemakers or bullies.[624] This may have damaging implications for rape complainants, as blame is inferred through scrutinising their personal and sexual morality. Although Brereton maintains rape and assault complainants endure similar questioning strategies, these differences are noteworthy. However, some caution is required as this comparative study uses transcripts of trials conducted in an Australian County Court between 1989 and 1991.

There are also differences in the nature of rape and other criminal offences, which may render direct like-for-like comparisons difficult. As already established, rape is more often committed in private against a female, known to the offender.[625] Brereton's sample of rape trials reflected this, however only 15% of complainants

[621] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 255.

[622] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 255.

[623] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 255.

[624] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 253-254.

[625] Stern V, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office 2010); Home Office, *An Overview of Sexual Offending in England and Wales* (Ministry of Justice, Home Office and the Office of National Statistics, Statistics Bulletin 2013).

were female in the assault sample.[626] Moreover, 48% of the assault cases involved strangers and a large proportion of the cases were witnessed in public,[627] which reflects the nature of many serious assaults, when occurring outside of domestic or intimate partner contexts. These different features may influence the questions barristers ask, and the inferences about the complainants' character and credibility that questions engender.

The problems caused within cross-examination may be particularly acute in rape trials for a number of other reasons. Firstly, the element of consent, which is a distinct and often a disputed issue within rape trials, may create further difficulties for complainants. With this, scope is reportedly created for defence barristers to reconstruct a complainant's account of rape into normal sex.[628] As Bieneck and Krahé suggest, the issue of consent sets cases of rape and robbery apart, which make direct comparisons difficult.[629] Secondly, questions that reference rape myths will not be applicable to other non-sexual offences. However, stereotypes may surround other offences, which create scope for victim blaming. Lastly, the offence of rape is likely to result in some questioning of a sexual and personal nature, which may heighten feelings of distress and embarrassment among complainants.[630] Little attention has been paid to the cross-examination of defendants, including whether they are asked equally intrusive questions and the implications this may have. Regardless of any similarities, this does not, however, ameliorate the problems for rape complainants.

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[626] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 247.

[627] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 247.

[628] Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone 1996) 346; Matoesian G.M, *Reproducing Rape: Domination Through Talk in the Courtroom* (Polity 1993)162-163; Smart C, *Feminism and The Power of The Law* (Routledge 1989) 36.

[629] Bieneck S and Krahé B, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There A Double Standard?' (2011) 26(9) Journal of Interpersonal Violence 1785, 1794

[630] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 52.

3.6 Conclusion

This chapter has examined the central issues surrounding the conduct of cross-examination within rape trials. The discussions have principally focused on the experiences of complainants and tactics of defence barristers, since research has not been conducted into these issues for defendants. From reviewing the literature, a dominant narrative of cross-examination within rape trials was presented. The existing literature appears to present cross-examination as adopting the traditional approach, where defence barristers are unduly aggressive, adopt manipulative tactics, and humiliate complainants. The controlling nature of cross-examination, alongside the combative adversarial trial, is said to permit the numerous cross-examination tactics that have been discussed.[631] Smith and Skinner suggested that adversarialism and the desire to win underpin defence barristers' manipulative tactics and their use of rape myths.[632] Defence counsel's role is to create reasonable doubt, therefore it is suggested they will try any available route to achieve this.[633] Temkin previously explained that cross-examination tactics reflect prejudicial attitudes towards rape held by legal personnel.[634] Other scholars have gone further, and have suggested that a deep-rooted structural bias towards women, and their experiences of rape, operate at trial.[635] However, many of these arguments are founded on relatively out-dated empirical research, and may not necessarily represent current attitudes.

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[631] Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds) *Feminist Perspectives on Evidence* (Cavendish 2000) 45-48; Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 16.

[632] Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) Feminist Criminology 298.

[633] This suggestion has been made in the context of adversarial trials within other jurisdictions, Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 16.

[634] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 240.

[635] Russell Y, 'Woman's Voice/Law's Logos: The Rape Trial and the Limits of Liberal Reform' (2016) 42(2) Australian Feminist Law Journal 273; Taslitz A.E, *Rape and The Culture of The Courtroom* (New York University Press 1999) 106-107; Matoesian G.M, *Reproducing Rape: Domination through Talk in the Courtroom* (Polity 1993) 215.

Although reforms have been implemented over the last two decades, including restrictions on sexual history evidence and the provision of Special Measures, literature often suggests that the position of complainants at trial has not improved and defence barristers tactics remain unchanged within England and Wales and other jurisdictions.[636] A dominant narrative emerging from the literature reviewed is that the adversarial trial and cross-examination prevents fair treatment and justice for complainants, and requires reform. Jordan maintains the success of reforms will always be compromised within adversarial systems.[637] However, Hoyano has argued that 'it has become fashionable to decry the adversarial system as being incapable of delivering justice in trials involving vulnerable witnesses', including rape complainants.[638] As this thesis will argue, reforms working within established adversarial bounds have not yet been exhausted. Given the recognised flaws of inquisitorial trials,[639] it would be speculative to suggest it would provide better justice and fairness towards rape complainants than the adversarial trial. Given the nature of cross-examination, it is unlikely to be an easy process for any witness. Equally, it should not be a harrowing process. To ensure complainants are treated fairly, scholars have proposed additional reforms, such as legal representation for complainants to ticketing for defence barristers.[640] Some of which will be considered against the

[636] Smith O, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave MacMillan 2018) 235; Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 1 and 15.

[637] Jordan J, 'Here We Go Round The Review-Go-Round- Rape Investigation and Prosecution-Are Things Getting Worse Not Better?' (2011) 17(3) Journal of Sexual Aggression 234, 239.

[638] Hoyano L, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' (2015) Criminal Law Review 107, 107.

[639] Doak J, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) Journal of Law and Society 294, 314; Brants C and Field S, 'Truth-Finding, Procedural Traditions and Cultural Trust in the Netherlands and England and Wales: When Strengths Become Weaknesses' (2016) 20(4) E. & P. 266.

[640] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 282-296; Raitt F.E, 'Independent Legal Representation for Complainants in Rape Trials' in McGlynn C and Munro V (Eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2011); Cook K, 'Rape Investigation and Prosecution: Stuck in the Mud?' (2011) 17(3) Journal of Sexual Aggression 250, 253. The shortcomings of these reforms are explained within: Hoyano L., 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' (2015) Criminal Law Review 107.

current findings within this thesis. Developing an understanding of the issues relating to the cross-examination of complainants has been essential for this study, and will aid interpretations of the data. These literary arguments will also be examined against the research findings. Before the findings are presented and critically examined, the following chapter will outline the methodology adopted.

Chapter Four: Methodology

4.0 Introduction

From reviewing the existing literature, significant apertures in knowledge and empirical research are evident. Namely, there is a limited contemporary evidence of how cross-examination is operating in practice. Moreover, research has not addressed how defendants are cross-examined. The overarching aim of this doctoral thesis is to understand and critically examine how cross-examination is currently conducted, in practice, for complainants and defendants within rape trials. To achieve this overarching research aim, three research objectives have been developed.

(1) Investigate how cross-examination operates in practice, including the questioning strategies adopted by counsel.

(2) Examine how cross-examination practices impact the interests of complainants and defendants.

(3) Consider whether any modifications are required to improve the conduct of cross-examination for complainants and defendants, and set out reform proposals.

These objectives inform the research strategy adopted, which will be explained and justified fully throughout this chapter. The research aim is centred upon cross-examination in action; therefore the nature of this research is socio-legal.[641] Socio-legal research draws upon social sciences, including the disciplines of sociology, criminology and psychology, to guide its methods.[642] Inevitably, research methodologies, including socio-legal methods are imperfect, and the limitations of the present study are acknowledged herein. All real world research must address a number of critical considerations, on grounds of ethics, research quality, sampling,

[641] Banakar R and Travers M, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) xii.

[642] Banakar R and Travers M, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 5.

data collection, and data analysis. These issues, as they pertain to the current study, will be discussed throughout this chapter.

4.1 Theoretical Perspective

All research will be shaped by the researcher's view of reality and knowledge.[643] With this, methodological choices for studying the social world are underpinned by philosophical traditions.[644] Thomas found that many researchers find learning the philosophical traditions and technical language behind qualitative research approaches difficult.[645] This can be supported by the researcher's own experience during this PhD. It is often advised that researchers make their theoretical perspectives and worldviews explicit, so the study's findings can be located in such a context.[646] The epistemological[647] and ontological[648] positions underpinning this doctoral study will now be explained.

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[643] Denzin N.K and Lincoln Y.S, 'Introduction: Entering the Field of Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds), *Strategies of Qualitative Inquiry* (Sage, Thousand Oaks 1998) 26.

[644] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd edn, Sage 2008) 2.

[645] Thomas D.R, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2006) American Journal of Evaluation 237, 238.

[646] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 81 and 83; Cibangu S.K, 'Paradigms, Methodologies and Methods' (2010) 32 Library and Information Science Research 177, 177.

[647] This is the researchers approach to the question 'what is the relationship between the researcher and what is being researched', and 'what is the nature of knowledge and how can knowledge be acquired'. Denzin N.K and Lincoln Y.S, 'Introduction: Entering the Field of Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds), *Strategies of Qualitative Inquiry* (Sage, Thousand Oaks 1998) 26; Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage, Thousand Oaks 2007), 17; Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 1.

[648] This is the researchers approach to the question 'what is the nature of reality (social world)', Denzin N.K and Lincoln Y.S, 'Introduction: Entering the Field of Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds), *Strategies of Qualitative Inquiry* (Sage, Thousand Oaks 1998) 26; Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage, Thousand Oaks 2007) 18; Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 1.

4.1.1 The Social Constructionist Approach

Interpretivism, or social constructionism, is considered integral to qualitative research.[649] From this stance, the social world is considered socially constructed and not an objective reality.[650] Reality and identity are seen as 'systematically constructed and maintained through systems of meaning and through social practices'.[651] It follows that human beings develop subjective meanings about their experiences, which are socially and historically shaped.[652] Social constructionists wish to understand the social processes and interactions, and the meanings people attach to them.[653] Hacking explains that the aim is to raise consciousness about a particular phenomenon (social constructions) in the social world.[654]

Research can be informed by positivism, which argues that reality exists and it can be understood and explained through an objective inquiry using the senses.[655] It is argued that knowledge of the social world can be obtained using approaches of natural science.[656] As this study seeks to examine cross-examination practices, which is a

[649] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 7.

[650] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 20.

[651] Georgaca E and Avdi E, 'Discourse Analysis' in Harper D and Thompson A.R (Eds), *Qualitative Research Methods in Mental Health and Psychotherapy: A Guide For Students and Practitioners* (John Wiley and Sons 2011) 2.

[652] Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage, Thousand Oaks 2007) 21.

[653] Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage, Thousand Oaks 2007) 21.

[654] Hacking I, *The Social Construction of What?* (Harvard University Press, 1999) 6.

[655] Guba E.G and Lincoln Y.S, 'Competing Paradigms in Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks 1994) 111; Goles T and Hirschheim R, 'The Paradigm is Dead, the Paradigm is Dead…Long Live the Paradigm: The Legacy of Burrell and Morgan' (2000) 28 Omega 249, 251-252 and 262; Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 20.

[656] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 6; Guba E.G and Lincoln Y.S, 'Competing Paradigms in Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks 1994) 112 and 109.

social process involving interaction between participants, social constructionism was deemed most compatible. Value is also attached to the context surrounding cross-examination by the researcher. This means that rape trials are unique, and the practices and behaviours observed must be examined with this subjectivity in mind. This furthers interpretivism's suitability because such research pursues 'an in-depth and context-specific understanding' of experiences of social phenomenon.[657]

4.1.2 The Critical Realist Approach

Social constructionist research is typically associated with relativism.[658] Relativism is an ontological approach that argues there is not a single reality, instead there are many subjective constructions varying across cultures and languages.[659] Accordingly, there cannot be one proven reality of the matter studied.[660] A relativist approach was rejected for this research, largely through the researcher's disapproval that any interpretation or view is valid. Many researchers are ostensibly troubled by this affect of relativism; most notably feminist scholars argue relativism prevents the challenge of oppressive ideas.[661] Furthermore, relativism seemed inappropriate because this study was not exploring participants' views of cross-examination or the meaning they attach to the social process.

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[657] Cibangu S.K, 'Paradigms, Methodologies and Methods' (2010) 32 Library and Information Science Research 177, 177.

[658] Denzin N.K and Lincoln Y.S, 'Introduction: Entering the Field of Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds), *Strategies of Qualitative Inquiry* (Sage, Thousand Oaks 1998) 27.

[659] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 13; Goles T and Hirschheim R, 'The Paradigm is Dead, the Paradigm is Dead…Long Live the Paradigm: the Legacy of Burrell and Morgan' (2000) 28 Omega 249, 252.

[660] Georgaca E and Avdi E, 'Discourse Analysis' in Harper D and Thompson A.R (Eds), *Qualitative Research Methods in Mental Health and Psychotherapy: A Guide For Students and Practitioners* (John Wiley and Sons 2011) 2; Willig C, 'Beyond Appearances: A Critical Realist Approach to Social Constructionist Work' in Nightingale D.J and Cromby J (Eds), *Social Constructionist Psychology: A Critical Analysis of Theory and Practice* (OUP 1999) 39.

[661] This purportedly stems from relativism's acceptance that 'anything goes', as knowledge and morality are not absolute, and therefore licences 'anything at all', including oppressive ideas. Hacking I, *The Social Construction of What?* (Harvard University Press, 1999) 4.

Realism is another perspective, which is typically adopted by positivist research and natural sciences.[662] Realism stipulates that a reality exists independent from our subjective beliefs.[663] Such realism, embraced by positivist research, was deemed inappropriate for the current study's aims and method, which values context and involves interpretations. Instead, a critical realist ontological stance was held.

Critical realism views the social world as constructed, but the natural world is not dependent on human action.[664] Critical realists argue enduring, sometimes hidden, structures exist in the social world, which facilitate and inhibit events, human actions, and experiences.[665] Bhaskar advocates for critical realists to adopt a relativist epistemology, in the limited sense that this approach 'insists only upon the impossibility of knowing objects except under particular descriptions'.[666] Research following this stance pursues explanations of social processes in terms of the underlying structures and human actions around it.[667] This approach also acknowledges that all viewpoints or interpretations of the phenomenon studied do not

[662] Within the social sciences, ethnocentrism is an alternative perspective, Wiarda H.J, 'The Ethnocentrism of the Social Science Implications for Research and Policy' (1981) 43(2) The Review of Politics 163.

[663] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 11; Goles T and Hirschheim R, 'The Paradigm is Dead, the Paradigm is Dead…Long Live the Paradigm: The Legacy of Burrell and Morgan' (2000) 28 Omega 249, 252.

[664] Fairclough N, 'Discourse Analysis in Organisation Studies: The Case for Critical Realism' (2005) 26(6) Organisation Studies 915, 922.

[665] Willig C, 'Beyond Appearances: A Critical Realist Approach to Social Constructionist Work' in Nightingale D.J and Cromby J (Eds), *Social Constructionist Psychology: A Critical Analysis of Theory and Practice* (OUP 1999) 45; Willmott H, 'Theorising Contemporary Control: Some Post-Structuralist Responses to Some Critical Realist Questions' (2005) 12(5) Organisation 747, 750; Georgaca E and Avdi E, 'Discourse Analysis' in Harper D and Thompson A.R (Eds), *Qualitative Research Methods in Mental Health and Psychotherapy: A Guide For Students and Practitioners* (John Wiley and Sons 2011) 2.

[666] Bhaskar R, *A Realist Theory of Science* (Routledge 2013) 241; Willig C, 'Beyond Appearances: A Critical Realist Approach to Social Constructionist Work' in Nightingale D.J and Cromby J (Eds), *Social Constructionist Psychology: A Critical Analysis of Theory and Practice* (OUP 1999) 45.

[667] Fairclough N, 'Discourse Analysis in Organisation Studies: The Case for Critical Realism' (2005) 26(6) Organisation Studies 915, 923; Willig C, 'Beyond Appearances: A Critical Realist Approach to Social Constructionist Work' in Nightingale D.J and Cromby J (Eds), *Social Constructionist Psychology: A Critical Analysis of Theory and Practice* (OUP 1999) 45.

have to be taken as true and one interpretation can be preferred to another.[668] The researcher contends that social structures exist in society. These structures, which are culturally and historically bound, shape human action and practices, including how cross-examination is conducted. Moreover, the knowledge generated by this research is substantiated within the data and context in which the cross-examinations were observed. Agreeing with Strauss and Corbin, such knowledge is real and is the most plausible interpretation within that time and context.[669]

4.1.3 The Feminist Perspective

Rape is known as a gendered crime, a type of violence against women.[670] A large amount of the existing literature on rape and the surrounding issues, such as criminal justice responses, embraces a feminist theoretical perspective. From this perspective, research aims to raise consciousness of gender inequality in order to improve the conditions of women through social change.[671] There are many different feminist thoughts, including radical, Marxist, and liberal feminism, which explain women's oppressions in different ways.[672] Moreover, there is not one 'feminist methodology'.[673] There are, however, some traditional feminist methodological

[668] Potter, G. and López, J 'After Postmodernism: The Millennium' in López J and Potter G (Eds), *After Postmodernism: An Introduction to Critical Realism* (The Athlone Press 2001) 7.

[669] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd edn, Sage 2008) 4.

[670] Hester M, Kelly L and Radford J, *Women, Violence and Male Power: Feminist Activism, Research and Practice* (OUP 1996); Skinner T, Hester M and Malos E, 'Methodology, Feminism and Gender Violence' in Skinner T, Hester M, and Malos E (Eds), *Researching Gender Violence: Feminist Methodology in Action* (Willan Publishing 2005) 2; MacKinnon CA, *Toward a Feminist Theory of The State* (Harvard University Press 1989); Brownmiller S, *Against Our Will: Men, Women and Rape* (Martin Secker and Warburg 1975).

[671] Hester M, Kelly L and Radford J, *Women, Violence and Male Power: Feminist Activism, Research and Practice* (OUP 1996) 5 citing MacKinnon C.A, *Toward a Feminist Theory of The State* (Harvard University Press 1989).

[672] Stuart Van Wormer K and Bartollas C, *Women and The Criminal Justice System* (4th Edn, Pearson 2014) 6-9; Hacking I, *The Social Construction of What?* (Harvard University Press, 1999) 7-8; Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage, Thousand Oaks 2007) 25-26.

[673] Stuart Van Wormer K and Bartollas C, *Women and The Criminal Justice System* (4th Edn, Pearson 2014) 18; Skinner T, Hester M and Malos E, 'Methodology, Feminism and Gender Violence' in

principles for researchers to follow, such as researcher-researched collaboration, political activism and allowing women's voices and experiences to be heard.[674] To some extent, the current study's methodology does not adhere to all of these principles. For example, non-participant trial observations are used, which uphold a researcher-researched relationship and do not give direct voice to marginalised groups.[675] However, the findings provide useful knowledge, which may empower complainants and defendants, including those in future cases.[676] For example, providing an understanding of how contemporary cross-examinations are conducted in a sample of cases, may inform complainants and defendants about the process. In addition, the findings yielded will inform matters of policy, with the aim to improve practice. This study is therefore informed by some feminist concerns, from a methodological perspective, and gender-based violence interests, as the topic and cases examined fall within the category of VAWG.

In addition, feminist concerns surrounding criminal justice responses to rape provide some of the parameters in which the operation of cross-examination will be examined and assist in building an understanding of what was observed. While there are certainly gendered issues surrounding rape, the researcher rejects a radical feminist stance towards sexual violence for this study. This radical position, focusing upon women's oppression through patriarchy and male power, can be criticised for its essentialism.[677] As rape complainants and defendants are the focus of this study, the issues from both sides need to be equally discussed and understood. The researcher

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Skinner T, Hester M, and Malos E (Eds), *Researching Gender Violence: Feminist Methodology in Action* (Willan Publishing 2005) 9-10.

[674] Stuart Van Wormer K and Bartollas C, *Women and The Criminal Justice System* (4th Edn, Pearson 2014), 18; Skinner T, Hester M and Malos E, 'Methodology, Feminism and Gender Violence' in Skinner T, Hester M, and Malos E (Eds), *Researching Gender Violence: Feminist Methodology in Action* (Willan Publishing 2005) 10-16.

[675] Skinner T, Hester M and Malos E, 'Methodology, Feminism and Gender Violence' in Skinner T, Hester M, and Malos E (Eds), *Researching Gender Violence: Feminist Methodology in Action* (Willan Publishing 2005) 12.

[676] Stuart Van Wormer K and Bartollas C, *Women and The Criminal Justice System* (4th Edn, Pearson 2014) 18.

[677] Stuart Van Wormer K and Bartollas C, *Women and The Criminal Justice System* (4th Edn, Pearson 2014) 7.

firmly values the importance of considering the interests of complainants and defendants, without depicting rape trials as a 'zero sum game'.[678] Understanding how cross-examination is conducted for complainants and defendants cannot be separated from criminal justice values, including the presumption of innocence, fair trial, and burden of proof. Remembering this when approaching the study, and scholarly discussions about criminal justice responses to rape, was imperative. By taking a perspective, which acknowledges the practice of cross-examination from the position of both complainants and defendants, this study generates a richer and well-rounded understanding of the cross-examination practices adopted in a sample of recent cases.

4.2 The Research Method

Good research is said to utilise methods that best answer the research question.[679] The present research objectives are best achieved with a qualitative method. Qualitative research is typically small in scale and naturalistic, whereby data is collected 'up close' and within a natural setting.[680] This can produce rich data for in-depth understanding and descriptions of the matter studied.[681] While quantitative studies traditionally test established theories, measure phenomenon and establish casual relationships,[682] qualitative studies are believed to explore phenomenon and develop existing theories.[683] Human behaviour and social processes are claimed to be

[678] This means that measures implemented during the trial that protect the interests and rights of one party, do not detract from the interests and rights of the other. Ellison L and Munro V.E, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2016) E. & P. 1, 55.

[679] Flyvbjerg B, 'Five Misunderstandings About Case-Study Research' (2006) 12 Qualitative Inquiry 219, 242, Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 12.

[680] Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage, Thousand Oaks 2007) 37; Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 5.

[681] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2003) 3-5.

[682] Denzin N.K and Lincoln Y.S, 'Introduction: Entering the Field of Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds), *Strategies of Qualitative Inquiry* (Sage, Thousand Oaks 1998) 8; Guba E.G and Lincoln Y.S, 'Competing Paradigms in Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks 1994) 112 and 109.

[683] Flick U, *An Introduction to Qualitative Research* (4th Edn, Sage Thousand Oaks 2009) 15.

subjective, dependent on culture and difficult to measure.[684] Accordingly, cross-examination appears to be a complex process with various elements impacting upon its operation. It is argued that quantification loses the subjective and contextual element of human behaviour and social processes.[685] A quantitative research method would be of limited use in examining how cross-examination is conducted for complainants and defendants. Studying rape trial cross-examinations closely and accounting for subjectivity of the process, with a qualitative method, can fulfil the current research aims.

4.2.1 An Observational Method

Observations are an established qualitative method, where researchers spend a relatively long time within a natural setting to develop an understanding of the phenomenon observed by looking and listening.[686] Depending on what is studied and the research objectives, observations can be conducted with or without participation.[687] Trial observations were conducted for this study, which fall within the 'non-participant observation' typology. This means the researcher does not engage in activities in the field, but observes events that occur within a natural setting unobtrusively.[688] The natural setting for this study is the courtroom in Crown Court where rape trials and cross-examination take place. It is argued that closely engaging with natural settings and focusing upon ordinary events improves researcher's understanding of the phenomenon, so the 'why' and 'how' research questions can be

[684] Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research*, (Sage 2006) 15.

[685] For discussion see, Westmarland N, 'The Quantitative/Qualitative Debate and Feminist Research- A Subjective View of Objectivity' (2001) 2(1) Qualitative Social Research.

[686] Lofland J and Lofland L, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Second Edition, Belmont CA: Wadsworth, 1995) 12-13.

[687] Hagan F.E, *Research Methods in Criminal Justice and Criminology* (9th edn, Pearson 2014) 188; Darlington Y and Scott D, *Qualitative Research in Practice: Stories from the Field* (OUP 2002) 77.

[688] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd edn, Sage 2008) 29; Darlington Y and Scott D, *Qualitative Research in Practice: Stories from the Field* (OUP 2002) 74-75; Atkinson P and Hammersley M, 'Ethnography and Participant Observation' in Denzin N.K and Lincoln Y.S (Eds) *Strategies of Qualitative Inquiry* (Sage 1998) 111.

considered.[689] Typically, this method is employed to explore under-researched areas.[690] Claims have been made that 'no other methodology could have given such a penetrating insight into cognitions and emotions',[691] furthering the appeal of an observational method.

4.2.2 Trial Observations: Justifications and Limitations

Trial observations have been a relatively underused qualitative method for research examining criminal justice responses to rape.[692] While this method is becoming more popular, the body of research in this field primarily relies upon interviews with legal personnel and complainants, analysis of transcripts, and mock-jury research. Rape trial observations conducted by Lees and Adler in the 1980s and 1990s, contributed significantly to early understandings of how rape trials operate.[693] More recent trial observations have also contributed to this field of research, and developed knowledge in this area.[694] However, these studies have not specifically addressed how cross-examination is conducted for complainants and defendants. Adopting trial observations for this doctoral study is a compatible method to achieve the research aims, but also addresses this methodological aperture within the existing literature.

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[689] Miles MB, Huberman AM and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd edn, Sage 2014) 73.

[690] Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage 2006) 171; Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice (*Second Edn, Sage 2003) 220.

[691] Waddington D, 'Participant Observation' in Cassell C and Symon G (Eds) *Qualitative Methods in Organizational Research: A Practical Guide* (Sage 1994) 115.

[692] Trial observations are sporadically utilised within criminal justice and criminology research, more generally. As discussed within: Hagan F.E, *Research Methods in Criminal Justice and Criminology* (9th edn, Pearson 2014) 85.

[693] Lees S, *Carnal knowledge: Rape on Trial* (Women's Press 1996); Adler Z, *Rape on Trial,* (Routledge 1987).

[694] Examples include: Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205; Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology 298; Kelly L, Temkin J and Griffiths S, *Section 41: An Evaluation of New Legislation limiting Sexual History Evidence in Rape Trials* (Home Office 2006).

Trial observations allow for immersion into the courtroom environment, where cross-examination is naturally performed. Therefore, observations are a more favourable method to investigate cross-examination in practice, than analysis of court transcripts. Analysing transcripts would lose other important factors, which contribute to how cross-examination is conducted. These observable and non-verbal factors range from participants' movements to the operation of courtroom technology. In addition, court transcripts were not feasible due to their high cost.[695] As Temkin acknowledges, criminal trials and court proceedings are recorded but are not regularly transcribed.[696] Recording devices are also strictly prohibited in court.[697]

A limitation of trial observations is that only the 'public face of justice' can be examined.[698] For the current study, the researcher only attended trials. She did not attend any pre-trial hearings, including PTPHs and GRHs, which may have taken place.[699] Within these hearings, advocates and judges would have discussed the admissibility of evidence and the modes of questioning, which were later observed during the trials. It could not be determined whether such hearings had occurred, unless referenced within the trials observed. Moreover, trial observations cannot capture pre-trial decision-making or discussions that occur privately between advocates. For this study, trial observations were essential because cross-examination occurs at this stage of criminal proceedings. Since the trial is one part of the entire courtroom proceedings in criminal cases, the researcher's understanding of each case is somewhat limited. This restricts how the data can be interpreted and limits the utility of the trial observations. For example, the reasons for late section 41 applications cannot be determined, unless stated in open court. The researcher will

[695] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 208-209.

[696] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 208-209.

[697] The Contempt of Court Act 1981.

[698] Baldwin J, 'Research on The Criminal Courts' in King, R.D and Wincup E (Eds), *Doing Research on Crime and Justice* (OUP 2000); Chan, J. 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503, 506.

[699] A Ground Rules Hearing was held on the first day of T4, and was observed by the researcher.

take these limitations into account when interpreting and discussing the research findings throughout this thesis.

It was also not possible to fully understand the reasoning and emotionality of the participants using non-participant observations.[700] For example, the reasons that barristers adopt particular cross-examination strategies, whether conscious or not, cannot be determined. However, some reasons will be known, for example to gain an acquittal. In addition, the feelings of complainants and defendants towards their experiences of cross-examination remain unknown. However, this research is primarily concerned with how cross-examination is conducted and does not attempt to understand any underlying meanings behind observed practices. Triangulating the findings with the existing empirical studies, which explore these issues, will assist in overcoming these limitations.[701]

Literature also warns that conducting observations is time consuming and places demands on researchers' energy and commitment to complete them.[702] Specifically, trial observations have been regarded as involving 'lengthy periods of unrelenting tedium' with delays and adjournments as the norm.[703] Anticipating such demands was important, and was experienced during this study. Baldwin suggests that researchers can simply 'turn up' at a Crown Court to observe and take notes.[704] Reflecting on the researcher's own experience, this view underestimates the demands faced by researchers and the careful consideration that goes into planning and conducting trial observations. There are numerous ethical issues to consider when conducting trial

[700] Darlington Y and Scott D, *Qualitative Research in Practice: Stories From the Field (2002)* (OUP 2002) 75.

[701] Mitchell D, 'Advancing Grounded Theory: Using Theoretical Frameworks within Grounded Theory Studies' (2014) 19 The Qualitative Report 1, 2 and 7.

[702] Hagan F.E, *Research Methods in Criminal Justice and Criminology* (9th edn, Pearson 2014) 185; Chan, J. 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503, 506.

[703] Baldwin J, 'Research on The Criminal Courts' in King, R.D and Wincup E (Eds), *Doing Research on Crime and Justice* (OUP, 2000) 245; Chan J, 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503.

[704] Baldwin J, 'Research on The Criminal Courts' in King, R.D and Wincup E (Eds), *Doing Research on Crime and Justice* (OUP, 2000) 237.

observations, or any other non-participatory observation. Researchers must navigate issues of informed consent, and overcoming the potential reactivity of participants to being observed, which will be discussed subsequently. These limitations should not prevent trial observations from being conducted, as the method can produce valuable research. Observations are particularly valued for overcoming the artificiality of interviews and accounting for any disparity between what people say and do.[705] Therefore, the present study may observe cross-examination practices that conflict with what legal personnel and scholars describe. The trial observations may also highlight cross-examination practices that have not been uncovered, or articulated by participants, within existing studies.[706] Trial observations can, therefore, generate a new understanding of cross-examination and modify existing theory.

4.3 Data Collection

It is important to outline how trial observations were implemented to collect the data. The data produced were field notes from eighteen rape trial observations, which include the complainants' and defendants' cross-examinations. To achieve this, the researcher did not simply turn up to Crown Court. There were important ethical, methodological, and practical factors to deliberate before beginning observations, which will now be discussed.

4.3.1 Gaining Access

Gaining access to the setting from gatekeepers is necessary for all research. As Crown Courts are open to public viewing, this process was initially underestimated. There were three gatekeepers whom the researcher approached. The researcher contacted the Crown Court seeking overarching permission to attend trials and take notes. To do so, the researcher made contact with the Listing Manager, who was very supportive and helpful throughout the data collection period. From there, overall permission from the

[705] Walker R, *Applied Qualitative Research* (Gower Publishing 1985); Hagan F.E. *Research Methods in Criminal Justice and Criminology* (9th edn, Pearson 2014) 183; Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 29.

[706] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 30.

Crown Court's Resident Recorder was granted, allowing the researcher to take notes and observe 16 to 20 rape trials.[707] The researcher also applied to the Data Access Panel (DAP) for HM Courts and Tribunals Service (HMCTS) for permission to conduct trial observations.[708] An application was sent to HMCTS seeking permission to carry out the academic research, which included an explanation of the PhD research aims and methodology. Feedback from the DAP regarding methodological issues was provided, which the researcher needed to respond to in writing before further consideration. Permission was then granted and the researcher signed a Privileged Access Agreement. Overall, this process was time consuming and resulted in data collection beginning later than planned. Finally, the researcher sought permission from the presiding judge of each trial, to observe and take notes for research purposes without any objections.[709] Judges sometimes ask observers to leave if they take notes without permission.[710] The researcher felt that being open and courteous when informing the gatekeepers of the study and seeking their permission helped establish rapport and supportive cooperation.

4.3.2 Complete Observations and Reactivity

Establishing how observations were to be conducted, and informing gatekeepers of this, was another important consideration. Decisions were made about the researcher's physical presence in the courtroom, while being mindful of the methodological and ethical impacts this may have. Unlike many social situations, observations are a natural part of the courtroom setting allowing for 'complete observations'.[711] It is argued that public settings, like courtrooms, make it easier for researchers to observe without influence.[712] Complete observations are considered to

[707] See section 4.7 for a detailed account of how this was achieved.

[708] Ministry of Justice, 'Access to Courts and Tribunals for Academic Researchers' (1 October 2014) <https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers> last accessed: 02/03/2016.

[709] For a more detailed account of how this was achieved, refer to section 4.7.

[710] Rozenberg J, 'Reporting Restrictions: When Can You Take Notes in Court?' (*BBC News*, London UK 16 February 2016) <http://www.bbc.co.uk/news/uk-35576972>last accessed: 30/03/2016.

[711] Bachman R and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice* (3rd Edn, Sage 2015) 175.

[712] Flick U, *An Introduction to Qualitative Research* (Fourth edn, Sage 2009) 224.

be non-disruptive and allow events to be observed as they naturally unfold.[713] The researcher decided to sit within the public gallery to observe, and consider this the most feasible and natural position to adopt. From here, the researcher could blend in to observe the entire courtroom without disruption. Note-taking was conducted visibly but from the public gallery, to be discrete and undisruptive. Sometimes barristers asked if the researcher wanted to sit behind them or on the press bench to take notes. These offers were politely declined to ensure consistency across all trials. The courtroom design and proceedings did not permit any active participation during trial observations. The only interaction the researcher faced was with participants during adjournments, such as seeking the presiding judge's permission before a trial began. The researcher did not approach participants, including barristers and witnesses, to ask questions. Many barristers and judges were interested in the researcher's presence in court and once this was explained they showed a genuine interest in the PhD study. Following advice, the researcher felt it was important to acknowledge participants, be courteous, and answer their questions about the study to ensure ethical and harmonious research.[714]

It is commonly acknowledged that a researcher's mere presence during complete observations can have a reactive effect.[715] Where observations are a natural and common activity within a setting, the risk of artificial and adapted behaviour of those observed is considered minimal.[716] Courtrooms are open to the public for observations, which legal personnel would be accustomed to. During this study's data collection period, students often sat in the public gallery and took notes. Members of the public and the complainants' and defendants' supporters were also present. Arguably, the serious nature and real-life consequences of criminal trials means

[713] Waddington D, 'Participant Observation' in Cassell C and Symon G (Eds) *Qualitative Methods in Organizational Research: A Practical Guide* (Sage 1994) 108.

[714] Waddington D, 'Participant Observation' in Cassell C and Symon G (Eds) *Qualitative Methods in Organizational Research: A Practical Guide* (Sage 1994) 109.

[715] Bachman R and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice* (3rd Edn, Sage 2015) 175; Darlington Y and Scott D, *Qualitative Research in Practice: Stories from the Field (2002)* (OUP 2002) 75.

[716] Bachman R and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice* (3rd Edn, Sage 2015) 175.

events would have unfolded whether the researcher was present or not. Researchers with experience of observational research have argued that participants quickly forget about the researcher's presence and fall into their natural behaviour.[717] It is possible that the participants in each trial became accustomed to the researcher as proceedings progressed.

4.3.3 Taking Field Notes

As recording court proceedings is strictly prohibited,[718] hand-written notes were taken to capture observations. Observing overtly in a public courtroom meant the researcher did not have to memorise events or excuse herself from the setting to take notes.[719] The notes were taken simultaneously with observations, using the researcher's own shorthand. Each trial was observed entirely to ensure the context of cross-examination was well understood, with notes capturing this information. Although, it is acknowledged that observing pre-trial proceedings would have improved this understanding further. Extensive contemporaneous notes were taken during the complainants and defendants' cross-examinations, with verbatim quotes captured where possible. Like Temkin *et al*'s observational study, the notes were not entirely verbatim but provided a very detailed account of what was observed in transcript form.[720] The transcripts contained spoken discourse including any interventions made by opposing counsel and judges during cross-examination. The researcher also descriptively captured, where possible, how things were said, movements and logistics, including how technology was used.

Chapters five to seven contain data extracts from the observational field notes, displayed using a particular format that requires clarification. The names of participants are anonymous, and will be represented in a format that denotes their

[717] Bachman R and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice* (3rd Edn, Sage 2015) 225.

[718] The Contempt of Court Act 1981.

[719] Bogdan R and Taylor S.J, *Introduction to Qualitative Research Methods: A Phenomenological Approach to the Social Sciences* (John Wiley and Sons 1975) 65.

[720] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 210.

position within the trial, and the trial number.[721] The exchanges during cross-examination are formatted to ensure the accuracy of the field notes is transparent, as illustrated below.

"Speech" Extracts of speech between quotation marks are verbatim quotes from observations.

[Speech] Extracts of speech between square brackets are the researcher's paraphrasing and approximation of the spoken discourse.

(*Notes*) Field notes in round brackets and italics denote the researcher's observations during the cross-examination exchanges, such as body language, tone of voice, background activities observed.

[T1C] Participant acronyms within square brackets denote where a participant's name was spoken during cross-examination and researcher has made this anonymous

… The ellipsis within the field notes denote where speech occurred but was not recorded during observations, often due to the fast pace of observations. This symbolises where questions and answers were longer than transcribed.

The researcher was aware that trial proceedings would be fast paced. Scholars have warned it is impossible to observe and capture everything when conducting courtroom observations.[722] For this study, capturing the spoken discourse during cross-examination was the priority, and where possible other observations were noted. Continual note taking was preferred over observation schedules because it was less

[721] The following abbreviations are used: 'J' for judge; 'PC' for prosecuting counsel; 'DC' for defence counsel; 'D' for defendant; 'C' for complainant; 'C2' for second complainant; and 'T1' for trial number one. For example, T1C will be equivalent to the complainant in T1.

[722] Roach Anleu S *et al*, 'Observing Judicial Work and Emotion: Using Two Researchers' (2016) 16(4) Qualitative Research 1, 2 and 6.

restrictive.[723] Observation schedules are seen as checklists, which dictate the specific matters researchers should observe.[724] For under-researched areas, it is not always known what information will be interesting for the purpose of analysis.[725] So this 'looser' design allowed as much information to be captured as possible for analysis.[726] Moreover, sitting in court with a notepad and continually taking notes was more practical. Lofland and Lofland recommend that after observing, the researcher's notes should be promptly written up into full field notes, which are a 'running log of observations'.[727] Thus, the researcher transcribed the rough field notes electronically during adjournments and at the end of each day. This process is said to require time and discipline.[728] It is estimated that for every hour observed it takes four to six hours to write up those notes.[729] Approximately, a minimum of fourteen hours was spent each day observing the trials and writing up notes. Overall, the process was demanding, laborious but satisfying, given the nature of the new findings.

4.4 Sampling Strategy

Sampling strategies and decisions are important for any research. Miles and Huberman outline six criteria for sampling that 'good research' will fulfil.[730] The six

[723] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook* (3rd Edn, Sage 2014) 37.

[724] Denscombe M, *The Good Research Guide: For Small Scale Research Projects* (Fifth edn, Open University Press 2014) 207-209.

[725] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd Edn, Sage 2014) 19.

[726] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd Edn, Sage 2014) 19.

[727] Lofland J and Lofland L, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Second Edition, Wadsworth, 1995) 64.

[728] Lofland J and Lofland L, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Second Edition, Wadsworth, 1995) 64.

[729] Bogdan R and Taylor S.J, *Introduction to Qualitative Research Methods: A Phenomenological Approach to the Social Sciences* (John Wiley and Sons 1975) 61; Darlington Y and Scott D, *Qualitative Research in Practice: Stories from the Field* (OUP 2002) 79.

[730] Miles M and Huberman A, *Qualitative Data Analysis* (Sage London 1994) 34; Curtis S *et al*, 'Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health' (2000) 50 Social Science and Medicine 1001, 1003.

criteria are that the sampling approach is: feasible, ethical, relevant to the research question, generates rich information, produces believable descriptions, and enhances generalizability.[731] The sampling approach for this study faced external restrictions, which will be explained below, however efforts were made to follow the six criteria.

4.4.1 Selecting the Setting

The Crown Court selected for this observational study will remain anonymous, to protect the identity of those involved in the cases observed. Assurances were provided to the Ministry of Justice that no data that could lead to the identification of any persons or the Crown Court would be recorded. As a self-funded PhD student, under time and resource constraints, geographical factors influenced the choice of setting. Resource availability is considered an important consideration to ensure sampling and data collection is feasible.[732] The setting location ensured ample time could be spent writing up field notes thoroughly at the end of each day. Approximately fourteen hours would be spent each day observing and writing up notes, meaning the process was time consuming. Therefore, the setting was primarily sampled using convenience sampling.

The Crown Court was selected with some purposiveness as it was situated within a relatively large city that hears an ample number of sexual offence cases. Investigations were made into the frequency in which the Crown Court listed rape trials. The Ministry of Justice was contacted to obtain court statistics for each Crown Court by offence type. The researcher was informed that the available material would include Crown Court data broken down by offence type at a sub-national level. A copy of the data, which ranged between 2010 and 2014, was provided.[733] This

[731] Miles M and Huberman A, *Qualitative Data Analysis* (Sage London 1994) 34; Curtis S *et al*, 'Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health' (2000) 50 Social Science and Medicine 1001, 1003.

[732] Ritchie J and Lewis J, Qualitative Research Practice- A Guide For Social Science Students and Researchers (Sage 2003) at 89; Miles M and Huberman A, *Qualitative Data Analysis* (Sage London 1994) 34.

[733] Ministry of Justice, Courts by Criminal Justice Area <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428957/courts-by-criminal-justice-area.zip> last accessed: 05 July 2019.

demonstrated that an average of 23 rape trials were listed each year at the Crown Courts in the relevant criminal justice area.[734] In addition, during conversations with the Listing Manager at the relevant Crown Court, assurances were provided that the researcher would be able to observe the number of trials required, and observe a range of judges and advocates, during the data collection period. Moreover, in 2015-2016, the national conviction rate for all rape trials was 57.9%.[735] The regional and force area trial conviction rates, in which the Crown Court is situated, were similar at 63.4% and 58.1% respectively.[736] This suggests some potential, albeit limited, typicality in the Crown Court at the time of data collection.

When planning this study, the researcher had intended to observe trials across three Crown Courts within different circuits. It was anticipated that six trials would be observed in each setting. When data collection began in the first location, some judges and barristers featured in multiple trials. A possible explanation for this is that a limited number of judges in the Crown Court and prosecution barristers in local chambers had 'sex tickets'.[737] In addition, a limited number of local chambers practised criminal law, further reducing the number of potential trial advocates. The researcher decided that staying longer in this setting would increase the probability of

[734] These rape trials were exclusively for rape of a female or male aged sixteen or over.

[735] HMIC, Rape Monitoring Group Digests (2017) <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 03 June 2018.

[736] HMIC, Rape Monitoring Group Digests (2017) <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 03 June 2018.

[737] All prosecuting advocates must be accredited and registered on the CPS Rape and Serious Sexual Offence (RASSO) panel to undertake rape cases. The CPS also has embedded specialist prosecutors within RASSO units. Within the trials sampled, only two CPS specialist prosecutors were observed and the remaining prosecutors were from external chambers. Judges must be ticketed in order to preside over sexual offence trials. For this, judges must complete the Judicial College's Serious Sexual Offence Seminar once every three years. CPS, *Response to HMCPSI Thematic Review of RASSO Units* (February 2016) para 41 and 42 <https://www.cps.gov.uk/sites/default/files/documents/publications/response_to_hmcpsi_thematic_review_of_rasso_units_2016.pdf> accessed 29 July 2019; HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 62; Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473.

observing other 'sex ticketed' advocates and judges. In reality, the sample of judges and advocates observed was somewhat limited. The challenges and limitations of this will be discussed within section 4.4.3. Moreover, the issue disputed in the first four trials was penetration. Therefore, spending a longer period of time within this setting increased the diversity of the cases observed, with regard to the issues disputed, the case narratives and evidence presented.

There are clear limitations with observing rape trials at one single Crown Court. Primarily, the research findings cannot, and will not, be used to suggest they are generalizable to all Crown Courts and legal personnel. The findings cannot be said to represent typical examples of cross-examination practices. Selecting multiple sites would have generated a wider potential sample of judges and advocates, from different circuits and chambers, for observation. This approach would have improved the generalizability of the findings, when compared to a single setting. However, conducting observations from only three settings would not have been representative of all Crown Courts in England and Wales. Moreover, meaningful comparisons could not be made where only six trials are observed from each setting.

Different Crown Courts may have specific 'court cultures'.[738] Variance may occur across a number of practices, from listing and expediting cases to case management. Judges may adhere to particular practices, as advocated by their Resident Recorder. For instance, within the Crown Court selected, judges set the timetable at the PTPH and sexual offence cases will always be listed as 'fixtures' due to the nature of these cases.[739] This means that they should always start on the date fixed. Further, support provisions for witnesses may also differ across court centres. A Witness Service was embedded within the Crown Court selected; along with external victim and witness

[738] Kirby A, Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts - A Question of Court Culture (2017) Criminal Law Review 949; Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 43 citing Hucklesby A, 'Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' (1997) 36(2) The Howard Journal of Criminal Justice 129.

[739] The Crown Court Listing Manager provided this information in in personal correspondence with the researcher on 02 August 2019. The researcher sent a request to the Crown Court Listing Manager for further information about the listing practices for adult rape trials in 2016-2017.

care services and a Sexual Assault Referral Centre, which operated within the force area. Variation may also occur in the demography of legal personnel, complainants, defendants and jurors across different Crown Courts.[740] Nonetheless, the 'local variation' across court settings would have also made selecting a representative Crown Court difficult.[741] Selecting a single site allowed for greater immersion within the setting. An in-depth understanding and snapshot of how cross-examination is being conducted, within the Crown Court at the time of data collection, was gained. This snapshot can highlight important issues and areas of potential significance. Since no efforts are made within this thesis to generalise or suggest the findings are typical examples of cross-examination practices, a single setting could be adopted and did not need to be representative of all Crown Courts in England and Wales.

4.4.2 Sampling the Trials

Non-probability sampling is typical of qualitative research, and most compatible with explorative research aiming to produce in-depth understanding about phenomena.[742] This research does not attempt to make generalisations to the wider population of rape trials. As such, a large representative sample generated from probability sampling methods was unnecessary.[743] Furthermore, the entire population of rape trials and their characteristics were unknown, rendering a representative probability sample

[740] The ONS census in 2011 reported the population of the Crown Court city was between 400,000 to 500,000 people. At this time, the majority of residents identified as white (84%), followed by black (6%) and asian (6%). The population size and demography of the city will affect the jury composition of the trials observed in 2016 and 2017. These figures will nevertheless have varied since 2011, and do not include other areas that form the jury service catchment area for the Crown Court observed. ONS census, *Ethnic Group, Local Authorities in England and Wales* (2011) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/2011censuskeystatisticsforenglandandwales/2012-12-11>

[741] Mason T *et al*, *Local Variation in Sentencing in England and Wales* (Ministry of Justice, 2007)

[742] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 105; Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 16.

[743] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 16.

unworkable.[744] Trial listings for the Crown Court setting did change, making random sampling unfeasible. Primarily, the trials were chosen based upon the availability of cases. The researcher observed a trial and would then observe the next available trial. Relevant trials for the study were not listed each week during the nine-month data collection period. Often only one relevant trial was listed on a particular week. On the rare occasion where multiple trials were listed, the researcher chose the trial listed for lowest number of days to ensure the next trial listed could be observed. The trials observed were a significant proportion of the total relevant trials listed within the data collection period. To some extent, the trials were also sampled purposively, as each trial needed to include at least one count of rape of a person sixteen years and above. Filtering any more factors from potential observable trials would have been unworkable. Focusing on rape trials with this age restriction addresses particular gaps in the literature, namely how adults are being cross-examined in rape trials, which would contextually, legally, and procedurally differ from child cases. This also avoided further ethical considerations when observing child cases.

The researcher had the invaluable support of the Crown Court Listing Manager before and during the observation process. Emails were sent to him at the end of each week to check the trials were still going ahead the following week. Also, each month the Listing Manager provided an overview of when relevant trials were listed for that month. Very little information was known about each case before entering the courtroom. The Listing Manager only provided the trial start date, estimated trial length, and the courtroom number ahead of each trial. Access restrictions on trial information was not considered a significant limitation for this study. It is argued that variation in data often occurs naturally, which makes for interesting analysis.[745] Each trial observed was unique, differing in context and characteristics. Having variation

[744] This is typical of qualitative research, as discussed within Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (Second Edn, Sage 2003) 105.

[745] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 154.

and diversity across a sample reportedly enables conceptual development of the data during analysis.[746]

Studying small samples in-depth can provide rich data to answer explorative research questions.[747] The PhD supervisory team advised that a minimum of fifteen trials would provide enough data for the study. As with many qualitative studies, the data collection process was guided by time and resource constraints.[748] It was anticipated between fifteen and twenty rape trials could be observed within the time available.[749] The researcher decided that observing between fifteen and eighteen trials would provide plenty of rich data, which was manageable and able to generate an insight into how cross-examination is operating. During the initial stages of data collection, it was realised that reaching the required number of trials would take a significant amount of time. The frequent short breaks between trials were gratefully received due to the sensitive nature of the observations.

Theoretical saturation often guides qualitative sampling.[750] Meeting the saturation point is regarded a personal decision for researchers because complete saturation can never be achieved and sampling can always continue.[751] The access restrictions on trial information for this study prevented purposive sampling to explore gaps in analytic ideas. Instead, the researcher continued to select trials to observe until there was enough data for analysis to provide a rich description and in-depth understanding

[746] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 154; Small M.L, '"How Many Cases Do I need?" On Science and The Logic of Case Selection in Field-Based Research' (2009) 10 Ethnography 5, 17.

[747] Curtis S *et al*, 'Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health' (2000) 50 Social Science and Medicine 1001, 1002.

[748] Waddington D, 'Participant Observation' in Cassell C and Symon G (Eds) *Qualitative Methods in Organizational Research: A Practical Guide* (Sage 1994) 111.

[749] The research was also granted a 'privileged access agreement' to conduct observations in the Crown Court until 28th February 2017.

[750] Theoretical satutration occurs where analytic themes are well developed, as explained within: Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 113.

[751] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd edn, Sage 2008) 149.

of the cross-examinations observed, under the resource constraints. It was not possible to sample trials with certain features that would diversify the data set, for example trials with male complainants were not listed during the data collection period.

4.4.3 The Study's Sample

The researcher observed eighteen rape trials over a nine-month period in 2016 and 2017 at one Crown Court. As previously discussed, pre-trial hearings were not observed, which limits the researcher from obtaining a full understanding of each case and restricts how the data can be interpreted. The indictment for each trial featured at least one count of rape of a person over sixteen, with many trials featuring other counts. The sample includes some trials with multiple complainants but there were no multiple defendant trials observed or listed.[752] Two trials were not observed in full due to the jury being discharged. Of these incomplete trials, the re-trial of one was observed.[753] The jury were discharged in T15 before the defendant could be cross-examined. All sixteen remaining defendants chose to give evidence and were cross-examined. It could not be known whether all defendants would give evidence in advance. The trial characteristics, including demographics and type of relationship between each complainant and defendant, can be found within appendices one to four. These characteristics may create some bias in the sample, but could also reflect a pattern in cases that are reported and prosecuted in the Crown Court selected.[754]

Within the sample of cases, a number of advocates and judges were observed on multiple occasions. Eleven circuit judges and recorders presided over the eighteen trials. Furthermore, three judges presided over ten of the trials, which is a significant proportion of the cases sampled. Across the entire sample of trials, a total of twenty-

[752] Some complainants, who did not meet the offence type requirements for this PhD study, were excluded from analysis.

[753] It is important to note that T13 is a re-trial of T12. Although this means the complainants and defendants are the same, observing a re-trial adds diversity to the sample. The trials and the cross-examinations featured similarities and differences. The examination of the trials within this thesis will discuss T12 and T13 together, unless stated otherwise.

[754] Between 2016-2017, only 11% of all reported offences of rape were against males. HMIC, Rape Monitoring Group digests (2017) <https://www.justiceinspectorates.gov.uk/hmicfrs/our-work/article/rape-monitoring-group-digests/#publications> accessed: 03 June 2018.

four advocates were observed.[755] Seven of these advocates appeared in more than one trial. Twelve advocates exclusively prosecuted and twelve advocates exclusively defended in the eighteen cases sampled. Two advocates were observed as prosecuting and defending. While a range of judges and barristers were observed, the diversity in the sample is somewhat limited. This undermines the utility of the sample when interpreting the research findings. Advocates and judges may conduct themselves in a particular style and manner throughout the trials and during cross-examination. This may produce some similarities in the data collected and skew the research findings. As such, broad and statistical generalisations cannot be made from the observations. Since this study aimed to provide some insight into how cross-examination is conducted and experienced, the trials sampled did not need to be demographically representative of all judges, barristers, complainants, and defendants. Despite the limitations of this study's sampling strategy, the trials selected provided enough diverse and rich data to achieve the research aims.

4.5 Data Analysis

The data produced was the researcher's typed field notes comprising of transcriptions of cross-examination talk and observed practices. Meaning must be given to the data, which is the act of qualitative data analysis.[756] Qualitative analysis has been summarised as the preparation, reduction, and representation of data.[757] Data reduction is sometimes called 'condensation' to illustrate nothing is lost from data; instead data becomes more focused to elicit meanings and conclusions.[758] For Ritchie and Lewis, analysis involves defining, categorising, theorising, explaining, exploring

[755] This figure would increase to twenty-five when including the junior barrister appearing in T1. The junior barrister was present to assist T1DC QC, and did not examine or cross-examine any witnesses during the trial.

[756] As discussion within, Hilal AYH and Alabri SS, 'Using NVivo for Data Analysis in Qualitative Research' (2013) 2(2) International Interdisciplinary Journal of Education 181, 181; Corbin J and Strauss A, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory, (3rd edn, Sage 2008) 64.

[757] Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Thousand Oaks 2007) 148.

[758] Miles MB, Huberman AM and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd edn, Sage 2014) 12.

and mapping the data.[759] There are different approaches to analysis, which vary in their aims.[760]

4.5.1 Thematic Analysis: An Inductive and Semantic Approach

Qualitative analysis commonly involves looking for and developing themes.[761] Themes are denoted as patterns within the data.[762] Interchangeably termed 'categories' or 'codes', themes are defined as attributes or classifications that link common incidents within data.[763] Braun and Clarke's thematic analysis (TA) method was utilised for this research.[764] This is an established method for finding, developing and reporting themes, and was selected for the clear manageable procedures and theoretical flexibility.[765] As this study sought to provide a detailed understanding and description of current cross-examination practices, TA was suitable for this lower level approach.[766] There is recognised overlap between TA and other established analytic method, such as grounded theory. The 'general inductive approach' advanced by Thomas,[767] also seems affiliated with TA. Miles and Huberman explain qualitative methodological approaches blur, making it possible for researchers to operate across

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[759] Ritchie J and Spencer L, 'Qualitative Data Analysis for Applied Policy Research' in Bryman A and Burgess RG (Eds) *Analyzing Qualitative Data* (Routledge, 1994) 176.

[760] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 50 and 53-54.

[761] Gery R.W and Russell B.H, 'Techniques for Identifying Themes' (2003) 15(1) Field Methods 86, 85-86; Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 83.

[762] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 82.

[763] Gery R.W and Russell B.H, 'Techniques for Identifying Themes' (2003) 15(1) Field Methods 86, 87; Vaismoradi M *et al*, 'Theme Development in Qualitative Content Analysis and Thematic Analysis' (2016) 6(5) Journal of Nursing Education and Practice 100, 101.

[764] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77.

[765] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 82 and 85.

[766] Vaismorad M *et al*, 'Theme Development in Qualitative Content Analysis and Thematic Analysis' (2016) 6(5) Journal of Nursing Education and Practice 100, 101.

[767] Thomas D.R, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2006) 27(2) American Journal of Evaluation 237, 239.

approaches.[768] Thus, while TA was the primary method, the literature on grounded theory and the general inductive approach has helped inform the analytic procedures chosen. This reflects the pragmatism of socio-legal research, which draws upon disciplines from the social sciences to guide its methods.[769]

This study took a largely inductive approach towards thematic analysis. Inductivity is explained as a 'bottom up' approach,[770] and is considered suitable for exploratory research examining new areas.[771] For this study, the themes came from the data without trying to fit within a pre-existing coding frame.[772] Braun and Clarke explain that analysis is not conducted in a vacuum.[773] Researchers bring their theoretical positions to the process.[774] Therefore, analysis will have some deductive influence.[775] Hence, Srivastava warns against suggesting themes 'emerge' from the data themselves.[776] Literature reviews and the interests of researchers are believed to guide theme development.[777] Existing knowledge and experience is also considered

[768] Miles MB, Huberman AM and Saldana J, *Qualitative data analysis: a methods sourcebook,* (3rd edn, Sage 2014) 9.

[769] Banakar R and Travers M, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 5.

[770] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 85.

[771] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn Sage 2003) 220.

[772] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 85; Srivastava P and Hopwood N, 'A Practical Iterative Framework for Qualitative Data Analysis' ' (2009) 8(1) International Journal of Qualitative Methods 76, 77; Thomas DR, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2006) 27(2) American Journal of Evaluation 237, 238; Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Thousand Oaks 2007) 38.

[773] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 88.

[774] Srivastava P and Hopwood N, 'A Practical Iterative Framework for Qualitative Data Analysis' ' (2009) 8(1) International Journal of Qualitative Methods 76, 77.

[775] A deductive approach is described as 'top down', where hypotheses and existing theories are tested. Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 85.

[776] Srivastava P and Hopwood N, 'A Practical Iterative Framework for Qualitative Data Analysis' ' (2009) 8(1) International Journal of Qualitative Methods 76, 77.

[777] Gery RW and Russell BH, 'Techniques for Identifying Themes' (2003) 15(1) Field Methods 86, 88.

useful for getting inductive analysis 'off the ground' by providing ideas of what to look for in the data, in terms of concepts and properties.[778] As such, analysis for this study had some deductive influence. For instance, knowledge of existing literature was necessary to fulfil the PhD course requirements meaning analysis could not be purely inductive. As this study explores an under-researched area, allowing themes to develop from the data itself was most appropriate. The emerging themes and findings can then be compared to the existing theories around rape trials. By developing themes found across the entire data, rich understanding and description of the contemporary cross-examination practices observed can be produced.[779]

In addition, TA was conducted at the 'semantic level', meaning 'themes are identified within the explicit or surface meanings of the data'.[780] Congruent with Temkin's approach to trial observations, this research aims to provide an explanation of the observed cross-examination practices.[781] The study does not look beyond what was observed to examine the underlying concepts or identify hidden meanings in the data, which a 'latent level' TA would provide.[782] This choice to conduct TA semantically appears to align with the critical realist perspective taken towards the research.

Qualitative analysis inevitably involves interpretation.[783] When interpreting the data, Strauss and Corbin caution against 'standard thinking' whereby the data is taken at face value.[784] Therefore, it was important to step back from the data and consider

[778] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, SAGE, London 2008) 75 and 76.

[779] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 87.

[780] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 89.

[781] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 210.

[782] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 89.

[783] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd edn, Sage 2008) 1, 48-49.

[784] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd edn, Sage 2008) 67.

other possible interpretations during analysis. Although having multiple analysts is thought to generate varied and judicious interpretations,[785] sole ownership is believed to produce deeper insight and awareness of what the data is revealing.[786] For this PhD research, sole ownership was required throughout. Interpretations of the data were checked with the PhD supervisory team and a non-practising barrister. However, the analysis and interpretations belong to the researcher.

4.5.2 The Process of Thematic Analysis

The analytical procedures adopted for this study's TA will now be outlined. Some steps followed were similar to, and informed by, other approaches to qualitative analysis. To begin, the transcribed field notes were read thoroughly and broken up into manageable sections.[787] This familiarisation process stimulates immersion into data for deeper sense making.[788] Reading the cross-examination of eighteen trials was a laborious task but was useful for refreshing memory and identifying some initial patterns in the data. These initial broad ideas were jotted down in rough board-blast format, which helps prepare for formal coding.[789] Coding is central to qualitative analysis, including TA.[790] Coding is described as an act of raising raw data to a

[785] Roach A.S *et al*, 'Observing Judicial Work and Emotion: Using Two Researchers' (2016) 16(4) Qualitative Research 1.

[786] Bogdan R and Taylor S.J, *Introduction to Qualitative Research Methods: A Phenomenological Approach to the Social Sciences* (John Wiley and Sons 1975) 86.

[787] As advised within, Thomas DR, 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2006) American Journal of Evaluation 237, 241.

[788] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 92; Vaismoradi M *et al*, 'Theme Development in Qualitative Content Analysis and Thematic Analysis' (2016) 6(5) Journal of Nursing Education and Practice 100, 103; Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Thousand Oaks 2007) 150.

[789] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 93.

[790] Bachman, R., and Schutt, R.K. *The Practice of Research in Criminology and Criminal Justice* (Second Edn, Sage 2003) 245; Thomas D.R 'A General Inductive Approach for Analyzing Qualitative Evaluation Data' (2006) American Journal of Evaluation 237, 239; Mitchell D, 'Advancing Grounded Theory: Using Theoretical Frameworks within Grounded Theory Studies' (2014) 19 The Qualitative Report 1, 3; Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008).

conceptual level, by attaching a word or phrase to a data segment that aptly describes its essence and meaning.[791] To summarise, this means asking 'what is this piece of data telling me?' and then attaching a label (a code) that captures the answer.[792] Braun and Clarke explain codes 'identify a feature of the data that appears interesting to the analyst'.[793] Reviewing these codes then helps to develop themes. A theme, according to Clarke and Braun, is 'a coherent and meaningful pattern in the data relevant to the research question', which have been developed from lower-level codes.[794]

Following TA procedures, the researcher went through the data thoroughly to assign codes identifying the elements and essence of data segments, which may form themes.[795] The codes assigned varied in form since they can be words or phrases within the data, composed by the researcher, or names established within literature that help describe the data.[796] Instead of coding specific phrases of interest within the cross-examinations, the researcher coded question and answer segments, as this ensures context is obtained.[797] This initial stage provided a large amount of codes and ideas that needed to be refined to create broader themes.

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[791] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd edn, Sage 2014) 71; Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 66 and 160.

[792] Creswell J.W, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Thousand Oaks 2007) 148.

[793] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 94.

[794] Clarke V and Braun V, 'Teaching Thematic Analysis: Overcoming Challenges and Developing Strategies for Effective Learning' (2013) 26(2) The Psychologist 120, 122; Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 94.

[795] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 94.

[796] Creswell JW. *Qualitative inquiry and research design: choosing among five approaches* (Sage Publications. Thousand Oaks, CA. 2007) 153; Miles MB, Huberman AM and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook* (3rd edn, Sage 2014) 73 to 81; Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 82.

[797] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 95.

T2DC: When he asked you had you ever had sex before did that strike you as very odd? **T2C:** Yeah **T2DC:** An odd thing to say **T2C:** Yeah **T2DC:** Did it raise any alarm bells?	Alarm Bells
T2C: Yeah **T2DC:** But you didn't go to your mother or sister and tell them? **T2C:** No	Didn't tell family She would have complained
T2DC: Because it simply didn't happen did it? **T2C:** Yeah it did. I NEED TO STOP give me five minutes I NEED TO STOP	Accusation of lying Wanting to stop

Next, the codes needed sorting into potential themes by considering how different codes combine together.[798] Braun and Clarke explain that some codes may develop into sub-themes or themes at this stage.[799] There are certain analytic tools that were deployed to identify themes, which were also useful when generating the initial codes. Gery advises looking out for repetitions, typologies, similarities and differences, metaphors, transitions, linguistic connectors, and potentially things missing within the data.[800] Additionally, the researcher also asked questions of the data, made comparisons between codes and also looked for conflicts between codes, as grounded theorists suggest.[801] This helped to establish the properties of the codes and how they relate to overarching themes.

[798] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 95.

[799] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 96.

[800] Gery RW and Russell B.H, 'Techniques for Identifying Themes' (2003) 15(1) Field Methods 86, 89-93.

[801] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 65 to 85.

T2DC: When he asked you had you ever had sex before did that strike you as very odd? **T2C:** Yeah **T2DC:** An odd thing to say **T2C:** Yeah **T2DC:** Did it raise any alarm bells?	**Expectations of behaviour (Theme 2)** Anticipate and prevent rape (subtheme) Alarm bells
T2C: Yeah **T2DC:** But you didn't go to your mother or sister and tell them?	**Expectations of behaviour (Theme 2)** Delayed Reporting: Disclosure
T2C: No **T2DC:** Because it simply didn't happen did it?	Putting Defence Case
T2C: Yeah it did. I NEED TO STOP give me five minutes I NEED TO STOP	**Welfare Protections (Theme 1)** Resistance to cross-examination

Subsequently, TA requires themes to be reviewed. This involved checking each theme was coherent and 'tells a convincing story'.[802] This also ensures the data was applied consistently to each code, sub-theme and theme.[803] Analysis was time-consuming and taxing, so sometimes stepping away from analysis was necessary to refresh the researcher's focus. This distancing and then re-immersion is believed to stimulate critical thinking towards analysis for well-developed themes.[804] Using computer software programmes is often advised, as it helps with storing, navigating and managing the data, codes and themes.[805] For these reasons, the software NVivo was

[802] Clarke V and Braun V, 'Teaching Thematic Analysis: Overcoming Challenges and Developing Strategies for Effective Learning' (2013) 26(2) The Psychologist 120, 122.

[803] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77, 96.

[804] Vasimoradi M *et al*, 'Theme Development in Qualitative Content Analysis and Thematic Analysis' (2016) 6(5) Journal of Nursing Education and Practice 100, 106.

[805] Miles MB, Huberman AM and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd edn, SAGE, 2014) 46; Hilal A.Y.H and Alabri S.S, 'Using NVivo for Data Analysis in Qualitative Research' (2013) 2(2) International Interdisciplinary Journal of Education 181, 181-2.

utilised during analysis. Across the following chapters, the developed themes will be discussed and evidenced, to generate understanding of how cross-examination was conducted in the rape trials observed.

4.6 Research Quality and Limitations

The current research strategy has been outlined, and some clear methodological limitations have emerged. Questions regarding the study's objectivity, validity, reliability and generalizability are anticipated and will be addressed. These criteria are well-established standards for assessing quantitative methods and positivist research.[806] The compatibility of these standards for assessing qualitative research is contested.[807] Guba and Lincoln advanced credibility, transferability, dependability, and conformability as more appropriate standards for qualitative research.[808] Others use similar terms, such as rigor and reflexivity.[809] It is acknowledged that there is little consensus on how qualitative research meets these criteria.[810] Perhaps this appropriately reflects the fluidity of qualitative research. What is clear is the traditional criteria are incompatible with the current research aims and strategy, yet it retains good quality and contributes valuable insight.

4.6.1 Subjectivity and Bias

Potential bias in sampling, capturing observations, and interpreting the data are issues this study must address. Firstly, the court and trials selected could create some bias. The researcher has been explicit about how notions of availability and convenience

[806] Guba E.G and Lincoln Y.S, 'Competing Paradigms in Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks 1994) 114.

[807] Chan J, 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503, 504; Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook* (3rd edn, Sage 2014) 311.

[808] Guba E.G and Lincoln Y.S, 'Competing Paradigms in Qualitative Research' in Denzin N.K and Lincoln Y.S (Eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks 1994) 114.

[809] Chan J, 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503, 504.

[810] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide For Social Science Students and Researchers* (Sage 2003) 263.

influenced the sampling method, and has justified the sampling strategy.[811] Secondly, there was potential for observations to be recorded selectively. The risk of this was low because the researcher took continual contemporaneous notes during cross-examinations to form a transcript. Official court transcripts would have ensured complete accuracy of spoken discourse, and observations schedules may have enhanced consistency in recording observations. As already discussed, both options were considered unfeasible and inappropriate for this study.[812] Thirdly, the objectivity of analytic interpretations may be questioned. This concern is not unique to this study, and applies to all research methods generally.[813] It is argued no research is value neutral and research topics are chosen out of our own academic interests.[814] For the current study, maintaining broad-mindedness during analysis was important. The researcher accepts that other people may interpret the findings differently.[815] The study does not claim to be objective. It was important for the researcher to acknowledge her potential biases, and therefore reflectively logged her feelings towards observations during data collection. Scholars suggest this enables critical reflection during analysis and ensures interpretations are considered from multiple perspectives. [816] Although intuition is valuable during analysis, checking interpretations and not ruling out puzzling findings is advised. [817] The researcher's

[811] See section 4.4.

[812] See section 4.2.2 and 4.3.3.

[813] Flyvbjerg B, 'Five Misunderstandings About Case Study Research' (2006) 12 Qualitative Inquiry 219, 220 and 235; Westmarland N, 'The Quantitative/Qualitative Debate and Feminist Research: A Subjective View of Objectivity' (2001) 2 Qualitative Social Research 1, 3.

[814] Westmarland N, 'The Quantitative/Qualitative Debate and Feminist Research: A Subjective View of Objectivity' (2001) 2 Qualitative Social Research 1, 3 and 9; Oakley A, 'Gender, Methodology and People's Ways of Knowing: Some Problems with Feminism and the Paradigm Debate in Social Science (1998) 32 Sociology 707, 715-716.

[815] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd Edn, SAGE 2008) 49.

[816] Bogdan R and Taylor S.J, *Introduction to Qualitative Research Methods: A Phenomenological Approach to the Social Sciences* (John Wiley and Sons 1975) 67-68; Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd Edn, Sage 2008) 80.

[817] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook* (3rd edn, Sage 2014) 278-279.

familiarity with the laws of evidence and conducting checks with the supervisory team helped ensure interpretations made good sense and were legally grounded.[818]

4.6.2 Reliability and Validity

Together, reliability[819] and validity[820] stress the importance of reducing error and ensuring accuracy so generalisations can be formulated.[821] These traditional concepts cannot apply to the present study.[822] Regarding reliability, the multiple contextual factors involved in each trial make replicating the study and its results problematic. Another researcher could adopt the same methodology, but would observe different cases, which could produce different results. The positivist notion of validity is also incompatible, as this study is not seeking to 'measure' but understand cross-examination practices in rape trials.[823] However, observational studies are claimed to have 'high internal validity', as data is collected from intense observations in a natural setting that reflect reality.[824] For qualitative studies, criteria of dependability, credibility, and trustworthiness are considered appropriate alternatives to measuring validity and reliability.[825] Being thorough and transparent about the research process

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[818] Darlington Y and Scott D, *Qualitative Research In Practice: Stories From The Field,* (OUP 2002) 76.

[819] Reliability concerns the replicability of the study and whether the same results can be produced through replication. LeCompte M.D and Goetz J.P, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) Review of Educational Research 31, 35.

[820] Validity relates to whether the research methods are measuring what it claims to measure and the results produced are a reflection of the phenomenon studied. LeCompte M.D and Goetz J.P, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) Review of Educational Research 31, 43.

[821] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide For Social Science Students and Researchers* (Sage 2003) 273.

[822] As explained within: LeCompte M.D and Goetz J.P, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) Review of Educational Research 31.

[823] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 16 and 22.

[824] LeCompte M.D and Goetz J.P, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) Review of Educational Research 31, 43

[825] For discussion see: Chan J, 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503, 504.

is thought to achieve this.[826] By providing detailed descriptions about how the research was conducted and evidencing findings with data extracts, readers can assess the researcher's interpretations and whether the findings are transferable to other contexts.[827]

Triangulation, meaning the combination of several methods or use of mixed methods, is thought to improve the 'internal reliability' of qualitative research.[828] Findings are deemed to be more credibility when other methods can support them, provide alternative perspectives or highlight errors in interpretations.[829] However, triangulation can often leave researchers with a contradicting muddle of data and interpretations.[830] Resource constraints meant using mixed-methods was not feasible for this study, meaning other methods of achieving validity were sought. Mitchell argues data can be triangulated with existing literature,[831] and was the approach was taken for this thesis. This type of triangulation stimulates analysis and allows comparisons to be made.[832] It also addresses the shortcomings of trial observations.

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[826] LeCompte M.D and Goetz J.P, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) Review of Educational Research 31.

[827] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook* (3rd Edn, Sage 2014) 311-312; Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 18; Ritchie J and Lewis J, *Qualitative Research Practice: A Guide For Social Science Students and Researchers* (Sage 2003) 268.

[828] Flick U, *An Introduction to Qualitative Research* (4th Edn, Sage Thousand Oaks 2009) 26-27; Travers M, Putt J and Howard-Wagner D, 'Special Issue on Ethnography Crime and Criminal Justice' (2013) 25 Current Issues Criminal Justice 463, 466.

[829] Thomas J, *Doing Critical Ethnography* (Sage 1993) 39; Miles M.B, Huberman A.M and Saldana J, *Qualitative data analysis: a methods sourcebook,* (3rd edn, Sage 2014) 299-300; Denzin N.K and Lincoln Y.S, 'Introduction: Entering the Field of Qualitative Research' in Denzin N.K and Lincoln Y.S (eds) *Strategies of Qualitative Inquiry* (Sage 1998) 4.

[830] Oakley A, 'Gender, Methodology and People's Ways of Knowing: Some Problems with Feminism and the Paradigm Debate in Social Science (1998) 32 Sociology 707, 715; Chan J, 'Ethnography as Practice: Is Validity an Issue?' (2013) 25 Current Issues Criminal Justice 503, 513.

[831] Mitchell Jr D, 'Advancing Grounded Theory: Using Theoretical Frameworks within Grounded Theory Studies' (2014) 19 The Qualitative Report 1, 2.

[832] Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, (3rd Edn, SAGE 2008) 37.

For example, interviews with legal personnel could assist in understanding why certain practices observed were adopted.

4.6.3 Generalizability and Representativeness

Generalizability is traditionally understood as the extrapolation of findings to the wider population, which requires a representative sample.[833] This study does not make broad generalisations about all cross-examination practices. To do so, a representative sample would be required, which was not feasible or necessary for this research. Strong claims of generalizability are rarely made in qualitative research, and this study follows accordingly. [834] Instead, qualitative research prioritises the 'transferability' of findings. The literature outlines various approaches for qualitative research to overcome criticisms of generalizability. Firstly, some argue qualitative studies can generate hypotheses,[835] which are logically justified but require further testing.[836] Accumulating knowledge with this approach arguably strengthens the transferability of findings. Arguably, this approach portrays qualitative research as a pilot for further quantitative research. Westmarland explains that quantitative studies establish the overall distribution of phenomenon to provide foundations for qualitative studies to answer the 'why' and 'how' questions through in-depth examination.[837] However, the present study does not overcome generalizability in this way, but questions may arise from findings that further research could explore.

[833] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide For Social Science Students and Researchers* (Sage 2003) 269.

[834] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 22.

[835] In the form of 'when X occurs, whether Y follows depends on Z', as explained within Small M.L, '"How Many Cases Do I Need?" on Science and The Logic of Case Selection in Field-Based Research' (2009) 10 Ethnography 5, 23.

[836] Small M.L, '"How Many Cases Do I Need?" On Science and The Logic of Case Selection in Field-Based Research' (2009) 10 Ethnography 5, 23.

[837] Westmarland N, 'The Quantitative/Qualitative Debate and Feminist Research: A Subjective View of Objectivity' (2001) 2 Qualitative Social Research 1, 7 and 9.

Another approach to overcoming generalizability is case-to-case transferability.[838] This occurs when readers have enough detailed information about the matter studied to assess its applicability to other situations or settings.[839] As this thesis aims to be as detailed as possible, readers could make transferability assessments. Finally, many qualitative studies, including this study, aim to make analytic generalisations.[840] This is where findings are applied to wider theory, as opposed to wider populations.[841] Firestone explains that this allows researchers to assess how well their findings fit with wider theories.[842] With this approach, qualitative studies using small samples can apply the falsification principle to yield analytic generalisations.[843] To achieve and enhance analytic generalisations, diverse rather than representative samples are required to allow other explanations to be considered.[844] In addition, the discovery of verifying evidence can enable analytic generalisations by establishing the boundaries of interpretations.[845]Alongside adopting some of these methods, the present study will provide valuable in-sight into a relatively under-researched area. Thus, dismissing

[838] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 17.

[839] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 18; Ritchie J and Lewis J, *Qualitative Research Practice: A Guide For Social Science Students and Researchers* (Sage 2003) 268; Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods Sourcebook,* (3rd edn, Sage 2014) 314.

[840] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 17; Curtis S *et al*, 'Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health' (2000) 50 Social Science and Medicine 1001, 1002.

[841] Curtis S *et al*, 'Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health' (2000) 50 Social Science and Medicine 1001, 1002.

[842] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 17.

[843] Flyvbjerg B, 'Five Misunderstandings About Case Study Research' (2006) 12 Qualitative Inquiry 219, 228.

[844] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 19.

[845] As utilised within ground theory research, Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage 2008) 113-114.

qualitative research and this study, because of its inability to make broad generalisations to the wide populations is unwise. [846]

4.7 Ethical Considerations

Studying sexual violence, with various research methods from interviews to observations, creates many challenges for researchers. The subject area is sensitive and can be emotionally challenging.[847] Furthermore, ethical issues require careful thought, some of which are specific to trial observations. Decisions were made about obtaining consent, ensuring anonymity and confidentiality, preventing harm to participants, and maintaining an overt approach, which will be discussed in turn.

4.7.1 Informed Consent

Gaining informed consent is deemed imperative for all research.[848] However, it is argued gaining informed consent in a strict sense is impractical for some methods and research topics.[849] Explanations of this research were given to the three gatekeepers when permission was sought to observe trials and take notes.[850] For HMCTS, the research aims and methodology were fully documented within the DAP application. To obtain consent from the Crown Court, the Resident Recorder was provided with an information sheet containing the research aims and methodology, along with a consent form, which was electronically signed. Assurances were also made that ethical approval and permission from HMCTS had been obtained.

At the start of each trial, the court clerk and usher were asked if permission could be obtained from the presiding judge to observe and take notes for research purposes.

[846] Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 22.

[847] Campbell R, *Emotionally Involved: The Impact of Researching Rape* (Psychology Press, 2002).

[848] Darlington Y and Scott D, *Qualitative Research In Practice: Stories From The Field* (OUP 2002) 25; Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods sourcebook,* (3rd Edn, SAGE 2014) 60.

[849] Calvey D, 'Covert Ethnography in Criminology: A Submerged Yet Creative Tradition' (2013) 25 Current Issues Criminal Justice 541, 544; Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage, 2006) 74.

[850] As discussed within section 4.3.1.

The researcher specified their status as a PhD researcher, who was conducting research on rape trials that focused on cross-examination. Copies of the information sheet, signed consent form, and documentation showing ethical approval and HMCTS' permission were to hand if required. Eventually court staff became familiar with the researcher, so lengthy explanations were not required. Even if the researcher had seen a particular judge before, permission was still sought for each trial. Each gatekeeper was also informed that anonymity and confidentiality would be ensured. The information sheet clearly stated that the researcher could be asked to stop note taking and leave the courtroom at anytime. Furthermore, trial judges could have exercised their common law and statutory powers to clear the courtroom if necessary. Although courtrooms are public spaces, the researcher felt it would have been counterproductive to insist on observing a trial if access was refused. However, such events did not arise and each presiding judge allowed the researcher to observe and take notes.

It was impractical to gain consent from everyone observed for each trial. Therefore, permission from each trial judge was sought instead. Initially, the researcher felt anxious about observing people who were not well informed of the research, particularly the complainants and defendants. Although observations were primarily concerned with the process of cross-examination, this inevitably involved people and their experiences. Despite this, it was felt informing these participants could have caused greater distress, which may have affected their ability to provide their best evidence. Others, including barristers, were arguably better informed about the researcher's presence because they were present throughout the trial and were often present when the judge's permission was sought. It was also not known who would be entering and exiting the courtroom throughout the trials. Travers suggests this makes gaining true informed consent impractical.[851] Trying to do so would have caused disruption and inhibited the trial process, which would be counterproductive for all. The public nature of criminal trials provided reassurance that this was not necessary. A strict approach towards informed consent would have made this method

[851] Travers M, Putt J and Howard-Wagner D, 'Special Issue on Ethnography Crime and Criminal Justice' (2013) 25 Current Issues Criminal Justice 463, 467.

impossible, preventing valuable research from being conducted. The approach taken for this study was efficient, flexible to the court's needs and ethically sound.

4.7.2 Covert or Overt

Ethics committees are known to typically warn against covert research due to the deception involved.[852] Observing trials covertly was considered unnecessary and undesirable, and would not have been possible for this study due to access requirements. The overt approach taken allowed continual and unrestricted note taking.[853] Literature warns that being very overt can result in the participants adapting their behaviour or feeling defensive, if they feel scrutinised under observation.[854] As previously explained, the problem of reactivity appears minimal in the courtroom environment.[855] The distinction between overt and covert research is deemed to be misleading because participants will not know every detail about the research or researcher.[856] The information about the study provided to participants needed to be concise and contain the key features due to the fast pace of Crown Court. As the research was largely inductive, the researcher could not say what it was they were 'looking for', which participants sometimes queried. The manner in which consent was obtained, as outlined above, established a suitable degree of overtness. The researcher was also open to answering any questions participants had. For example, the defendants' supporters often asked if the researcher was a media reporter so the researcher gave a brief explanation of her role and purpose.

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[852] Bachman R and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice* (3rd Edn, Sage 2015) 177; Calvey D, 'Covert Ethnography in Criminology: A Submerged Yet Creative Tradition' (2013) 25 Current Issues Criminal Justice 541, 542.

[853] Bachman R and Schutt R.K, *Fundamentals of Research in Criminology and Criminal Justice* (3rd Edn, Sage 2015) 176.

[854] Bogdan R and Taylor S.J, *Introduction to Qualitative Research Methods: A Phenomenological Approach to the Social Sciences,* (John Wiley and Sons 1975) 64-65; Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 230; Waddington D, 'Participant Observation' in Cassell C and Symon G (Eds) *Qualitative Methods in Organizational Research: A Practical Guide* (Sage 1994) 109.

[855] See section 4.3.2.

[856] Bogdan R and Taylor S.J, *Introduction to Qualitative Research Methods: A Phenomenological Approach to the Social Sciences,* (John Wiley and Sons 1975) 30.

4.7.3 Anonymity and Confidentiality

Ensuring anonymity[857] and confidentiality[858] of those studied is considered necessary for all research.[859] These safeguards are said to prevent harm to participants.[860] For the PhD study, this was acutely necessary because of the context and sensitive nature of the trials observed. Legislation provides rape complainants with anonymity,[861] therefore great efforts were made to ensure no names, addresses, or any other information that could lead to their identification were recorded from observations. Defendants are not afforded the same legal protections, yet the same standard of anonymity was maintained. Recording any identifying information of any participants, or the court, would not serve any useful purpose for this study.

Abbreviations were used to record identifiers throughout observations. For example, the defendants were noted as 'D' and prosecuting counsel as 'PC'. A number was also assigned to each trial instead of using the case number or name. All identifying details were left unrecorded, including names and addresses. Shorthand pseudonyms were always used for other locations, services, and people. This ensured the field notes still made good sense for analysis. It is argued that certain people could identify participants or themselves from obscure details in data.[862] For instance, barristers could identify a trial they were involved in based upon a brief description of the findings. Despite this risk with all research, all notes were anonymous on their face value. The anonymous transcribed field notes were securely stored electronically, and the original notes were destroyed once transcribed.

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[857] Ensuring participants and settings remain nameless, see: Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage Publications, 2006) 75.

[858] Ensuring identifying factors are omitted from the data, see: Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage Publications, 2006) 75.

[859] Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods sourcebook,* (3rd Edn, Sage 2014) 62-63.

[860] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 228 and 252.

[861] The Sexual Offences (Amendment) Act 1976, s.4.

[862] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 253.

4.7.4 Avoiding Harm

Preventing harm to participants, during and after data collection, is considered fundamental.[863] However, it is recognised that not all harm can be anticipated and accounted for.[864] Conducting trial observations appeared unlikely to cause physical or psychological harm to those observed. Smith explains that participants may feel unease from being observed, but this should be minimal when taking a 'low profile', as the researcher did.[865] Some participants, predominantly complainants, became emotional and distressed when giving evidence. These effects appeared separate from the researcher's presence. Ensuring anonymity and confidentiality in data collection and publication reportedly reduces direct harm to participants.[866] Publications could potentially cause harm to the wider public.[867] For example, some findings could be interpreted as discouraging complainants from supporting prosecutions. This was not the study's aim. Open-minded analysis of both complainants and defendants served to produce a thorough report of the cross-examination practices observed, which highlights important matters of criminal justice law and policy.

Harm to researchers is an equally important consideration.[868] For physical harm, the court environment was safe and court staff could have been contacted if there were any concerns. Emotional demands on researchers are a further consideration,

[863] Berg B.L, *Qualitative Research Methods for the Social Sciences* (5th Edn, Allyn and Bacon 2004) 150; Miles M.B, Huberman A.M and Saldana J, *Qualitative Data Analysis: A Methods sourcebook,* (3rd Edn, Sage 2014) 62; Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage Publications, 2006) 74-75.

[864] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 252.

[865] Smith O, 'Observing Response to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 94.

[866] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 252.

[867] Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (2nd Edn, Sage 2003) 252; Smith O, 'Observing Response to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 94.

[868] Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage Publications, 2006) 75.

particularly for observational studies due to the emersion involved.[869] This risk was furthered for this study, due to the sensitive context of rape trials. Despite having experience in researching sexual violence, hearing allegations of sexual violence and seeing those involved was sometimes emotionally difficult. These difficulties were more acute at the beginning of the data collection process. The support from family and the supervisory team was essential during the doctoral process.

4.8 Summary of the Research Strategy

To summarise, eighteen rape trial observations were conducted within a nine-month period from spring 2016 at one anonymous Crown Court. However, pre-trial hearings were not observed. The trials observed were selected using availability sampling, and were diverse in their characteristics. Contemporaneous anonymous notes were taken throughout the entirety of each trial, with particular focus on the complainants and defendants cross-examinations. These notes were typed up to provide full accounts of the trial observations, with a near verbatim narrative of the cross-examinations. Braun and Clarke's thematic analysis was employed at the semantic level.[870] Like Temkin's observational study, this was because the research focus was on observable practices. Although not without its limitations, this study can provide valuable insights and in-depth understanding of contemporary cross-examination practices within the sample of rape trials observed.

[869] Berg B.L, *Qualitative Research Methods for the Social Sciences* (5th Edn, Allyn and Bacon 2004) 167; Travers M, Putt J and Howard-Wagner D, 'Special Issue on Ethnography Crime and Criminal Justice' (2013) 25 Current Issues Criminal Justice 463, 464.

[870] Braun V and Clarke V, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77.

Chapter Five: The Cross-Examination of Complainants

5.0 Introduction

The central themes emerging from the eighteen trial observations will be critically discussed within the following chapters. This chapter discusses the findings relating to the complainants' cross-examinations. Four themes were developed from this data. These themes capture the following: how the welfare of complainants was considered; how the complainants' behaviour before, during and after the alleged rape was examined, which potentially created expectations and invoked rape myths; how the sexual history of the complainants was utilised; and how the credibility of the complainants and their evidence was challenged. The insights generated from these observations will be analysed against arguments and findings found in the existing literature, to consider their applicability.

The observations will also be analysed against the existing traditional and best evidence models of cross-examination, discussed within Chapter Two. In doing so, this chapter will identify many positive and some problematic practices, which are not always clearly embraced under these existing models. Particular attention will be paid to how the practices observed promote, or potentially inhibit, the complainants' best evidence. Herewith, the fair treatment model of cross-examination will be advanced and informed by the complainants' cross-examination data. As explained within Chapter Two, the FTM supports consideration of the difficulties individual complainants experience, thereby, rejecting the dichotomy that complainants are either 'robust' or 'vulnerable'. Any medical, intellectual or communication needs must be met with specific modifications encouraged under the existing best evidence approach. In addition, it is important to account for their general wellbeing, which may be exacerbated by the alleged rape and their journey through the CJS.[871] While

[871] The Equal Treatment Bench Book requires judges to have "an awareness of 'where a person is coming from' in terms of background, culture and special needs" and appreciate a court is a daunting environment. Judicial College, *The Equal Treatment Bench Book* (February 2018) 4.

the best evidence model recognises this,[872] it arguably affords greater attention to the needs of 'vulnerable' witnesses and defendants.[873] All complainants should be provided with an opportunity to give their best evidence, under conditions that promote equality and respect for their individual experiences and needs. Cross-examination should be conducted within an environment where intimidation, confusion, rape myths and stereotypes, irrelevant and inadmissible evidence, are absent. Together, this ensures complainants receive dignified treatment, and their best evidence is not impeded or undermined unfairly.

5.1 Ensuring The Complainants' Welfare

Welfare concerns have been a central tenet of feminist critiques of the cross-examination of complainants. Scholars criticise the intimidation and undignified treatment that complainants experience during cross-examination, and the insensitivity of defence barristers.[874] The current study has provided some insight into how the welfare of complainants was safeguarded during the cross-examinations observed. The discussion that follows will focus on three specific areas: the use of statutory Special Measures, how complainants were familiarised with the process of cross-examination before questioning, and how the court responded to their needs and emotions during cross-examination.

[872] As stated within, Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b); Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5.

[873] Similarly argued within, Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds) Addressing Vulnerability in Justice *Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

[874] Ellison L., 'Witness Preparation and the Prosecution of Rape' (2007) 27 Legal Studies 171; Jordan, J, 'Here We Go Round The Review-Go-Round: Rape Investigation and Prosecution: Are Things Getting Worse Not Better?' (2011) 17(3) Journal of Sexual Aggression 234, 238-239; Wheatcroft J.M, Wagstaff G.F, and Moran A, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 276; Ellison L, 'Cross-Examination in Rape Trials' (1998) Criminal Law Review 605, 613-614.

5.1.1 Special Measures

Special Measures are statutory provisions that can help vulnerable and intimidated witnesses give evidence in court. Examples of these measures include, screens, television link, and video recorded evidence-in-chief and cross-examination.[875] For those eligible, these measures can help witnesses give their best evidence and reduce stress when testifying.[876] All complainants of sexual offences qualify for Special Measures and can opt out of using them if they wish.[877] Special Measures were used extensively in the eighteen trials observed. For evidence-in-chief, all complainants, with the exception of T6C, had an achieving best evidence (ABE) interview played to the jury.[878] T6C provided a written statement to the police and was required to give evidence-in-chief live, which she did from behind a screen. The majority of complainants, therefore, did not have to repeat a narrative account of their allegations in court, which can reduce anxiety.[879] Despite prosecution barristers frequently

[875] Youth Justice and Criminal Evidence Act 1999, s.23-30.

[876] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004); Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS, April 2012); Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 118. For those eligible, Special Measures are available to prevent the quality of the witness's evidence from diminishing. The term 'quality' refers to the completeness, coherence and accuracy of a witness's evidence, Youth Justice and Criminal Evidence Act 1999, s.16(5). The Court of Appeal continues to recognise the importance of adapting the trial process, including procedures and cross-examination questioning, to meet the needs of witnesses, *R v Barker* [2010] EWCA Crim 4, para 42.

[877] Youth Justice and Criminal Evidence Act 1999, s.17 (4). There is a presumption that complainants of sexual offences will use pre-recorded evidence-in-chief and other Special Measures still require an application, Youth Justice and Criminal Evidence Act 1999, s.22(A).

[878] An ABE interview is a pre-recorded video interview with the complainant and is conducted by a police officer at the investigative stage of a case. During the interview, the complainant provides an account of the allegations. The interview will constitute the complainant's evidence-in-chief, which can be presented to the jury during a trial. As explained within: Stern V, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office 2010) 68.

[879] Westera N.J, Powell M.B, and Milne B, 'Lost in the Detail: Prosecutors' Perceptions of the Utility of Video Recorded Police Interviews as Rape Complainant Evidence' (2015) Australian and New Zealand Journal of Criminology 1, 2; Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special*

checking that the ABE interviews worked in court, technological problems did arise. For example, DVD players temporarily stopped working and the audio quality was sometimes poor, as other studies have found.[880]

During cross-examination, Special Measures were also used extensively, with only T10C and T15C deciding not to use them. Five complainants were cross-examined over the live television link, from a separate room in the court building. Technological and audibility problems also arose with the live link equipment, as earlier studies have also found.[881] In addition, the live link technology was not available in all courtrooms, resulting in courtroom relocations during two trials.[882] Eleven complainants gave evidence during cross-examination from behind a screen, shielding them from the dock and public gallery. The researcher could not observe their demeanour during cross-examination but their voices were generally audible. Two versions of the screens were available, which fitted with the two different courtroom layouts. On occasion, the correct screen was not available so the opposite screen would be fitted. Further, the curtain screen was often held to the structural frame with bulldog clips. While shielding the complainants fully, these practical problems produced an unprofessional appearance. Maintaining quality and increasing availability of screens is therefore required in this Crown Court, which reflects findings from other studies.[883]

Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses (London, HO 2004) 67.

[880] Smith O, 'The Practicalities of English and Welsh Rape Trials: Observations and Avenues for Improvement' (2017) Criminology and Criminal Justice 1; Burton M, Evans R and Sanders A, Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies (HO Report 01/2006) 54.

[881] Smith O, The Practicalities of English and Welsh Rape Trials: Observations and Avenues for Improvement (2017) Criminology and Criminal Justice 1, 7.

[882] For one trial, the relocation was to allow another case to use the live-link technology.

[883] Burton M, Evans R and Sanders A, *Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies* (Home Office 2006) 57; Durham R *et al*, *Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 Rape Trials 2015-2016* (Northumbria Police and Crime Commissioner 2017) 19.

All defendants were instructed to wait behind a door to the dock when screens were used so the complainant did not have sight of him. Fear of seeing defendants has been a long-standing concern for some complainants and witnesses.[884] These observations show that the judges were responsive to this. Only in T6 did the judge clear the public gallery, which included the defendant's supporters. Other complainants may have welcomed this action, as studies show seeing the defendant's supporters when entering the court building and courtroom causes complainants and witnesses anxiety.[885] In addition, courtroom adaptions during cross-examination were made for T10C, who was elderly and previously suffered an unrelated stroke. The judge, concerned about T10C's mobility, requested chairs to be placed beside the witness box for the complainant and her ISVA.[886]

Observations found that the complainants' choices regarding Special Measures were respected. For example, T16C began cross-examination with the screen but moved to the television link. At the beginning of cross-examination, T16C became extremely distressed. She was provided with a break and expressed a wish to continue cross-examination the following day. On returning, T16C's new preference to use the television link was granted and accommodated by moving courtrooms. In addition, T10C's and T15C's preference not to use Special Measures was upheld. While Special Measures applications must be submitted within particular time frames, the CrimPR recognise a complainant's circumstances may change and measures can be varied. [887] Encouragingly, observations found that barristers recognised this, as illustrated below.

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[884] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) E. & P. 1, 9-10; Pettitt B *et al*, *At Risk, Yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (Victim Support 2013) 41; Gregory J and Lees S, *Policing Sexual Assault* (Routledge 1999) 185-186.

[885] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) E. & P. 11(1) 1, 9-10; Burton M, Evans R and Sanders A, *Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies* (Home Office 2006) 59 and 63; Pettitt B *et al*, *At Risk, Yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (Victim Support 2013) 41.

[886] See Chapter Two at section 2.4.2 for an explanation of the role of an ISVA.

[887] Criminal Procedure (Amendment) Rules 2019, Part 18: Measures to Assist A Witness or Defendant to Give Evidence, CrimPR 18.11.

T10PC: …[T10C] does not want Special Measures…[I] will just check with her tomorrow because sometimes when the moment comes complainants may want to change their minds…

Special Measures were regularly discussed at the start of trial, to clarify the measures to be used. The prosecution were allowed time to establish the complainants' preferences when they appeared undecided. Five applications were made at the start of a trial.[888] There were never any objections by the defence, and the judges always granted the complainant's preferred measures. These findings are positive, as previous research suggests Special Measures are not always used when complainants would have appreciated them, if they were given the choice.[889]

Although Special Measures are important for reducing stress, they may have non-beneficial effects too. Without making causal claims, it is striking that the six trials where the complainants used the live link resulted in acquittals.[890] For jurors sitting opposite a complainant, her account, demeanour and emotions may have an impact.[891]

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[888] The reasons for these delays are unknown. Circumstances, stipulated under CrimPR 18.5, may have arisen permitting variance in the requirements for applications. Moreover, issues pertaining to Special Measures may have been raised in pre-trial hearings. Notwithstanding this, research suggests that late applications can cause anxiety and uncertainty for complainants, when Special Measures have not been granted in advance of the trial. Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring The Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS 2012) 18.

[889] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 117-118.

[890] Five of these complainants did not enter the courtroom at all. However, T16C was present in the courtroom for cross-examination behind a screen lasting sixteen minutes, before changing to the television link.

[891] Ellison and Munro found that mock jurors commented on the use of Special Measures, but concluded that there was 'no clear or consistent preference for in court over video-mediated evidence', Ellison L and Munro V.E, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' 23(1) Social and Legal Studies 3, 13-15. It is also believed mock jurors have expectations about appropriate emotions and demeanour of complainants when they give evidence. However, evidence on whether emotional responses influence jury decision-making is inconclusive. See, Ellison L and Munro V.E, 'Reacting

The researcher also felt an element of distance from the complainants during their ABE interviews and over the television link, compared to hearing their evidence in the courtroom. This view reflects findings from other studies and anecdotal commentary.[892] As one prosecuting barrister suggested, television produces a sense of detachment. He explained this detachment using an analogy of hearing a news story on the television as opposed to witnessing it directly.[893] Therefore, it may be beneficial for complainants, where possible and appropriate, to use screens over the television links. Clearly, caution is required here, as an insufficient number of trials were observed to draw any correlations or causal links. Furthermore, other research has found that the mode in which evidence is delivered, whether live or pre-recorded, does not significantly influence mock jury verdicts.[894]

Arguably, there may also be benefits for complainants, like T6C, who 'opt out' of providing an ABE interview, and instead provide a written statement to the police and

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to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 210-211; Dahl J *et al*, 'Displayed emotions and witness credibility- a comparison of judgements by individuals and mock juries' (2007) 21(9) Applied Cognitive Psychology 1145, 1152.

[892] Ellison L and Munro V.E, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' 23(1) Social and Legal Studies 3, 14-15; Fielding, N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 217; Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service; London 2012) 33.

[893] The following extract from the researcher's field notes illustrates this. T12PC gives a warning about watching televisions and suggests, "it distances us from the reality". He gives the example of watching the news and seeing Aleppo on the television. He suggests that if we were there and saw the injured children, it would be different from watching it on the TV. He stated that when watching it on television, "we feel detached from it, like it isn't real". T12PC says to the jury that they will meet the complainants. He explains that, "this is real, it is not television fiction".

[894] Ellison L and Munro V.E, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' 23(1) Social and Legal Studies 3, 13-15; Murno V.E, *The Impact of The Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review* (Scottish Government March 2018); Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-19 citing Hoyano L and Keenan C, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010).

then give live evidence-in-chief at trial.[895] Taking the time to complete and review a formal statement can ensure complainants are satisfied with its contents, which will guide their evidence-in-chief. A statement may also contain a more concise account, containing fewer details, inconsistencies and inaccuracies, for the defence to challenge.[896] Further, Burrows and Powell suggest giving live evidence-in-chief provides 'an opportunity for the witness to consolidate the story'.[897] Whereas, ABE interviews contain a spontaneous narrative account of events, which may be more difficult for complainants to completely and consistently recall in court, even after reviewing the recording. While some argue narrative accounts yield more accurate information,[898] complainants may miss out information or confuse matters when 'telling their story' in an interview format.[899] Despite this, T6DC challenged T6C's consistency in recall, and suggested this was due to the prolonged statement taking process, not her genuine memory. However, as the jury found the defendant guilty, it appears this did not create a reasonable doubt. Not all complainants will be able or willing to undergo the lengthier statement taking process and then provide live

[895] For a discussion of the shortcomings of pre-recorded evidence-in-chief see, Westera N.J, Powell M.B, and Milne B, 'Lost in the Detail: Prosecutors' Perceptions of the Utility of Video Recorded Police Interviews as Rape Complainant Evidence' (2015) Australian and New Zealand Journal of Criminology 1, 8; Westera N *et al*, 'Sexual Assault Complainants on The Stand: A Historical Comparison of Courtroom Questioning' (2017) 23(1) Psychology, Crime and Law 15, 23 and 27; Burrows K.S and Powell M.B, 'Prosecutors' Perspectives on Using Recorded Child Witness Interviews' (2014) 47(3) Australian and New Zealand Journal of Criminology 374, 379 and 383.

[896] As discussed within: Westera N.J, Powell M.B, and Milne B, 'Lost in the Detail: Prosecutors' Perceptions of the Utility of Video Recorded Police Interviews as Rape Complainant Evidence' (2015) Australian and New Zealand Journal of Criminology 1, 8; Westera N *et al*, 'Sexual Assault Complainants on The Stand: A Historical Comparison of Courtroom Questioning' (2017) 23(1) Psychology, Crime and Law 15, 23 and 27.

[897] Burrows K.S and Powell M.B, 'Prosecutors' Perspectives on Using Recorded Child Witness Interviews' (2014) 47(3) Australian and New Zealand Journal of Criminology 374, 379 and 383.

[898] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 219-220; Westera N.J, Kebbell M.R and Milne B, 'Losing Two Thirds of the Story: A Comparison of the Video-Recorded Police Interview and Live Evidence of Rape Complainants' (2013) 4 Criminal Law Review 290, 294 and 303.

[899] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 184-185.

evidence-in-chief.[900] However, there are some potential benefits for those who can, as illustrated above.

5.1.2 Introducing Complainants to Cross-Examination

The vast majority of defence barristers commenced their cross-examinations with some opening remarks to the complainants. Only two barristers immediately began their questioning.[901] These opening passages included instructions, explanations, reassurances, and offering choices. These interactions between defence barristers and complainants have not been discussed within existing literature. Variance in the content and extent of these opening remarks was observed for each complainant. Some introductions were brief. For example:

> **T11DC:** Miss [T11C] [the same with me] if you don't follow or want me to repeat a question please say so.
>
> **T11C:** Ok.

Other introductions were more elaborate and prolonged, as illustrated below.

> **T9DC:** I can't quite see you, (*pause*) are you more comfortable standing or sitting?
>
> **T9C:** Standing.
>
> **T9DC:** Do you have a glass of water? One is on its way.
>
> **T9C:** Thank you.
>
> **T9DC:** My name's [full name] I represent Mr [T9D] for the purposes of this trial he has been called [long name] did you know him as [long name] or [short name]?
>
> **T9C:** First of all I knew him as [long name] but now know him as [short name].

[900] As video interviewing allows complainants to provide a free account without interruption, this may be a 'better' or more suitable process for some complainants. Westera N.J, Kebbell M.R and Milne R, 'Interviewing Rape Complainants: Police Officers' Perceptions of Interview Format and Quality of Evidence' (2011) 25(6) Applied Cognitive Psychology 917, 921 and 925.

[901] In T6, the courtroom was cleared for the complainant to enter. The barristers or judge may have spoken to the complainant before the researcher re-entered.

T9DC: How would you like me to address you?

T9C: [first name].

T9DC: Thank you [T9C]. You might have seen films or television, I am not going to raise my voice at you or shout at you, there will be things we agree on and other things we disagree on, it is important you hear what I say and understand what I say, if you don't understand please say. [Say] if you don't remember, it is not a memory test. It is also important the jury hear what you say I know it is artificial but if you can project your voice. If you need a break please say so, if you need five, ten minutes whatever you need. The experience of the court is sometimes its better to keep going, all right.

The most common feature of these opening remarks was an explanation about the defence barrister's role. These explanations were short and ranged from the defence barristers simply stating they had questions to ask, to others explaining they represented the defendant and were going to "put his case". Complainants were also frequently asked how they would prefer to be addressed. Seven complainants were instructed to say if they did not understand a question or would like questions repeated. Adding to this advice, T4DC and T8DC provided reassurances that it would be their fault if their questions were not understood.

T4DC: Please can I call you Ms [T4C]?

T4C: Yes.

T4DC: Thank you, the questions I ask you are important if I ask you a question you do not understand that is my fault simply say you do not understand I don't want you to be embarrassed…what I am about to put to you is the defendant's case alright if you disagree with it please say so *(looking in T4C's direction, relatively slow pace, polite tone*).

T4C: Yes.

Reassurances were also given to two complainants that they are able to say if they did not know an answer or could not remember. Four complainants were instructed to say

when they disagreed with the barrister.[902] Instructions were only given to two complainants about projecting their voices to the jury. The complainants were occasionally given the choice to sit or stand, or to take breaks.[903] These opening remarks were given whether or not distress was observed.[904] Generally, the opening remarks provided to the complainants appeared assistive in nature, either for the court or the complainant. These remarks could be considered a brief preparatory period for complainants instead of experiencing the shock of immediate cross-examination questions.[905] The complainants can compose themselves, be put at ease, and be made aware of what to expect from the barrister cross-examining them. These observations highlight good practice among the defence advocates.

The complainants were often addressed by judges and prosecuting barristers beforehand. Fourteen complainants were met with an initial interaction with the judge. Eight prosecutors made introductory remarks to complainants in open court, and usually took place before supplementary evidence-in-chief questions.[906] Again, these ranged from a brief greeting to expansive dialogue, with similar features to that of defence counsel. Here, complainants were commonly afforded the choice to take breaks or sit during cross-examination.[907]

5.1.3 Responding to Complainants during Cross-Examination

Observations yielded insight into the treatment of complainants during cross-examination. Defence barristers and judges checked the welfare of ten complainants

[902] These were the complainants in T4, T12 and T15.

[903] Defence barristers only provided the choice to stand or sit to T9C and T12C1, and offered breaks to T9C, T16C and T18C.

[904] Only T5C and T16C were overtly distressed from the outset.

[905] However, this may not go far enough, as is argued that complainants encounter difficulties when they provide their evidence-in-chief live and are ‘plunged into cross-examination hostile cross-examination without a warm up’. Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) E. & P. 11(1) 1, 12; Burton M, Evans R and Sanders A, *Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies* (Home Office 2006) 54.

[906] Only one prosecuting barrister gave these introductory remarks without asking supplementary evidence-in-chief questions.

[907] Eleven judges offered one or both of these choices.

during cross-examination. Such occurrences were concurrent with visual or audible upset from complainants. These interactions included reassurances and checks on whether the complainants were feeling ok, if they needed water or a break, as demonstrated below. Three complainants were observed as exhibiting some upset in cross-examination; clear checks on their wellbeing were never made. For some complainants, welfare checks were delayed or not conducted in all instances of distress. Some complainants were advised that, 'it is better to keep going'. Judges have previously expressed frequent breaks are counter-productive, which Henderson argues demonstrates their misjudgement of the problems faced by witnesses in cross-examination.[908] It may be impractical to continually check a complainant's welfare when they are exhibiting continual upset. Fielding observed similar delays in cases of non-sexual violence, and explained this was not callous but reflects the conflict between the requirements of trials and feelings of witnesses.[909]

T16DC: It has already been agreed, Mr [T16D] doesn't dispute that you watched the TV and smoked a spliff together.

T16C: Yes (*hands to her face, crying, wiping eyes, shaking physically*).

T16DC: Take a deep breath for a moment.

T16DC: Have you got some water there?

T16C: Yes.

T16DC: Take a sip of water

T16DC: If it helps I am not going to be much longer.

T16C: Yes.

T16DC: Would you like to take a break or carry on?

T16C: Carry on.

Eight complainants took welfare breaks during their cross-examinations. The researcher uses the term 'welfare break' to describe breaks taken for the complainants needs, as opposed to procedural reasons. The term 'procedural break' is also adopted, to denote breaks taken for practical reasons, including the court timings or issues of

[908] Henderson E, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Discuss Judicial Management of The Cross-Examination of Vulnerable People' (2016) Criminal Law Review 181,188.

[909] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 39-40.

law.[910] The offering of welfare breaks generally correlated with observed distress. Only two complainants were provided breaks when distress was unobserved. In both instances cross-examination had already lasted forty-five minutes, so these breaks may have been offered for concentration purposes and comfort for all involved. Offering breaks and checking welfare are considered general legal conventions to alleviate upset and anxiety.[911] However, these findings demonstrate the difficulties rape complainants experience in cross-examination were being recognised. Welfare breaks mostly transpired once offered by counsel. Of the complainants observed, three asked for a break or wanted to stop cross-examination. Six complainants, who took welfare breaks, declined them on other occasions in cross-examination and expressed a wish to continue so questioning would finish. Three other complainants, displaying signs of distress, were offered breaks but declined having any breaks, for similar reasons. More 'resilient' complainants were not offered or provided breaks. However, reassurances featured throughout cross-examinations when complainants displayed composure and distress.[912] This included, for example, assurances that questions were not intended to embarrass or cross-examination was nearly finished.

T9DC: That is one topic done, I will move through them with the aim so you can get out of here. He was from an Italian family?

T9C: "Yes."

Complainants were sometimes resistive to particular lines of cross-examination, by challenging the relevance of matters or with direct counter responses. Different manners of resistance appeared to be met with different responses. Where five complainants were more argumentative, they would be given words of advice, questioning would move on, and occasionally breaks were taken.

T13DC: You hug him back, do you agree?

T13C2: Is the court going to see the rest of the CCTV?

[910] Procedural breaks were taken during the cross-examination of five complainants, due to the timings of the court day.

[911] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 39-40; Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-16 para 55 and 56.

[912] In total reassurances were given to fourteen complainants.

T13DC: Mr [T13PC] will introduce evidence–

T13C2: –[I would like the court to see] him dragging me away from the club with my legs buckling and not with my scarf on. Is that going to be shown? It makes me angry that you are not showing a true account.

T13J: Compose yourself. [If it is] relevant it will be shown by Mr [T13PC]…he will play the part he chooses to show.

When complainants resisted questions while upset, reassurances and welfare checks were provided.[913]

T5DC: I am going to read out what you said when asked how long you had split up from your ex-partner.

T5C: What has this go to do with it, what has this got to do with my ex? (*High pitched, crying*)

T5DC: I don't want to distress you I just have one question.

T5C: Ok.

It is positive that barristers often listened and responded to the complainants rather than simply pressing on, as others have found.[914] Additionally, the overall scope of cross-examination was reduced for T16C, when she was distressed. Questions on particular topics were also reduced for three complainants, as demonstrated below.

T2DC: How did you discover you were pregnant?

T2C: I didn't receive a period I don't wish to talk about this I don't wish to talk about this (*loud shouting voice*).

T2J asks for the camera to go on him.

T2J: It can be admissible for jury in another way…you won't be asked any more questions about this…

(*Hear crying from T2C, tissue covering her face*)

[913] This occurred during the cross-examinations of T2C, T5C and T8C. T11C and T12/13C resisted questions while displaying signs of distress, but welfare breaks or checks were not provided on these occasions.

[914] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 186

T2J: Knowing [that we are] not going there [are you] ok to continue?

T2C: Yeah.

In these cases, it appeared the complainants' distress made progressing with cross-examination difficult. The judges appeared to exercise their discretion to reduce the length of cross-examination and the content of questioning, without jeopardizing the defendants' fair trial.[915] This observed responsiveness from the judges was encouraging.

Overall, observations indicated that the monitoring of the complainants' welfare and the provision of breaks was largely determined by the emotions they exhibited. The comparatively composed complainants may have found themselves unable to communicate any discomfort, upset, confusion, or disapproval of some questions.[916] They may have benefited from welfare checks and breaks during cross-examination. However, as one judge explained within Fielding's study, it can be difficult to determine how witnesses are feeling, and the court can only support witnesses who display symptoms of concern.[917] Additionally, observations highlight the importance of distinguishing between levels of distress for complainants; sometimes it would be satisfactory to keep going, and other times cross-examination should be stopped or adapted. This distinction has also been recognised by the Court of Appeal.[918] Observations, therefore, contrast with Fielding's view that pressing on when

[915] *R v Steven Pipe* [2014] EWCA Crim 2570.

[916] Ellison L and Wheatcroft J, '"Could You Ask Me That In A Different Way Please?" Exploring The Impact of Courtroom Questioning and Witness Familiarisation on Adult Witness Accuracy' (2010) 11 Criminal Law Review 823, 830; Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 57. It is thought vulnerable witnesses are unable to monitor their own needs, see Henderson E, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Discuss Judicial Management of The Cross-Examination of Vulnerable People' (2016) Criminal Law Review 181, 189.

[917] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 187.

[918] The Court of Appeal has suggested breaks will usually enable distressed complainants to recover and return to 'normal cross-examination', *R v Dinc* [2017] EWCA Crim 1206; *R v SG* [2017] EWCA Crim 617. Though, case law equally recognises where a complainant may be too distressed to continue, as in *R v Steven Pipe* [2014] EWCA Crim 2570.

witnesses become distressed is an unfortunate part of the trial process.[919] Aside from welfare checks, judges also intervened during the cross-examination of fifteen complainants to varying degrees. This occurred where barristers asked compound and prolix questions or their questions were confusing. Judges and defence counsel rephrased questions for the complainants in these instances.

> **T4DC:** (*Assertive tone, nodding head*) You told the doctor when asked if you used illicit or recreational drugs that you drank a can of lager a week and had five roll ups a day, in reality, (*changes to upbeat tone, apologetic*) so sorry are you alright?
>
> No reply heard from T4C.
>
> **T4J:** Obviously if I may…can we maybe try to find a question in this…the complainant has to wait a long time for a question, it may be unnerving when you assert what she's done…

Clarification of the complainant's answers was also sought, mostly where judges appeared to mishear. Sometimes lines of questioning were subjected to judicial intervention because they were improper, as they required complainants to speculate, or featured inaccurate information.

> **T11DC** asks what [T11C] would have done if the [T11D] did smoke in her bed.
>
> **T11J:** It is becoming hypothetical, you are asking her to speculate, she has given you her answer that it didn't happen.
>
> **T11DC:** I am just exploring her attitude.
>
> **T11J**: She has given her answer; I suggest its time to move on.

These findings reflect contemporary judicial practices where judges adopt an active role within cross-examination.[920] Interventions can help create conditions for

[919] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 39-40.

[920] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019); CPD I General Matters 3E.1; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; *R v Jonas* [2015] EWCA

complainants to give their best evidence, by ensuring questions are comprehensible and fair.[921] Some judges were more active than others, which may reflect the view of judges that interventions were unnecessary or a difficult exercise.[922] Reflecting previous research, prosecuting counsel rarely intervened or objected in the cross-examinations observed.[923] This may be because trial judges hold inherent discretion to intervene and prevent unnecessary, improper or oppressive questioning.[924] Alternatively, prosecution barristers may have felt that questions were not objectionable.

As discussed within Chapter Two, guidance on adapting cross-examination under a best evidence approach has predominantly focused on the needs of children and vulnerable people.[925] Decisions following *Barker* have encouraged barristers to adapt traditional cross-examination questioning to fulfil the needs of vulnerable witnesses and defendants.[926] However, it is also recognised that the court must equally take reasonable steps to facilitate the participation of all witnesses and defendants, which

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Crim 562 para 31; Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) F7.10.

[921] Henderson E, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Discuss Judicial Management of The Cross-Examination of Vulnerable People' (2016) Criminal Law Review 181, 183.

[922] Henderson E, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Discuss Judicial Management of The Cross-Examination of Vulnerable People' (2016) Criminal Law Review 181, 189-192.

[923] Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 201.

[924] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.14.

[925] This was discussed within Chapter Two at section 2.3, and is argued within Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds) Addressing Vulnerability in Justice *Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

[926] *R v B* [2010] EWCA Crim 4*; R v Cox* [2012] EWCA Crim 549; *R v SG* [2017] EWCA Crim 617; *R v Cokesix Lubemba, R v JP* [2014] EWCA Crim 2064, para 45; *R v Stephen Pipe* [2014] EWCA Crim 2570; *R v Jan Jisl* [2004] EWCA Crim 696.

includes enabling their best evidence and ensuring they comprehend proceedings.[927] Steps have been advanced to assist with this, such as providing information and advice, avoiding legal jargon and inappropriate remarks.[928]

The best evidence model encourages breaks for vulnerable witnesses and defendants to aid their concentration, summarise evidence and provide comfort.[929] The Court of Appeal also recognises that when 'robust' complainants become so distressed they may require breaks, and in some circumstances questions can be curtailed or stopped.[930] However, case law warns that distress can occur for a number of reasons.[931] The court must balance the importance of enabling a complainant to give their best evidence without distress, with the defendant's interest in challenging the complainant's account.[932] As previously discussed, mature and articulate witnesses are also expected to withstand 'normal' cross-examination,[933] which use traditional questioning methods, where there is no risk of misunderstanding or acquiescence. The findings from the complainants' cross-examinations demonstrate that best evidence practices, including breaks and curtailing complex and distressing lines of questioning, are being implemented within actual cases as well as for 'robust' complainants. Welfare breaks and curtailing cross-examination, to avoid difficult

[927] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[928] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5.

[929] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F.22 and 3G.10; Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-16; The Advocates Gateway, Identifying Vulnerability in Witnesses and Parties and Making Adjustments: Toolkit 10 (March 2017) 6 and 16 <https://www.theadvocatesgateway.org/images/toolkits/10-identifying-vulnerability-in-witnesses-and-parties-and-making-adjustments-2017.pdf> accessed: 29 July 2019.

[930] As previously explained, cross-examination may be stopped and questions curtailed where advocates have examined the witness on the central elements of their case. However, a witness's distress is not consider sufficient ground for requiring advocates to prepare their questioning in writing, for the trial judges approval, and confining cross-examination to this extent. *R v SG* [2017] EWCA Crim 617; *R v Stephen Pipe* [2014] EWCA Crim 2570.

[931] *R v SG* [2017] EWCA Crim 617 para 58.

[932] *R v SG* [2017] EWCA Crim 617 para 58.

[933] *R v Dinc* [2017] EWCA Crim 1206 citing *R v SG* [2017] EWCA Crim 617.

topics or reduce the length of questioning, were normal practices within the trials observed. Regardless of the potential causes of the distress observed, these steps were taken, which could reduce stress and restore composure to allow the complainants to give their best evidence.

Additional practices were identified, which demonstrated the barristers and judges had regard to the welfare of complainants and the difficulties they can experience during cross-examination. Efforts were made to introduce complainants to cross-examination, check their welfare, and provide reassurances. These findings indicate that the cross-examinations observed were somewhat removed from the traditional approach.[934] For example, it could be argued that where complainants faced immediate questioning, without introductory remarks, cross-examination became more unsettling and hostile, thus reflecting a traditional approach. 'Robust' complainants are likely to find the prospect of cross-examination daunting.[935] Introductory remarks, welfare checks and reassurances, provide complainants with courteous treatment. These features also have the potential to reduce anxiety and stress, which may in turn assist complainants in giving their best evidence.

Despite this, these practices do not clearly fall within the best evidence approach. For instance, introductory remarks have been encouraged for vulnerable witnesses and defendants, and must accord with their individual needs.[936] This can include, *inter alia*, instructions to tell the truth, instructions say if they do not understand a question, and information about breaks.[937] In contrast, the VWTP's twenty principles of questioning vulnerable witnesses, indicates some reservation about rapport building.[938] Advocates are told that they 'do not need to build rapport with the

[934] As discussed within Chapter Two at section 2.3.2 and 2.3.2.1.

[935] As discussed within Chapter Two at section 2.3.4.

[936] Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-34.

[937] Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-34.

[938] Inns of Court College of Advocacy, *Advocacy and the Vulnerable: 20 Principles of Questioning* (ICCA 2017)

witnesses. A simple greeting is fine'.[939] Yet, as Cooper *et al* argue, there is a lack of evidence to support this rule.[940]

Embracing the existing best evidence practices and other positive practices observed would be desirable for all rape complainants and fall within a fair treatment approach. Fair treatment means providing complainants with the opportunity to give their best evidence, under conditions that promote equal and dignified treatment. While distress does not necessarily render a complainant vulnerable,[941] it is important to recognise the difficulties articulate and mature adult complainants experience. They may find cross-examination distressing, frustrating, confusing, and may feel they cannot communicate their discomfort. This could impede their best evidence and perceptions of their treatment. Further practical steps, which have been identified within this study, can be taken in an attempt to alleviate these difficulties and provide fair treatment. A fair treatment cross-examination would include standardised implementation of introductory remarks from defence counsel or judges, which account for individual complainants' needs.[942] This should not be the only familiarisation complainants receive. Introductory remarks should supplement other information and support provided, which includes courtroom familiarisation visits.[943] The welfare and best evidence of complainants should continue to be monitored and

[939] As explained within Cooper P *et al*, 'One Step Forward and Two Steps Back? The '20 Principles' for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) International Journal of Evidence & Proof 392, 400.

[940] Cooper P *et al*, 'One Step Forward and Two Steps Back? The '20 Principles' for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) International Journal of Evidence & Proof 392, 401.

[941] As stated within *R v SG* [2017] EWCA Crim 617, para 58.

[942] This practice has been encouraged for vulnerable witnesses and defendants, within Judicial College, *The Equal Treatment Bench Book* (February 2018). However, this practice has not been fully embraced within the Vulnerable Witness Training Programme, as explained within Cooper P *et al*, 'One Step Forward and Two Steps Back? The '20 Principles' for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) E. & P. 392, 401.

[943] The Ministry of Justice explains that arrangements can be made, including court visits, to support witnesses. Hamlyn *et al* explain that the vast majority of witnesses they consulted found these visits helpful. Ministry of Justice, Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence (MoJ Report, March 2014) 17; Hamlyn B *et al*, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*, (Home Office 2004) 34.

safeguarded, through utilising Special Measures, welfare checks, reassurances, and welfare breaks. Following existing best practice guidance and judicial obligations, judges should also continue to actively intervene to curtail difficult question topics, where appropriate, and to protect complainants from complex, lengthy and inaccurate questions.[944] This would not emulate, or replace, the more extensive best evidence modifications required for children and vulnerable witnesses with specific communication needs.

Cross-examinations that do not feature courteous opening remarks or welfare checks, for example, will not necessarily render a trial unfair or violate existing rules pertaining to the treatment of complainants.[945] However, as previously discussed 'fair treatment' is not defined in strict legal terms. Implementing the positive practices identified consistently, and rejecting traditional methods, would improve the treatment of complainants and the prospect of obtaining their best evidence. Modifying or restricting defence counsel's questions, and adopting a courteous approach, will not necessarily violate a fair trial, provided the defence are able to advance their case and adduce the remaining matters in other ways.[946] This approach would not take from a defendant's fair trial, since defendants have no genuine interest in complainants giving unreliable evidence or feeling intimidated.[947]

[944] Judicial College, *The Equal Treatment Bench Book* (February 2018); *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.1.

[945] For example, under existing guidance barristers are prohibited from asking questions 'merely to insult, humiliate or annoy a witness's, Bar Standards Board 2018 RC7.1.

[946] This approach has been endorsed for vulnerable witnesses, within Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4; *R v Wills* [2011] EWCA Crim 1938 para 39; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064. The Court of Appeal has also asserted that this approach to cross-examination 'can produce a powerful defence case', *R v Dinc* [2017] EWCA Crim 1206.

[947] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

5.2 Expected Behaviour of The Complainants

Rape trials have been criticised for focusing on the complainant.[948] In particular, defence barristers have been criticised for examining numerous aspects of the complainant's behaviour, to measure them against the 'real rape' or 'ideal victim' stereotypes.[949] With this, the 'real rape victim' is a stranger to their attacker, fights off their attacker, and suffers injuries as a result.[950] The 'ideal victim', as Christie explains, would also be carrying out a respectable task at the time, and could not be blamed for getting herself into the situation.[951] Where complainants fall short of meeting these stereotypes, their behaviour is seen as atypical of a genuine victim and they are treated with suspicion.[952]

Within the current study, all complainants were cross-examined on their behaviour before, during or after the alleged rape, including their failure to act in particular ways. The complainants were examined on the following central behaviours: the timeliness of their complaints, their physical and verbal resistance, efforts to escape the defendant, and how they could have anticipated and prevented the rape. The current observations will be analysed to establish whether questions necessarily encourage rape myths that have been identified within the literature. For this, the contemporary definition of rape myths, as 'descriptive or prescriptive beliefs about rape … that serve to deny, downplay or justify sexual violence' will be adopted.[953] Thereafter, Chapter Seven will critically discuss the potential implications that the definition of rape myths has on regulating questions within the courtroom setting.

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[948] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 8.

[949] Smith O & Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1; Adler Z, *Rape on Trial* (Routledge 1987).

[950] Estrich S, *Real Rape* (Harvard University Press, 1987).

[951] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 19.

[952] As discussed within Chapter Three at section 3.2.2 and 3.5.1.

[953] Gerger H *et al*, 'The Acceptance of Modern Myths about Sexual Aggression (AMMSA) Scale: Development and Validation in German and English' (2007) 33 Aggressive Behaviour 422, 425.

5.2.1 Disclosing and Reporting Rape

Most often, complainants were cross-examined on their delayed reporting and disclosure. Existing research has also found delayed reporting to be a central focus within cross-examination.[954] Nine complainants were questioned on their delayed reporting to the police.

T7DC: "You didn't report it to the police?"
T7C: "No."

Delayed reporting was an established fact within these cases. However, some questions appeared to infer that they could or should have immediately reported. Observations revealed some clear examples of complainants being challenged on this behaviour, which treated any delay as uncharacteristic of a genuine rape victim.[955] In fact, complaining of rape after days, months, or years is not unusual, and many women never report.[956] Feeling scared, shame, and self-blame is normal and can inhibit reporting.[957] Complainants occasionally provided reasons for their delayed reporting, which ranged from having a broken phone to feeling ashamed. Their justifications were met with disbelief.

T14DC: "You say in your interview you did not tell the police because you felt disgusted, ashamed, angry, and hurt, *yes*?"
T14C: Yes.
T14DC: "Why would you be ashamed?"

[954] Smith O & Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1.

[955] See Appendix Five, which outlines the number of trials where refutable rape myths in cross-examination were utilised. Where questions have a factual basis in the defence case, they were not assessed as invoking refutable stereotypes. The researcher has made these assessments based on trial observations only. Therefore, these interpretations are limited to what was observed in open court and the facts of these cases ventilated at trial.

[956] Burrowes N, *Responding to the Challenge of Rape Myths in Court* (NB Research: London 2013)

[957] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 51.

Of the complainants examined on their delayed complaints, three reported within the forensic window of seven days.[958] Of these three complainants, two reported within several hours. Their delayed reports would not have clearly impacted the availability of forensics or other evidence.[959] Therefore, it was remarkable that these complainants were challenged on their failure to immediately complain, particularly where the delay was only thirty minutes in one case. Barristers were undermining their relatively prompt report, by encouraging assumptions potentially held by jurors that genuine victims would react without hesitation and instantly report. Evidence suggests mock jurors appreciate that genuine victims delay reporting because of shock, embarrassment, self-blame, and fear.[960] However, some mock jurors have expressed suspicion about the veracity of allegations where delay features.[961] Therefore, challenging delay may be an advantageous tactic for the defence. Reporting was also portrayed as an easy step for genuine rape victims to take, in one case.

T14DC: "The incident made you feel ashamed, disgusted, angry, and hurt?"

T14C: "Yes."

T14DC: But not enough for you to mention it to anyone?

T14C: I didn't know how to say.

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[958] It is possible for forensics evidence, such as DNA, to be obtained from the complainant when the rape has been reported within seven days. Within this time frame, there is also an improved possibility of recovering other evidence such as CCTV and items from the crime scene. As explained within: Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 58 citing Faculty of Forensic and Legal Medicine, *Recommendations for the Collection of Forensic Specimens from Complainants and Suspects* (Faculty of Forensic and Legal Medicine, July 2015) <https://fflm.ac.uk/wp-content/uploads/2015/10/Recommendations-for-the-collection-of-forensic-specimens-from.pdf> accessed 28 August 2018.

[959] Additionally, T11C did not report for five years, but this would not have prevented the availability of forensics to undermine her account of rape, as consent was disputed. However, other circumstantial evidence may have been available if report was not delayed.

[960] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 210.

[961] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 210.

T14DC: Oh come on [T14C]! You could have walked into a police station and know full well you could report it and they would take care of you.

T14C: Yes.

T14DC: You didn't do that.

T14C: No.

In addition, ten complainants were cross-examined on their disclosures to others. For two of these complainants, their failure to immediately complain to someone nearby was directly challenged.[962] Other complainants were examined on their failure to tell close family or friends at the first opportunity.

T5DC: Your sister was with you in the house of Friday night and Saturday?

T5C: Yeah.

T5DC: Are you saying you didn't get an opportunity to speak to her about what happened to you?

T5C: No, no one would believe me.

It also appears the complainants were expected to use the word rape when eventually disclosing what happened. Four complainants, who did not label what allegedly happened to them as rape, were challenged on this. This was despite it being apparent that they were describing non-consensual intercourse. It is argued that some women will find it difficult to name their experiences as rape.[963] Examining their choice of words may dismiss these experiences.

T17DC: So you knew the incident you were describing to the police was rape?

T17C: Yeah.

[962] This occurred within the cross-examinations of T11C and T18C.

[963] Kelly L and Radford J, ''Nothing Really Happened': The Invalidation of Women's Experiences of Sexual Violence' (1990) 10(30) Critical Social Policy 39.

T17DC: Why did you not tell him it was rape when you say sex happened but you didn't want it?

T17C: I did not want to admit to myself that I have been through that again.

In addition, T4C and T9C initially contacted the police to report non-sexual offences relating to the defendants, and subsequently reported allegations of rape. Despite making these disclosures during the early stages of the police investigation, they were challenged on not reporting this from the outset. Although these questions may address matters troubling jurors, there may also be understandable reasons for this behaviour. For example, complainants may need to establish trust with the police.[964] Furthermore, Angiolini suggests that rape may not be the priority for some complainants, particularly those with chaotic lifestyles.[965] Angiolini explains that many women initially report less serious offences, and disclose rape at a later stage.[966] Similarly, four complainants were challenged on their reluctance to engage with the criminal justice process.

T6DC: At first you did not want to give a statement and didn't want to go to court did you?

T6C: No I didn't.

Yet, reluctance to engage and disengagement can be normal responses during the investigation process.[967] Professionals also experience difficulties with encouraging complainants to engage and cooperate with their support services.[968] Arguably, these

[964] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 53.

[965] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 53.

[966] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 53.

[967] Rumney P *et al*, 'A Police Specialist Rape Investigation Unit: A Comparative Analysis of Performance and Victim Care' (2019) Policing and Society 1; Feist A *et al*, *Investigating and Detecting Recorded Offences of Rape* (Home Office 2007).

[968] Pettitt B *et al*, *At Risk, Yet Dismissed: The Criminal Victimisation of People with Mental Health Problems* (Victim Support 2013) 59.

cross-examinations oversimplified the process of coming to terms with rape, and being able to discuss it openly.[969] Making and pursuing a complaint is not necessarily an easy process. For instance, the initial report and police interview alone has been described as intrusive, lengthy, tiring, and stressful.[970]

5.2.2 Resisting Rape

Another prevalent focus in the cross-examinations observed was the complainants' resistance to rape. In total, six complainants were cross-examined on their physical resistance. While the complainants' resistance was often an established fact within these cases, two defence barristers examined the complainants' complete failure to physically resist, which appeared to utilise the myth 'real rape victims actively resist an attacker'.[971] Where four complainants asserted they did physically resist in some way, this was met with further questioning.

> **T7DC:** But you were trying to get him off?
>
> **T7C:** Yes but couldn't get him off (*firm assertive tone*).
>
> **T7DC:** "Did you scratch him with your nails?"
>
> **T7C:** No, I have false nails they couldn't scratch anything anyway…don't scratch.

[969] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 52.

[970] Westera N.J, Powell M.B, and Milne B, 'Lost in the Detail: Prosecutors' Perceptions of the Utility of Video Recorded Police Interviews as Rape Complainant Evidence (2015) Australian and New Zealand Journal of Criminology 1, 12; Stuart D, 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology October 1992) 98.

[971] Temkin J, Gray JM and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 211-212 and 218; Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 3 and 11.

Their attempts to resist were also met with disbelief. For example, two barristers appeared to subtly utilise the 'ideal offender' stereotype that a genuine rapist would be a violent man and retaliate to resistance, in order to commit rape.[972]

T5DC: Despite you punching him over and over again…the only thing that he did was push you back?

T5C: I think so.

Similarly it was suggested to T2C that the defendant was 'not big' and only 'five foot seven', which implied that she could have fought him off. This arguably relies on the 'ideal offender' stereotype, which suggests offenders are bigger and stronger than their victim.[973] As Smith and Skinner found, barrister's references to size differences ignore how emotional coercion can prevent resistance.[974] As defence barristers are under no duty to elicit or emphasise testimony that supports the prosecution's case, this is unsurprising. Moreover, examining size differences may help the defence advance their case that the complainant was not overpowered.

Three complainants were cross-examined on their lack of injury, pain and clothing damage. These questions potentially infer that a genuine rape would involve injury and other damage.[975] However, research shows that physical injuries only occur in a minority of cases.[976]

T15DC: He took [your knickers] off [with your dead weight].

T15C: Yes.

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[972] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 19.

[973] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 19.

[974] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 12.

[975] Temkin J, Gray JM and Barrett J, 'Different Functions of Rape Myth Use in Court- Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 211.

[976] Painter K, 'Wife Rape in The United Kingdom' (American Society of Criminology Conference, 1991) 22; Sugar N.F *et al*, 'Physical Injury After Sexual Assault: Findings of a Large Case Series' (2004) 190(1) American Journal of Obstetrics and Gynecology 71.

T15DC: He didn't hurt you or make any bruising when he did that to you?

T15C: No he didn't.

The appropriateness of these questions will depend upon a complainant's allegations. For example, where a complainant alleges additional physical violence, the defence could properly challenge whether she was injured. However, the complainants within these three cases did not allege additional violence or suggest they physically resisted.

Four complainants, who suffered from internal injuries of bleeding and soreness, were cross-examined on their failure to see a doctor about these injuries. This may infer that the rational reaction is to be examined by a doctor. Like reporting, there may be many reasons for unwillingness to seek medical attention.[977] However, cross-examining on this issue allows the defence to highlight where the complainant's evidence of being injured is not supported. Had the complainants been medically examined, further evidence may have been available to corroborate their accounts. Though, medical evidence will rarely provide conclusive proof of rape.[978]

Research shows many women experience tonic immobility during rape, which is a 'state of motor inhibition' caused by intense fear in threatening situations.[979] This may explain why some complainants did not physically resist. In T8, the defence explored how the complainant froze during one non-consensual sexual act and did not freeze during the other.

[977] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 51-53.

[978] Saunders C.L, 'Rape as 'One Person's Word Against Another's: Challenging the Conventional Wisdom' (2018) 22(2) The International Journal of Evidence & Proof 161, 171.

[979] Möller A, Söndergaard H.P and Helström L, 'Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression' (2017) 96(8) Acta Obstetricia et Gynecologica Scandinavica 932, 932 and 935-936; Galliano G, Noble L.M, Travis L.A and Puechl C, 'Victim Reactions During Rape/Sexual Assault A Preliminary Study of the Immobility Response and Its Correlates' 8(1) Journal of Interpersonal Violence 109, 110.

T8DC: What you told the police officer was you definitely said no to that?

T8C: Yes.

T8DC: You didn't freeze in relation to that?

T8C: "What do you mean?"

T8DC: You weren't frozen unable to move [because you said no at that point].

T8C: Obviously.

The above passage implies a binary: the complainant either froze throughout, or not at all. However, human behaviour is more complex and may be counter-intuitive. For instance, tonic immobility is an unlearned, involuntary, and temporary state, which can involve tremors, inability to verbalize, unresponsiveness, and numbness.[980] This, therefore, challenges the 'real rape' myth that genuine victims fight off their attacker. However, research has demonstrated the obstinacy of this myth among mock jurors.[981] Moreover, mock jurors only accept a complainant would freeze in particular circumstances, such as when the attacker is a stranger. Ellison and Munro's study also indicates that the binary, described above, operates in mock jury deliberations.[982] For example, mock jurors were suspicious where complainants froze during the alleged rape, but immediately called the police.[983]

More frequently, the subject of verbal resistance was raised in cross-examination. Examining the verbal communication between a complainant and defendant may help

[980] Möller A, Söndergaard H.P and Helström L, 'Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression' (2017) 96(8) Acta Obstetricia et Gynecologica Scandinavica 932, 932-933; Galliano G, Noble L.M, Travis L.A and Puechl C, 'Victim Reactions During Rape/Sexual Assault A Preliminary Study of the Immobility Response and Its Correlates' 8(1) Journal of Interpersonal Violence 109, 110.

[981] Ellison L and Munro V.E, 'Jury Deliberation and Complainant Credibility in Rape Trials' in McGlynn C and Munro V (Eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2011) 286.

[982] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 207.

[983] Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 210.

the defence advance their case that the defendant had a reasonable belief in consent. Six complainants were questioned on whether they verbally communicated their non-consent, by saying 'no' or telling the defendant to stop.[984]

T13DC: If you woke up with a cord around your neck why not say stop?
T13C1: He had the cord round my neck.

Smith and Skinner found that some defence barristers focused on the complainant's failure to physically struggle, and ignored her evidence that she repeatedly said 'no'.[985] They argued this prioritises the complainant's removal of consent instead of the defendant's steps to gain her consent.[986] Their argument could also be applied to these current findings, as examinations attributed responsibility to complainants for withdrawing their consent by clearly saying 'no', rather than viewing consent as something given. This responsibility arguably parallels with Smart's 'phallocentric culture' argument, where women challenge the power of masculinity and subservience of women, with their ability to refuse sex.[987]

Six complainants were also asked whether they verbally resisted rape by screaming and shouting; three complainants accepted they did not scream or shout. Some defence barristers appeared to suggest a genuine victim would have resisted in this manner.

T2DC: "There were all sorts of things you could have done you could have screamed couldn't you?"
T2C: Scream? There was nobody about!

[984] Two complainants were directly challenged on their failure to say no. Although, these six complainants suggested they did resist in this manner, at some stage during the alleged rape.

[985] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 11.

[986] As explained within Chapter Two, the defence barrister's role in cross-examination is to challenge the prosecution's case and the complainant's evidence. Therefore, it is perhaps unsurprising that defence barristers overlook a complainant's claims of verbal non-consent and focus on her removal of consent. Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 11.

[987] Smart C, *Feminism and The Power of The Law* (Routledge 1989) 31-32.

Of the complainants examined on their failure to verbally resist by saying 'no' or shouting, three explained they were in shock or scared. In T8, the defence barrister undermined this explanation, and normal response to rape, as demonstrated below. Evidence shows that being unable to verbally or physically resist can result from fear or confusion.[988]

T8DC: Do you remember saying anything in response?

T8C: No I was scared.

T8DC: Scared, scared of what?

T8C: Of getting hurt.

Questions on verbal resistance may be permissible, on grounds that a lack of verbal communication does not necessarily indicate the absence of consent or reasonable belief in consent.[989] The defence may, therefore, be seeking to demonstrate this in cross-examination.

Further submissions were made to the complainants that their neighbours either could or would have heard a commotion.[990] The complainants' evidence that they screamed was doubted, because someone would have heard. The complainants' failure to scream was treated as counterintuitive, as potential help was nearby.

T9DC: The jury have heard you lived in shared accommodation and sometimes you could hear people through the walls.

T9C: Yes it would depend what landing they were on but yes you can.

T9DC: You didn't think to scream out, you got back into bed?

[988] Mason F and Lodrick Z, 'Psychological Consequences of Sexual Assault' (2013) 27(1) Best Practice and Research, Clinical Obstetrics and Gynaecology 27, 29; Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (NB Research: London 2013)

[989] Consent is not defined as an explicit verbal agreement under, Sexual Offences Act 2003, s.74. For discussion on the definition of consent see, Gurnham D, 'A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts' (2016) 19(2) New Criminal Law Review 141, 149; MacKinnon, C.A, *Women's Lives, Men's Laws* (Harvard University Press 2005) 243.

[990] Five complainants were examined on this issue.

T9C: I was too scared.

Together, these questions depict genuine rape as involving loud commotion with verbal resistance, which would not go unnoticed by people nearby. The possibility that fear inhibited the complainants' from screaming or saying 'no' is overlooked.[991] This is perhaps unsurprising, since defence barristers are conducting cross-examination and are under no obligation or duty to elicit or emphasise testimony that supports the prosecution's case. Moreover, examining this issue enabled the defence to demonstrate where the complainant's evidence was not corroborated.

5.2.3 Escaping Rape and the Rapist

In addition to resistance, complainants were cross-examined on their behaviour during and after the alleged rape, to escape the situation, location, and the defendant. Firstly, five complainants were examined on their efforts to escape during the alleged rape. The defendant's removal of clothing was presented as an opportunity to escape, for three complainants.

T5DC: So when he was taking his trousers off, were you not free?

T5C: There was no way. I'm quite a small girl he is really big I don't understand, I can't believe this.

In addition, T11DC suggested that there was physically space for T11C to get off the bed to escape. Freedom appears to be defined in physical and tangible terms, which ignores other forms of coercion potentially operating and other factors such as the complainant's fear.[992] Secondly, eight complainants were cross-examined on leaving the situation and location after the offence. This was whether the defendant was still present, was some distance away, or had left. The basic proposition often put to

[991] Möller A, Söndergaard H.P and Helström L, 'Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression' (2017) 96(8) Acta Obstetricia et Gynecologica Scandinavica 932, 932-933; Mason F and Lodrick Z, 'Psychological Consequences of Sexual Assault' (2013) 27(1) Best Practice and Research Clinical Obstetrics and Gynaecology 27, 29.

[992] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 12.

complainants was 'why did you not leave', which appeared to suggest this would be the rational response. Moreover, five complainants were cross-examined on remaining in the defendant's company during the initial aftermath. While there can be multiple and complex reasons for this behaviour,[993] remaining with the defendant was treated as unusual in cross-examination. However, these questions may not necessarily invoke rape myths. The defence could also be illustrating their position that there was no reason for the complainant to leave, because nothing non-consensual occurred. Therefore, this evidence should be aired during cross-examination to ensure the defence can advance their case and address unspoken questions that the jury may have.

T17DC: Why did you not just leave?

T17C: I didn't want to be stood on the street [waiting for my bus].

T17DC: If you are right, he forcibly raped you.

T17C: Yeah.

T17DC: And you thought it would be better to stay in a room with him than go outside and wait on a bus stop?

T17C: [I would] rather have a roof over my head than be outside where anything worse could happen.

Thirdly, the defence similarly challenged any contact between four complainants and the defendants beyond the immediate aftermath. For instance, three complainants were questioned on subsequent text communications, where conversation was 'normal'. This behaviour can be presented as counterintuitive, and attempts to undermine the complainant and the plausibility of her allegations.[994] Smith and Skinner observed similar practices, and argued the defence 'ignore the complexity of

[993] These reasons may parallel with experiences of continual sexual violence within marriages, where women do leave those relationships, either immediately or at all. Painter K, 'Wife Rape in The United Kingdom' (American Society of Criminology Conference, 1991) 15 and 34.

[994] As argued within Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 54; Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 12-13.

rape contexts' by arguing complainants would feel negatively towards him.[995] Normalising what happened is a recognised response to rape, particularly where there is some form of relationship with the defendant or children are involved.[996] Again, the defence could also be demonstrating that conversation was 'normal' because nothing non-consensual occurred. Therefore, these questions do not necessarily invoke rape myths, but ensure the defence can advance their case.

While some complainants were expected to escape and cease all contact with the defendant, three were cross-examined on their failure to confront him and accuse him of rape.

T14DC: You did not take the opportunity to…tell him what a bad man he had been.

T14C: I told him in my texts.

T14DC: You were in the company of other people…[you could have said what he had done].

T14C: I said in the text messages…

T14DC: Did you shout at him and say, you will never believe what he has done to me?

T14C: I couldn't tell anyone I felt ashamed upset and shocked.

T14DC: You could have got the attention of a police officer at the [festival].

T14C: I didn't.

T14DC: The reason for all of this is because it didn't happen the way you said it did.

T14C: That is not true.

Together, these questioning strategies arguably overlook the different possible reactions that follow rape, and the various external and contextual factors that influence a complainant's response. Although questions allowed the defence to

[995] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 10.

[996] Angiolini E, *Report of the Independent Review Into The Investigation and Prosecution of Rape in London* (Metropolitan Police and Crown Prosecution Service, 2015) 54.

advance their case, as explained above, they could also imply that a genuine victim would escape at the earliest opportunity, she would be too afraid to remain in the offender's company, and would not want to remain at the crime scene.

5.2.4 Anticipating and Preventing Rape

Finally, six complainants were cross-examined on anticipating rape or further violence, and their efforts to take protective action and prevent rape. Questions were expansive contextually. Sometimes complainants were asked about hypothetical behaviours, where they could have taken certain precautions.

> **T2DC:** He would come to your bedroom and rape you…why didn't you simply put a lock on your door?
>
> **T2C:** Why put one on?
>
> **T2DC:** To keep him out.
>
> **T2C:** Ok.
>
> **T2DC:** But you didn't.
>
> **T2C:** No.

This example places the onus on the complainant to prevent rape, and subsequently blames her for failing to take protective action. Similarly, the belief that women are sometimes to blame for rape, because of their risky behaviour, was implied in T4.[997] Here, the defence suggested it would have been safer for T4C to 'do business' at the defendant's address, and not outside. This is arguably misleading, as the nature of sex work means she is generally more vulnerable to rape,[998] and the public outdoor area was more familiar to her.

> **T4J:** You are putting to her it is safer at his home than the area, that is your proposition?

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[997] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review 710, 715.

[998] Survey research has found 26% of 2000 sex workers have reported rape, attempted rape or sexual assault to the national ugly mugs scheme, as discussed within Home Affairs Committee, *Prostitution* (2016-17, HC 26) para 44.

T4DC: Yes, given her history [it would be] safer for her to go to his house.

T4C: I would be more vulnerable at his house than outside.

Two complainants were cross-examined on the apparent warning signs in the defendants' previous odd behaviour.[999] This appeared to insinuate that they would have taken protective action in response to these signs, such as informing someone, if their allegations were true. For example, T6C was challenged on her awareness of T6D's violence and her failure to take precautions. On one occasion T6D assaulted T6C and her son, against a backdrop of previous violence and rapes. She was cross-examined on allowing T6D into her home, her failure to protect her son and her actions that could have provoked further violence.

T6DC: He'd gone into your bedroom…he had his shoes on the clean sheets…not to mention against background the jury heard, you describe that you were scared to tell the police but you were prepared to shout at him

T6C: Yes

In addition, two complainants were asked why they did not leave the relationship.[1000] This may imply that genuine victims would leave to protect themselves from further violence.[1001] Thus, attributing some responsibility to the complainants to predict and prevent the offence. This observation reflects Temkin *et al*'s research, where a complainant was repeatedly cross-examined on her failure to leave the marital home.[1002] As Temkin *et al* explain, the decisions of the many women, experiencing

[999] This occurred within the cross-examination of T2C and T10C.

[1000] Additionally, T9DC submitted in cross-examination that T9C could have left the defendant instead of making up a false allegation of rape.

[1001] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 215.

[1002] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 215.

domestic and sexual violence, to leave or stay are vast and complex.[1003] Therefore, these barristers arguably present a simplistic view of domestic relationships and the varying factors influencing responses to rape. On the other hand, these questions may not necessarily invoke rape myths. As previously explained, the defence could also be illustrating their position that there was no reason for the complainant to leave, because they had a good relationship and nothing non-consensual occurred. These questions may also address unspoken questions the jury may have. The complainant's responses may also refute these issues occupying the minds of jurors.

The questioning strategies analysed above, which explored the complainants' delayed reporting, resistance to rape, and efforts to escape or prevent rape, appeared to have persuasive purposes. Numerous broad rape myths could be inferred from these questions, which may play to assumptions potentially held by jurors. Therefore, these strategies arguably adhere to the traditional cross-examination principles of persuasion and advocacy.[1004] Henderson explains that the best evidence model rejects forensically unsafe tactics and persuasive performance, and instead seeks to obtain reliable evidence from witnesses through rigorous and reliable questioning.[1005] Though, the best evidence model does not clearly articulate how strategies, which play to the jury, affect a complainant's best evidence.

While some barristers clearly utilised myths,[1006] the above discussions also indicated alterative interpretations of these questions, which ensure the defence can examine central facts and fairly advance their case. The actions of the complainant, such as delayed reporting, will often form part of the case narrative. These issues could be probative and may need to be raised when questioning complainants, to address

[1003] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 215. Also see: Painter K, 'Wife Rape in The United Kingdom' (American Society of Criminology Conference, 1991) 15 and 34.

[1004] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

[1005] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 183-184 and 186; *R v Barker* [2010] EWCA Crim 4.

[1006] Appendix five outlines the number of trials where barristers clearly utilised refutable rape myths.

matters that occupy the jury's minds, such as why a complainant did not immediately report. The complainant's response to these questions may also address some of the worries jurors may have. This underscores the importance of distinguishing where questions regarding the complainant's behaviour clearly utilise myths, from good advocacy where questions allow barristers to legitimately challenge the credibility of a complainant's account. Such assessments would need to be made subject to the individual facts of each case.

A fair treatment approach would reject questions that clearly utilise refutable rape myths, where these questions have no factual basis in the case. For example, questioning a complainant on her lack of external injuries would not be misleading if the complainant alleges the defendant used additional force or violence, as the defence will be properly examining the absence of corroboration to her claims. In contrast, examining a complainant on their lack of physical injuries, when she does not allege additional force was used or suggest that she physically resisted, appears to infer that a genuine rape victim would sustain injuries. The latter undermines a complainant's best evidence and its reliability, by obscuring her evidence with refutable myths that may appeal to juror assumptions about rape. Moreover, these questions may inhibit the giving of best evidence, if complainants feel blamed, frustrated, and distressed by these questions. Although scholars recurrently critique the reliance upon rape myths within the courtroom, limited attention has been given to how this can be regulated within cross-examination. Chapter Seven will discuss how inappropriate questions that encourage refutable rape myths could be regulated, with a fair treatment approach.

5.3 Using The Complainants' Sexual History

In this study, the complainants' sexual history routinely featured in their cross-examinations. This included their previous sexual behaviour with the defendant and third parties, and also other related experiences such as pregnancy. For sixteen complainants their sexual history featured at some stage throughout the trials.[1007] At

[1007] The sexual history of T7C and T17C did not feature in their cross-examinations. This evidence did feature in both defendants' evidence and in T17C's ABE interview.

89%, these findings are comparable with Smith's observations,[1008] but diverge from others.[1009] Only two complainants were not questioned on these matters during cross-examination.[1010] The use of sexual history evidence is regulated under s.41 YJCEA.[1011] Where the defence wish to adduce evidence or cross-examine a witness on a complainant's sexual history, they must apply for leave in writing within a specified time frame.[1012] The application must state the issue to which the sexual behaviour is relevant, the details of the evidence and questions to be asked, and the s.41 gateway relied upon.[1013] Applications must be heard in private and in the absence of the complainant, during a pre-trial hearing.[1014] Section 41 applications were observed in seven trials,[1015] typically on the first day. Due to the methodological limitations of this study,[1016] it cannot be assumed that this shows procedural rules were not followed. Firstly, it cannot be known whether issues pertaining to sexual history evidence, and s.41 applications, were raised in earlier pre-trial hearings across the sample of trials. Secondly, there may have been problems, such as delayed

[1008] Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 161.

[1009] Durham R *et al*, *Seeing is Believing: The Northumbria Court Observers Panel. Report on 30 Rape Trials 2015-2016* (Northumbria Police and Crime Commissioner 2017) 8.

[1010] These complainants were T7C and T17C. The sexual history of T1C and T8C did not feature at all. However, T1C was cross-examined on the sexual history of her daughter (T1C1) with a third party, which was deemed admissible by the judge in chambers.

[1011] This regulation excludes any sexual behavior alleged to have taken place as part of the matters charged against the defendant, Youth Justice and Criminal Evidence Act 1999, s.42(1)(c).

[1012] Applications must be made within 14 days of disclosure of the material by the prosecution. Criminal Practice Directions Amendment No.6 [2018] EWCA Crim 516, CPD 22A.1; Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.4(1)(b).

[1013] Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.4(2); Criminal Practice Directions Amendment No.6 [2018] EWCA Crim 516, CPD 22A.2.

[1014] Youth Justice and Criminal Evidence Act 1999, s.43; Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.2(1)(a).

[1015] Of these seven applications, one application in T1 related to a complainant who has been excluded from analysis. In addition, one defence barrister raised the s.41 application, and informed the judge that the parties agree that the s.41 ruling from the previous trial will be carried over to the defendant's re-trial, in T15.

[1016] As discussed within Chapter Four at section 4.2.2.

prosecution disclosure, which warranted s.41 applications to be made at trial. However, observations did reveal one clear example of a late application. In T16, the application was sent by email on the first day of trial, which displeased the judge.[1017] Defence counsel in this case apologised to the judge, and accepted there were no excuses for the delay.

Although s.41 applications must be heard in private, the researcher was permitted to remain in court and take notes. Only once was the researcher asked to exit with other laypersons. Procedural rules stipulate that judges must state in open court their reasons for permitting or refusing leave, without the jury present.[1018] If leave is granted, they must outline the extent to which the evidence is adduced and questions that can be asked.[1019] Of the seven applications observed during the trials, four judges did not provide clear and detailed rulings in the courtroom. It is possible that rulings were provided to counsel privately or in writing. The cross-examination of sexual history for these fourteen complainants will now be analysed, with consideration of admissibility.

5.3.1 Sexual History with the Defendant

Recurrently, complainants were cross-examined on their sexual behaviour with the defendant.[1020] This related to sporadic instances of sexual activity or a continual sexual relationship, with questions varying in length and level of intimate details. This may appear proportionally excessive, since parliament's intention was to limit the use

[1017] To illustrate, the researcher's field notes from the first day of trial sixteen state the following: 'T16J says there is "no excuse" that the application was not made earlier and from looking at the file he anticipated that a section 41 application would have been required. He asserted that, "there are strict rules that need to be complied with". T16DC says she accepts this and is not going to make any more excuses'.

[1018] Youth Justice and Criminal Evidence Act 1999, s.43; Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.3.

[1019] Youth Justice and Criminal Evidence Act 1999, s.43; Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour, CrimPR 22.3.

[1020] This occurred for eleven complainants.

of sexual history.[1021] However, conclusions that s.41 is operating unsuccessfully cannot be reached on the mere basis that a high number of cases featured sexual history evidence. Instead, analysis will show that questions were largely admissible under s.41 and as background evidence within the small sample of trials observed. Section 41 was created with specific gateways of admissibility, deemed necessary for a fair trial. As such, it could equally be argued the legislation is operating successfully, in the cases observed. Nonetheless, the following discussion will highlight some areas where questioning on sexual history appeared to be inadmissible or conducted poorly.

Evidence of a sexual relationship, or alleged relationship, with the defendant was raised in eight complainants' cross-examinations.[1022] Within questioning, the general or typical nature of sexual activity during this relationship was cited.[1023] However, s.41(6) states that for questions to be admissible under s.41(3) and (5), they must 'relate to a specific instance or instances of alleged sexual behaviour'. As this chapter will demonstrate, these questions enabled the defence to advance their case.[1024] This highlights a problem with the wording of s.41, as relevant evidence will not necessarily relate to a discrete and specific occasion. However, the general nature of sexual activity was also cited, when it was clearly irrelevant, as demonstrated below.

T9DC: You said you loved each other all the time and were an affectionate couple.

T9C: Yes.

T9DC: "And you used to make love a lot?"

[1021] Kelly L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/2006) 1 and 17, citing Hansard Standing Committee E, June 24 1999, col 224.

[1022] This included T6C, T9C and T14C, who were in domestic intimate relationships with the defendants, and also T5C, T10C, T12/13C1, T15C and T16C, who did have or were alleged to have had a continual but casual sexual relationship with the defendant. Section 41 applications were observed in T9 and T16.

[1023] This occurred within seven of the eight complainants were examined on their sexual relationships with the defendant.

[1024] Appendix Five outlines the number of trials where barristers cited irrelevant sexual history evidence.

T9C: "Yes."

In T9, the defence were permitted to ask three specified questions about how anal sex and sex toys featured in their relationship. This was to rebut T9C's evidence that anal sex was only recently attempted and she did not like it, using s.41(5). Cross-examination went beyond the admissible questions permitted, as demonstrated above. The frequency in which the complainant and defendant had sexual intercourse throughout their relationship was plainly irrelevant and should not have featured.[1025] The jury were aware their relationship was sexual, without probing the intensity or regularity of it.

Questions pertaining to the parties' sexual relationship were admissible in other cases. For example, in two trials, questions allowed the defence to put their case that penetration did not occur.[1026]

T6DC: As part of your relationship you had consensual sex but not anal sex.
T6C: No.
T6DC: Did you know he does not engage in anal sex for religious reasons?
T6C: No.

Here, the defence denied that penetration occurred on the count of anal rape. Thus, gateway s.41(3)(a) applies, as questions do not relate to the issue of consent. The questioning primarily allows the defence to advance reasons why penetration would not have occurred. Refusal would prevent the defendant from fully advancing his case, so could lead to unsafe conclusions by the jury. More commonly, the defence used cross-examination to assert certain sexual behaviour did occur, when

[1025] This was the only example where cross-examination went beyond the admissible questions set out within an application, which the researcher was able to observe. The researcher does not know whether admissible questions were set out prior to trial in other cases, and also if they were subsequently contravened.

[1026] This featured within the cross-examinations of T6C and T10C. Although the questions contextually differed, they would have been admissible under s.41(3)(a), as the defendant denied penetration.

complainants wholly or partly denied that this behaviour took place.[1027] Accordingly, gateway s.41(5), which allows the defence to rebut the prosecution's evidence, would open in these cases. For example, T5C's claim that she only had casual sex with the defendant on three previous occasions was challenged, as the defendant suggested this occurred more frequently. In addition, the defence position was that consensual vaginal intercourse occurred, which began with T5C performing oral sex on T5D. However, in this cross-examination, the defence went beyond advancing their case and simply refuting the complainant's assertion. The exploration of further details, indicated below, should not have been admissible.[1028]

T5DC: I suggest to you he also performed oral sex on you but less frequently.

T5C: No.

Another interesting use of sexual history, where s.41(5) would have applied, occurred in T13. In cross-examination, defence counsel suggested that T13C1's injuries resulted from consensual sadomasochistic sex, which had previously featured in their relationship. Section 41(5) would apply here, as the complainant stated that she had never experienced 'rough sex' with the defendant, which conflicted with the defence case.

T13DC: Do you agree in the past you have bitten each other?

T13C1: No.

T13DC: After consuming crack cocaine

T13C1: No, never.

T13DC: Has he pulled your hair?

T13C1: No, never.

T13DC: Have you slapped him?

T13C1: No, never.

T13DC: He has slapped you before.

T13C1: No never.

[1027] This featured within the cross-examinations of six complainants.

[1028] T5C was also cross-examined on the last occasion of intercourse, which was five days previously.

T13DC: You have choked each other

T13C1: No, never

T13DC: I suggest to you that in that past he has used a dressing gown cord to choke you

T13C1: No, never

The defence could also argue the specific instances of choking with instruments or slapping were 'so similar' to the allegations charged and relevant to consent under s.41(3)(c)(i). The evidence would also be relevant to T13D's reasonable belief in consent, and admissible through s.41(3)(a). While the various elements of s.41 appear satisfied, admissibility of this evidence could be regarded as problematic. If the parties previously had consensual sadomasochistic sex, it does not necessarily follow T13C1 would have consented again.[1029]

In addition, observations revealed inconsistencies in how the court responded to disputes about the existence of previous sexual relationships within T15 and T16. Within T15, the complainant was cross-examined on having a secret affair with the defendant, which occurred after nights out and without contraception. She wholly denied any sexual relationship, and stated this in her ABE interview. Therefore, the evidence would fall within s.41(5). The defence argued it was primarily relevant to the issues of consent and reasonable belief. Within T16, the complainant denied any sexual history, which the defence sought to challenge under s.41(5). The prosecution did not contest the late application or reliance on s.41(5),[1030] and asserted that:

[1029] As argued within, Conaghan J and Russell Y, 'Rape Myths, Law and Feminist Research: 'Myths about Myths'?' (2014) 22 Feminist Legal Studies 2; Firth G, 'The Rape Trial and Sexual History Evidence: *R v A* and the (Un)Worthy Complainant' (2006) Northern Ireland Legal Quarterly 57(3) 442, 457 citing Schwartz H, Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection' (1994) Criminal Reports 31 (4) 232, 233-235. For a discussion of the tension produced by statutory provisions of sexual history evidence, see Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 94-95.

[1030] As Hoyano argues, it would be unethical to oppose a late application where the evidence is clearly admissible. Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 91.

T16PC: Where a complainant states there was no sexual relationship before, if it is the defence case that there was then they cannot be barred [from that].

These examples demonstrate inconsistencies in how the barristers approached s.41, as the different admissibility gateways were used in similar circumstances. A further inconsistency was identified, in relation to the scope of questioning permitted to refute the complainant's evidence in these cases. For example, T16J allowed the defence to ask if there was previous sexual activity, under s.41(5), but they could not explore the nature because denial by the complainant was expected. This view was not reflected in T15, where the complainant was cross-examined on this issue on eight occasions and questions featured intimate details.

More infrequently, complainants were cross-examined on sporadic occasions of sexual behaviour with the defendant, where the parties did not have any prior relationship. Specific occasions of previous kissing were most commonly questioned, and one complainant was examined on an alleged occasion of sexual intercourse. For the three complainants examined on occasions of kissing, s.41 (5) operated.[1031] A clear example of admissibility arose within T18, where the complainant asserted the defendant was kissing and sexually touching her in a taxi, and then was dragged to the hotel by force. The defence rebutted this with CCTV showing them kissing and holding hands on entering the hotel.[1032] In contrast, the admissibility of an alleged previous drunken kiss between T13C2 and T13D is more ambiguous. Initially the judge expressed reluctance to allow cross-examination on this evidence because it occurred a week before and was not 'so similar' to the intercourse alleged. This view correctly follows the position in *A*, when applying s.41(3)(c).[1033] The judge held that this refusal would not render a conclusion of the jury unsafe. However the judge was later persuaded that the evidence fell under s.41(5), and would allow the defence to challenge T13C2's assertions that she was not sexually attracted to the defendant and would not have consented. The defence also claimed that consensual sex occurred the

[1031] This featured within the cross-examinations of T3C, T12/13C2 and T18C.

[1032] Although this sexual behavior was proximate to the alleged rape, s.41(3)(b) need not apply because the issue at trial was penetration not consent.

[1033] *R v A* (No 2) [2001] UKHL 25.

following afternoon of the alleged rape, which the complainant denied in cross-examination. The judge was satisfied, under s.41(3)(b), that this evidence was proximate, related to a specific instance, and was not primarily being used to impugn the complainant's credibility. The judge, drawing upon Lord Clyde,[1034] acknowledged in his ruling that:

> **T12J:** …Issues of consent and issues of credibility may well run so close to each other as almost to coincide. A very sharp knife may be required to separate what may be admitted from what may not…

This underlines the delicate balance judges must achieve when deciding admissibility, particularly under s.41(3)(b) or (c). Overall, a significant proportion of the questions relating to the complainant and defendant's sexual history, whether pertaining to sporadic occasions or a continual sexual relationship, were admissible as rebuttal evidence. As such, s.41(5) appears to be an accessible gateway, where sexual history is disputed, in the trials observed. This notably arose where complainants made comments in their ABE interview about their relationship and experiences with the defendant.[1035] McGlynn argues that high levels of admissibility, such as this, indicate that s.41 is not operating to restrict sexual history evidence, as parliament intended.[1036] However, to ensure fairness, the defence must be able to refute the prosecution's evidence, which s.41(5) permits.[1037] Section 41 stipulates four gateways of admissibility that are necessary for a fair trial. Parliament, therefore, did not intend to restrict sexual history evidence that properly falls under s.41(5), or the other gateways. The high frequency in which the complainants' sexual history featured in

[1034] *R v A* (No 2) [2001] UKHL 25 para 138.

[1035] Temkin *et al* similarly found references to sexual history being made within ABE interviews with 'scant evidence' of editing these references from the recordings, Temkin J, Gray J.M and Barrett J, Different Functions of Rape Myth Use in Court: Findings From A Trial Observation Study (2016) Feminist Criminology 213.

[1036] McGlynn C, 'Commentary on *R v A* (No 2)' in Hunter RC, McGlynn C and Rackley E (Eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 214. Kelly L *et al*, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/2006) 1 and 17, citing Hansard Standing Committee E, June 24 1999, col 224.

[1037] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 74.

the small sample of trials observed, does not necessarily indicate the statutory provisions are operating successfully or unsuccessfully. The penultimate chapter of this thesis will consider this issue further, including whether any reforms are required to the sexual history provisions and procedural rules.[1038]

5.3.2 Sexual History with Third Parties

Comparatively, only T3C and T5C were cross-examined on their sexual relationships with third parties. The Court of Appeal has made clear that a complainant's sexual history with third parties is, 'almost always irrelevant'.[1039] Where such evidence was admissible in *Evans*, the case was declared uncommon.[1040] Within *Evans*, the defence sought to adduce fresh evidence to show the complainant consented to sexual intercourse with two men, around the time and under similar circumstances to the alleged rape.[1041] The defence successfully argued under s.41(3)(c) that the similarities between the sexual behaviour, from the complainant's words during intercourse and the same sexual position adopted, did not need to be striking and was not coincidental.[1042] The decision in *Evans* was made with hesitation', and once the defence surpassed the high hurdle for admissibility.[1043] Therefore, *Evans* appears to reiterate the position in *A* that sexual history with third parties would be admissible in exceptional circumstances.[1044] In line with this view, the evidence was heard infrequently in the small sample of cases observed. However, analysis of these observations demonstrates the evidence appeared to be inadmissible. In trial three, the complainant was briefly examined on kissing another male, in the nightclub a few hours before the matters charged.

[1038] Refer to Chapter Seven at section 7.3.3.

[1039] *R v A* (No 2) [2001] UKHL 25 para 30.

[1040] *R v Evans* [2016] EWCA Crim 452 para 74.

[1041] *R v Evans* [2016] EWCA Crim 452.

[1042] *R v Evans* [2016] EWCA Crim 452.

[1043] *R v Evans* [2016] EWCA Crim 452 para 48 and 74. For a critique of this decision, see McGlynn C, Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence (2017) 81(5) The Journal of Criminal Law 367.

[1044] *R v A* (No 2) [2001] UKHL 25, para 30.

T3DC: [You] did a little dancing.

T3C: Yeah.

T3DC: You and [male] had a kiss.

T3C: Yeah.

Here the issue disputed was penetration. As such, s.41(3)(a) is the most appropriate gateway for admissibility. The prosecution previously adduced this evidence, perhaps to show the complainant's disinterest in the defendant at the time. The defendant accepted they were only friends despite kissing previously. Other than merely re-establishing this as background evidence, the evidence was irrelevant and could not help the jury determine if penetration occurred.[1045] In T5, the defence cross-examined the complainant at greater length on her previous sexual relationship with a mutual friend of the defendant 'X' and her ex-partner 'Y', who is her child's father. Defence counsel was keen to establish if there had been an overlap between the sexual relationships and the defendant's knowledge of them.

T5DC: Was there a time when you were seeing [X] and [T5D] at the same time?

T5C: No. What do you mean?

T5DC: I mean that did the sexual relationship with [X] and [T5D] overlap?

T5C: No.

The defence disputed that T5D was besotted with T5C and committed rape out of jealousy from discovering she was seeing someone else, 'Z'. Consent was the issue. Firstly, the sexual behaviour did not relate to a specific instance, as required for any gateway of admissibility.[1046] Moreover, the sexual behaviour with X and Y was not

[1045] In her ABE interview, the complainant was asked if any previous sexual contact occurred on the evening of the offence. The complainant stated she had kissed a male, whom she had a previous 'on off relationship' with. As the defence were not seeking to rebut or explain this prosecution evidence further, Youth Justice and Criminal Evidence Act s.41(5) is not applicable.

[1046] Under Youth Justice and Criminal Evidence Act 1999, s.41(6).

contemporaneous to the alleged offence,[1047] and the timings were unspecified. Therefore, gateway s.41(3)(b) does not open. Reliance on the similarity of these sexual behaviours under s.41(3)(c) is also unconvincing. Although the similarity need not be striking or unusual,[1048] in this instance the only similarity is that a general sexual relationship occurred. S.41(5) would not apply since the defence were not disputing the prosecution's evidence regarding X and Y, which featured in her ABE interview. These questions may seek to demonstrate the defendant's lack of jealousy because their relationship was casual,[1049] thereby rebutting the complainant's evidence that he was jealous and wanted a serious relationship with her. However, the alleged motive of jealousy could have been explored and refuted without probing third party sexual history evidence. Cross-examining T5C about X and Y added to the case background but was irrelevant to the central issue of consent. It is difficult to see how any gateways s.41(3) or (5) could have opened.

5.3.3 Other Sexual Behaviour

Earlier studies have found that other sexual experiences, including pregnancy and contraception, are explored in cross-examination to undermine the complainant's reputation.[1050] The current study found experiences of sex work, contraception, pregnancy, termination and miscarriage, were raised in the cross-examinations of seven complainants. These findings will be analysed to demonstrate how these matters were used in the contemporary cross-examinations observed, and whether this evidence was admissible. The law, rather ambiguously, defines sexual behaviour as 'any sexual behaviour or experience of the complainant'.[1051] Therefore, cross-examination on these experiences could be considered sexual behaviour and regulated by s.41. However, the Court of Appeal asserts that a distinction must be made

[1047] Under Youth Justice and Criminal Evidence Act 1999, s.41(3)(b), 'at or about the same time' has a narrow meaning of a few hours or days. *R v A* (No 2) [2001] UKHL 25, para 12.

[1048] *R v A* (No 2) [2001] UKHL 25, para 135; *R v Evans* [2016] EWCA Crim 452, para 73.

[1049] The complainant agreed their sexual relationship was casual, as she stated they had sex three times previously when she was drunk. However, she maintained the defendant was obsessed with her and wanted a more serious relationship.

[1050] Adler Z, *Rape on Trial* (Routledge 1987) 77-79; Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 137-138.

[1051] Youth Justice and Criminal Evidence Act 1999, s.42.

between questions 'about' the complainant's sexual behaviour and those that simply refer to experiences relating to sexual behaviour, including pregnancy or abortion, when examining other central issues.[1052]

This distinction could be made within three cases, and the sexual behaviour appeared to be admissible. The cross-examination of two complainants referred to their pregnancies, which enabled the defence to challenge inconsistencies in their evidence. For example, T2C stated in evidence-in-chief that she became pregnant, as a result of the rape, and had a termination. Her medical records did not corroborate her claims, and this was put to her in cross-examination. The questions were not 'about' the sexual behaviour, but were exploring the credibility of her evidence. Therefore, following the position in *R v RP*, this behaviour would not be caught by s.41 and would be admissible.[1053] This position would equally apply in T6, where the defendant disputed that on discovering the complainant had a termination he became violent and subsequently raped her. Cross-examination focused on the effects of the termination to rebut T6C's claims, rather than exploring the details. This demonstrates the importance of distinguishing questions about sexual history from other matters, which are central to the defence case. However, the observations from T9 provide an example of where the position in *R v RP* would not apply and questioning should have been prevented.[1054] The defence briefly and cautiously cross-examined the complainant on her experience of a miscarriage and domestic violence with her ex-partner.

T9DC: [Son]'s father was a violent man wasn't he?

T9C: Yes.

T9DC: He treated you very poorly (*said softly, concerned look on face*).

T9C: Yes.

T9DC: I only want to touch on this briefly, but during your relationship and engagement you suffered sadly two miscarriages, is that right?

T9C: Yes.

[1052] *R v RP* [2013] EWCA Crim 2331 para 33.

[1053] *R v RP* [2013] EWCA Crim 2331, para 33.

[1054] *R v RP* [2013] EWCA Crim 2331, para 33.

Although the details of this sexual behaviour were not explored, the behaviour became the sole focus of the questions. These matters were raised in isolation, and were not cited in order to examine other issues, such as an inconsistency in her evidence.[1055] Therefore, in applying s.41, these questions could not help resolve the core issues of consent and reasonable belief, and should have been inadmissible.[1056] Moreover, these questions could indirectly undermine the complainant's character by portraying her as 'damaged'.[1057] Despite T9C's composure, these personal questions could have been unexpected and upsetting.

The remaining references to sexual experiences were also 'about' these behaviours, as such, *R v RP* would not apply.[1058] References to contraception were raised in T15. As previously analysed, the defence were examining the complainant's alleged sexual relationship with the defendant, which occurred following nights out and without contraception.[1059] Lastly, two complainants were examined on their experiences of sex work. The complainants' sex work formed the narrative of these cases, which was necessary to explain that the parties had a worker and client relationship. The defence also examined T4C on this sexual behaviour to rebut her evidence that she rarely engaged in sex work, which fell under s.41(5). However, the cross-examination in T18 appeared to be inadmissible.

T18DC: We know what you do for a living [T18C] have you never had scary experiences in the course of your employment?

T18C: Yes I have but at the time I was working from my home, working in a room I wasn't going out to hotels.

[1055] *R v RP* [2013] EWCA Crim 2331, para 33.

[1056] The references to her ex-partner's violence would also be inadmissible bad character of a non-defendant, as regulated under under Criminal Justice Act, s.100.

[1057] Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 166.

[1058] *R v RP* [2013] EWCA Crim 233 para 33.

[1059] As discussed within section 5.3.1.

Within this case, the issues in dispute were penetration, as such s.41(3)(b) and (c) could not apply. This questioning did not rebut any prosecution evidence, for s.41(5) to apply. Moreover, how the complainant's previous scary experience related to whether penetration occurred with T18D is difficult to comprehend. Instead, the questioning implies that T18C would have known better than going to a hotel with a stranger, and is blamed for her risky behaviour.[1060]

Overall, from applying the current legislation to the observations, the complainant's sexual history was largely admissible. Amidst this, a limited number of defence barristers utilised inadmissible sexual history, relating to the defendant and third parties. The observations also provide some, albeit very limited, examples where procedural rules were not followed. This included a late application in T16, and the failure to limit cross-examination to the questions approved within an observed judicial ruling in T9.[1061] Formal judicial rulings were not provided in four trials, following observed applications, but may have been provided in private or writing. However, wider claims that procedural rules are not routinely followed cannot be made, due to the methodological limitations of this study.[1062]

As Henderson summarises, a fundamental principle for any cross-examination is that it must only investigate admissible and relevant matters.[1063] Any model of cross-examination, including the best evidence approach, would therefore reject the small number of problematic questioning observed. The few examples of poor practice observed demonstrated that statutory and procedural rules regulating sexual history

[1060] Temkin J, '"And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review: An International and Interdisciplinary Journal 710, 715.

[1061] However, it is important to acknowledge that the evasion of some procedural rules, for example late applications, may result from late prosecution disclosure, which have occurred in a number of recent rape cases. CPS, *Rape and Serious Sexual Offence Prosecution: Assessment of Disclosure of Unused Material Ahead of Trial* (CPS June 2018).

[1062] As discussed within Chapter Four at section 4.2.2.

[1063] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 184-185.

were not always followed across the trials sampled.[1064] It remains unclear how the best evidence model would address this and ensure these rules are followed more consistently. The cultural shift towards best evidence cross-examinations aims to improve conditions of cross-examination to facilitate the giving of best evidence, where there is a risk of confusion or acquiescence. It does not appear to consider how specific questioning strategies may undermine this.

A fair treatment approach would recognise that inadmissible, irrelevant, and excessive questioning on sexual history is problematic, as it obscures the central issues in a case, and does not encourage complainants to give their best evidence to resolve these issues. These questions can also cause distress, as observed within the sample of cases, which may inhibit the giving of accurate, coherent, and complete evidence.[1065] Moreover, questions citing irrelevant sexual history could undermine instances where complainants have given reliable evidence, as the irrelevant evidence may have a prejudicial influence on jurors.[1066] Reforms that seek to ensure sexual history evidence is adduced correctly in every case and is used proportionately will be considered within Chapter Seven.

5.4 Discrediting The Complainants' Character and Account

Within cross-examination, the general credibility of the complainants and their evidence was often challenged. Common tactics were to scrutinise any imperfections in the consistency, plausibility, and reliability of the complainants' accounts, and

[1064] Youth Justice and Criminal Evidence Act 1999, s.41; Criminal Procedure (Amendment) Rules 2019, Part 22: Evidence of a Complainant's Previous Sexual Behaviour.

[1065] Britain G and Heilbron D.R, *Report of the Advisory Group on the Law of Rape* (HM Stationery Office, Cmnd. 6352, 1975) para 89; LimeCulture, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: A Survey of Independent Sexual Violence Advisers (ISVAs)* (LimeCulture, September 2017).

[1066] Schuller R.A and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252, 257-259; Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) E. & P. 299, 312-313; Ellison L and Munro VE, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 797.

examine their character. Not all complainants, however, were cross-examined on each of these issues. These findings, which will be discussed, support some existing research into the tactics defence barristers use. These strategies appeared to compare complainants with the 'perfect' witness, who would be consistent from the outset, have complete and perfect recall of all matters, and be honest individuals. However, the following analysis will identify alternative interpretations for these strategies, where some examinations of the complainants' consistency, plausibility, reliability, and character were necessary and proper. Nonetheless, issues with these strategies will be critically analysed. The values of a fair treatment approach, and how it addresses these issues, will be established at the end of this chapter.

5.4.1 Inconsistent Accounts

Complainants will provide their account of rape more than once, from their first disclosures, report to police, formal statement or interview, and when giving evidence at trial. Scholars have suggested that examining inconsistencies is a central defence cross-examination strategy within adversarial trials.[1067] The current study also found that the complainants were often examined on inconsistencies within their evidence, and discrepancies between their accounts and other evidence.[1068] Previous research suggests that contemporary cross-examinations in New Zealand are less likely to focus on internal inconsistencies.[1069] This was not supported by the current study, as nine complainants were challenged on internal inconsistencies.[1070] Often this

[1067] As found in Zydervelt S, Zajac R, Kaladelfos A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1,14-15; Temkin J, 'Prosecuting and Defending Rape: Perspectives From The Bar' (2000) 27(2) Journal of Law and Society 219, 235.

[1068] As found in Zydervelt S, Zajac R, Kaladelfos A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 14-15; Temkin J, 'Prosecuting and Defending Rape: Perspectives From The Bar' (2000) 27(2) Journal of Law and Society 219, 235.

[1069] Zydervelt S, Zajac R, Kaladelfos A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 14-15.

[1070] The researcher uses the term 'internal inconsistencies' to denote differences between the complainant's own evidence at trial and other accounts she gave. 'External inconsistencies' is a term used to denote differences between the complainant's evidence and other admissible sources, such as evidence of other witnesses and documentation.

involved comparing the complainant's earlier account to the police, namely her ABE interview, with her live evidence. All complainants were able to re-watch their ABE interviews or reread their police statement before the trial to refresh their memories, which may assist with recall and improve their consistency. However, internal inconsistencies still arose. For five complainants, they were examined on inconsistencies pertaining to their accounts of the rape itself, which varied in the degree of intimate detail cited.[1071]

T5DC: [In] your first account you said he grabbed [your vagina] when you were stood up, or were you lying down? Which was it? When you were standing up or lying on the bed?

T5C: I don't remember (*sounded tearful*).

It is important that barristers conduct questioning sensitively when examining these central inconsistencies, since recalling events in intimate detail can be distressing or embarrassing.[1072] Additionally, internal inconsistencies about actions proximate and relating to the offence were raised during the cross-examination of six complainants.

T6DC: You told the jury [son] was with you again when [T6D] assaulted you he was present in the house during the attempted rape?

T6C: Yes.

T6DC: So why did you say to the police he had never seen [or witnessed anything]?

T6C: He didn't see him break my nose; he did see the blood but never actually saw what happened he saw I was bleeding.

However, the central significance of these inconsistencies about proximate events appeared to vary. For example, T8C was questioned on differences in her ABE

[1071] These were T5C, T6C, T8C, T14C and T15C.

[1072] Research across different jurisdictions using adversarial trials, has found that recalling events in intimidate detail can cause distress for complainants. These studies include: Adler Z, *Rape on Trial* (Routledge 1987) 51-52; Burman M, 'Evidencing Sexual Assault: Women in the witness box' (2009) 56(4) Probation Journal 379, 383-384; Kennedy J *et al*, 'How Protected is She? "Fairness" and The Rape Victim Witness in Australia' (2012) 35(5) Women's Studies International Forum 334, 335.

interview and cross-examination about proximate but minor events, including whether the light was left on or not. Inconsistencies about background matters were also examined in four cases.[1073]

Overall, these nine complainants, after refreshing their memory, were expected to recall events that occurred some time ago and in detail, and do so consistently with any previous accounts given. Within criminal trials, discrepancies are used as indicators of inaccuracy, unreliability and untruthfulness in testimony.[1074] Evidence shows that inconsistencies influence mock-jurors' perceptions.[1075] Therefore this strategy may be advantageous for the defence. Highlighting inconsistencies, even if peripheral, arguable implies the belief that genuine victims would provide wholly consistent accounts.[1076] Four defence barristers unequivocally attributed the complainant's inconsistencies to her being untruthful.[1077]

T4DC: "Can you explain the difference?"
T4C: "No."
T4DC: Is it because the event never took place?
T4C: No.

Inconsistencies can result from mistakes in memory, or a complainant's deliberate untruthfulness. Therefore, the defence barristers' questions could be exploring this. Jurors may question why a complainant has been inconsistent, and the defence barristers may be addressing these unspoken concerns. However, research shows

[1073] Four defence barristers questioned internal inconsistencies relating to background matters.

[1074] For a discussion see, Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 245-246; Wheatcroft J.M, Wagstaff G and Kebbell M, 'The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy' (2004) 9(1) Legal and Criminological Psychology 83.

[1075] Berman G.L and Cutler B.L, 'Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision-Making' (1996) 81(2) *Journal of Applied Psychology* 170.

[1076] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review 710, 715.

[1077] This occurred within T1, T4, T6 and T15.

inconsistencies also result from stress and confusion following the trauma of rape.[1078] It is also argued that being inconsistent is a natural part of accurate recall.[1079] Therefore, placing demands on complainants to be wholly consistent by examining inconsistencies about very minor details seems unrealistic.

Various external inconsistencies were explored with eleven complainants. Evidential sources, such as telephone records, CCTV footage and professional documents, were used to contradict aspects of the complainants' evidence. Previously, Kennedy suggested that independent sources make a juror's task easier, but the private nature of most rape means they will 'feel anxious about whether the allegation has been proved beyond reasonable doubt'.[1080] Therefore, where independent sources contradict aspects of a complainant's evidence, this may rightly carry significant weight in the jury's assessments of the complainant's overall credibility.

T14DC: You sent 79 messages in 4 hours.

T14C: Ok.

T14DC: That's hardly ignoring him is it? (*Abrupt, accusing, deep tone*)

Similarly, statements from other witnesses, which conflict with aspects of the complainants' evidence, were also used. With this, the defence, unsurprisingly, attached greater weight to a witness's evidence, to discredit the complainant's account. While witness evidence can be a source of doubt in a complainant's evidence, witnesses are not always neutral to the case, and may be mistaken or lying.

Exploring inconsistencies was a general cross-examination technique in the trials observed. Internal and external inconsistencies were used to undermine the complainants' credibility. However, as Kennedy persuasively suggests, these

[1078] Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 245-246; Ellison L and Munro V.E, Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process (2016) E. & P. 1, 26.

[1079] Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 245-246.

[1080] Kennedy H, *Eve was Framed: Women and British Justice* (Chatto and Windus 1992) 119

'weakness' are not inevitably damaging to the prosecution, as 'the quality of detail and sheer conviction within which the witness testifies on the crucial aspects of a cases leaves them [the jury] in no doubt as to where the truth lies'.[1081] The guilty verdicts delivered within T6 and T10 provide some evidence of this, as these complainants were examined on inconsistencies in their evidence.

5.4.2 Unreliable and Implausible Accounts

Observations found the complainants ideally needed to provide a clear and complete account of events from the outset. Eight complainants were examined on the vagueness or missing information within an earlier account. Often, this related to their account of the offence itself, as demonstrated below.[1082] Though, omissions pertaining to proximate events and background matters were also explored.

> **T17DC:** So that you understand, I am asking these questions to give you the opportunity to answer them alright, I am asking questions on notes, I've been given notes from the officers…and notes from the doctor, within those there is no mention of oral sex or a blow job or masturbation, did you deliberately leave that out?
>
> **T17C:** No.
>
> **T17DC:** Did you think those looked like you actively participated?
>
> **T17C:** No.
>
> **T17DC:** Can you explain why you left it out?
>
> **T17C:** My head was all over the place, I had the medical examination the day after, I was so stressed.

Such questioning seems to imply that the complainant would have mentioned these matters from the outset, if they were true. Complainants were able to explain in cross-examination that these omissions resulted from feeling tired, distressed, and anxious, which research suggests are normal reactions to rape that can impair recall.[1083]

[1081] Kennedy H, *Eve was Framed: Women and British Justice* (Chatto and Windus 1992) 119.

[1082] This featured within the cross-examinations of six complainants.

[1083] Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (2013) NB Research: London [Online] 6 <http://nb-research.com/wp-content/uploads/2013/04/Responding-to-the-challenge-of-

Research also shows it is not uncommon for further details to be recalled over time, after traumatic events.[1084] However, the defence unsurprisingly overlooked these valid reasons, by moving questioning on. The prosecution could seek to explore these reasons within evidence-in-chief or re-examination, depending on the information they have about a case. Feeling embarrassed, self-blame, or fearful may also lead complainants to omit matters from their accounts.[1085] However, omissions could equally result from untruthfulness, on which complainants were also directly challenged.

T1DC: Just pause. Just pause, you also made no reference then to him punching you…you have just made that up haven't you?

T1C: …this is the court of god, mind what you are doing…

These questions may also provide examples of defence barristers examining matters that address unspoken questions the jury may have. Jurors may question why a complainant failed to mention particular matters from the outset. The complainant's responses to these questions may equally address these matters, which potentially preoccupy jurors.

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rape-myths-in-court_Nina-Burrowes.pdf>; Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328 citing Tromp S, Koss M, Figueredo A and Tharan M 'Are Rape Memories Different? A Comparison of Rape, Other Unpleasant and Pleasant Memories Among Employed Women (1995) 8(4) Journal of Traumatic Stress 607.

[1084] Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328 citing Tromp S, Koss M, Figueredo A and Tharan M 'Are Rape Memories Different? A Comparison of Rape, Other Unpleasant and Pleasant Memories Among Employed Women (1995) 8(4) Journal of Traumatic Stress 607; Angiolini E, 'Report of the Independent Review Into The Investigation and Prosecution of Rape in London' (London, Metropolitan Police and Crown Prosecution Service, 2015) 53.

[1085] Hohl K and Conway M.A, 'Memory As Evidence- How Normal Features of Victim Memory Lead to The Attrition of Rape Complaints' (2017) 17(3) Criminology and Criminal Justice 248, 261; Angiolini E, 'Report of the Independent Review Into The Investigation and Prosecution of Rape in London' (London, Metropolitan Police and Crown Prosecution Service, 2015) 53.

In addition, eleven complainants were cross-examined on the accuracy and fallibility of their recollections. This is despite some defence barristers reassuring complainants that cross-examination was not a memory test. The defence examined areas the complainants could not remember, or emphasised the complainants' fallible recall when this information was volunteered. These differences are demonstrated below.

T3DC: The police officer asked if his penis was erect and you said you didn't know.

T3C2: Yeah.

T3DC: You were asked if you could feel his penis, remember that?

T3C2: Yeah.

T3DC: The truth of it is you're not sure his penis was inside you.

T3C2: No [I am] sure it was.

T17DC: [There was a point during this] he turned the music off in the room.

T17C: I can't remember.

T17DC: So are you saying it might have happened or might not have but you can't remember?

T17C: I can't remember.

The consumption of alcohol or drugs also featured in four cross-examinations, which directly undermined the reliability of the complainants' memory of the alleged rape.[1086] Their poor memories of central events, which defence barristers linked to heavy intoxication, relate to the complainant's credibility. These questions allow the defence to advance their case that the complainant's heavy intoxication has impeded her memory of consensual intercourse, or the lack of intercourse.

T13DC: Does drinking bottle of wine on top of anti-depressants have any affect on your memory?

T13C2: No.

[1086] This occurred for T3C, T5C, T12/13C1 and T12/13C2.

Another common strategy used in the cases observed involved barristers examining the plausibility of the complainant's account. For five complainants, this pertained to matters central to the alleged offending. For example, within T2 the defendant stated his penis was circumcised. To show penetration did not occur, the defence asked:

T2DC: Can you describe Mr [T2D]'s penis?

T2C: It was black!

T2DC: …you can't describe it because you've never seen it…

In closing, the defence submitted T2C could answer this if she had been raped as many times as she suggested. Arguably, T2DC is also implying that a genuine victim would be alert to their surroundings during rape.[1087] This defence advocate also adopted a direct approach in T14. In cross-examination, he stated the complainant's account of being forced down and having her hair pulled, while being anally raped, did not make sense. For other complainants, implausibility was subtly inferred through the defence advocates' confusion.

T7DC: I want to understand what you are saying, are you saying he knelt on your arms?

T7C: On my wrists…he was talking to me saying basically who are you giving sex to if your not giving sex to me…said I was just tired and wanted to go to sleep…basically hurt…I wanted him off me it was hurting he said he wasn't on my chest.

T7DC: You said you're not on my chest you're on my arms.

T7C: Yes.

T7DC: Are you saying both of his knees were on your arms?

T7C: Yeah.

[1087] Research has found that victims of sexual assault experience sensations such as closing their eyes or motor inhibition. This may mean they are not alert to everything that is happening to them or their surroundings, see Galliano G *et al*, 'Victim Reactions During Rape/Sexual Assault, A Preliminary Study of the Immobility Response and Its Correlates' 8(1) Journal of Interpersonal Violence 109, 111. Mason F and Lodrick Z, 'Psychological Consequences of Sexual Assault' (2013) 27(1) Best Practice and Research, Clinical Obstetrics and Gynaecology 27, 29.

Cross-examiners also challenged the plausibility of the complainant's account in relation to other matters, including proximate events and background details.[1088] The phrasing of questions, continued probing, and disbelieving tones by defence counsel insinuated implausibility. These implausibilities mostly related to important facts and background matters that were in dispute. Although these matters do not directly resolve the core issues in dispute, such as consent, the questions challenge the overall credibility of the complainant's account.

5.4.3 Untrustworthy, Unreliable, and Aggressive Dispositions

Defence counsel commonly 'put to' complainants that the allegations charged were false. In addition, cross-examination tested the truthfulness and reliability of many complainants, using various strategies. The character of complainants, therefore, became a common subject in cross-examination. Questions explored the complainants' previous lies,[1089] misconduct and temperaments.[1090] Also, the complainants' vulnerabilities[1091] and general alcohol and drug use were cross-examined.[1092] Firstly, proven falsehoods within five complainants' evidence were questioned. All complainants accepted their untruthfulness.[1093]

T17DC: You told the police you didn't see his uncle, is that true?

T17C: Yes.

T17DC: Why did you tell the boy in Ireland that you had been a long time because you were talking to [T17D]'s uncle?

T17C: I did not want to tell him what happened not then anyway.

[1088] Nine defence barristers examined implausibilities about proximate events and related matters to the alleged offending, and ten defence barristers probed implausibilities about background matters.

[1089] This includes established lies told in evidence and other previous lies.

[1090] This featured in the cross-examination of T1C, T2C, T4C, T7C, T10C, T13C1, T15.

[1091] This featured in the cross-examination of T1C, T2C, T4C, T6C, T13C2 and T16C.

[1092] This featured in the cross-examination of T1C, T3C, T4C, T5C, T6C, T13C1, T13C2, T15C and T16C. This was distinct from questions regarding the complainants' consumption of alcohol or drugs at the time of the alleged offence.

[1093] This related to evident lies told by T2C, T4C, T15C and T17C in their disclosures to others. Only T10C was questioned on other lies, unrelated to the offence itself. For example, she told the defendant that she knew someone who worked for the police, and she accepted this was a lie.

T17DC: So you told a lie.

T17C: Yes.

As expected, their justifications for lying were overlooked, with defence counsel emphasising their deliberate dishonesty. Exploiting clear fabrications could be used to demonstrate their unreliability and capability of misleading others. The defence barristers may be exploring this possibility, which could address unspoken questions that the jury may have. However, there are also reasonable explanations for telling lies, including fear and embarrassment,[1094] which the prosecution could explore in re-examination.

Furthermore, alleged previous false allegations of rape made by four complainants were raised in *voir dire*.[1095] The evidence only featured in cross-examination of T4C and T13C, and was deemed inadmissible within the other two trials. Where the defence argue previous complaints are false, s.41 does not apply because cross-examination refers to lies, not the sexual behaviour itself.[1096] A bad character application must then be made.[1097] For the application to be successful, there must be some evidential basis that the complaint was made and is untrue.[1098] As T14J stated, the material for this evidential basis "does not need to be strong".[1099]

T13C1 accepted her dishonesty, and the judge ruled this evidence was admissible because it demonstrated her propensity to turn consensual intercourse into non-consensual intercourse. In contrast, T4C's two previous complaints were not conclusively false. The defence argued that these were false allegations made by T4C, and the prosecution were 'neutral' on the application to adduce this evidence.

[1094] Angiolini E, 'Report of the Independent Review Into The Investigation and Prosecution of Rape in London' (London, Metropolitan Police and Crown Prosecution Service, 2015) 53.

[1095] This arose in relation to T4C, T13C1, T14C and T16C. As pre-trial hearings were not observed for this study, it is possible that applications to adduced previous complainant evidence were made in other trials and were unsuccessful.

[1096] *R v All-Hilly* [2014] EWCA Crim 1614, para 12..

[1097] The Criminal Justice Act 2003, s.100.

[1098] *R v All-Hilly* [2014] EWCA Crim 1614, para 13; *R v Murray* [2009] EWCA Crim 618.

[1099] As stated in Murray [2009] EWCA Crim 618; *R v All-Hilly* [2014] EWCA Crim 1614, para 13. This evidential basis was absent in T14 and T16, where this evidence was inadmissible.

Negative CCTV footage and inconsistencies in T4C's allegations satisfied the 'less than strong' evidential basis for falsity.[1100]

Some confusion about whether such evidence is bad character or sexual history was observed. For example, T14DC firstly applied incorrectly under s.41 only.[1101] This is despite clarification from *R v All-Hilly* that s.41 does not apply to previous false complaints.[1102] The cross-examinations of T4C and T13C1 explored the nature of the previous complaints and investigations, and challenged the credibility of them, as demonstrated below. Despite being lawfully admissible, the lengthy cross-examinations appeared to detract from the current allegations against the defendant.

> **T4DC:** The real difference in the account you were approached by an Asian man for sexual acts without payment and you get away before he was able to do anything…[that is different from account you gave where you say] you were kept for 45 minutes less than two weeks later you say you get away before he can do anything, I use the word profoundly it is different is it not?
>
> **T4C:** Yeah

Temkin *et al* argue that this evidence is used to undermine a complainant's credibility by relying on the inaccurate assumption that genuine victims are not raped more than once.[1103] However, these suggestions were not made within the present study. The defence barristers used this evidence to demonstrate the complainant had a tendency to lie about being raped.

Bad character evidence, in the form of previous convictions, was only raised for T1C. Her violent convictions were admissible under s.100 (b). The defence argued T1C

[1100] As stated in Murray [2009] EWCA Crim 618; *R v All-Hilly* [2014] EWCA Crim 1614, para 13.

[1101] The researcher's field notes from the trial state 'T14PC says if the defence are suggesting they are false allegations. T14PC states that "s.41 does not bite" and it is more likely to be a bad character application'.

[1102] *R v All-Hilly* [2014] EWCA Crim 1614, para 12.

[1103] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 214.

was "an aggressive, violent and unbalanced lady" and sustained accidental injuries from T1D, when defending himself against her. The evidence was resisted by T1C, and her argumentative manner during cross-examination was emphasised.

T1DC: Do you agree you are a violent person?

T1C: No.

T1DC: Do you agree you have a temper you can't control?

T1C: No, no.

T1DC: What do you say about behaviour at the moment that the jury can see?

T1C: Can I talk, [it is the] reaction to pain I'm under…from gallstones…

Similarly, the defence criticised T15C when she referred to inadmissible bad character evidence. The complainant alleged that the defendant had been violent towards his ex-girlfriend on a separate occasion.

T15DC: And you thought you would tell the jury about that.

T15C: –I'm just telling the truth.

T15DC: –We are getting a measure of you.

The complainant's confrontational personality was also examined, as illustrated below. From observations it appeared T15DC was conducting a fishing expedition to undermine the complainant's credibility, as her personality was irrelevant to the central issues in dispute.[1104]

T15DC: You are not a lady to be messed with are you? He would know that.

T15C: Can you explain yourself?

T15DC: You have a strong personality.

[1104] In T15, the defendant was on trial for one count of rape under s.1 Sexual Offence Act 2003 only. Additional violence was not alleged. This contrasted with T1, where T1D was also on trial for assault causing grievous bodily harm with intent, and the complainant's temperament and violence was relevant to the defence of self-defence.

T15C: What do you mean?

T15DC: I will come to that, [witness] has said when you have had a drink you become confrontational.

T15C: We have had arguments but never anything that would break our friendship.

In addition to discrediting the complainant's character, this questioning also appears to encourage rape myths pertaining to resistance and the types of women who are raped. Specifically, questions appeared to suggest that T15D would have not have "messed with" T15C or commit rape, because she would not have allowed it to happen. Aside from T7C being characterised as "furious" during events relating to the non-sexual offence charged, other complainants were not cross-examined on their personalities.

5.4.3.1 Vulnerabilities, Alcohol, and Drugs

Adopting a definition of vulnerabilities as 'being exposed to attack or harm, physically or emotionally',[1105] thirteen complainants had identified or observable vulnerabilities. [1106] Only six complainants were cross-examined on these vulnerabilities, which related to their mental health and homelessness. Although evidence suggests that perpetrators do target people with these vulnerabilities,[1107] research also shows these complainants experience high levels of attrition.[1108] It is argued that some legal professionals perceive complainants with mental health problems as less credible, which is one contributory factor to this high attrition

[1105] Stanko B and Williams E, 'Reviewing Rape and Rape Allegations in London: What are the Vulnerabilities of the Victims who Report to the Police?' in Horvath M. and Brown J (eds.) *Rape: Challenging Contemporary Thinking* (Routledge 2009) 214. See Chapter Two at section 2.3.4.

[1106] This does not include complainants who were vulnerable at the time due to their consumption of alcohol or suffered from addictions to alcohol and drugs, which will be discussed within the following section.

[1107] Mason F and Lodrick Z, 'Psychological Consequences of Sexual Assault' (2013) 27(1) Best Practice and Research, Clinical Obstetrics and Gynaecology 27, 28.

[1108] Rumney P, McPhee D, Fenton R.A, Williams A, and Soll J, 'A Comparative Analysis of Operation Bluestone: A Specialist Rape Investigation Unit: Summary Report' (Project Report UWE, Bristol 2016) 4-5; Ellison L, Munro V, Hohl K and Wallang P, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (2015) 15(2) Criminology and Criminal Justice 225.

rate.[1109] The influence vulnerabilities have on jurors' assessments is under-researched. If jurors similarly assess vulnerable complainants as having lower credibility, highlighting vulnerabilities may be a formidable defence cross-examination tactic. The observations demonstrated that vulnerabilities were often embedded within cross-examination questions that targeted different issues. Therefore, these matters were not used in homogenous ways or used to merely undermine a complaint's credibility. For example, one complainant's vulnerability was referenced where questions established background facts of the case. Here, the defence reiterated the complainant's homelessness, without exploring this matter in detail.

T16DC: You described that you were sofa surfing, you were living with you grandma is that right?
T16C: Yes

In addition, vulnerabilities were cited where defence counsel challenged aspects of the complainant's evidence, in four cases. For example:

T6DC: You have self-harmed haven't you when he was in your flat?
T6C: Yes.
T6DC: He tried to help you.
T6C: Yes.
T6DC: You shut yourself in the toilet for example and he tried to help you.
T6C: Yes.

Here, the defence are demonstrating T6D's benevolence towards T6C, which implicated her mental health, to show he would not hurt her. The defence also appear to distance T6D from being the 'ideal rapist'.[1110] This tactic appears to rely upon the myth that violent pathological men commit rape, despite suggestions that rapists

[1109] Ellison L, Munro V, Hohl K and Wallang P, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (2015) 15(2) Criminology and Criminal Justice 225, 236-237.

[1110] This tactic has been observed in another recent study. See, Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 171.

appear to be 'perfectly normal men'.[1111] This strategy could be advantageous to the defence, as research has found that some mock jurors discuss how a defendant does not fit the rapist profile, during their deliberations.[1112] An additional example occurred within T2, where the complainant was challenged on 'doing nothing' to prevent the repeated rapes when she was 'virtually suicidal'. However, feeling depressed or suicidal following rape is not uncommon.[1113] Lastly, the mental health problems of two complainants were used to plainly undermine their credibility, as demonstrated below.

> **T4DC:** So you don't misunderstand this is not a criticisms of you please understand that at this time you were neither mentally or physically very well.
>
> **T4C:** No.
>
> **T4DC:** I won't go into detail but you had hepatitis C.
>
> **T4C:** Yes.
>
> **T4DC:** And suffered from mental problems, you had severe depression.
>
> **T4C:** Yeah.

Such questions appear to infer that the complainant's mental health led her to make a false allegation against the defendant.[1114] The questioning could be described as a fishing expedition, seeking to undermine T4C's credibility, as this evidence was not relied upon elsewhere by the defence. Moreover, this evidence would not resolve the central issue of whether intercourse stopped when consent was withdrawn. A recent study by Temkin *et al* observed similar questioning within one case, where the judge

[1111] As discussed within: Ellison L, 'A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems' (PhD, University of Leeds 1997) 232.

[1112] Ellison L and Munro V.E, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 789-790.

[1113] Wheatcroft J.M, Wagstaff G.F and Moran A, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) Victims and Offenders 265, 279.

[1114] This is discussed further within Chapter Seven at section 7.3.2.

intervened to question the relevance of the complainant's mental health.[1115] However, T4C was not afforded such protection from the irrelevant questioning observed. In contrast, T1C was more directly challenged on her credibility, when cross-examined on her diagnosed personality disorder, which she denied having.

> **T1DC:** You imagine things that aren't true don't you?
> **T1C:** Like what?
> **T1DC:** You imagine things that aren't true…you believe everyone is against you

To demonstrate T1C was a 'fantasist' and capable of inventing her allegations, the defence also examined her previous fantastical claims. These included the receiving of death threats in the blood of animals, being sent hundreds of letters from different stalkers, and believing the police were going to 'rush' her house and kill her. Where complainants have a vivid history of making false statements, it would be appropriate for the defence to examine this evidence, as it relates to credibility. However, T1DC's questions were extensive and occurred on four separate occasions within cross-examination. This repetitive questioning would reflect a traditional advocacy approach. The defence could have effectively examined her credibility, and put their case, without adopting this repetitive approach.

Further prevalent features across the trials were alcohol and drugs, which were referenced within eleven complainants' cross-examinations. Questions focused on their consumption at the time of the alleged rape, but also their previous substance use and addictions. Cross-examination did not always solely target the complainant's credibility. As previously discussed, four barristers explored the relationship between poor memory and intoxication. In addition, questions commonly examined background evidence, including the complainant's level of intoxication at the time and the role intoxicants had within the complainant and defendant's relationship.[1116]

[1115] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 218.

[1116] This was observed within the cross-examination of seven complainants.

Questions established these background matters, but also involved the defence challenging important background facts that were disputed, as illustrated below.

T16DC: To be clear you deliberately said it was in relation to cocaine.

T16C: It was.

T16DC: Mr [T16D] has said that the debt is for money he gave you on and off.

T16C: That is not true.

Moreover, two complainants were directly challenged on having a drug addiction. This evidence was only central to the issues in dispute within T1. The defence argued T1C was accidentally injured as she assaulted T1D for disposing of her cocaine,[1117] and T1C2 fabricated her allegations to avoid living with T1C, who mistreated her and made her sell drugs.[1118]

T1DC: You depend on cannabis don't you?

T1C: Nope.

T1DC: You even broke off interview with [the] psychiatrist for cannabis didn't you?

T1C: No…

These questions were, therefore, admissible as they had substantial probative value to the disputed issues.[1119] While evidence of drug dependency was deemed relevant, the defence used various examples to demonstrate her involvement with drugs to, what appeared to be, unnecessary excess. Similarly, the references to drugs and alcohol within the eleven cross-examinations were frequent. Defence barristers may be aware that alcohol and drugs influences perceptions of blame and undermines a

[1117] This was in relation to count thirteen on the indictment for causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861.

[1118] This was in relation to count nine on the indictment, for indecency with child under 16 and count ten on the indictment, for indecent Assault with a child under 16.

[1119] Criminal Justice Act 2003, s.100(1)(b).

complainant's character and her allegations.[1120] For instance, defence counsel still asked T14C whether she consumed alcohol, despite alcohol not featuring elsewhere in the case. Therefore, T14DC disregarded her duty to distinguish between important matters that are relevant to the core issues, and unnecessary matters.[1121]

Overall, the observations demonstrate that while the complainants' character became a focus in cross-examination, this was not examined in homogenous ways. The defence examined particular matters, including their vulnerabilities and intoxicant use, constructively to further their case and explore important background material. Other matters were examined to undermine the complainant's credibility, which included lies within their accounts, previous 'false' allegations, and convictions. As previously explained, the material being examined must be admissible and sufficiently relevant to the core issues, which includes credibility.[1122] Defence barristers within the cases observed, generally demonstrated regard to these principles. Material was adduced in accordance with evidential rules. However, a small minority of cases featured irrelevant material, which included the complainant's mental health in T4 and her temperament in T15. The findings also identified a tension where questioning became protracted, in the sense of being unnecessarily lengthy.

Rejecting irrelevant and protracted questioning would uphold fair treatment, as this ensures complainants give their best evidence on matters that are in issue. Protracted questioning on admissible character evidence, while legally relevant to issues of credibility, could detract from the current allegations against the defendant and the other issues in dispute. Moreover, irrelevant probing into the complainant's character, including their temperament or mental health, could undermine instances where

[1120] Finch E and Munro V.E, '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; Finch E and Munro V.E, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45 Brit. J. Criminol 25; Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 104.

[1121] *R v B (Ejaz)* [2005] EWCA Crim 805, para 10.

[1122] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 184-185.

complainants have given reliable evidence, if such questioning has a prejudicial influence on jurors. For example, the irrelevant questioning of T15C's aggressive temperament seemed to unfairly infer she was not the 'sort of person' who would be raped or 'let rape happen'.

Similar issues arose where complainants were examined on inconsistencies, incompleteness, and incoherence in their evidential accounts and recall of the alleged rape and other events. By examining these matters, the overall credibility of the complainants' evidence, and their allegations, was targeted. The prevalence of this strategy is somewhat unsurprising, since a central purpose of cross-examination is to 'impeach the witness's credibility', providing that questions are admissible and relevant.[1123] Although the findings indicate that the cross-examinations largely focused upon central inconsistencies, incompleteness, and incoherence within a complainant's evidence, the small minority of questions pertained to peripheral details. This may reflect a traditional approach, which involves the lengthy examination of peripheral matters in minute detail.[1124]

Where these details are not really in issue, questions become irrelevant and evade the fundamental principles of cross-examination.[1125] These questions create unrealistic expectations that complainants would provide entirely complete and consistent accounts, and have infallible memories, even about very minor details. Since these 'imperfections' are not necessarily indicators of untruthfulness, questions that encourage these expectations may undermine where a complainant has given accurate and reliable evidence. Hohl and Stanko argue a common rape myth is that genuine rape victims will have a clear and detailed memory of what happened, due to its

[1123] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.5; McPeake R, *Advocacy* (18th Edn, OUP 2016) 168-172.

[1124] Hohl K and Conway M.A, 'Memory As Evidence: How Normal Features of Victim Memory Lead to The Attrition of Rape Complaints' (2017) 17(3) Criminology and Criminal Justice 248, 252; Burman M, 'Evidencing Sexual Assault: Women in The Witness Box' (2009) 56(4) Probation Journal 379, 383.

[1125] *R v B (Ejaz)* [2005] EWCA Crim 805 para 10 citing *R v Kalia* [1974] 60 Cr App R 200.

serious nature.[1126] They suggest that complainants are deemed less credible when they provide incomplete, incoherent, and inconsistent accounts.[1127] As a result, these complainants reportedly suffer greater attrition.[1128] However, imperfections in a complainant's account and memory may also result from untruthfulness, mistake, or heavy intoxication. As there may be numerous explanations for these imperfections, jurors may be uncertain on how to evaluate these matters. Acquittals may not necessarily result from unreasonable expectations about such imperfections, and instead the jury may simply lack confidence in an account that is incomplete, incoherent, and inconsistent, to be sure of a defendant's guilt.

This, therefore, presents a challenging area, where the court must strike a careful balance. The defence must be able to test a complainant's credibility fully. However, to uphold fair treatment, distinctions must be made between central imperfections in a complainant's evidence, and imperfections pertaining to minor details that would not really provide a useful indicator of the complainant's credibility or resolve the core issues in dispute. Such distinctions would need to be made on a case-by-case basis.

5.5 Conclusion

This chapter has provided new insight into how cross-examination is conducted in practice for a sample of rape complainants. Firstly, the attention paid to the complainants' welfare during cross-examination was examined. The observations highlighted that the cross-examinations were largely removed from the traditional approach. For instance, best evidence practices often featured, including Special Measures, welfare breaks, and judicial interventions to prevent complex questioning

[1126] Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328.

[1127] Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328.

[1128] Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328.

and limit question topics.[1129] This shows that a best evidence approach was being adopted for 'robust' complainants. Additional positive practices were identified, including introductory remarks, reassurances, and welfare checks, which are not strictly endorsed under the best evidence approach.[1130] Embracing these positive practices and the existing best evidence practices observed would be desirable for all rape complainants, and would fall within a fair treatment approach. Under this model, complainants must be given an opportunity to provide their best evidence in cross-examination, within an environment that promotes equal and dignified treatment. The difficulties 'robust' complainants can experience, including anxiety and fear, must be recognised so cross-examination does not exacerbate these problems.[1131] Intimidation, confusion and undue stress should be absent to ensure fair treatment. The findings demonstrate that many steps can be taken to safeguard the proper treatment of complainants.[1132] Substantive efforts were made towards this within the small sample of trials observed. However, there was scope for further improvements within these trials, namely the consistent implementation of welfare checks for distressed complainants, and the availability and quality of the Special Measures used.

Secondly, the central questioning strategies that complainants encounter during cross-examination were examined. Observations found that the complainants were robustly examined on admissible and relevant matters, which allowed the defence to properly and fairly test their evidence. Within this, problematic practices were occasionally identified. This included, questions that clearly utilised refutable rape myths; questions that examined the complainants' sexual history evidence and character, which were irrelevant and unduly lengthy; and questions that focused on peripheral and minor details.[1133] From this, the principles of the fair treatment approach were identified.

[1129] A discussion of the various best evidence practices can be found within Chapter Two, section 2.3.

[1130] As discussed within section 5.1.3.

[1131] As acknowledged within, Judicial College, *The Equal Treatment Bench Book* (February 2018) 4.

[1132] This goes beyond the steps advocated within the Equal Treatment Bench Book, which include providing information and advice, avoiding legal jargon and inappropriate remarks. Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5.

[1133] Refer to Appendix Five, which outlines the number of trials where barristers cited irrelevant sexual history evidence and clearly utilised refutable rape myths in cross-examination. The researcher has

As previously explained, the FTM rejects strategies that contravene common law and statutory law, which includes inadmissible and irrelevant questions. In addition, the model disapproves of other poor lines of questioning that fall short of this. For instance, questions that clearly reference and encourage factually refutable rape myths are problematic, despite being legally admissible. Such questions have persuasive purposes, which a best evidence model would reject in favour of 'rigorous and reliable' examinations of a complainant's evidence.[1134] However, the best evidence model does not clearly articulate how these problematic strategies undermine a complainant's best evidence, or how they should be tackled. Accordingly, a FTM of cross-examination would reject questioning that clearly utilises refutable rape myths, as this undermines and obscures a complainant's potential best evidence by appealing to jurors' assumptions about rape. Importantly, complainants may be inhibited from giving accurate, coherent, and complete evidence, if they feel blamed, frustrated, or distressed, as a result of these questions. Deciding whether questions on the complainant's behaviour necessarily encourages refutable rape myths, would need to be made on a case-by-case basis, as this depends on the facts of each case.

Overall, to uphold fair treatment, complainants must be provided with an opportunity to give their best evidence, without this being obscured with inadmissible sexual history, unfair attacks on their credibility, or refutable rape myths and stereotypes. Where complainants experience difficulties with particular topics, the welfare considerations embraced by the fair treatment approach, should be implemented. Within the trials observed, the complainants were largely afforded this opportunity, and were robustly examined. There was, however, some scope for a more consistent approach for all the complainants, and potential reforms will be advanced within Chapter Seven. The following chapter will examine the observations from the defendants' cross-examinations, and will consider how the 'fair treatment approach could also extend to defendants.

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made these assessments based on trial observations only. Therefore, these interpretations are limited to what was observed in open court and the facts of these cases ventilated at trial.

[1134] Henderson E, 'Best Evidence or Best Interests? What Does the Case Law Say about the Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 198.

Chapter Six: The Cross-Examination of Defendants

6.0 Introduction

The observed trials featured contrasting narratives about the alleged rape, from the complainants and defendants. This included instances where the defendant wholly denied any penetration, or asserted the complainant consented and he had a reasonable belief in consent. The prosecution must prove each element of the offence of rape. Although defendants do not have to prove their innocence,[1135] the jury must assess and evaluate their evidence to the same standard as any other witness. Eliciting helpful testimony from a defendant during cross-examination and demonstrating weaknesses in his account will strengthen the prosecution's case and help prove the elements of rape.[1136] This study provides insight into how a small sample of prosecution barristers conducted cross-examination, in attempt to achieve these aims. With the exception of T15D, all defendants gave evidence and were cross-examined.[1137]

Four central themes were developed from the defendant cross-examination data. These themes capture the following: how the welfare of the defendants was considered; how the defendants' behaviour before, during and after the alleged rape was examined, and wherein rape myths were utilised and refuted; how the sexual history of the defendants was utilised; and how the credibility of the defendants and their evidence was challenged. The observations across these themes will be analysed against arguments and findings found in existing literature, to consider their applicability to the cross-examination of defendants. The insights generated demonstrate that defendants encountered similar and diverging cross-examination practices, compared to those identified within Chapter Five.

[1135] This is unless the evidential presumptions arise under Sexual Offences Act 2003, s.75.

[1136] For a discussion of these 'constructive' and 'destructive' cross-examination approaches, refer to section 2.2 within Chapter Two.

[1137] The jury was discharged before T15D was called to give evidence.

The findings will also be analysed against the existing traditional and best evidence models of cross-examination, to identify where the defendants' cross-examinations fell within and outside these models. The best evidence approach does recognise that 'robust' defendants 'should be enabled to give the best evidence they can' and may require assistance.[1138] Despite this recognition, changes in attitudes towards cross-examination have primarily concerned the needs of children and vulnerable people, and the modifications they require.[1139] Moreover, discrepancies in the availability of best evidence safeguards for defendants are apparent, and will be discussed within this chapter. The fair treatment model will be developed to address these issues, and will be supported by the empirical data relating to the defendants' cross-examinations.

The FTM equally regards cross-examination as an opportunity for 'robust' and 'vulnerable' defendants to give their best evidence, under conditions that promote equality and respect for their individual needs and experiences, while upholding their fair trial rights. Adult defendants may find cross-examination stressful, intimidating, and confusing. It is important to account for their general wellbeing and potential trauma they experience, which may be exacerbated by the serious indictment they face and their journey through the CJS. This consideration must be in addition to any medical, intellectual, or communication needs, which require specific modifications encouraged under the existing best evidence approach. The FTM will embrace the positive practices identified within this study. This includes, but is not limited to, existing best evidence practices. The model also rejects problematic traditional questioning strategies. With this, defendants should receive dignified treatment and appropriate support, and their best evidence should not be impeded or undermined unfairly.

[1138] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4 and 3D.2.

[1139] Also argued within, Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds) Addressing Vulnerability in Justice *Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

6.1 Ensuring The Defendants' Welfare

The treatment of defendants within cross-examination has received limited attention within existing literature. The courtroom environment is thought to increase stress and hamper the ability of vulnerable and 'robust' witnesses to recall events and provide accurate evidence within cross-examination.[1140] This may equally present difficulties for defendants. Reducing stress and ensuring welfare may in turn better position defendants to give their best evidence. The trial observations yielded insight into how the welfare of the sixteen[1141] defendants was considered during cross-examination, and whether improvements were required. The discussion that follows will focus on three specific areas: the use of statutory Special Measures, how the defendants were familiarised with the process of cross-examination before questioning, and how the court responded to their needs and behaviours during cross-examination.

6.1.1 Special Measures

Defendants do not have the same statutory protections to use Special Measures as rape complainants. The YJCEA 1999 originally afforded Special Measures to vulnerable and intimidated witnesses, not defendants.[1142] Two statutory amendments have been made to partially redress this, but only the provision for vulnerable defendants to use live link is in force.[1143] The remaining statutory amendment, for intermediaries, is not yet operative.[1144] The use of Special Measures for vulnerable defendants, including intermediaries and modified cross-examination, is regulated

[1140] For discussion see, Westera N.J, Kebbell M.R and Milne B, 'Want a Better Criminal Justice Response to Rape? Improve Police Interviews With Complainants and Suspects' (2016) 22(14) Violence Against Women 1748, 1758; MoJ, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (March 2011) 116.

[1141] Although eighteen trials were observed, T13 was the re-trial of T12 and the jury was discharged in T15 before the defendant gave evidence. Therefore, the cross-examinations of sixteen defendants were observed.

[1142] Youth Justice and Criminal Evidence Act 1999, s.16-17.

[1143] Youth Justice and Criminal Evidence Act 1999, s.33A as amended by Police and Justice Act 2006, s.47.

[1144] The use of intermediaries for the accused under Youth Justice and Criminal Evidence Act 1999 s.33 (BA) and (BB) are not in force, as amended by Coroners and Justice Act 2009, s.104.

under common law and implemented at trial with the judge's discretion.[1145] Adult defendants are eligible for the live link where they have a mental disorder or significant intellectual impairment.[1146] Where the CPS is satisfied a defendant with a mental disorder should be prosecuted, the defendant must also be 'fit to plead' and able to effectively participate in their trial.[1147] Special Measures, particularly intermediaries, are considered an important tool for ensuring this.[1148]

Only one defendant, T4D, used Special Measures during his trial. This defendant was deemed vulnerable due to his extremely low intellectual abilities. The remaining defendants were not referred to as 'vulnerable' during observations, although references were made to two defendants' intellectual impairments. These were T1D's inability to read or write and T6D's dyslexia. For T6D, it seemed this difficulty was not identified in advance, as demonstrated below. However, this inference is not conclusive; it is possible that this issue was discussed privately or during pre-trial hearings.

> T6D gives his oath but stops when trying to say a word. The usher has to say the word to him and then he carries on reading it aloud. T6DC then asks for the defendant to state his full name.
>
> **T6DC:** How old are you?
>
> **T6D:** (*pause*) twenty, thirty-one sorry.
>
> **T6DC:** [From reading the oath can I ask] do you have any difficulty reading?
>
> **T6D:** Yes I do. (*Speaks slowly*)

[1145] *R (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088; *R v Walls* [2011] EWCA Crim 443; *R v Camberwell Green Youth Court ex parte D* [2005] 2 Cr App R 1 para 17. For a discussion see, Talbot J, *Fair Access to Justice? Support for Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust, 2012) 3 and 9.

[1146] Youth Justice and Criminal Evidence Act 1999, s.33A as amended and implemented by the Police and Justice Act, s.47.

[1147] CPS, *Mentally Disordered Offenders* <https://www.cps.gov.uk/legal-guidance/mentally-disordered-offenders> accessed 28 August 2018.

[1148] *R v Walls* [2011] EWCA Crim 443; *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 para 225. For a discussion see, Talbot J, *Fair Access to Justice? Support for Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust, 2012).

Assessing whether other defendants, including T1D and T6D, were vulnerable and could have benefited from Special Measures is difficult and will not be attempted here. However, research suggests that some defendants do conceal their vulnerabilities.[1149] It is therefore not altogether implausible that some defendants, in the cases observed, did so. Defendants without appropriate support, when eligible, may choose not to give evidence at trial, which may result in adverse inferences being drawn.[1150] Alternatively, defendants may still give evidence but may not provide their best evidence. Fairclough suggests that when poor evidence is given, it may create a 'bad impression on the jury' and unfairly influence the trial outcome.[1151] The issues surrounding the identifications of vulnerabilities and providing appropriate support for defendants will be critically discussed in Chapter Seven.[1152]

For T4D, an unregistered intermediary was present during the entire trial to assist communication between T4D and the court, alongside an interpreter. This enabled effective participation for T4D and safeguarded his fair trial.[1153] The CrimPD specify that the appointment of a defence intermediary for a defendant's evidence will be

[1149] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209; Talbot J, *Fair Access to Justice? Support For Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust 2012) 17. It is thought people with learning disabilities often suffer discrimination by society, which may influence them in concealing or minimizing their disabilities. Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (CPS March 2011) 32.

[1150] Criminal Justice and Public Order Act 1994, s.35.

[1151] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 212.

[1152] This discussion is provided within section 7.2.

[1153] Case law has outlined how Special Measures, including intermediaries, enable effective participation of defendants, *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228. Moreover, the High Court has ruled that vulnerable defendants, who require an intermediary, should have access to a registered intermediary to assist when they give evidence, *R (on the application of OP) v Secretary of State for Justice* [2015] 1 Cr. App. R 7.

'rare', and 'extremely rare' for the entire trial.[1154] As such, the use of a defence intermediary in T4 may reflect this 'extremely rare' practice. Throughout his trial, T4D was provided with three different intermediaries, due to their limited availability to attend court.[1155] It was established during a GRH that T4D would need regular breaks. Additionally, the prosecution were required to modify cross-examination, by using short and simple questions. When giving evidence, T4D could not be asked any tagged questions[1156] or questions that contained more than one concept. The intermediary recommended that open questions were preferable. Mostly, this cross-examination did not feature direct challenge, as all others did. These differences can be demonstrated with the extracts below.

T4PC: [T4C] says when you were having sex with her you were taking your penis all the way out and all the way back in hard, is that true?

T4D: No not true.

T4PC: "She says she told you to stop but you carried on, is that true?"

T4D: It is not true.

T5PC: You raped her that evening didn't you?

T5D: No I didn't.

T5PC: You raped her because you couldn't deal with her seeing someone else.

T5D: No I didn't.

[1154] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F: Intermediaries 3F.12 to 3F.13, citing *R v Yahya Rashid* [2017] EWCA Crim 2; *R v* Cox [2012] EWCA Crim 549*; R (on the application of OP) v Secretary of State for Justice* [2015] 1 Cr. App. R 7

[1155] The first intermediary assisted during T4D's evidence-in-chief and the second intermediary was assisted during his cross-examination. The third intermediary was present after the defendant gave evidence, assisting the defendant from the dock.

[1156] A tagged question features a statement followed by a short question, which invites confirmation, as explained within The Advocates Gateway, 'Planning to Question a Child or Young Person: Toolkit 6' (December 2015) <https://www.theadvocatesgateway.org/images/toolkits/6-planning-to-question-a-child-or-young-person-141215.pdf> accessed: 28th November 2018. For example, T4D could not be asked the tagged question, 'you raped [T4C], didn't you?' Instead, an open question such as, 'did you rape [T4C]?', was deemed preferable.

When T4D provided evidence-in-chief and was cross-examined, differences in the intermediaries' approaches were observed. The first intermediary actively intervened when evidence-in-chief questions were deemed problematic. In cross-examination, the second intermediary did not intervene. Instead, the judge and defence barrister intervened when questions were confusing or unmodified. Arguably, the second intermediary could have provided greater assistance to the defendant by ensuring the ground rules were being followed during cross-examination.[1157] These observations demonstrate that the subjective decision-making of intermediaries can lead to inconsistent interventions in practice, which could risk unfairness for defendants. Defence intermediaries, including those observed, are usually unregistered and receive limited regulation, which could produce inconsistent and lower quality assistance.[1158] The use of multiple intermediaries observed, may also inhibit rapport building with the defendant for effective assistance. Given the crucial role of intermediaries, these findings, although limited, enrich existing literature concerned with the availability of defence intermediaries. Moreover, at times the prosecution did revert to traditional cross-examination practices of using leading and tagged questions.[1159]

T4PC: "Are you saying you were still drunk?"

T4DC: No that's not what he said (*firm, remains seated*)

T4J: Well, let him answer.

T4PC: That's how I understood the answer…I will clarify with him (*calm tone*).

[1157] However, the Court of Appeal has asserted that the judge's duty to ensure cross-examination is adapted to meet the needs of vulnerable defendants is not absolved because intermediaries are now available. *R v Cox* [2012] EWCA Crim 549 para 29.

[1158] *R (on the application of OP) v Secretary of State for Justice* [2015] 1 Cr. App. R 7. This issue is also discussed within: Cooper P and Wurtzel D, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales (2013) Criminal Law Review 4; Henderson E, '"A Very Valuable Tool": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) E. & P. 154.

[1159] For a discussion on these traditional features of cross-examination refer to Chapter Two, at section 2.2 and 2.3. *R v Edwards* [2011] EWCA Crim 3028, para 28*; R v Wills* [2011] EWCA Crim 1938, para 19 and 26.

T4DC: Please do not ask tag questions there have been a series of them now (*assertive tone*).

Thus, it appears these modifications were difficult to sustain. This may arise if modifying cross-examination contrasts with the traditional view of cross-examination held by some barristers.[1160] However, all advocates acting in vulnerable witness and defendant cases must now complete the VWTP.[1161] As this training programme was implemented during the data collection period,[1162] barristers may now be better equipped to fully sustain these modifications. Nonetheless, these observations demonstrate efforts were being made to ensure cross-examination is adapted when required, following the best evidence approach.[1163] As this was the only trial that featured an intermediary, wider claims about the effectiveness of intermediaries and modified cross-examination cannot be made. These findings do, however, provide an example of some inadequacies with defence intermediaries in practice.

6.1.2 Introducing Defendants to Cross-Examination

During the trials observed, defendants were not provided with any introductory remarks by prosecution barristers before cross-examination. All prosecution barristers immediately proceeded with their questions. However, twelve defendants were addressed before their evidence-in-chief by their barrister. These passages included brief instructions and explanations. Only one defendant was informed he could take

[1160] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 937-8 and 940-1.

[1161] *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 para 226; *R v Yahya Rashid* [2017] EWCA Crim 2, para 80.

[1162] T4 was observed prior to the implementation of the Vulnerable Witness Training Programme, which launched on 14 November 2016, as discussed within Hoyano L, 'Why We Should All Take The Vulnerable Witness Training Programme' (2018) Criminal Bar Quarterly 17.

[1163] *R v Barker* [2010] EWCA Crim 4, para 40; Henderson E, 'Best Evidence or Best Interests? What Does the Case Law Say About The Function of Criminal Cross-Examination?' (2016) E. & P. 183, 184; Henderson E, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Discuss Judicial Management of The Cross-Examination of Vulnerable People' (2016) Criminal Law Review 181, 182; Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 935.

breaks. Mostly these remarks featured instructions regarding audibility, to ensure the defendant spoke clearly and loudly for the jury.

T16DC: Mr [T16D] please give your full name to the court.

T16D: [Full name].

T16DC: Mr [T16D] you have heard what has been said already, it is very important the jury hear what you say all right, you are going to be asked some questions now don't worry about looking at me project your voice towards the jury.

T16D: Yes.

Before evidence-in-chief began, three defendants were addressed by the judge and were given similar instructions and explanations. Two judges offered the defendants the choice to stand or sit during their evidence.[1164] Altogether, four defendants were not given any introductions. The absence of opening remarks by prosecution barristers could be a result of the defendants' role at trial. Firstly, all defendants were positioned in the dock throughout their trial and could be more familiar with the process of cross-examination from observing other witnesses give evidence. Defence counsel and judges even acknowledged this familiarity when addressing defendants.

T7DC: You've seen enough people giving evidence…speak loudly for the jury to hear…if your voice drops I will let you know.

Additionally, defence counsel may have privately explained the process to their clients during their conferences.[1165] The defendants also experienced the 'warm up' of providing live evidence-in-chief in court.[1166] Therefore, the difficulties of being

[1164] One judge also informed the defendant he could take breaks during his evidence, if required.

[1165] The Advocacy Training Counsel advises that conferences take place for vulnerable defendants, and witness, so the trial process can be explained. During observations, the defendants had conferences with their barrister, where this may have occurred. Advocacy Training Council, *Raising the Bar: The Handling of Witnesses, Victims and Defendants in Court* (ATC, 2011) 53-56.

[1166] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) E. & P. 11(1) 1, 12; Burton M, Evans R and Sanders A, *Are*

'plunged into hostile cross-examination' were arguably minimised.[1167] However, the nature of direct-examination and cross-examination are distinct, and the shift in dynamic and questioning style may present difficulties for defendants.[1168] Moreover, a defendant's potential anxiety and stress may be heightened as they wait through the entire trial for their turn.

6.1.3 Responding to Defendants During Cross-Examination

Observations yielded insight into how the barristers and judges responded to the emotions and reactions of the defendants during their cross-examinations. Checks on the defendants' welfare during cross-examination were not conducted in any of the trials observed. This sharply contrasts with the practices of defence barristers, who frequently checked whether complainants were 'all right', reassured them, and offered breaks.[1169] As most defendants were not observed as distressed, these actions may have been considered unnecessary. Instead, a number of defendants were observed as exhibiting anger, frustration, and argumentativeness during periods of cross-examination.[1170] Although these emotions can be markers of stress,[1171] some prosecutors utilised this to their advantage.[1172] Only two defendants were observed as upset and tearful during cross-examination. Their emotions were met with different responses. Firstly, T9D's voice was observed as sounding 'shaky', as if he were

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Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies (Home Office 2006) 54.

[1167] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) E. & P. 11(1) 1, 12; Burton M, Evans R and Sanders A, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies* (Home Office 2006) 54.

[1168] During direct-examination, the defendant will be questioned in a non-leading manner by his own council to establish his evidence, which will support his case. This contrasts sharply with the purpose of cross-examination, which was discussed within Chapter Two at section 2.2 and 2.3.1. Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F6.1, F6.13 and F7.5.

[1169] As discussed within Chapter Five at section 5.1.3.

[1170] Nine defendants were observed as exhibited these emotions at some stage during cross-examination. These defendants were T1D, T3D, T5D, T6D, T7D, T10D, T11D, T16D and T17D.

[1171] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 187

[1172] For a discussion, refer to section 6.4.3.

'about to cry'. The prosecution barrister pressed on with his questions, without acknowledging these emotions. Secondly, T5D was briefly examined on visiting his ill grandmother before questions moved on. Following this, the defendant became emotional and was provided with a welfare break.

> **T5PC** asks about T5D bringing or having alcohol at T5C's house.
> (*T5D then raises his left hand, becoming tearful*).
> **T5J:** Would you like a break?
> **T5D:** I don't want to speak about my Nan…
> (*T5D sounding aggressive, speaking with gritted teeth*)
> **T5J** tells T5D to take a seat. T5J tells the jury to leave and be ready for 10 minutes time. Once the jury leave, T5J tells T5D to have a break and sit outside away from anyone involved in the case.

Aside from the break taken during T4D's cross-examination, to accord with the GRH, this was the only welfare break observed. Displays of upset or distress are overt signals to the court that something is wrong during cross-examination, which can be addressed and alleviated with checks, reassurances and breaks. However, other defendants may have found it difficult to express their needs or difficulties with cross-examination.[1173] Their emotions may have been controlled, or expressed in different ways, including evasiveness or aggression.[1174] Some defendants may have welcomed taking a break. Six defendants had breaks in cross-examination for lunch or overnight adjournments, and legal arguments. Although these breaks were not intended for the defendants' benefit, they could provide much needed respite from the stress of cross-examination.

Judges can exercise their inherent discretion to intervene during cross-examination to *inter alia* ask their own questions, clarify ambiguous points, set time limits, and

[1173] Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (Criminal Justice Alliance, 2015) 18-19.

[1174] For a discussion, refer to section 6.1.3.

restrict the subject and form of questioning.[1175] Eight judges intervened when cross-examination became problematic, providing assistance to the defendant and the court.[1176] Firstly, interventions occurred where questioning was complex, prolix, and unclear. Where the vocabulary adopted was potentially problematic for two defendants, the judge interrupted. Questions were subsequently rephrased or abandoned.

T14PC: She hadn't fought you on the 5th July…you forced your penis in her mouth.

T14J: That is quite a compounded question with facts in issue.

T14PC: On the 4th July you had sex in the morning.

T14D: We had sex in the morning yes.

Secondly, interventions occurred to allow four defendants the opportunity to fully answer questions. Only T1PC was criticised for obstructing the defendant.

T1PC: You saved it for the solicitors, why didn't you say it in your statement.

T1D begins answering but is cut off (*answer unrecorded due to fast pace*).

T1PC: Why not?

T1J: We're at the point when your asking question before he's finished answering.

T1D: She's trying to make me look stupid.

Lastly, three judges intervened to seek clarification of a defendant's answers. Here, judges paused cross-examination and requested that their answers were repeated. This appeared to be done to ensure judges had an accurate written note of their evidence.

[1175] See Chapter Two at section 2.4 for a detailed discussion on judicial intervention. Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.6 and F7.10.

[1176] Section 6.1.3 will distinctly address judicial intervention where defendants were resistive to lines of questioning. The only remaining occurrence of judicial intervention during a defendant's cross-examination was in T14, where the judge asked for an exhibit to be shown to him and the jury.

Although in T4, the judge intervened and gave cautionary advice to the barrister, when the defendant's answers became confused.

> **T4J3:** We also know [he had] a solicitor and interpreter in his interview, whether or not he remembers that or is confused…I think you need to tread a little carefully where you are taking this.
>
> **T4PC:** I will deal with it in my closing speech…given the defendant the opportunity to say what he can recall…I don't think I can take this further in the circumstances…I hope no one will criticise me about it…
>
> **T4DC:** The jury have the statement and can compare it with the current account…
>
> **T4PC:** I'll move on.

Rather than pursuing with the problematic topic, the material was later adduced within agreed facts. This responsiveness demonstrates the best evidence approach was adopted for this vulnerable defendant, as the judge took an active role and exercised his inherent powers to control and manage cross-examination.[1177] More infrequently, defence barristers intervened during cross-examination.[1178] These interventions were to rectify questions containing inaccurate information, to raise matters of law, and to object to unfair questions and the unmodified questioning in T4.[1179] Here, it was evident that the defence barristers were protecting their clients from potentially problematic questions, regardless of whether they were vulnerable or 'robust'.

Resistance to cross-examination questions from defendants, through means of clear evasion or argument, was observed. In total, eight defendants evaded answering questions. This evasion included stating they 'do not know' or 'cannot remember' to

[1177] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.1; *R v Wills* [2011] EWCA Crim 1938; [2012] 1 Cr. App. R. 2; *R v Barker* [2010] EWCA Crim 4.

[1178] This occurred in T4, T7, T10 and T14.

[1179] The objections to unfair questions arose in T7 and T10, where prosecuting counsel asked the defendant to speculate about matters or commented on the evidence.

simple questions, requiring further information before eventually providing an answer, and not directly answering the question.[1180] While there were occasions when these reactions were ignored, with questions moving on, other responses were observed from prosecution counsel and judges. Prosecution barristers either repeated their questions to obtain a direct answer, or emphasised the defendant's apparent evasion. Judges also intervened, advising defendants against their evasiveness.

T10PC: You see we heard in her evidence that you asked her if you could have the opportunity to meet her grandchildren is that true?
T10D: I never met her grandchildren.
T10PC: That is not the question I am asking.
T10D: I never met them.
T10PC: That is not the question I am asking.
T10J: Just listen carefully to the question again please.

Notably, three barristers criticised the defendants for their indirect and digressive answers. For example:

T1PC: You abused your position in the home didn't you?
T1D mentions the complainant and states that couldn't have happened
T1PC: I wasn't asking you about [T1C], and you're not in control of this cross-examination you are here to answer my questions (*very stern tone*)

Five defendants were observed as being somewhat argumentative when resisting questions. These defendants 'answered back', opposed the content of questioning, challenged the barristers' knowledge of some evidence, or 'had their say at length'.[1181] While the prosecution barristers and judges did ignore some of these displays, other barristers emphasised this resistance, occasionally with reprimanding

[1180] Indirectness includes answers that do not address the question, verge off topic, or contain additional information that the question did not require, McPeake R, *Advocacy* (18th Edn, OUP 2016) 175.
[1181] McPeake R, *Advocacy* (18th Edn, OUP 2016) 176.

remarks.[1182] Notably, two defendants 'had their say' and displayed argumentative resistance on multiple occasions. They also received advice and criticism of these displays from prosecution counsel and judges. The judge also insisted T7D should provide short answers only.

T7PC: Mr [T7D] you knew you were facing rape charges

T7D: I wouldn't walk into the police station would I… it would get the ball rolling

T7J: Mr [T7D] you're not doing as I suggest to you, you don't need to keep arguing it is not doing you any favours

Overall, this resistance was treated adversely. By advising defendants to 'calm down' or simply answer questions, it appears judges perceived their evasiveness and belligerency as potentially damaging to their evidence and case. Therefore, the judicial advice given may be to protect the defendants' interests. These instances could also be regarded as 'admonishment', particularly when coupled with the judge's general authority, which subsequently creates a poor impression of the defendant.[1183] Prosecution barristers later relied upon instances of argumentative resistance and their hostile reactions to portray the defendant as an angry person or someone who disliked being challenged.[1184] However, these resistive behaviours may manifest from a defendant's difficulty with cross-examination, and the highly formalised and potentially unfamiliar, environment it occurs within.

To summarise, the contemporary best evidence approach to cross-examination was primarily developed to ensure vulnerable witnesses and defendants are not excluded from the trial process.[1185] However, it has recently been acknowledged that cross-

[1182] For example: T14D: If you say so (*quiet mumbled*), T14PC: No, it is your answer (*firmer tone*)

[1183] McPeake R, *Advocacy (*18th Edn, OUP 2016) 175-176.

[1184] This was observed within the closing speeches of four prosecution barristers. See section 6.4.3 for a discussion of these practices and their implications.

[1185] The trial process and cross-examination must be adapted to the needs of vulnerable witnesses and defendants, to enable their effective participation and best evidence. Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; *R v B [2010] EWCA Crim*

examination must enable all witnesses and defendants to give their best evidence.[1186] As previously discussed, best evidence practices include Special Measures, breaks, modified questioning, and active judicial intervention to manage cross-examination and restrain improper and complex questioning.[1187] Only one defendant was identified as 'vulnerable'. He was afforded modified cross-examination, Special Measures and active judicial intervention to protect him from complex questioning. However, some 'robust' defendants were also protected from compound questions, prolix language and questions containing inaccurate information. As previously discussed, the best evidence model recognises that all witnesses and defendants may require assistance to give accurate, complete, and coherent evidence.[1188] However, guidance and changes in attitude towards cross-examination have primarily considered the needs of children and vulnerable people.[1189] The present findings demonstrate that some best evidence modifications were implemented for the 'robust' defendants observed.

However, the cross-examination practices observed did not fully account for the welfare of the 'robust' defendants. Other practices that are not clearly addressed or endorsed under the best evidence model were not generally afforded to defendants.[1190] These practices included welfare checks, introductions, and reassurances following displays of resistance. Under a fair treatment approach, defendants must equally be provided an opportunity to give their best evidence, without feeling intimidated, confused, or unduly stressed. This requires recognition of the difficulties 'robust'

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*4;*Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2.

[1186] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4

[1187] As discussed within Chapter Two, section 2.4. *R v Jonas* [2015] EWCA Crim 562 para 31; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.1.

[1188] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2. and 3E.4.

[1189] Also argued within: Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds) Addressing Vulnerability in Justice *Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

[1190] As discussed within section 5.1.3.

defendants also experience. In particular, feelings of stress and anxiety may manifest as aggression, frustration, or distress within cross-examination, which could negatively impact the defendant's ability to give best evidence. Equally, these feelings may not manifest into overt emotional responses at all.

To implement these values, reasonable steps should be taken to safeguard a defendant's welfare from the outset. This would include standardised implementation of introductory remarks for defendants, which would establish courtesy and provide helpful advice to alleviate potential worries and stress. In addition, the welfare and best evidence of defendants would require monitoring and safeguarding, through welfare checks, reassurances, welfare breaks, where required. Following existing best practice and legal authority, judges should continue to actively intervene to protect defendants from complex, lengthy, and inaccurate questioning.[1191] Together, this would not undermine the welfare considerations afforded to complainants, since defendants must equally be able to give the best evidence that they are capable of.

The findings described above provide insight into the modes of treatment that the defendants experienced, which predominately fell short of a fair treatment approach. Cross-examinations that do not include these practices, such as introductory remarks and welfare breaks for defendants, will not necessarily violate their right to a fair trial. However, as previously discussed, fair treatment is not defined in strict legal terms.[1192] As such, traditional styles of advocacy, which fall short of violating a fair trial, but nevertheless hinder defendants from giving their best evidence, are rejected under the FTM.

6.2 Expected Behaviour of The Defendants

This section will discuss how the defendants were cross-examined on aspects of their behaviour before, during, and after the alleged rape. The findings will demonstrate

[1191] As discussed within Chapter Two, section 2.4. Judicial College, *The Equal Treatment Bench Book* (February 2018); *R v Jonas* [2015] EWCA Crim 562 para 31; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.1.

[1192] As discussed within Chapter Two, section 2.3.5.

that the defendants' behaviour became a focus, and the rationality of their behaviour was scrutinised, which appeared to imply a standard of expected behaviour that an innocent defendant would display. In addition, this section will discuss how the prosecution barristers refuted some rape myths, and also appeared to utilise the 'ideal offender' stereotype within cross-examination. However, analysis will also reveal that most questions had alternative interpretations and did not necessarily implicate broad rape myths. The following discussion will highlight the potential issues with these strategies, which will be accounted for when developing the FTM.

6.2.1 Refuting Rape Myths

Prosecution barristers challenged some factually refutable myths in their speeches to the jury.[1193] For example, prosecution barristers cautioned the jury that there is no typical way a person reacts to rape and emphasised that stranger rape is rare.[1194] However, only T10PC directly busted myths about normal reactions to rape during the defendant's cross-examination. An extract includes:

> **T10PC:** Do you understand that a person who has been raped may be frightened and not immediately report to the police do you understand that?
>
> **T10D:** Yes.
>
> **T10PC:** A person who has been raped by someone they are in a relationship with or know may have mixed loyalties and may not want to report to the police, do you understand that as a concept?
>
> **T10D:** Umm yeah.
>
> **T10PC:** "That is exactly what happened here." (*loud firm tone*)

[1193] Some myths were addressed and challenged in seven opening speeches and eight closing speeches given by the prosecution. These figures include T12PC and T13PC. Six barristers did not address any myths in either of their speeches, including T5PC.

[1194] Examples illustrating myth busting during prosecution opening speeches to the jury include: **T13PC:** …should you expect a woman to physically resist, she might then again she might not. Should you expect her to display emotion, she might then again she might not, you might think [a woman would] immediately attend a police station or dial 999 she might…but so often she doesn't… **T9PC:** Most people when they hear allegations of rape tend to think of a stranger attacking someone in the street late at night that is very rare indeed.

T10D: That is your perception.

This defendant, and T6D, overtly relied upon the rape myth that a genuine victim would report immediately in their cross-examinations. They directly asserted that the complainants would have gone to the police at the time, if their allegations were true. While T10D was met with direct myth busting, of the nature shown above, the other prosecution barrister was less direct and responded by examining the complainant's fear at the time. Since T6D explicitly relied upon the complainants' delay,[1195] the prosecution could have directly challenged this factually refutable belief.

6.2.2 Force and Coercion

Cross-examination is an opportunity for prosecuting counsel to 'put their case' to the defendants. When fulfilling this role, barristers reiterated the involvement of physical force, violence, and injuries, where alleged. While these questions underscore aspects of 'real rape',[1196] these features are potentially signs of non-consent that assist the prosecution in proving the offence, when consent is disputed. Although, where additional violence was alleged, it was mostly uncorroborated and thus refuted by the defendant.[1197] Six defendants were cross-examined on their larger size and strength.[1198] This may explain why five complainants in these cases were unable to fight back and physically resist.[1199] Temkin *et al* explain that the 'real rape' stereotype does not recognise that complainants will be unable to physically resist due to fear, or

[1195] Within cross-examination T6D asserted 'why come out all of a sudden why come out ten years ago if I'm such a dangerous person all the rest of it why didn't she go to the police in the first place what is that all about'. This was the only other occasion where defendants relied upon factually refutable beliefs about rape.

[1196] Estrich S, *Real Rape* (Harvard University Press 1987).

[1197] In relation to this strategy, an exception related to T12/13C1, who had visible injuries. However, T12/13D explained these injuries were a result of consensual sadomasochistic sex with T12/13C1.

[1198] Smith similarly found prosecution barristers often relied upon difference in physique throughout the trials observed. However, it is unclear whether this was observed during the defendant's cross-examination. Smith O, 'Observing Response to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 160.

[1199] Of these six cases, five complainants were examined on their failure to physically resist the defendant.

account for the 'strength differential between most men and women'.[1200] Where prosecutors emphasis this size and strength differential between the two parties, this can demonstrate how the defendants were able to overpower the complainants.

T17PC: How tall are you? *(Abrupt tone)*

T17D: Six foot five.

T17PC: What do you weigh? *(Abrupt tone, fast pace)*

T17D: Fifteen stone.

T17PC: She is about five foot of a small build, it would not take much to overpower her would it?

T17D: No.

However, these questions may align defendants with the 'ideal offender' stereotype, who is bigger and stronger than their victim.[1201] As Christie suggests, attributes of the 'ideal offender' include being 'big and bad'.[1202] Arguably, the 'ideal offender' stereotype may, in turn, discount the possibility of rape being committed against large or strong individuals elsewhere. Some people, including mock jurors, may believe rape cannot practicably be committed against 'healthy' women,[1203] or by physically inferior men. Anecdotal evidence for this arose in T14, where a juror requested the height and weight of T14D, who was visibly smaller than the complainant. Only one prosecution barrister challenged these assumptions, albeit by emphasising the defendant's strength.

T8PC: You describe with great sensitivity that she was a larger build and you were not able to pull her onto you.

[1200] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 211.

[1201] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989), 19.

[1202] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989), 25-26.

[1203] Burt M.R, 'Cultural Myths and Supports For Rape' (1980) 38(2) Journal of Personality and Social Psychology 217, 217; Ellison L and Munro V.E. 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review 781.

T8D agrees.

T8PC: But you were able to, you were strong enough to overpower her.

T8D: No.

As Smith and Skinner suggest, focusing on the physicality of rape ignores other forms of coercion that may be operating.[1204] This would occur if the only argument made by the prosecution relied upon physical coercion. However, barristers also explored other possible coercive strategies in cross-examination, notably a defendant's control and exploitation of the complainant, and her fear of him. This may provide an alternative narrative of events that undermines some stereotypes about rape, particularly regarding violence and resistance.

Two defendants were cross-examined on the complainant's fear of him before and after the alleged rape. This may explain why both complainants did not leave the relationship or report the allegations immediately.[1205] To illustrate, T6D's assertions that the complainant would have immediately reported were met with repetitive questioning about her fearfulness, as demonstrated below.

T6PC: She was frightened of you.

T6D: She is trying to take my life away from me [that is] all I can say.

T6PC: She was frightened of you wasn't she?

T6D: No she wasn't.

Five defendants were examined on their controlling behaviour, which they refuted. During this, three barristers also put to the defendants that they were 'manipulative' or 'controlling'. This appeared to present the defendants as someone who would commit rape, and the 'ideal offender'.[1206] Within the adversarial trial, the prosecution

[1204] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 12.

[1205] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 215.

[1206] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25. Though, research suggests that some offenders target people who trust them and are in a position of power over, and can be manipulative. CPS, *Toolkit for*

will legitimately seek to present the defendant as someone who is capable of committing rape, and convince the jury that he did commit rape against the complainant. Arguably, this strategy could play to jurors' potential beliefs in the 'ideal offender' stereotype. Though, without robust research into mock juror attitudes towards the defendant, this supposition cannot be confirmed.

Three defendants were cross-examined on their supply of alcohol or drugs for the complainant, which coincided with their sexual relationship. Feminist scholars would perceive this as exploitative and coercive, limiting the complainant's autonomy and enabling rape to be committed.[1207] The CPS suggests that a person's drug use may be a factor rendering them vulnerable to being targeted by offenders, and the promising of drugs may help to facilitate the offending.[1208] Only T13PC advanced this explanation within cross-examination, as demonstrated below.

> **T13PC:** Were you drawn to them because they were both vulnerable?
> **T13D:** I met [T13C1] in a crack den…I met [T13C2] in a pub that was it

This strategy follows advice that prosecutors should adopt 'an offender-centric' approach, by focusing on a defendant's behaviour and decisions to target people with vulnerabilities.[1209] The CPS toolkit encourages prosecutors to place focus on the

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Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim <https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1207] Carline A and Easteal P.W, *Shades of Grey: Domestic and Sexual Violence Against Women: Law Reform and Society* (Routledge, London 2014); Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 215.

[1208] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1209] Burrowes N, *Responding to the Challenge of Rape Myths in Court* (NB Research 2013) 16; CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

defendant's behaviour and motives, when building and prosecuting cases of rape.[1210] The toolkit provides information on some of the tactics offenders adopt and behaviours they display, to commit rape and avoid getting caught.[1211] Prosecution barristers are encouraged to utilise this information, where appropriate, and focus on a defendant's credibility, behaviour, and motives.[1212] As other complainants had vulnerabilities, other prosecution barristers could have adopted the 'offender-centric' approach.[1213] Using this strategy, the prosecution could have examined the defendants on their knowledge of the complainants' vulnerabilities, and 'put their case' that the complainants were targeted, as T13PC did.

6.2.3 Opportunistic Rapists

In cross-examination, seven defendants were portrayed as committing rape to satisfy their wish for sex. With this, their attitudes towards sex and consent were scrutinised. This included overt assertions that they 'take sex' without regard for the other person's consent. During cross-examination, the response of one defendant insinuated that he believed previous consensual intercourse guarantees future consent. The prosecution challenged his attitude and emphasised the complainant's expressions of non-consent.

> **T9PC:** She said she had a headache and was tired, what account did you take towards her feelings?

[1210] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1211] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1212] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1213] This would depend on the evidence and information prosecution barristers receive about the case. From considering the context of each case, the trials T1, T2 and T10 are clear examples where this approach could have been appropriately adopted.

T9D: I did take into account her feelings.

T9PC: Did you say 'oh dear I'll get you an aspirin'?

T9D: No.

T9PC: Did you say do you just want to go to sleep?

T9D: No.

T9PC: You didn't ask because your only interest was that you wanted to have sex with her.

T9D: Not really, no.

T9PC: Not really? (*Loud disbelieving tone*)

T9D: No, every Friday night we have sex.

T9PC: "Did you think that gave you the right to have sex when you wanted it?"

T9D: No.

Overall, questions produced a particular characterisation of the defendants, as opportunists pursuing sex. Thus, many barristers appeared to be utilising aspects of the 'entitled rapist' narrative.[1214] An additional, and notable, example where a defendant's opportunistic behaviour was examined occurred in T12, which resulted in the jury being discharged. The prosecution used evidence to show the defendant purportedly propositioning another woman. It appeared the prosecution were portraying him as an opportunist, seeking a sexual opportunity that evening, but who subsequently obtained sex non-consensually with T13C2.[1215] To illustrate:

The soundless CCTV footage shows his friend going away and it just being T12D and the girl, she puts her middle finger up at him twice and in between these she is shooing him away with hand gestures, she steps back from him and he steps closer.

T12PC: I suggest to you that you are propositioning her–

T12J: Jury behind the door please (*stern and abrupt tone*)

[1214] Burrowes explains that the entitled rapist holds negative attitudes towards women, feels entitled to sex, and is opportunistic when committing rape. Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (NB Research 2013).

[1215] These inferences correspond to other cross-examination practices, where defendants were questioned on their attitudes towards the complainant and women, discussed within section 6.4.3.1.

This was considered inadmissible bad character evidence, as the prosecution were suggesting to the jury that this reprehensible behaviour showed his attitude to women generally. The soundless footage of an unidentified woman was considered speculative and irrelevant to resolving the central issue at trial, which was whether non-consensual intercourse occurred with women he knew. Equally, it may be problematic to infer guilt from these behaviours. For example, a defendant may have been interested in having consensual sex, which subsequently occurred with the complainant.

Aside from scrutinising their attitudes towards consent, the prosecution must prove a defendant did not reasonably believe the complainant consented during the alleged rape. To determine this, the jury must have regard to all the circumstances including any steps he took to ascertain consent.[1216] Therefore, there is scope for barristers to shift their focus onto the defendant's actions. However, where intercourse was not disputed, only four defendants were examined on the steps he took to ensure the complainant consented. These examinations varied in their directness, with T8PC being the most explicit.

> **T8PC:** "You didn't say is it ok to do this?"
>
> **T8D:** She was fully consenting…she was kissing me and when I say kissing I mean we put our tongues in each other's mouths.

This strategy is a classic 'offender-centric' approach, which the CPS regards as an important tool for challenging assumptions about consent and to show a defendant did not have a reasonable belief in consent.[1217] This may help ensure consent is understood as mutually negotiated and given, rather than something that must be clearly withdrawn. The other three defendants were examined on their judgements relating to consent, or how the complainant demonstrated her consent. These appear

[1216] Sexual Offences Act 2003, s.1(2).

[1217] CPS, what is consent?
<https://www.cps.gov.uk/publications/equality/vaw/what_is_consent_v2.pdf>

to be examples of barristers examining the steps the defendant took to ascertain consent, although the phrasing of their questions could have been more explicit.

T13PC: No, do the flashes [of your memory] point to anything [she did] to show she consented to it?

T13D: No, there was no talking no

T13PC: There was nothing to suggest you had a reasonable belief she was consenting

T13D: I told you what I remember the three flashes that's all I remember

Throughout cross-examination prosecution barristers would also be seeking to undermine the reasonableness of a defendant's belief in consent, where this issue is disputed. To help achieve this, more barristers could take a direct approach and focus on his behaviour and actions. For example, using the above extract, T13PC could have placed greater emphasis on T13D's actions, for example by asking the defendant if he recalls verbally communicating with the complainant to check she was consenting. Nonetheless, by briefly focusing on the complainant, the prosecution were able to demonstrate the complainant displayed no sign of consenting, which was important for their case. The scope for widespread adherence to the offender-centric approach among prosecution barristers will be discussed further within Chapter Seven.[1218]

6.2.4 Sexual and Physical Attraction

The presence and absence of sexual and physical attraction between the defendant and complainant became another focus in cross-examination. Three prosecution barristers suggested the defendant was attracted to the complainant.

T13PC: I suggest you developed an unhealthy attraction towards [T13C2] that [compelled] you to rape her

T13D: No, no (*sighs, said firmly and slowly*)

[1218] See Chapter Seven, section 7.3.4 for a discussion.

Examining the defendant's attraction to the complainant may help strengthen the prosecution's case by providing a rationale for the offending. The prosecution may be demonstrating that the defendant took the opportunity to satisfy his own sexual attraction and desire, without having regard to whether the complainant was consenting. The emphasis on sex and attraction could also operate to the prosecution's disadvantage. Research shows some mock jurors draw upon scripts of sexual attraction to excuse a defendant's actions.[1219] For example, mock deliberations habitually reference men as being unable to control their sexual desires.[1220] Thus, the above cross-examination practices may encourage jurors to draw comparisons between the alleged rape and their understanding of normal sex, which may include these notions about male sexuality. Rape is considered an expression of power and control, by some, rather than being about sexual attraction and gratification.[1221] Prosecution barristers could be urged to place less emphasis on sex and attraction to redress this. However, another interpretation is that these questions purposefully emphasise sex and attraction, since rape can be motivated by sexual desire, either alone or in conjunction with other factors, including anger and power.[1222] Prosecution barristers also examined the complainant's lack of reciprocity towards the defendant. Some reiterated the complainant's sexual disinterest in the defendant, as demonstrated below.[1223]

T13PC: So you were sexually attracted to her and she didn't find you sexually attractive, is the answer yes?

T13D: Yeah.

[1219] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291.

[1220] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 297-8.

[1221] Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (NB Research 2013) 8; CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim* <https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1222] Bourke J, *Rape: A History from 1860 to the Present* (Virago Press 2007) 409.

[1223] This occurred during the cross-examinations of T8D, T12/13D, T11D and T17D.

Others cross-examined on the absence of certain behaviours, such as flirtation or other 'sexual cues'.[1224]

T11PC: Was there anything sexual between you?
T11D: When?
T11PC: Before.
T11D: No, there was no kissing or cuddling.
T11PC: No kissing or cuddling.
T11D: No.
T11PC: No kissing or cuddling, no flirting?
T11D: No.

Together, emphasising a complainant's disinterest may show there was no sexual miscommunication, and imply the complainant would not have consented. As mock jurors use scripts about sexual miscommunication to exonerate defendants, these cross-examination strategies may minimise these interpretations. Had these complainants felt some sexual attraction or exhibited sexual cues, consent is not necessarily more likely.[1225] Thus, these prosecutors arguably benefit from assumptions that sexual cues, such as flirting and kissing, indicate consent to sex.[1226]

Lastly, the physical attractiveness of complainants also featured in cross-examination, albeit rarely.[1227] Only in T10 did the prosecution examine the defendant's attraction towards the complainant's physical appearance. This defendant, who was thirty-three at trial, and the elderly complainant had a prior consensual sexual relationship.

[1224] This occurred during the cross-examinations of T8D and T11D.

[1225] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review: An International and Interdisciplinary Journal 710, 715 and 733.

[1226] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review: An International and Interdisciplinary Journal 710, 715; Gray J.M, 'What Constitutes a 'Reasonable Belief' in Consent to Sex? A Thematic Analysis' (2015) 21(3) Journal of Sexual Aggression 337.

[1227] The exceptions were within the cross-examination of T8D and T10D.

Additionally, one defendant raised the complainant's attractiveness, while being cross-examined on his 'disinterest' in the complainant, which was mutually shared.

> **T8PC:** You were disinterested, you were not interested at all is that what you mean?
>
> **T8D:** I had a girlfriend they were not ugly girls…I was not talking or wanting to get with them.

The physical attractiveness of complainants is believed to influence public, and mock juror perceptions of rape.[1228] Firstly, research has found attractive complainants and defendants are sometimes assessed favourably.[1229] Secondly, research reveals some mock jurors expect normal sex to occur between 'compatible people', in terms of their physical and social compatibility.[1230] Thus, the prosecution in T10 may be exploiting these assumptions and beliefs that elderly women are not sexually desirable, potentially held by the jury.[1231] In T8, the prosecution were indicating their suspicion of the defendant's account that consensual intercourse occurred hours later, by examining his subsequent 'sudden' attraction towards her. The prosecution, therefore, rely upon absence of sexual and physical attraction to argue that non-consensual intercourse was more likely to have occurred. The defendant's response arguably provides some potential compatibility between them by suggesting she was

[1228] Maeder E.M, Yamamoto S and Saliba P (2015) 'The Influence of Defendant Race and Victim Physical Attractiveness on Juror Decision-Making in a Sexual Assault Trial' (2015) 21(1) Psychology, Crime and Law 62; Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 202-203.

[1229] However, research in this area has produced mixed results. Vrij A and Firmin H.R, 'Beautiful Thus Innocent? The Impact of Defendants' and Victims' Physical Attractiveness and Participants' Rape Beliefs on Impression Formation in Alleged Rape Cases' (2001) 8(3) International Review of Victimology 245, also citing Mazella R and Feingold A, 'The Effects of Physical Attractiveness, Race, Socio-Economic Status, and Gender of Defendants and Victims of Judgements of Mock Jurors: A Meta-Analysis' (1994) 24 *Journal of Applied Social Psychology* 1315.

[1230] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 301-302.

[1231] Bows H and Westmarland N, 'Rape of Older People In The United Kingdom: Challenging The 'Real Rape' Stereotype' (2017) 57(1) Brit. J. Criminol 1, 11.

'not ugly'. Thus, he presents consensual intercourse as unsurprising, which may have some influence on the jury's perceptions that his account is more likely.[1232]

6.2.5 Responding to Rape and Expressing Guilt

Cross-examination also focused on the defendants' responses following the alleged rape, specifically their treatment of the complainant and behaviours that could indicate guilt. Four defendants were cross-examined on their alleged behaviour towards the complainant after committing rape. These behaviours were diverse, including attributions of blame, seeking sympathy, or making verbal threats. For example:

> **T13PC:** [T13C2]'s evidence is you accept raping her on Saturday morning; you then became needy. You tried to convince her otherwise and said your life was over, (*T13D tries responding; T13PC points left index finger in air, twists upper body to jury then returns hands together on stand, continuing to look ahead*), and you were going to hand yourself in, did you say your life was over and you would hand yourself in?
>
> **T13D:** Saturday no, she said I had taken advantage of her that happened then she stopped talking about it…on Sunday, I did say crumbs my life is over I can hear the cell doors bang I did (*long pause*) over something I hadn't done (*quieter voice*).

Similarly, two defendants were questioned on remaining with the complainant after the alleged rape, as demonstrated below.[1233] The barristers seemed to infer this behaviour was controlling, to prevent the complainant from disclosing what happened. As other complainants were challenged on remaining with the defendant

[1232] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 302.

[1233] This included T5D, who was also cross-examined on the verbal threats he made, and T8D.

and their failure to immediately leave, other prosecution barristers could have considered these narratives to reflect the 'offender-centric' approach.[1234]

T5PC: You manipulated and controlled her.

T5D: No I did not.

T5PC: You stayed with her.

T5D: I stayed but left to go to the shops.

Within cross-examination, barristers suggested that five complainants confronted the defendants over what happened. For T5D and T14D, their responses to the complainants' accusations were scrutinised.[1235] Questions indicated that innocent defendants would be expected to fiercely contest these serious accusations. For example, digital evidence showed T14D responding "if I wanted to rape you I would have done" and ignoring further accusations from T14C. These responses were challenged.

T14PC: Why didn't you respond that is all complete lies?

T14D: I had no reception at the [festival].

Behaviours that could be interpreted as the defendant confessing or apologising for rape were also examined.[1236] Mostly, this involved defendants saying 'sorry' in some way. These defendants disputed such utterances or provided an alternative

[1234] With consideration of the context of the trial and the prosecution's case, this could have also been adopted within T2, T6, T11, T12/13, T14 and T17. CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim* <https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1235] Within these trials, evidence was provided to corroborate the complainant's account that she confronted the defendant. However, within T5 this corroborating evidence was provided from the complainant's sister, who was present at the time of the confrontation. The defendant maintained this did not happen.

[1236] This featured within the cross-examinations of T8, T11, T12/13 and T17.

explanation. Distinctively, T13D was examined on his telephone call to the police, to portray his words as a confession.[1237]

T13PC: What you say is I feel like 'I didn't give her the option I forced her' (*head turned slightly to jury*).

T13D: I was scared even though it was consensual she would say I raped her.

Two further defendants called the police or a third party on leaving the alleged crime scene. These actions were treated with suspicion in cross-examination. The prosecution advocates submitted that these defendants anticipated allegations of rape were going to be made, and were trying to 'get their story in first' or 'muddy the waters'. The CPS 'offender-centric' toolkit suggests offenders may behave in particular ways following the offence, to distance themselves from their offending, or reframe events into consensual sex or an absence of intercourse.[1238] These behaviours may include making a counter allegation, being unconcerned or overfriendly with the complainant, which were displayed by the defendants within the cases outlined above.[1239] The prosecution barristers are thus reframing these responses, into indicators of guilt.

6.2.6 Refuting Claims that the Allegations Are False

Prosecution barristers adopted strategies to undermine suggestions that the allegations being tried are false.[1240] Prosecutors submitted to defendants in cross-examination that there was no reason for the complainant to lie about being raped. Different methods were utilised for this. For eight defendants, questions established that the complainant

[1237] This related to the alleged rape committed against T13C2. Within T12, the content of the defendants' phone call to the police was not explored before the jury was discharged.

[1238] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1239] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1240] For an overview of the trial narratives, including the defence cases, refer to appendix three.

was a 'good person', regarded the defendant positively, or had a 'good' relationship with him.

T13PC: So when she says in her ABE interview in her distressed state I'm a good person [you would agree with her]?

T13D: Yeah up to [my interview] what I knew of her she was a decent person.

T2PC: You said at the time you had a perfectly good relationship with [T2C]

T2D: [It was] good all the time

Specifically, within T13, the prosecution explicitly asked whether the complainants had 'an axe to grind' with him. In highlighting the absence of malice, it appears the prosecution advocates were attempting to exclude this as a possible motive for a false allegation.[1241] Questions seem to infer that untruthful complainants would portray the defendant negatively, to bolster their fabricated allegations. In addition, five defendants were overtly asked whether they knew why the complainant would make an accusation of rape against them, if the allegations were untrue.

T17PC: "Do you have any explanation as to why she said you did this to her?"

T17D: Not a great explanation, no.

The prosecution can properly examine this, as questions inspect matters within the defendant's own knowledge.[1242] However, it is not for the defendant to speculate or prove why an allegation is false. It is imperative that these practices do not influence

[1241] This implies false allegations are motivated by malice, when false allegations can be made non-maliciously. See, Wheatcroft J.M. and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 240.

[1242] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.16 citing *R v Brook* [2003] 1 WLR 2809; *R v Horncastle* [2010] 2 AC 373.

the jury to begin their deliberations from the position that there is no reason for the complainant to lie, since the prosecution must prove each element of the offence with evidence.[1243] Some of these prosecution practices perpetuate an understanding that false allegations are made intentionally and out of malice. Yet, false allegations can be made for other non-malicious reasons, such as mental health problems.[1244] Additionally, four defendants advanced some motives for the allegations, during their cross-examinations. These were that the complainant was regretful of the intercourse, jealous, wanted to end their relationship, and was incited by others. Prosecution barristers challenged these views, for example:

> **T9PC:** It has been suggested to her that she made this up to end the relationship and get away from you.
>
> **T9D:** Yes that's true.
>
> **T9PC:** It isn't, all right. Because previously she was quite capable of leaving you and not needing to say you raped her or anything like that, she felt stifled by you.
>
> **T9D:** Not at all, I loved that woman.

Research shows mock jurors often discuss possible motives behind the allegations, with revenge being most frequently proposed.[1245] Some mock jurors also submit that false allegations are common.[1246] Challenging the defendant's reasoning, as illustrated above, may also challenge these views potentially held by actual jurors. However, caution is required since there is significant uncertainty regarding the

[1243] *Woolmington v DPP* [1935] AC 462.

[1244] As discussed by, Rumney P and McCartan K, 'Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications' (2017) Journal of Criminal Law 1, 26.

[1245] Ellison L and Munro V, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review, 796-797.

[1246] Ellison L and Munro V, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review 781, 796-797.

frequency of false complaints of rape.[1247] It is therefore possible that false allegations, whether malicious or non-malicious, do reach trial. This said, Rumney and McCartan argue there is little robust evidence to suggest that false allegations occur at a rate higher than 3-10% of all recorded offences.[1248]

Overall, the observations demonstrated that the defendants' behaviour surrounding the alleged rape became a focus during the cross-examinations observed. Such questioning largely pertained to facts within the case, ranging from their controlling behaviour to their reactions to the allegations, and did not generally contravene evidential rules.[1249] However, analysis of these findings demonstrated where prosecuting counsel might also be relying upon broad rape myths, relating to physical resistance and false allegations, to their advantage. In addition, it appears a potential prosecution strategy is to create a version of the 'ideal offender', by examining a defendant's controlling behaviour and larger size, which may appeal to assumptions among jurors about how a rapist behaves and appears.[1250] These strategies appear to reflect the traditional principles of persuasion and advocacy, as the barristers adopt lines of questioning that potentially 'play to the jury' and their assumptions.[1251]

However, many of the questions observed had alterative interpretations, demonstrating that the defendants were robustly examined on central facts and the core issues, including consent. For instance, examining defendants on their physical size allows the prosecution to reasonably demonstrate that he could have easily overpowered the complainant to commit rape. This, therefore, allows the prosecution to fairly advance their case. In addition, some limited evidence is available into the strategies offenders adopt to commit rape. For example, offenders can use coercion,

[1247] Rumney P and McCartan K, 'Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications' (2017) Journal of Criminal Law 1.

[1248] Rumney P and McCartan K, 'Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications' (2017) Journal of Criminal Law 1, 14.

[1249] This is with the exception of the inadmissible bad character evidence that was adduced within T12, which resulted in the jury being discharged.

[1250] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) From Crime Policy to Victim Policy: Reorienting the Justice System (1st Edn, Macmillan1989) 25-26.

[1251] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

manipulation, and target people, particularly those with vulnerabilities.[1252] Therefore, examining defendants on their alleged manipulative and controlling behaviour, for example, does not necessarily rely upon, or create, misleading assumptions about offenders. These findings emphasise the importance of distinguishing between poor questioning that draws upon the defendant's behaviour to clearly utilise refutable stereotypes, from questions pertaining to the central facts and issues in dispute. Such distinctions would need to be based on the individual facts of each case. While the prosecution barristers rarely referenced the defendant's behaviour in a manner that made or clearly implied generalisations about rape and offenders,[1253] a fair treatment approach would reject questions that do so. These questions obscure the central issues and does not encourage defendants to give their best evidence on matters that resolve these issues.

6.3 Using The Defendants' Sexual History

Observations yielded insights into how sexual history evidence is used during the defendants' cross-examinations. Twelve defendants were cross-examined on their own sexual history with the complainant. The complainant's sexual behaviour with others featured in one cross-examination. Six defendants were also cross-examined on their sexual history with third parties. The wording of s.41 does not prevent the prosecution from adducing or questioning the defendants on sexual history evidence.[1254] Moreover, a defendant's sexual history with others would not generally be considered bad character,[1255] since behaviour is not reprehensible because it is 'morally lax' or 'irritating, inconvenient or upsetting' to another person.[1256] However,

[1252] Burrowes, N., 'Responding to the Challenge of Rape Myths in Court' (NB Research 2013) 16; CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1253] Appendix five outlines the number of trials where barristers cited irrelevant sexual history evidence and clearly utilised refutable rape myths in cross-examination.

[1254] Youth Justice and Criminal Evidence Act 1999, s.41(1).

[1255] Criminal Justice Act 2003, s.98.

[1256] *R v Weir and Manister* [2006] 2 All E.R. 570; *R v Scott [*2009] EWCA Crim 2457. As discussed within Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F13.6.

trial judges will decide whether behaviour is reprehensible, amounting to evidence of misconduct and bad character,[1257] by considering the specific facts surrounding the behaviour in question.[1258] Regardless of this, the evidence must still be relevant.[1259] How the prosecution barristers utilised this evidence within cross-examination will now be analysed.

6.3.1 Sexual History with the Complainant

The cross-examinations of defendants on their sexual history with the complainant referred to occasional instances of sexual activity or their continual sexual relationship. With the exception of T7C and T17C, the complainants were also cross-examined on this evidence.[1260] The sexual relationship between the parties was examined within nine cross-examinations.[1261] This includes where defendants suggested a sexual relationship occurred, but the complainants wholly or partly disputed the alleged sexual behaviour. While the evidence contextually differed, questions targeted similar areas.

Firstly, only T9D was challenged on how previous consensual intercourse gave him the "right" to have sex on this occasion, in response to his assertion that they "always did it". Exploring a defendant's attitude towards consent could emphasise to the jury that the mere fact the parties have sexual history does not mean the complainant consented, or gave him ground to believe she consented, on this occasion. This could be important, as professionals working in the sexual assault sector believe that jurors assume that consent can be implied or continuing between former and current sexual

[1257] Criminal Justice Act 2003, s.98 and s.112(1).

[1258] *R v Palmer* [2016] EWCA Crim 2237, para 29.

[1259] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F1.11.

[1260] However, their sexual relationship with the complainant was referenced elsewhere during the trials.

[1261] This related to T5C, T6C, T7C, T9C, T10C, T12/13C1, T14C, T16C, and T17C.

partners.[1262] While Ellison and Munro found mock jurors generally do not adopt these assumptions, these views were not entirely absent within their deliberations.[1263]

Secondly, the sexual history between the complainant and defendant was often used in cross-examination to test aspects of the defendant's case that relied upon this evidence.[1264] Where such evidence is lawfully admissible but is wholly or partly contested on its facts, prosecution counsel are entitled to examine the defendant and advance the prosecution's position.[1265] Principally, prosecution barristers were challenging whether the sexual behaviour occurred, as the defendant suggested. For this, different strategies were observed. Barristers either explored the defendant's position, subsequently submitting it was untruthful, or examined the credibility of their account. An example of the latter includes:

> **T9PC:** According to you, (*pause*) you've been having anal sex on a daily basis *(loud astonished tone)* yet you accept that night it was getting easier.
>
> **T9D:** …we didn't use lubricant this time… *(Quick, stumbling speech).*

Thirdly, sexual history evidence was used to strengthen various aspects of the prosecution's case.[1266] For two defendants accused of anal rape, cross-examination focused on their previous experiences of anal intercourse and the complainant's enjoyment of it. One complainant expressed her aversion of anal sex within her evidence. Both barristers presented anal sex as not pleasurable,[1267] presumably to demonstrate the complainants would not have consented to this activity.

[1262] Larcombe W *et al*, ''I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (Un) Reasonable Belief in Consent in Rape Law' (2016) 25(5) Social and Legal Studies 611, 621.

[1263] Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(2) E. & P. 299, 313.

[1264] This was observed within T5, T6, T7, T9, T16 and T13.

[1265] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.1 and 7.8.

[1266] This occurred during the cross-examinations of T7D, T9D and T17D.

[1267] Weiss K.G, 'Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization' (2010) 5(3) Feminist Criminology 286, 297.

T7PC: I am going to ask you about the anal sex, is that something [T7C] enjoyed.

T7D: Yes, it hurt her but she didn't want to stop [or say stop].

T7PC: Because in interview you said this… (*T7PC reads from his police interview where he states T7C had complained of discomfort during anal sex previously*).

T7D: She was complaining she couldn't sit down…

T7PC: You're saying she's consented to that when she can't sit down for two days (*disbelieving tone, louder voice*).

T7D: Anal sex is not just about pleasure for a man, women get pleasure from it too.

Moreover, T9PC compared the parties' typical sexual behaviour with the defendant's version of events for the alleged rape. Differences from their 'typical' intercourse were treated with suspicion, and indicators of non-consent.

T9PC: Ordinarily, when you make love does it finish with you ejaculating?

T9D: All the time.

T9PC: So it must have been pretty unusual I suggest for her to get up when you were making love if it was passionate, is that something she has ever done before?

T9D: Yes, she did loads of times (*stumbles over words, nervousness*).

A further constructive approach using sexual behaviour evidence occurred in T17D's cross-examination. The parties' sexual relationship, including a specific occasion of intercourse, and the complainant's use of contraception featured. The defendant was examined on his failure to discuss protection on this occasion, when they had used protection previously.[1268] This seemed to advocate a 'communicative understanding

[1268] The defendants within T11 and T18 were also cross-examined on whether they discussed contraception with the complainant, at the time of the alleged offence, without references to previous sexual behaviour.

of sexuality',[1269] which would involve mutual conversation and the opportunity to ask about protection. This may be advantageous, by presenting the defendant as opportunistically committing rape with disregard for the complainant. Additionally, this is another example of the prosecution examining the steps taken by the defendant to ascertain consent.[1270] Thus, the reasonableness of his belief in consent is doubted.

Akin to these constructive approaches, previous sexual relationship evidence was implicated when the prosecution advanced its case about important background matters, with varying directness.[1271] For example, T13PC directly suggested that the defendant often gave T13C1 drugs in exchange for sex. With this, the defendant can respond to the prosecution's case.[1272] Lastly, however, some uses of sexual history appeared to only enhance the context of the case or established additional details about the parties' sexual relationship.[1273] Since questions examined details that were supplementary, remote from central matters or simply reconfirmed and repeated aspects of the defendant's evidence-in-chief, these questions seemed unnecessary.[1274] For example:

T5PC: You said you had sex just two days after you met her?
T5D: Yes.

With all the above practices, it is important to note questions largely explored the parties' sexual history in general terms. Focus was placed on the general nature of their sexual relationship, including how often sex took place, the type of sex that featured, the circumstances in which sex occurred, and the parties' satisfaction with

[1269] Finch E and Munro V.E, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) Legal Studies 303, 304

[1270] Sexual Offences Act 2003, s.1(2).

[1271] This was observed during T7D, T10D and T14D's cross-examinations, in conjunction with the other practices described above.

[1272] *Browne v Dunn* (1893) 6 R 67, para 76-77.

[1273] This was observed within the cross-examinations of T5D, T6D and T7D.

[1274] The only clear example of irrelevant sexual history of the complainant, used by the prosecution, was observed within T5. Within T7, T10 and T16 references to sexual history were made by prosecution barristers to target particular relevant issues, but could have been approached in a more concise way.

their sexual relationship. Only two defendants were cross-examined on specific occasions of sexual behaviour with the complainant during their sexual relationship.

Notably, three defendants were cross-examined about specific occasions of sexual behaviour with the complainant, when a romantic or sexual relationship was not apparent.[1275] The barristers examined this evidence to refute aspects of the defendant's testimony. This included the defendant's account of the sexual behaviour.[1276] For example, T13D suggested he had consensual intercourse with T13C2 on the afternoon following the alleged rape, which was admissible under s.41(3)(b).[1277] The prosecution refuted this entirely, arguing it was fabricated to assist his case, and challenged the credibility of this evidence.

> **T13PC:** There must have been an extraordinary chill down your body being told you raped a woman who was unconscious through drink and drugs, yes? (*T13D nods slowly during question*).
>
> **T13D:** Yes.
>
> **T13PC:** Can you explain to the jury why you then indulged in a sex marathon with her on Saturday evening?
>
> **T13D:** She wouldn't let me leave (*loud slightly exclaiming tone*) I said I needed to go and see my mother, she doesn't know about this…she [T13C2] said we need to talk about it…something changed…[thought I had] better sort it out (*speaks loudly and very quickly*).

Diverging accounts of the parties' sexual history were also presented within T3. The prosecution explored the defendant's account, and subsequently challenged his truthfulness directly and advanced their position.[1278] The evidence was utilised to

[1275] The sexual history related to TC3, T12/13C2 and T18C. Two of these defendants also referred to the sexual behaviours in their answers to other unconnected questions.

[1276] This was observed within the cross-examination of T3D and T13D.

[1277] As discussed within Chapter Five at section 5.3.1.

[1278] The sexual history evidence concerned previous occasions of kissing. The defendant suggested he kissed T3C on three occasions, not once as the complainant contended. The complainant also explained how the defendant tried to kiss her the night before he committed rape, which he disputed.

challenge T3D's account that he viewed T3C 'like a little sister'. Additionally, this behaviour was examined to show T3D was sexually attracted to T3C. This appeared to strengthen the prosecution's case, by showing a potential motive behind the opportunistic rape.

T3PC: [The] reality is you were sexually attracted to her.
T3D: No.
T3PC: Kissing is a sexual thing isn't it?
T3D: It was a mistake [when I was] under the influence of alcohol [or when I was going through something].

Within T18, sexual behaviour was used to challenge the defendant's account that he did not check into the hotel to have intercourse with T18C, a sex worker. Examining the defendant's attitude and intentions, using their sexual behaviour during the taxi journey to the hotel, may simultaneously strengthen the prosecution's case that he wanted, and had, sex despite T18C's objections. In addition, T11D was examined on potential occasions of sexual behaviour with the complainant, to reiterate the absence of any sexual history. For example:

T11PC: When you were watching television there was nothing sexual between you…
T11D: No [there] was just general conversation.

This seemed to infer that since the complainant was not sexually interested in the defendant at the time, it seems dubious that subsequent intercourse would have been consensual.[1279] Therefore, the prosecution may be utilising the belief that 'consent to sex can be assumed from…certain types of behaviour, such as flirting or kissing', to strength their case.[1280] Temkin argues this belief is one of many damaging myths to exist.[1281] Existing research has found some members of the public hold women

[1279] For a related discussion on sexual attraction, refer to section 6.2.4.

[1280] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review 710, 715.

[1281] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review 710, 715.

responsible for rape when they have been flirtatious.[1282] Research also demonstrates that kissing and flirtation are considered sexual cues within 'normal' sex.[1283] Although, participants within Gray's interviews drew distinctions between these behaviours, as indicators of sexual interest not consent.[1284] However, some mock jury members have been reluctant to adhere to this distinction.[1285]

6.3.2 Other Sexual History

Although not prohibited, six defendants were examined on their sexual history with third parties, which targeted different issues. Firstly, when exploring background matters, three barristers alluded to a defendant's sexual history but did not examine his sexual behaviour, as such.[1286] This background evidence was not examined at length or detail, which would otherwise contravene the position in *Ejaz*.[1287]

> **T16PC:** You started a relationship with [girlfriend] you started that relationship in September 2015.
>
> **T16D:** Yes.
>
> **T16PC:** And she became pregnant shortly after.
>
> **T16D:** She did.

Secondly, this type of sexual history was used to undermine one defendant's evidence. In T6, cross-examination seemed to test his assertion that he never engaged in oral or anal intercourse, while also putting the prosecution's case.

[1282] Of the 1095 participants surveyed, 6% held women totally responsible and 28% held women partially responsible, Amnesty International, *Sexual Assault Research Summary Report* (Amnesty International/ICM 2005).

[1283] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 295.

[1284] Gray J.M, 'What Constitutes a 'Reasonable Belief' in Consent to Sex? A Thematic Analysis' (2015) 21(3) Journal of Sexual Aggression 337.

[1285] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 296.

[1286] These defendants were asked questions about their girlfriends, who became pregnant around the time of the alleged rape.

[1287] *R v B (Ejaz)* [2005] EWCA Crim 805, para 10 citing *R v Kalia* [1974] 60 Cr App R 200.

T6PC: No, so when [T6C] described when you were on top of her on the bed…she said she thought you were going to have oral sex that doesn't make any sense at all does it? *(T6D does not answer; T6D and T6PC looking at each other).*

T6PC: So you never had oral sex?

T6D: No.

T6PC asks if he is with [current girlfriend].

T6D: Yeah.

T6PC: You have never had oral sex with [current girlfriend]?

(Pause) T6D says he has not.

Lastly, the prosecution used sexual history to explore or strengthen their case in four trials.[1288] For one defendant, the evidence challenged the likelihood of the complainant consenting. Here, questions explored why T17D thought that T17C was sexually interested in him, while knowing he was having other sexual relationships. References to the defendants' sexual history were also made when examining their attitudes towards sex. For example, T6D was asked whether his previous sexual relationships were consensual, which may have been to advance the prosecution's position that T6D ignores women's consent. In addition, questions implicated the defendant's sexual history when examining their intentions at the time of the alleged offence. For example, cross-examination established that T4D intended on having intercourse with a sex worker and knew where to find one. T4PC further enquired into whether he "used prostitutes" before and how often, which was irrelevant to the core issues. In contrast, the prosecution properly cited the defendant's sexual history to further their case that he was competitive and was "trying to score", and subsequently committed rape.[1289]

T8PC: You did not lose your inhibitions with [witness 1]?

[1288] This included T4D, T6D, T8D and T17D.

[1289] In this circumstance, the sexual touching appears to be reprehensible, as his advances were presented as him trying his luck with the witness. Observations revealed the defence agreed for this evidence to be adduced, under Criminal Justice Act 2003, s.101(1)(a). This was so the defence could argue that the witness, having experienced T8D behave in this manner towards her, allowed her friend, T8C, to be in a room alone with him.

T8D: No.

T8PC: You did not touch [witness 1] in the vaginal area? (*fast pace*)

T8D: No.

T8PC: [Was she mistaking it for anyone else]?

T8D: I can't comment about anyone else.

T8PC: It was not sex you were looking for [no sexual action] at all?

T8D: Not at all.

Observations also found one occasion where the defendant was cross-examined on the complainant's sexual history with third parties. Here, the evidence would not help the jury resolve the disputed issue of consent, but simply provided further context to the complainant and defendant's casual relationship.[1290] Therefore, it is perplexing that the prosecution would reiterate this irrelevant evidence, as demonstrated below.

T5PC: You said you had sex just two days after you met her?

T5D: Yes.

T5PC: and [male] was having some sort of relationship with T5C…

T5D: No.

T5PC: How did you know that?

T5D: He was my friend (*attitude, gritted teeth*).

T5PC: Did you discuss having sex with her to him?

T5D: Yeah.

T5PC: And he was all right with that?

T5D: Yeah.

Overall, the observations have identified how sexual history can be used during the cross-examination of defendants. The use of a complainant's sexual history, by defence barristers, is recurrently critiqued within the scholarly literature. However, limited attention has been paid to how prosecution barristers utilise this evidence, and also the defendant's own sexual history, in cross-examination. The observations largely identified appropriate uses of this evidence, to assist the prosecution in robustly, and fairly, advancing their case and challenging the defendant's evidence

[1290] The irrelevance of this evidence was explained within Chapter Five at section 5.3.2.

about core issues. Although evidential rules do not restrict prosecuting counsel from examining sexual history, whether pertaining to the complainant or defendants, irrelevant uses of sexual history were also observed in a small number of cases. A fundamental principle for any cross-examination is that it must only investigate admissible and relevant matters.[1291]

As previously indicated, the shift towards best evidence cross-examinations aims to improve conditions so that witnesses and defendants can give their best evidence, where there is a risk of confusion and acquiescence. Best evidence guidance and case law does not unequivocally address how questions on sexual history affect defendants. A fair treatment approach would recognise that inadmissible, irrelevant and excessive questioning on sexual history is equally problematic for defendants. Such questioning obscures the central issues in a case, and diverts a defendant's attention away from providing evidence that would assist with resolving the core disputed issues. Under the FTM, defendants would be entitled to polite and respectful treatment. Irrelevant or insensitive questions on sexual history evidence may be surprising to defendants and create upset, annoyance, or hostility, which may prevent them from giving their best evidence.

Furthermore, where defendants have provided their best and most reliable evidence, this could be undermined if irrelevant sexual history evidence has a prejudicial influence on jurors. For instance, examining sexual behaviours of the defendant, such as buying sex, could implicitly undermine his character or instil dislike towards him among jurors. Cross-examination on these matters would meet the CPS's offender centric model, which urges prosecutors to focus on the defendant's behaviour, so jurors know more about their character.[1292] However, there is a risk that inaccurate

[1291] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 184-185.

[1292] Bentham M, 'Rapists Who Ply Victims with Drink or Drugs Targeted in New Clampdown' (Evening Standard, August 2017) <https://www.standard.co.uk/news/crime/rapists-who-ply-victims-with-drink-or-drugs-targeted-in-new-clampdown-a3606336.html>; CPS, *Toolkit for Prosecutors on Violence Against Women and Girls in Cases Involving a Vulnerable Victim*. <https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf>.

assumptions about sexual offenders may ensue from this strategy. Additionally, examining the defendant's behaviour may encroach upon their bad character, and therefore must be lawfully adduced. Akin to factually refutable rape myths, cross-examination would become unfair where questions clearly suggest that innocent defendants should be of good moral standing, in relation to his sexual behaviour and relationships. Determining whether prosecution barristers clearly rely upon refutable stereotypes would depend on the individual facts of every case. As the prosecution barristers observed rarely utilised these assumptions overtly, this presents a challenging area to address.[1293]

The cross-examination of T5D particularly exemplifies how prosecution barristers could contravene a fair treatment approach for complainants. Here, questioning shifted focus towards T5Cs sexual relationship with another man. As discussed in Chapter Five, the defence cross-examined T5C on this evidence, which appeared to be irrelevant and inadmissible based on the facts heard at trial. Under the FTM, complainants must receive dignified treatment and their privacy must be protected. This means that their sexual history, when irrelevant, should not feature within a defendant's cross-examination. Prosecutors are purportedly committed to preventing the inappropriate examinations of sexual history by the defence.[1294] By extension, cross-examining defendants on this irrelevant evidence demonstrates disregard to this commitment. Fortunately, this practice was seldom observed.

6.4 Discrediting The Defendants' Character and Account

Resembling the complainants' cross-examinations, the general credibility of the defendants and their evidence was challenged. Cross-examination commonly focused on the consistency, plausibility, and reliability of their evidence, and aspects of their character that may undermine their trustworthiness and credibility. Although these were common tactics in the trials observed, not all defendants were cross-examined on each matter. Where these matters arose, they appeared to be treated as indicators of the defendant's guilt. Some questions implied that an innocent defendant would

[1293] See Appendix Five, which outlines the number of trials where barristers cited irrelevant sexual history evidence and clearly utilised refutable rape myths in cross-examination.

[1294] CPS, *Policy for Prosecuting Rape* (CPS, September 2012) section 38 and 39.

provide a consistent and conceivable account, denying penetration or non-consensual intercourse. In addition, they were expected to be composed, honest, and likeable, inside and outside of the witness box. These observations will be discussed, which will demonstrate how the prosecution potentially push the defendants towards the 'ideal offender' stereotype, demonstrating him as the type of person likely to commit rape. However, the findings also show that questions did not necessarily invoke stereotypes, and the defendants were robustly and appropriately challenged on their evidence and credibility. How a fair treatment approach would deal with these strategies will be considered at the end of this chapter.

6.4.1 Inconsistent Accounts

Defendants are not required to provide their version of events. However, defendants may choose to provide their account and assert their innocence. They may provide a written statement to the police or answer questions in a police interview, and choose to give evidence at trial. Of the defendants observed, eleven answered all questions in their police interview and five provided a written statement.[1295] With the exception of T15D, all defendants gave evidence at trial. Thus, most defendants had provided two evidential accounts, which could be compared. Like the complainants, cross-examination focused on the internal and external consistency of the defendants' accounts. The inconsistencies related to the core allegations and peripheral matters. As thirteen defendants were examined on some inconsistency in their evidence, this appeared to be a general and central cross-examination strategy in the trials observed.[1296] Nine defendants were examined on inconsistencies across their accounts. For two defendants, this related to the alleged offending and was central to the disputed issues:

T9PC: She said she had a headache and was tired, do you agree?

T9D: She didn't say she was tired.

[1295] T10D did not provide a statement and answered 'no comment' to nearly all questions in interview.

[1296] This enhances existing research conducted within England and Wales and beyond, which has shown this to be a cross-examination tactic for complainants, such as: Zydervelt S, Zajac R, Kaladelfos A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 14-15; Temkin J, 'Prosecuting and Defending Rape: Perspectives From The Bar' (2000) 27(2) Journal of Law and Society 219, 235.

T9PC: Did you get it wrong the day after, you said in your interview she said she had a headache and was tired you can have a look if you want. (*Fast tone, holds papers close to him then holds them up in T9D's direction*).

T9D does not respond.

Moreover, seven prosecution barristers exposed inconsistencies in the defendants' accounts of proximate matters relating to the alleged offence, including the lead up and initial aftermath.[1297] This was even where defendants provided largely the same version of events, albeit with some slight variances.

T14PC: This morning, you told the jury you came back to her flat and she had taken a long time to get ready.

T14D: Yes.

T14PC: After that [you went to get your stuff ready] and pack the beer.

T14D: Yes.

T14PC: That is different from what you told the police.

T14D: No, it's the same.

Inconsistencies regarding background matters were also examined, many of which were not important in resolving the issues disputed.[1298] An example, includes:

T6PC: Miss [T6DC] asked you were you in a relationship in September 2015 and your answer was no, you were not in a relationship in 2015 is that right?

T6DC: No, I thought she was chatting asking about Mrs [T6C] [Sic.]

Thus, it appeared the defendants were expected to be entirely duplicative and 'stick to' their original account, even for non-central background matters. These inconsistencies appeared to be presented as the defendants 'slipping up' and indicators of guilt. With this, the prosecution seemingly rely upon a stereotype of the

[1297] This occurred during T12D's cross-examination and not his re-trial.

[1298] Five defendants were examined on these inconsistencies.

'ideal defendant', who would provide an accurate and consistent description of all events, if innocent. While significant or slight inconsistencies can be attributable to untruthfulness, they can result from confusion, poor memory, or stress.[1299]

Contrasts were also made between the defendants' evidence and other evidential sources or witness testimony.[1300] No such contrasts were made that were directly associated with central events of the alleged offence. The external inconsistencies examined in cross-examination related to proximate matters in three cases, and a variety of background details in five cases.

T2PC: Well we had a statement from [witness 3] who said she was living with her for four months yes?

T2D: She would stay a week there then come home.

Unsurprisingly, the prosecution attached greater weight to a witness's evidence over that of the defendants. This is despite the possibility of witnesses lying or being mistaken, just as defendants or complainants may be. In sum, the external consistencies relating to background matters and proximate events would not resolve the central issues in dispute. However, the jury will not be deliberating whether the prosecution has proved the offence in a vacuum. By exploring these contextual and background inconsistencies, the prosecution attempts to undermine the overall credibility of the defendant's evidence and his case. Equally, contextual discrepancies may support aspects of the prosecution's case, including the complainant's account.

The findings demonstrate how most prosecution barristers challenged a variety of inconsistencies in the defendants' accounts. Demands were placed on the majority of defendants to be wholly consistent, across their accounts and against other evidence. The notion that consistency is indicative of truthfulness and increases credibility, appeared to underpin these practices. Jurors may hold these assumptions that can be

[1299] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) E. & P. 1, 16

[1300] Seven defendants were cross-examined on external inconsistencies.

exploited by highlighting inconsistencies.[1301] While not unique to rape trials,[1302] these strategies were deployed despite research demonstrating inconsistencies are not necessarily indicators of untruthfulness or inaccuracy.[1303] However, inconsistencies can equally result from untruthfulness.

6.4.2 Unreliable and Implausible Accounts

Incompleteness within the defendants' accounts and recall were also explored in cross-examination. Missing information across seven defendants' accounts was examined.[1304] These defendants had left pieces of information out of their police statement or interview, and this was presented as suspicious. These omissions all related to their explanations for the alleged rape, including their explanation of very proximate events. A truthful defendant appeared to be depicted as wanting to explain his version of events fully at the first opportunity.

T18PC: No Mr [T18D], there isn't any mention of you going to bars or [street], why not?

T18D: I did say [we were going to] go out for a drink.

T18PC: It's a simple question, why is it not in your statement you gave to the police?

T18D: Maybe the question wasn't asked in my interview…maybe that is why.

T18PC: Is it because it is something you thought of after you made your statement? (*Looking down*).

T18D: No, I'm telling you in detail what happened that evening.

[1301] Berman G.L and Cutler B.L, 'Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making' (1996) 81 Journal of Applied Psychology 170.

[1302] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 36; Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242.

[1303] For discussion see, Hohl K and Conway M.A, 'Memory As Evidence: How Normal Features of Victim Memory Lead to The Attrition of Rape Complaints' (2017) 17(3) Criminology and Criminal Justice 248, 249; Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) E. & P. 1, 16.

[1304] This figure includes T12D and T13D, since different omissions were examined in each trial.

Moreover, five barristers explored the accuracy and fallibility of the defendants' recall.[1305] While contextually different, questions mostly concerned their recall of very proximate events to the alleged rape, as demonstrated below.[1306] Barristers examined whether defendants could recall particular events, potential gaps in their memory, and the genuine nature of their recall. Questions attempted to demonstrate that events, forming part of the prosecution's case, could not be ruled out.

T8PC: You don't remember [witness 2] and [witness 1] coming into the room.

T8D: [witness 1] one hundred per cent didn't come into the room…[witness 2] and [friend] came in.

T8PC: Is that a gap in your memory or are you sure? (*curious tone*).

T8D: One hundred per cent sure.

Distinctly, T3D and T13D's poor memory resulting from their intoxication was targeted to undermine the defence case. Cross-examination explored how T13D had a generally poor memory of events but was able to recall "sufficient snippets" of activity that indicated intercourse was consensual. This appeared an attempt to show these memories were conveniently fabricated. Whereas, T3D denied penetration and committing rape but stated, "I don't know if I have or haven't, I can't remember", during his police interview. This was challenged in cross-examination.

T3PC: You like to think you haven't done it. (*Quick pace, accusing tone*).

T3D: I know within myself I haven't done it. (*Slow pace*).

T3PC: You've recovered your memory now have you?

T3D says he only remembers riding his moped when they got back and waking up.

[1305] This figure omits T12D because his memory was similarly examined in T13.

[1306] Only T14D was cross-examined on his fallible memory of more outlying events.

Cross-examination also probed and exposed implausibilities within fifteen defendants' evidence,[1307] which varied in centrality to the alleged offences. Direct assertions that aspects of their accounts were implausible or illogical were seldom made.[1308] Instead, the phrasing of questions, continual probing, and disbelieving tones seemed to insinuate this. Ten defendants were examined on their accounts about the period of time where the alleged offence took place and concerned their explanations of consensual sexual activity.[1309] By cross-examining particular actions, events and thought processes, the barristers presented the defendants' accounts as dubious or illogical.

T11PC: How did you get your hand on top of her t-shirt?

T11D: It was a built into the t-shirt…I don't know how to explain not you…it was a t-shirt like a sports bra.

T11PC: I am just trying to picture it.

T11D: I've only ever seen two of them before.

T11PC: No not the bra, the position you were in on the bed. (*slight abrupt tone*, *laughter from the jury*).

T11PC: Her head is on your right arm and you are kissing her she is kissing you which hand was on her bra?

T11D: My left.

T11PC: [How was that?]

T11D does a scooping action with his left hand.

Defendants were also examined on implausibilities within their descriptions of related matters or events close to the alleged offending. This was regardless of whether consent or penetration was disputed.[1310] While some improbabilities may not directly

[1307] This figure omits T12D because the same implausibilities were examined similarly in both trials.

[1308] This was observed within the cross-examination of T1D. Within T3D and T14D's cross-examinations, the prosecution barrister asserted the defendant was lying after examining implausibilities in their accounts.

[1309] This figure also includes one defendant who disputed penetration for the alleged vaginal rape. He explained some consensual sexual activity occurred but they did not have vaginal intercourse.

[1310] This was observed during ten defendant's cross-examinations.

resolve the contested issues, they often related to matters that were central to a defendant's case.

T3PC: You were drinking the same amount and that left her tipsy and you hammered is that correct? (*Fast pace, questioning tone*)

T3D: Yes.

T3PC: You said you on the scale of one to ten you were about a fifteen. (*Fast pace, questioning tone*)

T3D: Yes.

T3PC: I suggest to you that you were making it up saying you don't remember. (*Assertive tone*)

T3D: It's the truth. (*Neutral tone*)

T3PC: It's the truth. (*Disbelieving tone*)

Moreover, nine defendants were examined on the plausibility of their accounts about background information or outlying events. These implausible matters may appear peripheral, but many were associated with central aspects of each case and contextualised the allegations. By targeting these implausibilities, the prosecution's case could appear more conceivable. To illustrate, T1C alleged she was raped on her wedding night and repeatedly throughout her marriage to T1D. Using background evidence, cross-examination targeted the plausibility of there being consensual intercourse, when the parties married for convenience.

T1PC: When did it move from you simply being a friend to having a sexual relationship?

T1D: We got closer [and we] got more intimate…

T1PC: And that happened to coincide with the marriage did it?

T1D: Before we got closer but [it was] not sexual, I didn't sleep with her before.

Together, these findings demonstrate how the plausibility of the defendants' evidence, about central and remote matters, was challenged. This could undermine a defendant's general credibility as a witness. Such questions appear to infer that illogical and dubious accounts result from untruthfulness and inventions.

Accordingly, any implausibility indicates where a defendant's façade of innocence has slipped. Unlikely or illogical accounts may not necessarily indicate untruthfulness and may be attributed to confusion or poor articulation. Barristers may believe jurors view implausibilities as signs of untruthfulness and utilise this with their questioning. However, the influence of a rape defendant's inconsistent, incomplete, and incoherent account has on jurors has not been examined with research. Further robust mock jury research is therefore required to investigate attitudes towards defendants.

6.4.3 Untrustworthy, Unreliable and Aggressive Dispositions

Different cross-examination strategies were observed that appeared to undermine the credibility of the defendants, as individuals inside and outside of the witness box. Questions explored the defendants' misconduct, temperaments, vulnerabilities, and attitudes. Some questions appeared to present the defendants as a person capable of committing rape, and the 'ideal offender'.[1311] Attributes of the 'ideal offender' stereotype, as Christie suggests, include being a monster, dangerous, and 'big and bad'.[1312] Christie explains that the 'ideal victim' is interdependent upon the 'ideal offender'.[1313] Therefore, these tactics may reflect the prosecution barristers' attempts to legitimise the complainant's status as a victim, by aligning the defendants to the 'ideal offender' stereotype, where possible. However, an established function of cross-examination, generally, is to impeach a witness or defendant's credibility, in appropriate circumstances.[1314] The different prosecution strategies observed, which sought to achieve this, will be examined below.

[1311] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25.

[1312] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25-26.

[1313] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25.

[1314] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.5; McPeake R, *Advocacy* (18th Edn, OUP 2016) 168-172.

Four defendants were cross-examined on their previous convictions, which were admissible through bad character applications under s.101.[1315] Evidence from two defendants, namely their denials of being violent men, was tested using their convictions for battery and s.47 assault.[1316] Additionally, examining some of T6D's other convictions appeared to strengthen the prosecution's case.

T6PC: In 2006, when you were in a relationship with [T6C] why were you carrying a knife then?

T6D: (*Pause*) just was young, for my own protection probably.

T6PC: So it would be no surprise at all when you have a knife on you and pull it on [T6C].

T6D: Sorry?

The jurors received judicial directions, which cautioned them against using these convictions to assess the defendants' guilt for rape. The sexual offending of three defendants, including T6D, was also examined. Firstly, cross-examination explored the facts of T10D's convictions concerning indecent images,[1317] and tested his explanation for committing the offence. This conviction was admitted by agreement between the prosecution and defence, as it was tied up within other evidence at trial. The protracted questioning could have distorted why the evidence was admitted, despite the jury receiving judicial directions.

T10PC: The images involved small boys being sexually abused by females.

T10D: Yes, small boys messing about with maids.

[1315] Criminal Justice Act 2003, s.101. Previous convictions of defendants were admitted within six trials, including these four defendants. Unsuccessful s.101 applications were observed in three trials (T7, T10 and T17). T10D and T17D had convictions for sexual offences and T7D had a conviction of non-fatal offences against the person within a domestic violence context. It is possible that other unsuccessful applications were made during pre-trial hearings. For example, the researcher was made aware that T4D and T15D had criminal convictions and T11D had been investigated for sexual offences without prosecution.

[1316] This evidence was admitted by the defence within T18 and following an agreement between the parties in T6, under Criminal Justice Act 2003, s.101.

[1317] T10D pleaded guilty to two counts under s.1 (1)(a) and (1)(b) Protection of Children Act 1978.

T10PC: And that is something you did not want to look at [sic].

T10D: Yes.

T10PC: Why did you feel the need to keep the images on your phone?

T10D: I thought I deleted them.

Lastly, T1D and T6D's previous convictions for rape were cross-examined. These offences post-dated the indictments for the trials observed. Both judges decided they took place 'at or about the time of the alleged offences' and there was basis for the crown to advance a propensity argument.[1318] The arguments were, T6D had a tendency to ignore a woman's consent and T1D was prone to sudden sexual violence using weapons. Yet, these submissions were not overtly made within cross-examination. Instead, the bare facts of the convictions were asserted in questioning. Both defendants disputed the correctness of these convictions.[1319] The prosecution barristers challenged this, and examined the convictions at length. This may have detracted focus from the current allegations.

T1PC: Ten women gave evidence about what happened to them is that right?

T1D: Yes.

T1PC: Were you representing yourself?

T1D: No.

T1PC: Did you have a silk?

T1D: Yes.

T1PC: Were they there to challenge the witnesses?

T1D agreed.

While admissible, the jury needed to be sure the convictions demonstrated the defendants had a tendency to commit the offences alleged, otherwise these convictions were to be disregarded. Notwithstanding the careful judicial directions provided, this evidence may influence jurors' broader feelings towards the defendants and their likeability. Before this conclusion can be drawn, robust research should

[1318] Criminal Justice Act 2003, s.101 (1)(d).

[1319] It was argued T6D falsely pleaded guilty to the offence and T1D was wrongfully convicted.

examine the influence of these previous convictions on mock juror's assessments of defendants within rape cases.

In addition to previous convictions, seven defendants were cross-examined on their violent and angry tendencies, which were often disputed. Observations found these characteristics were examined in different ways, with some defendants experiencing a combination of these practices. Three defendants faced generalised accusations of being violent or aggressive.

T7PC: "You're a violent man, aren't you?"
T7D: "No."

Cross-examinations were sometimes more explorative, with prosecution barristers probing whether defendants ever became violent or how they react when feeling angry.[1320] For others, specific occasions where the defendants purportedly displayed these tendencies were utilised.[1321] Remote occasions, where two defendants lost their temper or were heavy handed with the complainant, were briefly explored. Also, defendants were questioned about proximate events to the alleged rape, where they displayed aggression, as demonstrated below.[1322] The facts of these events were examined, with emphasis on the aggressive or irritable emotions of defendants.

T5PC: Thursday you found on her phone a message indicating she was sleeping with someone else.
T5D: No.
T5PC: You reacted to that didn't you?
T5D: No.
T5PC: You reacted angrily to that didn't you?
T5D: No.
T5PC: You were angry because you were in love with her?
T5D: No

[1320] This was observed during the cross-examination of T1D, T6D and T18D.

[1321] This was observed during the cross-examination of T5D, T6D, T9D and T18D.

[1322] This was observed during the cross-examination of T5D, T10D and T18D.

T5PC: You were angry because you were obsessed with her

T5D: No.

T5PC: You were angry at spending time and money on her

T5D: No.

Moreover, four barristers commented on the defendants' temper or confrontational attitudes displayed during cross-examination.[1323]

T10PC: "Mr [T10D] (*clears throat*) yesterday when asking you questions is it fair to say you lost your temper do you agree with that?" (*Moves documents when speaking)*

T10D: I do not have a problem with my temper, I am not an angry person I have not lost my temper. (*Holds witness box edge, loud mumbled voice*).

T10PC: I suggest to you that you become angry and lose your temper when you are challenged–

T10D: –in what way?

T10PC: –That's what happened yesterday (*pause, looking ahead*) do you agree with that?

T10D: No.

These practices may encourage jurors to assume that the defendant's temperament displayed in court echoes "the sort of character he is" outside of the courtroom.[1324] Submissions of this nature were made within four prosecution barristers closing speeches.

T7PC: …You had the opportunity yesterday to see Mr [T7D] himself, how he dealt with sometimes the simple questions I asked of him, [it is for you to form a view on that]…you may say [he] showed firm aggression or controlling aggression…he was happy to stand there and confront me in this environment with all the people watching…what was he like with

[1323] These displays occurred when defendants were resisting questions, as discussed within 6.1.3.3.

[1324] This was suggested by T5PC within his closing speech.

> [T7C] when they were living together, you saw what he was like with me yesterday…

Targeting a defendant's temperaments inside and outside of the courtroom, using the different practices outlined above, attempts to discredit his character. These practices could influence the jury's perception of the defendant, including his likeability and whether he is the 'sort' of person to commit rape.[1325] With this, defendants were seemingly compared to the 'ideal offender',[1326] which may engender assumptions that rapists are dominant and aggressive men.[1327] However, these questions also enable the prosecution to advance their case that the defendants are, indeed, violent and aggressive men, who did commit rape.

6.4.3.1 Treatment of Women

Defendants were also cross-examined on their treatment of the complainants and their attitudes towards women. These practices could present the defendant as capable and motivated to commit rape. Firstly, two defendants were cross-examined on their attitude towards women, more generally.[1328] For T13D, this concerned his feelings at the time of the alleged offence. However, T1D's general attitude towards women and gender roles was probed and associated with his attitude towards T1C. These matters had a factual basis in the prosecution's narrative, and also seemed to infer that the defendants disregarded women in some way.[1329] In turn, this may depict them as

[1325] Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) E. & P. 299, 316-317.

[1326] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25.

[1327] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(30) Social and Legal Studies 291, 298-299.

[1328] Only two defendants, T1D and T12/13D, were cross-examined on this matter.

[1329] This is similar to cross-examination practices that explore a defendant's attitude towards sex and consent, as discussed within section 6.2.3. Research, using interviews with men convicted of rape, has examined their motives and feelings towards their offending. Scully found some men took satisfaction in having power over their victims and viewed women as 'opponents to be reduced as abject powerlessness' or 'meaningless objects'. Scully D, Convicted Rapists' Perceptions of Self and Victim- Role Taking and Emotions (1988) Gender and Society 200, 210-211.

capable of committing rape, as scholars argue rape is a gendered crime and an expression of power over women. [1330]

T13PC: "Were you feeling angry towards women?"
T13D: No, I was feeling sorry for myself I wasn't angry no.

T1PC: Do you have different ideas about how women behave in the home?
T1D answer unrecorded (*fast and inaudible answer*).
T1PC: When you married her you told her what her role would be?
T1D: …[you] have to respect every woman.

Secondly, defendants were cross-examined on their treatment of the complainant or other women. Examples of uncaring behaviours towards the complainants were explored with three defendants.[1331] This included the defendant's disinterest in her safety, failure to acknowledge her, and his demands for domestic chores to be completed by her.

T14PC: At most, you were friends with benefits.
T14D: Yes.
T14PC: Friends with benefits when you are friends and have sex.
T14D: Yes.
T14PC: Apparently it also means friends that do your washing for you (s*light sarcastic, higher tone*).
T14D: She was like that anyway.

Additionally, the defendant's infidelity featured within six cross-examinations, albeit in different ways. For example, T14D's infidelity towards the complainant was bound together with important background evidence, and it was frequently referenced

[1330] MacKinnon C.A, Toward a Feminist Theory of The State (Harvard University Press 1989) 182; Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone, London 1996) 359.

[1331] This section discusses 'uncaring behaviours' as distinct from violent or aggressive displays towards the complainants.

in cross-examination, without being challenged on this immoral behaviour.[1332] However, four defendants conceded to having consensual intercourse with the complainant,[1333] despite having a partner, and faced some criticism for this in cross-examination.

T18PC: Did you go to the city centre to pick up a girl? (*Firm slower tone*)
T18D: No. As I told you I had a girlfriend.
T18PC: Yes. You had a girlfriend but you went to a hotel with a prostitute to have sex (*firmer tone*).
T18D: If you speak between men–
T18PC: –We have women here as well, don't shy away from it.
T18D: [That's what happens] when a woman is interested in you.
T18PC: You had a girlfriend (*pause*), yes?
T18D: Yes. It would be a one-night stand, a fling.
T18PC: And that's ok (*loud, upbeat tone*).
T18D: That is what I felt like at the time.

References to this behaviour, whether accompanied with direct criticism or where bound together with important background evidence, could impact a jury's assessment of the defendant's likeability and trustworthiness.

6.4.3.2 Vulnerabilities, Alcohol and Drugs

Across seven trials, references were made to the defendants' poor physical health, mental health problems, learning disabilities, chaotic lifestyle or dependency on alcohol and drugs.[1334] These features could be considered vulnerabilities,[1335] although

[1332] Similarly, T12D was asked how his casual relationship with T12C1 coincided with his other relationship, without direct criticism for this immoral behaviour. This questioning was not observed within T13.

[1333] This includes T18, where prosecution and defence agreed that some consensual sexual activity occurred before the alleged rape.

[1334] In relation to alcohol and drug dependencies, the prosecution mostly alleged these features.

[1335] Keay S and Kirby S, 'Defining Vulnerability: From the Conceptual to the Operational' (2017) Policing 1; Stanko B and Williams E, 'Reviewing Rape and Rape Allegations in London: What Are

would not meet the relatively narrow legal definition of vulnerability.[1336] Nonetheless, defendants were seldom cross-examined on these matters. Unless relevant to the core facts and issues, the prosecution may avoid these matters to prevent jurors feeling sympathy towards the defendant. Only references to T5D's mental health and T13D's "problematic life" were made when the prosecution put their case and explored central background evidence, as demonstrated below.

T5PC: And you started to self-harm.

T5D: Yeah.

T5PC: Again, I suggest that…exactly what you said at the time you said to [witness1] that I hurt her so I have to hurt myself.

T5D: That never happened.

T5PC: I suggest to you that makes perfect sense if [you wanted to hurt yourself because of what you had done].

T5D: If that's the excuse why was I doing it for years before?

Similar findings were yielded where four defendants were cross-examined on their alcohol or drug addictions, with three defendants disputing any such dependency. While this evidence was central to most cases,[1337] the relevance of some questions was not always apparent.[1338] Even where relevant, this behaviour was sometimes overstated within cross-examination or examined at length, as indicated below.

T13PC: You told us about your drink and drug problem, taking crack cocaine when you were seventeen.

T13D: I first tried it at seventeen.

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the Vulnerabilities of the Victims who Report to the Police?' in Horvath M and Brown J (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 214.

[1336] Youth Justice and Criminal Evidence Act 1999, s.16. See Chapter Two at section 2.3.4, for a discussion of the definition of vulnerability.

[1337] These addictions had some relevance within T2, T6 and T13, as it related to background evidence regarding the complainant' and defendants' relationship. For example, in T2, the prosecution was showing that the family home was unstable due to the defendant's 'drink problem'.

[1338] Within T5, the defendant and complainant's casual relationship featured alcohol and drugs. However, the prosecution examined, in isolation, whether the defendant had a drug addiction.

T13PC: And you had shaken it off and returned to it in your twenties.

T13D: Yeah.

T13PC: Crack of course, do you agree, is a highly addictive drug.

T13D: Not like heroin, it is not physical but a mental state you can go hours and not have crack.

T13PC: Nonetheless, it's a highly addictive drug.

T13D: It's very moreish, yeah.

T13PC: Yes. The use of crack cocaine was a toxic [substance in] [T13C1]'s life.

T13D: Yeah.

In addition, references to a defendant's alcohol and drug use were observed within ten cross-examinations.[1339] Firstly, eight defendants were examined on their consumption of intoxicants at the time of the alleged rape. Questions established the defendants' level of intoxication, which was central to the context of the allegations and their state of mind at the time. It appeared that barristers were attempting to present the defendants as being drunk and of unsound judgement, although these inferences did not always manifest clearly.

T18PC: You'd been drinking a home brewed plum spirit

T18D: Yes

T18PC: Quite powerful alcohol [isn't it]?

T18D: No I drink it diluted with tomato juice

Secondly, eight defendants were examined on their general use of alcohol and drugs.[1340] Examining this evidence, although differing contextually, allowed six prosecution barristers to advance central aspects of their case. The extent alcohol and drugs featured in a defendant's life or within his relationship with the complainant was also explored. While these matters had some relevance to the disputed issues or essential background evidence, some questions drifted into irrelevant ground or

[1339] The following discussion, including any stated figures, within this subsection will omit T12D since the same matters were examined similarly within T13.

[1340] As intoxicant dependencies were discussed above, this will not be discussed within this section.

overstated this evidence through probing unnecessary detail at length, as illustrated below.[1341] This was despite the Court of Appeal cautioning counsel against advancing every point within their case and examining very minor matters.[1342]

T5PC: How much would you use? (*Raised eyebrow; intrigued tone*)
T5D: About half a gram.
T5PC: And how much would that cost? (*Raised eyebrow; intrigued tone*)
T5D: 30 to 40 pounds.

These findings identify a difficulty with cross-examination, where the issue of alcohol or drugs is relevant to the disputed issues and important background evidence, but questioning becomes protracted or borderlines on being irrelevant. Under the guise of being relevant, prosecution barristers may seek to discredit a defendant. For example, questions may be relevant to specific issues, but may have a wider influence on a jury's assessment of the defendant, particularly if these matters are removed from their own experiences. Without additional robust research exploring the influence this evidence has on mock juror attitudes towards the defendant, this supposition cannot be confirmed.

Overall, these findings demonstrate that, like complainants, the defendants' character became a focus within their cross-examinations. Their character was not examined in a homogenous way. Prosecution barristers examined their character to directly challenge their credibility. They also examined their character constructively, to further their case and explore important background material. The observations provide evidence that defendants were robustly examined on legally admissible and relevant material. For example, the defendants' previous convictions were adduced in accordance with evidential rules. Other matters, including their attitudes towards women and aggressive displays during questioning, were not regulated by such rules. However, observations also identified a tension where questioning on relevant and admissible material was conducted in a protracted manner. In addition, a small

[1341] The researcher assessed occurrences within two cross-examinations to be irrelevant in the context of the cases. Where a defendant's alcohol or drug use was relevant, three prosecution barristers were assessed as overstating this feature.

[1342] *R v B (Ejaz)* [2005] EWCA Crim 805, para 10 and 15; *R v Kalia* [1974] 60 Cr App R 200.

number of cross-examinations focused on matters, such as a defendant's drug use, which were relevant to the prosecution's case but specific questions encroached upon irrelevancy and probed unnecessary details.

Irrelevant and protracted questioning would be rejected under any model of cross-examination. Examining character evidence can be relevant to credibility, which will be an important issue at trial. It is important that questions are measured in length to prevent the distortion of the other core issues, including consent. Prolonging cross-examination, and therefore the trial, by examining irrelevancies, may also increase tension for defendants.[1343] Lengthy examinations of their character may equally be distressing or frustrating for defendants. Succinct periods of questioning on these matters would promote the fair and dignified treatment of defendants. Moreover, the observations highlighted how questions could be associating defendants with the 'ideal offender' stereotype,[1344] by examining aspects of their character. This could undermine where defendants have given reliable evidence, if these questions have a prejudicial influence on jurors.

These principles also apply where the defendants were cross-examined on inconsistencies, incompleteness and incoherence in the evidential accounts and recall of the alleged rape and other events. These matters relate to the overall credibility of a defendant's evidence, which is a central issue at trial. Defendants were robustly challenged on the quality of their account and memory. Though, a number of defendants were examined on inconsistencies, incompleteness, and incoherence in their accounts regarding peripheral matters. Examining peripheral matters in minute detail would reflect a traditional approach.[1345] Where details are not 'really in issue',

[1343] The Court of Appeal has explained that taking longer than necessary at trial, and when cross-examining complainants, is wasteful of resources, creates distress, and does not assist the jury in reaching their verdicts. This principle, reiterated in *Ejaz*, must equally apply to protracted questioning of defendants. *R v B (Ejaz)* [2005] EWCA Crim 805, para 15.

[1344] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25.

[1345] Hohl K and Conway M.A, 'Memory As Evidence: How Normal Features of Victim Memory Lead to The Attrition of Rape Complaints' (2017) 17(3) Criminology and Criminal Justice 248, 252;

questioning becomes irrelevant and contravenes the fundamental principles of cross-examination.[1346] Such questioning may also encourage unrealistic expectations that innocent defendants will be entirely consistent in their accounts and have infallible memories about minor and peripheral details. Research suggests inconsistencies and incompleteness are normal features of genuine recall.[1347] This must also be true for defendants. These 'imperfections' may result from feelings of stress or confusion, when defendants provide evidential accounts to the police or at trial. Questioning that places demands on defendants to provide a faultless account of events, including the minute details, may undermine where accurate and reliable evidence is given. Nonetheless, imperfections might equally result from a defendant's untruthfulness, mistake, or heavy intoxication. This, therefore, presents a challenging area where the court must strike a careful balance between questions that assist the prosecution in testing the defendant's credibility, and questions that place unreasonable demands on a defendant's recall. This balance would need to be reached on the basis of individual facts and evidence in every case. Chapter Seven will examine these issues further, and reforms will be considered to uphold this aspect of fair treatment.

6.5 Conclusion

This chapter has provided new insight into how cross-examination is conducted in practice for sixteen defendants. Firstly, the consideration afforded to the defendants' welfare, and their treatment, during cross-examination was analysed. The findings indicated that some 'robust' defendants were protected from compound questions, prolix language, through active judicial intervention. In addition, the only vulnerable defendant observed, received Special Measures and modified cross-examination, although shortcomings were observed. These findings demonstrate the best evidence

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Burman M, 'Evidencing Sexual Assault: Women in The Witness Box' (2009) 56(4) Probation Journal 379, 383.

[1346] *R v B (Ejaz)* [2005] EWCA Crim 805, para 10 citing *R v Kalia* [1974] 60 Cr App R 200.

[1347] Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 245-246; Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) E. & P. 1, 16 citing J. McEwan, 'Adversarial and Inquisitorial Proceedings' in R. Bull and D. Carson (eds), *Handbook of Psychology in Legal Contexts* (John Wiley 1995) 495.

practices were implemented for 'robust' and 'vulnerable' defendants, albeit in a very limited way. Established best evidence considerations, such as breaks and visible support, were primarily absent for the defendants observed. The positive practices identified within the complainants' cross-examinations, including introductory remarks and welfare checks, which are not clearly endorsed within the current best evidence model,[1348] were not implemented for the defendants.

The absence of these practices created a more hostile environment for the defendants, which appeared to reflect a traditional approach. The limited support and considerate treatment afforded to the defendants may have created unfairness and inhibited them from providing their best evidence. Implementing the positive practices identified would be desirable for all defendants in rape trials and would fall within a fair treatment approach. This would also include the existing best evidence safeguards of Special Measures, welfare breaks, and judicial interventions to prevent complex questioning, as well as extensive modifications for defendants with specific communication needs.[1349] Defendants must equally be able to give their best evidence within a cross-examination environment that promotes 'calmness and care' and dignified treatment.[1350] As such, cross-examination should not be an intimidating, confusing, or unduly stressful process. The needs of 'vulnerable' and 'robust' defendants, and the difficulties they can experience during cross-examination, including anxiety and stress, must be recognised. Defendants must be appropriately supported and cross-examination should not heighten these difficulties, as recognised within the Equal Treatment Bench Book.[1351] However, efforts to achieve this could be furthered. The following chapter will consider reforms that promote this aspect of fair treatment for defendants.

[1348] As discussed within section 5.1.3.

[1349] As discussed within Chapter Two, the Court of Appeal has made clear that modifications to cross-examination must be implemented for vulnerable defendants. In addition, it is acknowledged that ordinary defendants may require assistance. *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 40; *R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228, para 225 and 226; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[1350] The notion of 'calmness and care' within adversarial trials is discussed within: Elias S, *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, 2018) 158.

[1351] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5.

Secondly, the central questioning strategies that the defendants faced during cross-examination was examined. The findings indicate how the prosecution barristers robustly cross-examined the defendants on matters pertaining to the core issues in dispute, such as consent, to advance their case and challenge the defence case. The prosecution barristers focused on the defendants' behaviours, including how they ascertained consent. This provides some evidence to counter claims that the complainant becomes the focus of a rape trial.[1352] Notwithstanding this, some tensions stemming from these strategies were identified. A small minority of questions cited irrelevant sexual history, focused on peripheral details at unnecessary length, and inferred refutable stereotypes.[1353]

In discussing these issues, the principles of a fair treatment model were underlined. To afford fair treatment to defendants, their best evidence must not be obscured by refutable stereotypes, and irrelevant questions on their sexual history and character. In addition, the model disapproves of other poor lines of questioning that fall short of violating evidential or procedural rules. For instance, prosecution barristers appeared to create an image of the 'ideal offender' within cross-examination and aligned the defendants to this. However, these questions were legally admissible and about facts within the case. Nonetheless, questions that clearly utilise refutable stereotypes about offenders would be problematic. While not commonly observed, these strategies could appeal to assumptions about how a rapist appears and behaves, which jurors may hold. This could undermine where a defendant has provide reliable and accurate evidence. Determining whether questions invoke stereotypes about rape and defendants would need to occur at an individual case level, with account of the evidence presented. Assessments about whether questions encourage myths cannot be made without this context in mind, as the matters raised may have a factual basis in a given case. This equally applies when considering the relevance of questions around the defendant's sexual history, character, and recall of events. The following chapter will examine the issues identified within Chapters Five and Six, and will consider reforms that encourage a fair treatment approach for both parties.

[1352] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 8.

[1353] Appendix Five outlines the number of trials where barristers cited irrelevant sexual history evidence and clearly utilised refutable rape myths in cross-examination.

Chapter Seven: Improving 'Fair Treatment' for Complainants and Defendants

7.0 Introduction

The cross-examination of the complainants and defendants were central aspects of the trials observed. This is an opportunity for their evidence to be robustly and fairly tested and to advance the opposition's case.[1354] The previous chapters have examined how this was actually conducted in practice for a small sample of cases. Direct like-for-like comparisons between these findings are difficult, and sometimes inappropriate, since complainants and defendants are differently situated within the trial. This is evident when examining the notion of fairness and fair treatment.

Distinctly, defendants have an absolute right to a fair trial.[1355] This is comprised of minimum rights, including the right to 'examine or have examined witnesses against him.[1356] Trechsel's analysis of ECtHR case law identifies a paradox where a fair trial is upheld when specific minimum rights are breached.[1357] The ECtHR has made clear that its task is to ascertain whether trial proceedings in their entirety are fair.[1358] Therefore, the court often considers Article (6)(1) alongside Article (6)(3), rather than these minimum rights in isolation.[1359] As discussed in Chapter Two, the interests of defendants must be balanced against other interests.[1360] *Doorson* explains that while

[1354] For discussion refer to section 2.2 within Chapter Two.

[1355] European Convention on Human Rights Article 6; Human Rights Act 1998 Protocol 1, Article 6.

[1356] European Convention on Human Rights, Article 6(3)(d); Human Rights Act 1998, Protocol 1, Article 6(3)(d).

[1357] Trechsel S, 'The Character of the Right to a Fair Trial' in Jackson J and Summers S (Eds) Obstacles to Fairness in Criminal Proceedings (Hart 2018) 23-26.

[1358] *Doorson v Netherlands* (1996) 22 EHRR 330, para 72; *SN v Sweden* (2004) 39 EHRR 13 para 44; *Van Mechelen v Netherlands* (1988) 25 EHRR 647 para 50.

[1359] Examples include, *Doorson v Netherlands* (1996) 22 EHRR 330, para 2; *SN v Sweden* (2004) 39 EHRR 13 para 43; *Van Mechelen v Netherlands* (1988) 25 EHRR 647 para 49.

[1360] This has been made clear in domestic and European case law, including: *R v A* (No 2) [2001] UKHL 25 para 38; *Doorson v Netherlands* (1996) 22 EHRR 330, para 70; *PS v Germany* (2003) 36 EHRR 61 para 22; Criminal Procedure (Amendment) Rules 2019, Part 1: The Overriding Objective, CrimPR 1.1(2)(d). For a discussion see: Hoyano L, 'Striking A Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a

the interests of complainants are not explicitly addressed under Article 6, their rights to privacy and security must be considered and balanced against the defendant's interests.[1361] The CrimPR in England and Wales support this notion of fairness.[1362] European case law also makes clear that 'balancing' interests is important in sexual offence cases, as trials can be 'an ordeal' for complainants.[1363] While complainants must be protected from harm,[1364] qualifications to a defendant's Article 6 right must be sufficiently counterbalanced, for example with judicial directions.[1365]

In addition to their Article 3 and 8 rights,[1366] complainants can expect certain entitlements throughout the criminal justice process under the Code of Practice for Victims.[1367] For example, complainants are entitled to speak to the prosecution barrister before giving evidence, benefit from the use of Special Measures where eligible, and to be protected from inappropriate or aggressive cross-examination.[1368] Ashworth and Redmayne note that complainants and defendants have the same interest in fair and dignified treatment, and accurate-fact-finding.[1369] As such, they

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Fair Trial?' (2001) Criminal Law Review 948, 955; Bowden P, Henning T and Platter D, 'Balancing Fairness to Victims, Society and Defendants in The Cross-Examination of Vulnerable Witnesses An Impossible Triangulation?' (2014) 37 Melbourne University Law Review 539, 557 to 560.

[1361] *Doorson v Netherlands* (1996) 22 EHRR 330, para 70; *PS v Germany* (2003) 36 EHRR 61 para 22. As discussed within: Hoyano L, 'Striking A Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' (2001) Criminal Law Review 948, 955.

[1362] The Criminal Procedure Rules also state that to fulfill the overriding objective to deal with cases justly, the interests of witnesses, victims and jurors must be respected. Criminal Procedure (Amendment) Rules 2019, Part 1: The Overriding Objective, CrimPR 1.1(2)(b), (2)(d).

[1363] *SN v Sweden* (2004) 39 EHRR 13 para 47, O-112; *Baegen v Netherlands* (1996) 23 EHRR 330 ECtHR para 77.

[1364] *SN v Sweden* (2004) 39 EHRR 13 para 47, O-112; *Baegen v Netherlands* (1996) 23 EHRR 330 ECtHR para 77.

[1365] *PS v Germany* (2003) 36 EHRR 61 para 23; *Doorson v Netherlands* (1996) 22 EHHR 330; Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 49.

[1366] Article 3 and 8 European Convention on Human Rights; Protocol 1, Article 3 and 8 Human Rights Act 1998.

[1367] Code of Practice for Victims of Crime under the Domestic Violence, Crime and Victims Act 2004.

[1368] Ministry of Justice, *Code of Practice for Victims of Crime* (Ministry of Justice October 2015) 25-26

[1369] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

both have an interest in giving their best evidence.[1370] Evaluating whether a general 'clash' of interests exists that need to be 'balanced away' is considered problematic.[1371] Particular cross-examination practices may not necessarily 'take' from defendants and give to complainants, or inversely so.

With this notion of 'fairness' in mind, this chapter critically discusses the central research findings further. This analysis includes comparing the research findings to existing research and literature on rape trials, to highlight areas of support, divergence and new findings. Alongside this, the observations are examined against the traditional and best evidence theories of cross-examination. Gaps within these models are identified, which further emphasises the need for a fair treatment approach. Reforms that encourage fair treatment for complainants and defendants will also be considered. This will include holistic recommendations for change, such as developments in advocacy training, which do not simply demand changes to be made within the courtroom. It will be proposed that under a fair treatment approach, the positive practices observed and existing best evidence features should be adopted for 'robust' and 'vulnerable' complainants and defendants. This requires a rejection of traditional advocacy. In essence, the FTM incorporates and goes further than the existing best evidence model. Together, the changes advanced seek to improve the prospect of fair treatment for complainants and defendants.

7.1 Evaluating the Cross-Examinations Observed

Before examining the cross-examination approaches and advancing reforms, it is important to crystallise how the traditional and best evidence models of cross-examination apply to the different cross-examination practices observed. A shift in attitudes towards cross-examination practices is already occurring.[1372] This shift has been underpinned by guidance and case law on how the court should respond to

[1370] For a discussion on 'best evidence' considerations see Chapter Two, section 2.4. Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?'(2016) 20(3) *E. & P.* 183, 185.

[1371] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44 and 49-50.

[1372] As discussed within: Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds) Addressing Vulnerability in Justice *Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

vulnerable witnesses and defendants to ensure their best evidence is achieved.[1373] Under this best evidence approach, adaptions to cross-examination can be made for vulnerable witnesses and defendants, which includes reducing the scope of questioning, simplifying questions, and taking breaks.[1374] The best evidence model does recognise that ordinary witnesses and defendants may also require assistance.[1375] This necessitates early identification of their potential needs, and trial judges taking 'reasonable' steps to adapt cross-examination in order to facilitate their participation and best evidence.[1376] Notwithstanding this, the Court of Appeal has suggested that a balance must be struck between properly challenging a witness's evidence and ensuring they can provide their best evidence, when they are distressed.[1377] It appears that robust witnesses and defendants are expected to withstand 'normal' cross-examinations, using traditional methods, unless there is a risk of misunderstanding or acquiescence.[1378] The current study demonstrates that established best evidence practices were implemented for 'robust' complainants, and some defendants.[1379]

It is recognised that traditional cross-examination practices have the potential to prevent best evidence, where there is a risk of distress, confusion, or acquiescence.[1380]

[1373] See Chapter Two, section 2.3 for a discussion. *R v B [2010] EWCA Crim 4; R v Cox [2012] EWCA Crim 549; R v SG* [2017] EWCA Crim 617; *R v Cokesix Lubemba, JP [2014] EWCA Crim 2064, para 45; R v Stephen Pipe* [2014] EWCA Crim 2570; *R v Jan Jisl* [2004] EWCA Crim 696.

[1374] See Chapter Two, section 2.4 for a discussion.

[1375] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2.

[1376] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[1377] *R v SG* [2017] EWCA Crim 617.

[1378] *R v Dinc* [2017] EWCA Crim 1206 citing *R v SG* [2017] EWCA Crim 617.

[1379] The Court of Appeal discusses these considerations in the context of vulnerable witnesses. However, Henderson argues these considerations should apply to 'robust' witnesses too; Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 195; Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 943.

[1380] See Chapter Two, section 3.3 for a discussion. Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

This approach could feature lengthy cross-examinations, an absence of Special Measures where required, overbearing barristers, complex questioning, persuasion, commentary, and putting the examiner's case in a confrontational and leading manner to vulnerable witnesses and defendants.[1381] Comparing and examining the extent some of these features occur during the complainants and defendants' cross-examinations highlighted whether barristers adopted a traditional approach or whether the process was geared towards enhancing best evidence. It appears that the different cross-examination practices observed may reflect a combination of these approaches, thus are not necessarily mutually exclusive approaches to cross-examination. Further, this study also identified cross-examination practices that were not clearly embraced by the best evidence model.

Where best evidence features occur, different implications may result for the complainant and defendant. Theoretically, where complainants are provided with extensive best evidence considerations, this may encourage more complainants to come to court and give evidence against the accused without feeling intimidated and distressed. In turn, this may improve the prospect of convicting offenders, as they may otherwise not be tried. Where defendants are afforded the same considerations, this may enable defendants to meaningfully participate in their trial and give reliable evidence to challenge the prosecution's case.

In relation to questioning strategies, the content of questions in any cross-examination must adhere to numerous legal principles.[1382] Importantly, questions must be 'sufficiently relevant to facts in issue' and admissible[1383] In *Ejaz* it was held that counsel does not have the right to examine every point of their case or examine

[1381] See Chapter Two, section 2.3 for a discussion. Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931; Henderson E, 'Best Evidence or Best Interests? What Does the Case Law Say about the Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 184.

[1382] See Chapter Two, section 2.2 for a detailed summary.

[1383] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F1.11; Roberts P and Zuckerman A, *Criminal Evidence* (2nd Edn, OUP 2010) 123.

matters that are not really in issue.[1384] The central concern was that cross-examining irrelevant matters would waste time, which Lord Justice Dyson reiterated could create tension and distress for complainants, defendants, and witnesses.[1385] Other restrictions include questions that are asked 'merely to insult, humiliate or annoy a witness' and contain untrue or misleading facts.[1386] In contrast with welfare safeguards and the style of questioning, the content of questions are more difficult to categorise as traditional or best evidence approaches.

Arguably, questions that contravene evidential and procedural rules risk unfairness and provoke emotions that prevent best evidence, including distress and frustration. Even where admissible, questions could also produce such emotions. This could arise where questions are not anticipated, or complainants and defendants take issue with the relevance of questions. This effect could be furthered if questions are asked in the traditional style, for example, if barristers are overbearing. A central feature of traditional cross-examination is described as persuasion.[1387] Therefore, the content of questions that have persuasive purposes and 'play to the jury' would adhere to this approach.[1388] These models of cross-examination will continue to be applied to the research findings, and the limitations of the best evidence model will be highlighted. This will underscore the importance of a new fair treatment approach.

7.2 The Welfare of Complainants and Defendants

Observations have provided insight into how the welfare of the complainants and defendants was safeguarded during their cross-examinations. The data relating to the use of Special Measures, familiarisation remarks, welfare checks, welfare breaks, modifications, and interventions, contribute to this understanding. These welfare

[1384] *R v Ejaz* [2005] EWCA Crim 805, para 10.

[1385] *R v Ejaz* [2005] EWCA Crim 805, para 10 and 15;*R v Chaaban* [2003] EWCA Crim. 1012 para 37.

[1386] RC3.1 and RC7.1 Bar Standards Board 2018.

[1387] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931; Henderson E, 'Best Evidence or Best Interests? What Does the Case Law Say about the Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 184.

[1388] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

considerations, some of which go beyond the established best evidence features, are core components of the fair treatment approach. Complainants and defendants must be able to give their best evidence during cross-examination, without intimidation, confusion, or undue stress. Cross-examination should be conducted under conditions that promote equality, 'calmness and care'.[1389] This requires understanding of the difficulties individual complainants and defendants can experience, whether 'vulnerable' or 'robust', and responding to them with appropriate support and dignified treatment.[1390] The following discussion will reiterate where these considerations are present, absent and inadequate, and how this affects the interests of complainants and defendants. Although many positive practices were observed in this area, the findings highlight where the cross-examinations could have been improved for both parties.

7.2.1 Special Measures and Support

Research suggests that Special Measures reduce stress and intimidation for complainants, and enable them to provide their best evidence.[1391] The case of *Watts* underscores the importance of Special Measures.[1392] Here, Mr Justice Mackay affirmed that the YJCEA 1999 has enabled vulnerable complainants to give evidence, who would otherwise be discounted from giving evidence due to the difficulties involved.[1393] Plotnikoff and Woolfson's evaluation also revealed that without intermediaries, some cases with vulnerable witnesses would never have reached trial.[1394] Although the complainants in the present study did not utilise intermediaries,

[1389] The notion of 'calmness and care' within adversarial trials is discussed within: Elias S, *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, 2018) 158.

[1390] As acknowledged within, Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[1391] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 78; Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS, April 2012).

[1392] *R v James Watts* [2010] EWCA Crim 1824.

[1393] *R v James Watts* [2010] EWCA Crim 1824, para 17.

[1394] Plotnikoff J and Woolfson R, 'Making The Best Use Of The Intermediary Special Measure At Trial' (2008) Criminal Law Review 91, 92.

research also shows other Special Measures, including screens and live link, enable some complainants to attend court who otherwise would have felt unwilling or unable to.[1395] Within the present study's sample of cases, all complainants utilised Special Measures unless they had opted out.[1396] Special Measures firstly enable complainants to enter the courtroom, and secondly create conditions that encourage best evidence. Together this may improve the prospects of convictions, which adheres the 'crime control' model's priority to secure convictions.[1397] However, increasing the prospect of convictions is not guaranteed, nor is this the objective of Special Measures. For example, the present study found all trials resulted in acquittals where complainants used the live link, and therefore did not enter the courtroom. While this finding is interesting, generalisations and causal claims cannot be made as only eighteen trials were observed. Mock jury research also does not establish this effect.[1398] However, legal practitioners have expressed concern that Special Measures negatively influence jurors' assessments of witnesses.[1399]

[1395] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 78; Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS, April 2012); Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 118.

[1396] See Chapter Five, section 5.1.1.

[1397] See Chapter Two at section 2.5, citing Packer H.L, The Limits of the Criminal Sanction (Stanford University Press 1968) 158

[1398] Ellison L and Munro V.E, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' 23(1) Social and Legal Studies 3, 13-15; Murno V.E, *The Impact of The Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review* (Scottish Government March 2018); Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-19 citing Hoyano L and Keenan C, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010). Professor Cheryl Thomas is conducting the first empirical study into the impact of special measures and digital presentation of evidence on actual jury decision-making.

[1399] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 212.

The extensive use of Special Measures observed for the complainants is significant for two reasons. First, these findings demonstrate that the eligible complainants, within the current sample, properly received Special Measures. This shows progress since Kebbell *et al*'s research, which showed that eligible complainants, in a sample of cases between 2000 and 2002, were not always afforded Special Measures.[1400] Second, the observations demonstrated that attention was paid to the complainants' needs for Special Measures and their choices. This may alleviate criticisms that complainants are not treated with care or consulted on matters regarding the trial process.[1401] In contrast, the use of Special Measures for the defendants was negligible.[1402] This disparity may be for a number of reasons. Firstly, this may reflect the different eligibility criteria for complainants and defendants. All the complainants were entitled to Special Measures by virtue of being complainants of a sexual offence.[1403] This meant they are easily identified as appropriate recipients. The defendants, in contrast, have limited statutory protections and must meet more restrictive eligibility criteria. They are afforded only one statutory Special Measure, the live link, and other measures, including intermediaries and modified cross-examination, are implemented using the judge's common law powers.[1404] Defendants must suffer from a mental disorder or significant intellectual impairment, to be eligible as a 'vulnerable defendant'.[1405] Moreover, a defendant's vulnerability must also render him 'unable to participate effectively' when giving evidence.[1406] The

[1400] Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 116-117.

[1401] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 271-272

[1402] See Chapter Six, section 6.1.1.

[1403] Youth Justice and Criminal Evidence Act 1999, s.17 (4).

[1404] Youth Justice and Criminal Evidence Act 1999, s.33A(2) inserted by the Police and Justice Act 2007 s.47; *R (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088. The use of intermediaries for the accused under Youth Justice and Criminal Evidence Act 1999 s.33 (BA) and (BB) are not in force, as amended by Coroners and Justice Act 2009, s.104.

[1405] *R (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088; YJCEA 1999, s.33A, as amended and implemented by the Police and Justice Act, s.47.

[1406] Youth Justice and Criminal Evidence Act 1999 s.33A(2) as amended by the Police and Justice Act 2007 s.47(5)(b); YJCEA 1999 s.33 (BA) and (BB), as amended by Coroners and Justice Act 2009, s.104. The use of an intermediary must also be necessary for his fair trial under Youth Justice and Criminal Evidence Act 1999 s.33(BA)(2)(b), as amended by Coroners and Justice Act 2009, s.104.

restrictive criterion may result in limited implementation, when compared to vulnerable witnesses, which appears to be the objective. For example, the CrimPD state the court 'will rarely exercise its inherent powers to direct appointment of an intermediary' for defendants.[1407] As scholars pervasively argue, this position and the restrictive eligibility criteria for defendants, risks unfairness and indicates that the needs of witnesses take priority.[1408]

Secondly, the negligible use of Special Measures for defendants may reflect the difficulties in identifying defendants that require such measures. A defendant's legal representative is responsible for identifying their needs and vulnerabilities, and ensuring appropriate measures are in place.[1409] This is considered difficult because vulnerabilities may be hidden, intentionally or otherwise.[1410] Moreover, Fairclough found that some barristers view defendants as not deserving of the status of vulnerability, or see any need for Special Measures.[1411] As Cooper and Mattison suggest, barristers may lack the skills required to identify vulnerabilities, since there

[1407] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F: Intermediaries 3F.12.

[1408] Cooper P and Wurtzel D, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' (2013) Criminal Law Review 4; Hoyano L and Rafferty A, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' (2017) Criminal Law Review 93.

[1409] Cooper P and Wurtzel D, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' (2013) Criminal Law Review 4, 11-12.

[1410] Talbot J, *Fair Access to Justice? Support For Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust 2012) 17; McEwan J, 'Vulnerable Defendants and the Fairness of Trials' (2013) Criminal Law Review 100, 106.

[1411] Fairclough S, 'The Vulnerable in Court: The Use of Live Link and Screens' (Birmingham Law School Research Spotlight, University of Birmingham 2017) 2. Research also suggests that there are misconceptions about what constitutes 'vulnerability' among barristers, see: Cooper P and Mattison M, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) E. & P. 351, 364; Plotnikoff J and Woolfson R, 'Making the Best Use of the Intermediary Special Measure at Trial (2008) Criminal Law Review 91, 97.

is no standard guidance for them to follow.[1412] Similarly, the absence of a statutory framework for defendants may also explain the limited use of Special Measures observed.[1413] As judges rely upon their common law powers, this could result in limited or patchy implementation of Special Measures and modifications to cross-examination for vulnerable defendants. Research has demonstrated the reality of this *ad hoc* approach, exacerbated by restrictive guidance under the CrimPD,[1414] which risks unfairness to trials.[1415] To ensure defendants consistently receive the support required for fair treatment, amendments should be made to the statutory Special Measures provisions to include vulnerable defendants, using the same eligibility criteria as vulnerable witnesses under s.16 YJCEA 1999.

A final explanation for the current research findings is that defendants did not require these measures. Two defendants observed, displayed some intellectual difficulties, although the researcher could not discern whether they and others were vulnerable.[1416] Importantly, research suggests many defendants 'do not have a single or clearly delineated form of intellectual or psychological difficulty', but experience difficulties stemming from mental illness, learning difficulties, or substance abuse.[1417] Yet, as Jacobson and Talbot highlight, these vulnerabilities are excluded from support

[1412] Cooper P and Mattison M, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) E. & P. 351, 364.

[1413] Defendants are excluded from the provision of Special Measures under the Youth Justice and Criminal Evidence Act 1999, s.16(1). Justification for this was provided within Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office London, 1998) para 3.28. The Working Group's reasoned that defendants have safeguards, namely legal representation and ability to choose to give evidence, which witnesses not benefit from. They also stated that many Special Measures are not applicable to defendants, as they are designed to shield witnesses from him.

[1414] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F: Intermediaries 3F.11-3F.18.

[1415] Hoyano L and Rafferty A, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' (2017) Criminal Law Review 93, 101-103.

[1416] Only T4D could be identified as vulnerable.

[1417] Jacobson J and Talbot J, *No One Knows: Vulnerable Defendants in the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 6-7.

provisions for defendants.[1418] The limited use of Special Measures observed could have had damaging implications, if, theoretically, some defendants would have benefited from them. As Fairclough suggests, this may prevent defendants from fully participating in their trial, impacting their chances of acquittals.[1419] Thus, cross-examinations in these circumstances would be removed from the fair treatment approach.

Further differences were observed in the support available to complainants and defendants during cross-examination. Fourteen complainants were accompanied by an ISVA and, or a representative from the Witness Service when giving live evidence in court or within the live link suite.[1420] In contrast, a dock officer accompanied the defendants when they gave evidence, and sat within the witness box or nearby. The absence of support for the defendants may be attributed to their positioning within the trial.[1421] To illustrate, by way of contrast, the complainants were speaking of the alleged sexual violence inflicted upon them. Whereas, the defendants denied intercourse or suggested it was consensual. Although cross-examination did involve potentially embarrassing questions, the risk of re-traumatisation for defendants is unlikely since they are not alleging or providing an account of a traumatic event. In addition, defendants have their own legal representation, unlike complainants.[1422]

[1418] Jacobson J and Talbot J, *No One Knows: Vulnerable Defendants in the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 6-7.

[1419] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 212.

[1420] This is a minimum figure, which captures where references were made that complainants were being supported in the live-link room or the researcher observed this support in the courtroom.

[1421] The Court of Appeal has suggested that there are two distinct types of assistance that defendants may require. Defendants may require general support and reassurance, which is 'readily achieved by an adult with experience of life', such as counsel. Alternatively, defendants may require skilled support, interpretation and intervention, which would be provided by an intermediary; R v Rashid [2017] EWCA Crim 2 citing *R (OP) v Ministry of Justice* [2014] EWHC 1944 (Admin).

[1422] This reasoning also forms part of the government's justification for excluding defendants from Special Measures provisions under the Youth Justice and Criminal Evidence Act 1999. Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office London, 1998)

However, as already discussed, defence barristers may not be equipped to provide the necessary support to their clients, in comparison to qualified intermediaries and support services. Defendants may also feel unable to communicate these difficulties to their barrister. It is important to acknowledge that simply by virtue of being a defendant, it does not mean they will not experience difficulties and anxiety during cross-examination.[1423] Defendants may experience stress from going through the criminal justice process, and may find being accused of rape and potentially facing imprisonment traumatic. Yet, it appears vulnerable defendants can only have a support worker or 'appropriate companion' to assist during the trial, in circumstances where an intermediary is not available.[1424]

Research has shown ISVAs are invaluable in supporting complainants through the court process.[1425] Ensuring complainants are supported by ISVAs and the Witness Service means complainants, who otherwise would have withdrawn from the process, feel more able to give evidence.[1426] During cross-examination, this support was mostly passive, with Witness Service personnel and ISVAs sitting a short distance from the complainant. There were no observable interactions between them in the presence of the jury, with exceptions during T10 and T16.

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para 3.28. For a discussion see, Hoyano L and Rafferty A, 'Rationing defence intermediaries under the April 2016 Criminal Practice Direction' (2017) Criminal Law Review 93, 93.

[1423] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 220.

[1424] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3F.12

[1425] Robinson A, *Independent Sexual Violence Advisors: A Process Evaluation* (Home Office 2009) 31; Hester M. and Lilley S.J, *More Than Support to Court: ISVAs in Teeside* (University of Bristol in association with the Northern Rock Foundation, 2015); Stern V, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office 2010).

[1426] Robinson A, *Independent Sexual Violence Advisors: A Process Evaluation* (Home Office 2009) 30-31; Hester M and Lilley S.J, *More than support to Court: ISVAs in Teeside* (University of Bristol in association with the Northern Rock Foundation 2015); Stern V, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office 2010).

T16J: Miss [T16C] I can see you are very distressed and keep turning round, are you ok? Take a deep breath again. The people from witness support are behind you, they are still there.

T16C: Ok

Within T10, the judge allowed the ISVA to sit beside the complainant during her live evidence, and suggested if T10C needed to hold her hand that it would be 'perfectly normal'. During cross-examination, the ISVA on two occasions provided emotional support to the complainant.

T10DC: You were still receiving messages…you hadn't told him to stop messaging you.

T10C: After that I think I thought if I answered I [would] save him from coming over I didn't want him to come over (*twists in swivel chair towards witness box slightly*) I wanted (*loud cry, deep breathing*) I wanted to get over what happened not to go over it again, I can't do it anymore I can't do it anymore (*spoke while crying loudly and uncontrollably, rapid breathing, ISVA gives her a tissue and is rubbing her back slowly, T10C is facing away towards witness box with head in hands*).

The Court of Appeal in *Christian* recognised that physical support does not necessarily risk unfairness.[1427] *Christian* featured a vulnerable complainant using an intermediary, who put her arm around the complainant. This was not considered 'surprising or impactful' on the jury, who were aware of the complainant's difficulties.[1428] However, within T10, the judge did not caution against any potential prejudice arising from the distress and support, as heard in *Christian*,[1429] nor did the defence request this. T10C's distress and the brief support provided seemed unsurprising and of limited impact, to require this direction.

[1427] *R v Anthony Christian* [2015] EWCA Crim 1582.

[1428] *R v Anthony Christian* [2015] EWCA Crim 1582.

[1429] *R v Anthony Christian* [2015] EWCA Crim 1582 para 37.

Identifying the needs of complainants and defendants before trial is essential for ensuring appropriate support is arranged.[1430] This may alleviate any anxiety, so that best evidence can be provided. Observations, although limited in number, raised concerns about the timeliness of this identification. One complainant suffered from 'fibromyalgia', a medical condition that can affect immediate memory, which was only discovered shortly before her cross-examination.[1431] Due to this condition, there were long pauses before her answers during her ABE interview. Without knowledge of this, these pauses may have appeared odd or suspicious to the jury. Alternatively, it may have created sympathy, if the pauses were understood as the complainant finding it difficult to talk about events. A further complainant was later identified as undergoing cross-examination, despite not having taken her medication.[1432] The low intellectual ability of one defendant appeared to be identified during his evidence-in-chief, but might have been discussed earlier in proceedings or privately.[1433] Establishing these difficulties in an open courtroom could have caused embarrassment and anxiety for him.[1434]

For a fair treatment model to be successful, the difficulties 'vulnerable' and 'robust' defendants experience, and the different ways this may manifest, must be understood and identified in advance. The timely identification of a defendant's needs is required under the CrimPR.[1435] Toolkits are available to assist advocates in fulfilling this

[1430] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2(2)(b) and 3.9(3)(a) and (b).

[1431] In this trial, the prosecution barrister met with T11C after her ABE interview was played to the jury. On returning to the courtroom, the prosecution barrister explained to the judge and defence counsel that T11C had informed him that she has fibromyalgia, and 'this has the affect of short-term memory loss and T11C forgets what the question was'.

[1432] The court was aware T7C had cystic fibrosis and a heart condition. During a welfare break, the Judge was informed that T7C had not taken medication that she should have taken an hour previously. The trial was adjourned until the following morning.

[1433] As discussed within Chapter Six at section 6.1.1.

[1434] McEwan J, 'Vulnerable Defendants and the Fairness of Trials' (2013) Crim.L.R. 100, 106.

[1435] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2(2)(b); Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-9.

duty.[1436] However, the difficulty in identifying defendants' vulnerabilities and the disparities in support services provided to them, are acknowledged within existing literature.[1437] Accordingly, improved support for defence counsel and infrastructure for identifying a defendant's individual difficulties are required. Though, it is appreciated that the CJS is under immense strain,[1438] and these changes would take time to come into fruition. In addition, guidance on identifying a defendant's vulnerabilities and needs could be incorporated within the VWTP. This would help ensure defendants receive appropriate support and Special Measures where necessary.

From their initial police report, many complainants will be directed towards support services, including ISVAs, who conduct needs assessments and signpost further support.[1439] This infrastructure is lacking for defendants, as the process of identifying needs and liaising appropriate support is left with their legal representative. The present findings concerning the identification of a defendant's vulnerabilities are limited. Therefore, further large-scale research is needed to establish whether defendants' needs are identified efficiently and effectively in practice, and how they are being supported during the trial process. This should involve interviewing defendants, who have been on trial for rape, about their experiences of support. Organisations working with defendants should also be approached, to understand how defendants utilise their services and what support is available to them during the trial process. This would supplement existing research into the support provisions

[1436] The Advocates Gateway, Identifying Vulnerability in Witnesses and Parties and Making Adjustments: Toolkit 10 (March 2017).

[1437] Talbot J, *Fair Access to Justice? Support For Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust 2012) 17; Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 222.

[1438] Since 2010, spending by HM Courts and Tribunal Service has fallen significantly, yet the complexity of cases is purportedly increasing. The Institute for Government, Criminal Courts (2018) <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2018/criminal-courts> accessed: 17 August 2019.

[1439] Rumney P.N.S *et al*, 'A Police Specialist Rape Investigation Unit: A Comparative Analysis of Performance and Victim Care' (2019) Policing and Society 1; Hester M and Lilley S.J, *More than Support to Court: ISVAs in Teesside* (University of Bristol in association with the Northern Rock Foundation 2015).

available to defendants, which highlight the absence of empirical evidence into the actual operation and effectiveness of such provisions.[1440]

7.2.2 Familiarisation with Cross-Examination

The difference between the prosecution and defence barristers' conduct before they commenced their cross-examination questions was stark. It was common practice for defence barristers to engage in some introductory and familiarising dialogue with the complainants before cross-examination. However, the prosecution barristers did not provide introductory remarks to any defendant.[1441] The complainants generally experienced lengthy and extensive introductions with a greater focus on their welfare. Introductory remarks immediately before cross-examination are beneficial for several reasons, and are a positive practice that a fair treatment approach would fully embrace.

Where introductions cover audibility and speech issues, this ensures their evidence is clearly communicated to the jury and allows legal personnel to take accurate notes of their evidence. Explanations of the cross-examination process may ensure complainants and defendants understand the process, and offering welfare breaks may ensure they feel comfortable. This is important as evidence suggests witnesses sometimes feel unable to ask for breaks, when they are needed.[1442] Where barristers introduced themselves, this established politeness and may ease complainants into the questioning process. Together, these features may enhance the quality of a complainant's evidence and promote fair treatment. Yet, existing best evidence guidance appears conflicted in embracing introductory remarks.[1443] Under the FTM,

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[1440] Cooper P and Mattison M, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) E. & P. 351.

[1441] Twelve defendants were addressed before evidence-in-chief, by the defence barrister. Judges provided introductory remarks to three defendants. Four defendants did not receive any introductions.

[1442] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 52.

[1443] See Chapter Five, section 5.1.3 for a discussion. The ICCA's 20 Principles of Questioning illustrate there is some reservations about the usefulness of rapport building and introductory remarks. As discussed within: Cooper P *et al*, 'One Step Forward and Two Steps Back? The "20 Principles" for

this practice should be implemented consistently for complainants and defendants. The absence of these remarks for defendants created a more hostile environment and relationship with the prosecutor, reflecting a more traditional approach. Literature often criticises defence barristers for their hostility towards complainants in cross-examination.[1444] However, sensitivity was displayed towards complainants during the introductory remarks observed, providing some indication that cross-examination is not always aggressive.[1445]

Guidance encourages prosecution barristers to meet with complainants before they give live evidence, to ensure complainants are aware of the process of giving evidence.[1446] Observations found that prosecution barristers did meet at least nine complainants, before they gave live evidence. Theoretically, complainants may have received information at this stage that addressed the issues raised in the defence barristers' opening remarks. Therefore, the defence barristers' opening remarks may have had tactical underpinnings. Addressing the complainants with politeness and consideration before questioning may reflect some barristers' views that jurors would turn against the defence if they treated a complainant poorly.[1447] Nonetheless, the present findings demonstrate that cross-examination is not immovable from the

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Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) International Journal of Evidence & Proof 392, 401. However, introductory remarks have been encouraged within Judicial College, *The Equal Treatment Bench Book* (February 2018) 2-34.

[1444] For a detailed discussion, refer to Chapter Three at section 3.5. Burman M, 'Evidencing Sexual Assault: Women in the Witness Box' (2009) 56(4) Probation Journal 379, 382-383; Brown J *et al*, *Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Responses to Rape* (Government Equalities Office, 2010) 27-28; Cook K, 'Rape Investigation and Prosecution: Stuck in the Mud?' (2011) 17(3) Journal of Sexual Aggression 250, 253; Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds), *Feminist Perspectives on Evidence* (Cavendish 2000) 43-44.

[1445] The Ministry of Justice has suggested that contemporary cross-examinations are adapting and becoming less aggressive. Ministry of Justice, Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence (Ministry of Justice March 2014) 9.

[1446] CPS, *Policy for Prosecuting Cases of Rape* (CPS 2012) 29.

[1447] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 229.

hostile practices Lees and Adler previously observed.[1448] The defence barristers displayed sensitivity and concern towards most complainants, despite Temkin's pessimism surrounding their willingness to do so.[1449]

Displaying this sensitivity to defendants may be regarded as 'tactically non-beneficial to the defence'. This is since some barristers stress the importance of defendants making a 'good impression' and gaining sympathy from the jury.[1450] As such, some barristers may consider it preferable for defendants to endure a hostile cross-examination from the outset, and subsequently draw upon any difficulties displayed and their differential treatment, when compared to the complainant, to gain sympathy.[1451] Practical reasons may also explain the absence of introductory remarks from prosecutors to defendants. Defendants may be provided with information familiarising them with cross-examination during conferences with their barrister, and may be more familiar from observing other witnesses give evidence.[1452] In addition, defendants experienced the 'warm up' period of live evidence-in-chief, unlike most complainants.[1453] However, defendants may find the change in dynamic from evidence-in-chief to cross-examination unsettling and difficult. It is also suggested that, for vulnerable defendants, observing the trial passively and being able to give

[1448] Adler Z, *Rape on Trial* (Routledge 1987); Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996).

[1449] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 273.

[1450] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 222-223.

[1451] Research shows this practice is utilised by barristers, see: Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (CJA, 2015) 19; Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 222-223.

[1452] As discussed within Chapter Six at section 6.1.2.

[1453] Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) E. & P. 11(1) 1, 12; Burton M, Evans R and Sanders A, Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies (Home Office Report 01/2006) 54.

evidence are different things.[1454] Difficulties may also result from the stress that 'robust' defendants experience from the trial process,[1455] which may be exacerbated by the serious indictments they face. For example, waiting throughout the trial to have their turn could increase nervousness, which in turn may impact their best evidence.[1456] For a fair treatment approach, cross-examination must be free of undue stress and intimidation. Good practice would be for all defendants to be addressed with politeness and provided introductory remarks. Judges should provide some opening remarks to both parties, as a minimum expectation, under the FTM model. In doing so, the judge, with their authority and neutrality, can reiterate the equality between the parties. One judge adopted this approach, as demonstrated below, which provides an example of best practice.

> **T5J:** You are the same to me [as any other witness] you can choose to stand up or sit down…if during the questions you want to sit down simply sit down, if you feel you need a break ask for one or if you can't find the words raise a hand…if you can go at about a tenth of the speed that your read that you will do yourself justice if you rush you won't do yourself justice.

It may seem unnecessary for defendants to receive opening remarks before cross-examination, if already provided before evidence-in-chief.[1457] Even so, six complainants were provided with opening remarks before supplementary evidence-in-

[1454] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 220.

[1455] Jacobson J *et al*, *Structured Mayhem: Personal Experiences of The Crown Court* (CJA, 2015) 8 and 19-20.

[1456] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 220.

[1457] Thirteen defendants were provided opening remarks before evidence-in-chief, by the judge or defence counsel.

chief questions, and before cross-examination shortly afterwards.[1458] Therefore, judges should ensure defendants are provided with comprehensive introductory remarks before evidence-in-chief, from defence counsel or themselves, and intervene to remind defendants of these earlier comments before cross-examination begins.

This practice should be endorsed within judicial training. As previously indicated, judges must have 'sex tickets' to preside over sexual offence trials. For this, judges must complete the Judicial College's SSOS once every three years.[1459] As Rumney and Fenton explain, the interactive seminar covers a range issues, including procedural matters and the use of Special Measures.[1460] During this section of the training, introductory remarks for all complainants and defendants could be advanced as good practice. In addition, incorporating the fair treatment requirement of introductory remarks into the CrimPD, would endorse this approach.

7.2.3 Responses during Cross-Examination

Observations revealed differences, and some similarities, in how the barristers and judges responded to the complainants and defendants during their cross-examinations. These responses related to welfare checks and breaks, interventions, and modifications to questioning. Checks and breaks were provided for complainants, and one defendant, when they became distressed or resistant to questioning.[1461] The extent that the complainants were provided welfare breaks, afforded checks, and given encouraging reassurances shows efforts were made to safeguard their treatment during their cross-examinations, ensuring they were as comfortable and composed as possible. These findings may go some way to alleviate criticisms that complainants

[1458] Nine complainants were cross-examined, without supplementary evidence-in-chief questioning. These complainants therefore appeared in court only for cross-examination, and therefore would only require introductory remarks for this process.

[1459] HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 60; Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473, 474 to 475.

[1460] Rumney P.N.S and Fenton R.A, Judicial Training and Rape' (2011) 75 The Journal of Criminal Law 473, 476.

[1461] As discussed, ten complainants had their welfare checked and six complainants had welfare breaks.

are not being treated seriously or with dignity.[1462] This good practice does not create an imbalance for the defendants, as both parties have an interest in hearing reliable evidence from each side.[1463] This would be hindered if complainants were in a state of distress or discomfort. However, three complainants did not receive checks or welfare breaks in response to displayed upset. For individual cases, decisions to provide checks and breaks may involve some balance between these difficulties and the need to 'press on' so the defence are able to examine the complainant.[1464] Some barristers have suggested it is better for complainants to 'keep going' instead of taking breaks.[1465] This view was communicated to six complainants, by judges and defence counsel, before and during cross-examination.

> **T9DC:** …If you need a break please say so, if you need five ten minutes whatever you need. The experience of the court is sometimes its better to keep going, all right?

Pressing on may be beneficial for some complainants, in getting out of the courtroom as quickly as possible.[1466] The pressure on courts to deal with cases efficiently may sometimes necessitate pressing on. However, efficiency must be subsidiary to the needs of complainants under a fair treatment approach. It is important that complainants do not feel pressured to continue and are provided with the genuine choice to take breaks. Most defendants were not provided with welfare checks,

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[1462] Stern V, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office 2010) 46; Payne S, *Rape: The Victim Experience Review* (Home Office 2009) 13.

[1463] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44*; R v SG* [2017] EWCA Crim 617.

[1464] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 39-40. The Court of Appeal has suggested breaks will usually enable distressed complainants to recover and return to 'normal cross-examination', *R v Dinc* [2017] EWCA Crim 1206; *R v SG* [2017] EWCA Crim 617. Though, case law equally recognises where a complainant may be too distressed to continue, as in *R v Steven Pipe* [2014] EWCA Crim 2570.

[1465] Advocacy Training Council, *Raising the Bar: The Handling of Witnesses, Victims and Defendants in Court* (ATC, 2011) 50.

[1466] Advocacy Training Council, *Raising the Bar: The Handling of Witnesses, Victims and Defendants in Court* (ATC, 2011) 50.

breaks, or reassurances.[1467] There may be reasons for this disparity, without necessarily resulting in unfairness. Barristers and judges can only respond to observable activity during cross-examination, including the emotions displayed.[1468] Distress is an indicator that a complainants' evidence may be compromised, and action needs to be taken to alleviate this.[1469] In contrast, the vast majority of the defendants observed did not exhibit distress. Although checks and breaks resulted for T5D when he became distressed, the upset displayed by T9D was comparatively brief and not responded to. The higher proportion of breaks taken by complainants may, as Hamlyn *et al* suggest, reflect their greater need for breaks, as questions are often sensitive in nature.[1470]

However, diverging responses to complainants and defendants were observed, when distress was not displayed. For instance, only complainants were given encouragement and reassurances in moments where they appeared composed. Moreover, some disparities were observed when complainants and defendants resisted questioning in an argumentative manner. Unless these displays of resistance were ignored, defendants were given warnings and instructed to answer the questions.[1471] Similarly, three complainants were given cautionary advice and one complainant was advised to give 'yes and no' answers, and other occurrences were ignored. However, complainants were also provided welfare checks, welfare breaks, and questions were curtailed.[1472] This is perhaps because their argumentative resistance was sometimes accompanied with distress.[1473] If responses are dissimilar for similarly situated defendants and complainants, tensions in fairness may occur. The potential unfairness was usefully summarised by T7DC during her closing speech.

[1467] Only two defendants were provided with welfare breaks.

[1468] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 187.

[1469] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 187.

[1470] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 52.

[1471] This was observed for three defendants, who displayed resistance.

[1472] This was observed for five complainants.

[1473] This was observed during the cross-examinations of T5C, T8C and T12/13C(2). However, occurrences of argumentative resistance without signs of distress were observed during the cross-examinations of T1C, T8C, T12/13C(2) and T15C.

> **T7DC:** There is [an] "inequality in the system when a defendant argues back and when a defendant answers back he is criticized for that". Remember, he was told to answer yes or no. If I asked [T7C] to just answer yes or no…we are polite to complainants, we give them breaks when they need them, all of that is correct and right. If this is how things are with the complainant, it should be the same for him. When she argued with me she wasn't told off…[he is getting argumentative and answering back] just the same as she did, it is just the same.

The curtailing of questioning further demonstrates the flexibility of cross-examination, and shows a number of judges and advocates were willing to modify the procedure. Other than for T4D, this practice was unique to the complainants. Where questions were curtailed, the judges made sure all relevant matters were placed in front of the jury. Where defendants resisted questions this best evidence practice was not observed. The warnings and admonishment they instead received may have been intended as helpful advice, to encourage them to restore composure to maximise their best evidence. This encouragement should be more explicit, to demonstrate fair treatment towards defendants. This should occur despite suggestions from some barristers that they can utilise the defendant's resistance and difficulties within their closing speeches, to gain the jury's sympathy.[1474] The observations provided evidence of this practice being adopted, where these difficulties related to the defendant's resistance and appearance during cross-examination.

> **T16DC:** Is he someone trying to pull the wool over your eyes or is this a man who faces a rape allegation who is sitting on his own at the back of the court when [T16C] isn't able to carry on, imagine that is you fighting for your life. You have a barrister sitting in front of you representing you, and you have to talk to a room full of people who have your life in their hands. Perhaps you thought he was nervous, perhaps you thought he got a

[1474] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 222-223.

> bit cross, perhaps you though he was frustrated. Was he lying to you or is he just a man trying to express to you this rape allegation is just false.

Although greater efforts were made to monitor and safeguard the complainants' wellbeing and ability to give best evidence, the process was not faultless. Some practices resembled the traditional approach, where cross-examination included comment and interjection.[1475] Encouragingly, interventions occurred in circumstances where two complainants and one defendant did not respond to questions. Judges and barristers also intervened when they regarded questions to be improper or complex, or to clarify the answers provided.[1476] However, in these circumstances, the judges were most proactive at intervening. The defence barristers intervened slightly more often than the prosecution barristers, as previous research has found.[1477] The prosecution barristers may have chosen against intervening for tactical or practical reasons, or because they deemed there to be insufficient grounds to do so.[1478] Alternatively, these findings may stem from the different duties the barristers adopt. Defence counsel must strive to protect their client's interests fearlessly, whereas prosecuting counsel represent the state, present the case fairly and impartially and do not strive for convictions at all costs.[1479]

The disparity observed with the provision of welfare breaks, welfare checks, and modifications to questioning, demonstrates that greater focus was placed upon the

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[1475] See: Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931-933.

[1476] For the complainants, two prosecution barristers and fifteen judges intervened. For the defendants, four defence barristers and eight judges intervened.

[1477] Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 201.

[1478] Literature suggests judges may be reluctant to intervene to ensure cross-examination does not become disjointed or confrontational. These reasons may also apply to prosecution barristers. See: Bowden P *et al*, 'Balancing Fairness to Victims, Society and Defendants in The Cross-Examination of Vulnerable Witnesses An Impossible Triangulation?' (2014) 37 Melbourne University Law Review 539, 549-550.

[1479] Rule C15 of The Bar Standards Board; Bar Standards Board, Written Standards for the Conduct of Professional Work <https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/written-standards-for-the-conduct-of-professional-work/> accessed 03 May 2018.

welfare and fair treatment of the complainants observed. Understandably, these actions would be unnecessary if complainants and defendants were outwardly managing under cross-examination. However, fair treatment requires equality in how complainants and defendants are treated during cross-examination. This is reiterated by the current legal position and best practice guidance, which acknowledges that all complainants and defendants must be able to provide their best evidence.[1480] Composed and 'robust' complainants and defendants may experience difficulties that they conceal or cannot express.[1481] A judge within Fielding's research acknowledged that distress is not the only observable indicator of a witness's difficulties, suggesting evasiveness could be an indicator too.[1482] Ensuring both parties are provided with introductory remarks, would improve rapport that encourages the communication of any difficulties, and ensures fair treatment. Some distress and frustration is perhaps unfortunately expected, as cross-examination involves the testing of evidence. However, it is important that responses to complainants and defendants equivalently aim to enhance their best evidence, by ensuring cross-examination does not contain intimidation, undue distress, or confusion.

7.3 Cross-Examination Questioning Strategies

The questioning strategies and tactics adopted by defence barristers continue to be a central concern among scholars.[1483] Their efforts to impugn the credibility of complainants, and their use of sexual history evidence and rape myths within cross-examination are frequently criticised.[1484] The current study provides additional insight

[1480] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 40; Judicial College, *The Equal Treatment Bench Book* (February 2018).

[1481] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 52.

[1482] Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006) 187

[1483] These concerns have been raised in relation to rape trials in England and Wales, and other jurisdictions. Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) Feminist Criminology 298; Zydervelt S, Zajac R, Kaladelfos A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1.

[1484] LaFree G, *Rape and Criminal Justice: Social Construction of Sexual Assault* (Wadsworth 1988) 98; Temkin J and Krahé B*, Sexual Assault and The Justice Gap: A Question of Attitude* (Hart 2008);

into the central questioning strategies adopted for complainants in eighteen trials. Unique insight was also provided into the cross-examination strategies prosecution barristers adopted for the defendants. The data demonstrate that both parties utilised broadly similar strategies. Complainants and defendants were robustly and fairly examined on their evidence. However, tensions were also identified, where a small number of prosecution and defence barristers appeared to utilise stereotypes and irrelevant evidence.[1485] As previously discussed, a fair treatment approach would disapprove of lines of questioning that contravene common law and statutory law, as any true model of cross-examination would. All cross-examinations must only investigate admissible and relevant matters.[1486] In addition, some traditional strategies that fall short of these fundamental principles will be rejected under the FTM. For example, some questioning observed reflected traditional advocacy, as questions appeared to have persuasive purposes and 'play to the jury' by encouraging refutable stereotypes about rape. Yet, such questioning pertained to the facts of a case, and did not contravene evidential rules.

The best evidence model, as advocated within case law and literature, does not clearly address how specific lines of questioning undermine best evidence. In contrast, a fair treatment approach would require distinctions to be made between robust questioning of complainants and defendants, and poor questioning that encourages refutable stereotypes, examines irrelevant sexual history evidence, and focuses on very minor and peripheral details. Drawing this distinction would require consideration of the individual facts of each case. As previously explained, this is essential for fair treatment because irrelevant and inadmissible matters obscure the central issues in a case. Irrelevant and inadmissible questioning would not encourage complainants and defendants to give best evidence on matters that may help to resolve the core issues in dispute. Moreover, these questions may create tension or cause distress among complainants and defendants, impeding them from giving their most accurate,

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Lovett J, Uzelac G, Horvath M and Kelly L, *Rape in the 21st Century:Old Behaviours, New Contexts and Emerging Patterns* (ESRC End of Award Report 2007).

[1485]Appendix Five outlines the number of trials where barristers cited irrelevant sexual history evidence and clearly utilised refutable rape myths in cross-examination.

[1486] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 184-185.

complete, and coherent evidence. The following discussion will examine these questioning strategies and their implications, and consider how fair treatment could be promoted through reforms.

7.3.1 Rape Myths

A central criticism surrounding the conduct of rape trials is the perpetuation of rape myths. Previous research has shown that some defence barristers examine a complainant's behaviour, which implicates various rape myths.[1487] The present study found the complainants were examined on their behaviour, and were most frequently challenged on their delayed reporting and physical or verbal resistance. Existing research also indicates that prosecution barristers use rape myths to their advantage, notably within their speeches. [1488] However, little attention has been paid to how this specifically occurs during the cross-examination of defendants. The present study found that defendants were cross-examined on their behaviour before, during, and after the alleged rape. For example, prosecution barristers explored the defendant's sexual attraction towards the complainant, large size and strength, the alleged force used, violent tendencies, and negative attitudes towards women.

Together, these questions could invoke rape myths, and the 'ideal victim' and 'ideal offender' stereotypes.[1489] Where the complainant and defendant's behaviour was inconsistent with expectations, the plausibility of their version of events could be undermined. This is despite the different ways genuine victims may react to rape and the different ways innocent defendants may respond to accusations of rape.[1490]

[1487] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205; Smith O & Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1.

[1488] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1, 15.

[1489] Christie N, 'The Ideal Victim' in Ezzat A. Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25.

[1490] As acknowledge by judges in their summing up to the jury. The jury in T1, T2, T4, T5, T10, T14, and T17 were directed that 'there is no one typical reaction of victims of sexual offences and no one typical reaction of those wrongly accused of sexual offences'. Additionally, the jury were directed that there is no stereotypical victim or offender who commits rape within twelve trials. Within T8,

However, these questions may not necessarily entail the invocation of rape myths. As previously indicated, some lines of questioning had alternative interpretations and a factual basis in the trials.[1491]

Identifying the use of rape myths is difficult,[1492] and potential tensions surface when interpreting these questioning strategies. A general approach within literature, followed within the present study, has been to frame questioning strategies as perpetuating rape myths, which influence jurors.[1493] However, it must equally be recognised that in the context of an individual case, these questions may be legitimate. Questions that feature delayed reporting, lack of resistance, and size differences, frequently associated with rape myths, are factual circumstances and may be relevant to either party's case. Only with careful consideration of case circumstances, can distinctions between relevance and illegitimate questioning be appreciated.

For example, examining delayed reporting allows defence barristers to properly advance their case that a complainant did not immediately complain because nothing untoward happened to warrant this behaviour. While questions may appear to simultaneously promote prescriptive standards of expected behaviour, this importantly allows the defence to advance their case.[1494] Moreover, the complainant's delayed reporting to the police in six of the cases observed would have had clear implications on forensics and obtaining other evidence.[1495] In contrast, three

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T13 and T16, the judges directed the jury to avoid assumptions about how a genuine victim would react to rape. Only in T3 were no such directions provided.

[1491] As discussed within Chapters Five and Six, sections 5.2 and 6.2.

[1492] As acknowledged within Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 209.

[1493] Smith O and Skinner T, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) Social and Legal Studies 1; Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 15 and 17.

[1494] Christie N, 'The Ideal Victim' in Ezzat A. Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System (*1st Edn, Macmillan1989) 18-19.

[1495] For two of these complainants, some questions were also deemed to inappropriately encourage refutable rape myths. For example, in T2, the defence advocate suggested many women would have reported immediately in the complainant's position. In T14, the same defence advocate suggested

complainants reported promptly, which did not clearly impact the availability of other evidence. Yet they were challenged on their failure to immediately report, even where the delay was just thirty minutes. Here, questions seem to 'play to the jury' and infer disbelief while creating a standard of expected behaviour.

During the complainants' cross-examinations, some refutable rape myths were clearly utilised in the cross-examinations observed. These included expectations that complainants would physically resist, sustain injuries, and immediately report.[1496] Examples of unreasonable questioning from the defence barristers were also observed, which reflected the traditional approach.

> **T14DC:** Oh come on [T14C]! You could have walked into a police station and know full well you could report it and they would take care of you.

> **T18DC:** Did you think to pause and scream and shout "I've been raped I've been raped?" (*Both hands gesture out with palms facing each other, bouncing them up and down, loud voice*).

When examining the complainant's behaviour, the majority of defence barristers were courteous. However, three complainants were subjected to repetitious traditional questioning on their failure to physically resist and immediately report.

> **T2DC:** You could have fought him couldn't you?
>
> **T2C** agrees.
>
> **T2DC:** You could have bitten him.
>
> **T2C:** Right (*slightly drawn out, uncertain tone*).
>
> **T2DC:** Kicked him (*questioning tone*).
>
> **T2C:** Yeah.

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that even though T14C felt ashamed, she could have reported to the police and they would have looked after her.

[1496] Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (2013) NB Research: London 6 <http://nb-research.com/wp-content/uploads/2013/04/Responding-to-the-challenge-of-rape-myths-in-court_Nina-Burrowes.pdf>.

T2DC: Punched him.

T2C: Yeah.

T2DC: But you did none of those things.

T2C: No I was scared.

On another occasion during cross-examination, the complainant was asked:

T2DC: Did you scream, did you?

T2C: No I was scared.

T2DC: "Nor did you bite him?"

T2C: "No."

T2DC: "Punch him?"

T2C: "No."

T2DC: "Or injure him any other way?"

T2C: "No."

Complainants may find this distressing, frustrating and feel blamed following multiple assertions about their failure to act in a particular way. These defence barristers should have demonstrated greater sensitivity by reducing their repetitive questioning.

Within a legal framework, the broad contemporary definition of rape myths would be problematic, since questions would need to contain false and misleading information to be inadmissible.[1497] This may explain why these prosecution and defence cross-examination practices featured. For a fair treatment approach, regulating barristers' questions that clearly utilise rape myths, which within the court's experience are factually refutable and have no factual basis in the prosecution or defence case, is required. The wide-ranging rape myths identified within the literature, would render prohibition of all questions difficult. For instance, examining defendants on their physical and sexual attraction towards the complainant may imply that 'only attractive

[1497] Bar Standards Board 2018, RC3.1.

women are raped'.[1498] Some research suggests that people believe thin and attractive women are targets for rape.[1499] However, attractive complainants are also attributed greater responsibility for being raped than unattractive women. [1500] Mock jurors also expect normal sex to occur between compatible people, in terms of their status and physical attractiveness, and incompatibility is treated with more suspicion.[1501] These mixed and somewhat confused findings are exacerbated with evidence supporting the 'beautiful is good' theory.[1502] Herewith, attractive witnesses have been judged as more truthful and unattractive defendants as guilty.[1503] Thus, questions may not inevitably encourage rape myths in a one-dimensional manner that is always damaging for complainants. Instead, questions could influence jurors in different ways.

Across jurisdictions, scholars have criticised the pervasiveness of rape myths during the cross-examination of complainants and question what prosecutors can do to address this problem.[1504] The present study provides some evidence of prosecutors attempting to counterbalance this, in the sample of English trials observed. Firstly, prosecution barristers adopted questioning strategies that provided an alternative

[1498] Jacobson M.B, 'Effects of Victim's and Defendant's Physical Attractiveness on Subjects' Judgement in a Rape Case' (1981) 7 *Sex Roles* 247 cited by Wheatcroft J.M, Wagstaff G.F, and Moran A, 'Revictimizing The Victim? How Rape Victims Experience The UK Legal System' (2009) 4(3) Victims and Offenders 265, 273.

[1499] Clarke A.K and Stermac L, 'The Influence of Stereotypical Beliefs, Participant Gender, and Survivor Weight on Sexual Assault Response' (2011) 26(11) Journal of Interpersonal Violence 2285, 2294 and 2297.

[1500] Clarke A.K and Stermac L, 'The Influence of Stereotypical Beliefs, Participant Gender, and Survivor Weight on Sexual Assault Response' (2011) 26(11) Journal of Interpersonal Violence 2285, 2294 and 2297.

[1501] Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 301-302.

[1502] Dion K *et al*, 'What is Beautiful is Good' (1972) 24(3) Journal of Personality and Social Psychology 285.

[1503] Vrij A and Firmin H.R, 'Beautiful Thus Innocent? The Impact of Defendants' and Victims' Physical Attractiveness and Participants' Rape Beliefs on Impression Formation in Alleged Rape Cases' (2001) 8(3) International Review of Victimology 245, 253.

[1504] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1.

narrative of events, which appeared to challenge some broad myths.[1505] This arose when defendants were examined on their alleged coercive strategies and opportunistic tendencies. This strategy adheres to the 'offender-centric' approach, which involves focusing on the defendant and the different tactics he may have utilised to commit rape.[1506] Secondly, one defendant was also cross-examined in a manner that directly 'busted' the myth that genuine victims would immediately report.[1507]

Where questions created standards of expected behaviour in the trials observed, this did not appear to follow from the barristers' ignorance of the complex realities of rape. For instance, two barristers challenged myths in their speeches to the jury when they were prosecuting, yet utilised myths to their advantage when defending. These observations may provide a small indication that further education about rape myths and the potential complexities surrounding rape is not necessarily required. Due to the methodological limitations of observing a small sample of cases, this presumption is not conclusive.

Nonetheless, it is important that all advocates undertaking sexual offence cases understand when questioning may become problematic. Currently, all prosecuting advocates must be accredited and registered on the CPS Rape and Serious Sexual Offence (RASSO) panel to undertake rape cases.[1508] The CPS also has embedded specialist prosecutors within RASSO units.[1509] Together, these specialist prosecutors must undertake training, demonstrate their competency, undergo monitoring, and undertake regular refresher courses.[1510] At present, this formal accreditation process

[1505] As discussed within Chapter Six, section 6.2.

[1506] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018. For a detailed discussion of this 'offender-centric' approach refer to section 7.3.4 within this chapter.

[1507] As discussed within Chapter Six, section 6.2.1.

[1508] CPS, *Response to HMCPSI Thematic Review of RASSO Units* (February 2016) para 41 and 42

[1509] CPS, *Response to HMCPSI Thematic Review of RASSO Units* (February 2016) para 41 and 42

[1510] CPS, Rape and Sexual Offences, Chapter 16: Briefing and Monitoring the Advocate <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-16-briefing-monitoring-advocate> accessed 29 July 2019; CPS, *Advocate Panel Scheme* 2016-2020

does not apply to defence advocates.[1511] However, during the data collection period, the VWTP was implemented.[1512] All advocates acting in serious sexual offence trials involving vulnerable witnesses and defendants must complete this training.[1513] This requirement has, in effect, created a ticketing system for barristers in such cases. The Ministry of Justice has claimed this programme delivers, and goes beyond, the 2014 manifesto commitment that 'publically funded advocates will have specialist training in handling victims before taking on serious sexual offences'.[1514]

From the information available that outlines the content of this programme,[1515] it appears that this training could be enhanced to cover specific issues affecting serious sexual offence trials. The training could also extend to all witnesses, complainants, and defendants, and not simply those who are 'vulnerable'.[1516] Firstly, training should focus on the manner in which all complainants and defendants are examined, particularly in relation to their behaviour at the time of the alleged offence. Such questioning should be conducted with courtesy and sensitivity, since this can cause distress. Secondly, this training should distinguish where lines of questioning implicate refutable rape myths that are misleading and inappropriate, from questions

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<https://www.cps.gov.uk/sites/default/files/documents/publications/selection-criteria-the-rape-list.pdf> accessed 29 July 2019.

[1511] As advocates often prosecute and defend, many defence advocates will undego training and become accredited. All advocates must have the appropriate skills to undertake sexual offence cases. Therefore, defence advocates may undergo training on their own accord. Ministry of Justice, *Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence* (MoJ Report, March 2014) 16; HH Peter Rook QC, *Prosecuting Sexual Offences* (Justice, 2019) 62 citing *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228*, para 226.*

[1512] The VWTP launched on 14 November 2016, as explained within: Hoyano L, 'Why We Should All Take The Vulnerable Witness Training Programme' (2018) Criminal Bar Quarterly 17.

[1513] *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt [2017] EWCA Crim 1228*para 226; *R v Yahya Rashid* [2017] EWCA Crim 2, para 80; Cooper P *et al*, 'One Step Forward and Two Steps Back? The '20 Principles' for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) International Journal of Evidence & Proof 392, 394.

[1514] HM Government, *Victims Strategy* (Cm 9700, September 2018) 34.

[1515] See Chapter Two, section 2.3.3.

[1516] See Chapter Two at section 2.3.4.

that allow each party to advance their case. Thirdly, elements of the existing RASSO training could be incorporated, such as the workshops focusing on rape myths.[1517]

The RASSO training delivered to prosecutors should continue to incorporate the 'offender-centric' workshops, provided since 2015. This training familiarises prosecutors with the tactics some offenders adopt to commit rape, enabling them to identify and utilise these features within cross-examination.[1518] There is a danger that this 'offender-centric' approach could create a stereotype of an 'ideal offender'. Therefore, the 'offender-centric' narratives, endorsed within this training, must be grounded within the CPS's experience of how offenders operate, and not factually refutable stereotypes of how offenders appear and behave. This thesis has identified areas of improvement, where some prosecution barristers could have utilised the 'offender-centric' approach in cross-examination. Accredited prosecution advocates undergo refresher training and have their performance monitored.[1519] Therefore, prosecution barristers in other trials and courts may be adopting the 'offender-centric' approach more extensively. Nevertheless, evaluating training is essential to establish its effectiveness and whether prosecutors feel equipped to utilise this approach.[1520]

A further reform to counter refutable rape myths often proposed within the existing literature is for expert evidence.[1521] General expert evidence has previously been

[1517] CPS, *Response to HMCPSI Thematic Review of RASSO Units* (February 2016); CPS, Advocate Panel Scheme 2016-2020.

[1518] As subsequently discussed within this chapter, at section 7.3.4. For a detailed discussion, see CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1519] CPS, Advocate Panel Scheme 2016-2020.

[1520] Evaluating this training may prove difficult, as "there are no agreed criteria for measuring the effectiveness of advocacy training or the quality of advocacy". As explained within Cooper P *et al*, One step forward and two steps back? The "20 Principles" for questioning vulnerable witnesses and the lack of an evidence-based approach (2018) International Journal of Evidence & Proof 392, 395

[1521] Home Office, Convicting Rapists and Protecting Victims: Justice for Victims of Rape (Home Office: London, 2006) 16; Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 162-163; Ellison L and Munro V.E, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) The Brit. J. Criminol 363;

considered, whereby experts offer neutral explanations using general social-science research findings.[1522] This approach would ensure fairness as both parties have the opportunity to cross-examine this evidence and call their own expert witnesses. While mock jury research has demonstrated the effectiveness of general expert evidence within deliberations, judicial directions were found to be equally effective.[1523] Therefore, it cannot conclusively be argued that current approach of using judicial directions, outlined within the *Crown Court Compendium*,[1524] is ineffective at tackling rape myths and less influential on jurors than experts. Moreover, the CJS is presently under immense strain to conduct trials efficiently, with limited resources.[1525] There are legitimate concerns that using experts would result in a costly battle of experts and create delays at trial.[1526] Without further research into real juror decision-making and investment into the CJS, expert evidence does not appear to be the most viable option for tackling rape myths.[1527]

Henderson E and Harvey D, 'Myth-busting in Sex Trials: Judicial Directions or Expert Evidence?' (2015) Archbold Review 5; Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 16.

[1522] Home Office, Convicting Rapists and Protecting Victims: Justice for Victims of Rape (Home Office: London, 2006); Ellison L and Munro V.E, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) The Brit. J. Criminol 363, 364-365.

[1523] Ellison L and Munro V.E, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) The Brit. J. Criminol 363.

[1524] Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (December 2018) 20-1

[1525] Since 2010, spending by HM Courts and Tribunal Service has fallen significantly, yet the complexity of cases is purportedly increasing. The Institute for Government, Criminal Courts (2018) <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2018/criminal-courts> accessed: 17 August 2019.

[1526] For a critical discussion of these concerns and other limitations of expert testimony, see; Ellison L and Munro V.E, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) The Brit. J. Criminol 363, 364-366; Ellison L and Munro V.E, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) Brit. J. Criminol 202, 214; Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 162-164.

[1527] Professor Cheryl Thomas has been commissioned by the president of the Queen's Bench Division to conduct empirical research with real jurors. Interviews were conducted with over fifty jurors, once they had provided their verdicts within actual trials. The research will be considering the extent that

In addition, the BSB currently prohibits barristers from advancing untrue or misleading facts.[1528] This could be revised to also include the prohibition on questioning that clearly utilises factually untrue rape myths. Due to the methodological limitations of this study,[1529] it cannot be known whether the findings reflect wider practices. Nonetheless, trial practices in other areas have developed, albeit slowly, which includes the regulation of sexual history. Thus, there is room for optimism that regulating of questioning that inappropriately reference refutable myths can be achieved in all cases.

7.3.2 Impugning Credibility

The nature of most rape cases, including the trials observed, involve known parties in a private setting.[1530] In these circumstances, whether consent or penetration is disputed, trials are conventionally regarded as 'one word against the other' when corroboration is lacking.[1531] With this, the complainants' and defendants' credibility becomes important, and can be challenged using relevant and admissible material. Existing research has found that criticising a rape complainant's character is a central defence strategy.[1532] Though, this appears to be a standard strategy for witnesses

actual jurors believe rape myths and whether further educational guidance will help prevent rape myths from influencing their decisions. The findings will be published in Autumn 2019. HC Deb, 21 November 2018, vol 631, col344W; BBC, Rape Myths (BBC Law in Action, June 2019). <https://www.bbc.co.uk/sounds/play/m000671m> accessed: 28 September 2019.

[1528] Bar Standards Board 2018, RC3.1.

[1529] As discussed within Chapter Four at sections 4.2.2 and 4.4.

[1530] Lilley-Walker S.J *et al*, 'Rape, Inequality and the Criminal Justice Response in England: The Importance of Age, Gender and Mental Health' (Forthcoming); Kelly L, Temkin J and Griffiths S, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (HO Report, London: Home Office 2006) 2.

[1531] This depiction has been critiqued within Saunders C.L, 'Rape as 'one person's word against another's: Challenging the conventional wisdom' (2018) 22(2) E. & P. 161, 176-177. Burrowes N, 'Responding to the Challenge of Rape Myths in Court' (NB Research: London 2013) 12.

[1532] Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 231-235.

across other offences.[1533] The current study provides fresh additional evidence that this was a 'bread and butter' cross-examination strategy in the trials observed.[1534]As both parties similarly utilised this broad cross-examination strategy, this arguably shows the system was working equally to test evidence from adverse witnesses on both sides in these cases. Observations found complainants and defendants were examined on similar aspects of their character. These were their previous convictions, temperaments, consumption of intoxicants, and vulnerabilities, including mental health problems. Despite these similarities, divergences were observed too. For complainants, this included their previous lies and false complaints of rape.[1535] Only defendants were examined on their previous convictions of rape, and treatment of women.[1536]

While the majority of complainants and defendants were robustly examined on their credibility, the previous chapters highlight some instances where questions appeared to target irrelevant aspects of their character.[1537] This occurred despite cross-examination being an opportunity to investigate and test all relevant aspects of a case, as Henderson explains.[1538] The Court of Appeal also reiterates the importance of cross-examining on relevant evidence only.[1539] Interventions were not observed, which could demonstrate a reluctance to intervene among some legal personnel and trial judges. Equally, these matters and lines of questioning may have been discussed at pre-trial hearings, which the researcher did not attend. Alternatively, questions may not have been regarded as objectionable. Notwithstanding this, where the matters raised are plainly irrelevant, judges and barristers should actively intervene to protect

[1533] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 253-254; Fielding N.G, *Courting Violence: Offence Against the Person Cases in Court* (OUP 2006).

[1534] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 254.

[1535] See Chapter Five, section 5.4.3, for a discussion.

[1536] With the exception of T1C, only defendants were examined on their convictions for non-sexual violence. See Chapters Five and Six, sections 5.4.3 and 6.4.3, for a discussion.

[1537] These assessments were based upon the observations at trial only. See Chapter Six, section 6.4.3.

[1538] See Chapter Two and Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 185.

[1539] *R v B (Ejaz)* [2005] EWCA Crim 805.

complainants and defendants. This will provide fair treatment as both parties are protected from potentially upsetting and provoking lines of questioning, while ensuring cross-examination focuses on gaining their best evidence about relevant matters.

A further implication of these questioning strategies is the potential for barristers to insinuate how a genuine rape complainant or innocent defendant is expected to appear.[1540] For example, cross-examining complainants on their previous lies, 'false' allegations of rape, mental health problems could portray them as someone who is likely to make a false allegation. Moreover, references to two complainants' aggressive dispositions may imply that they are unlikely victims of rape.[1541] In addition, cross-examining defendants on their poor treatment of women, previous violent behaviour, and aggressive dispositions may utilise images of the 'ideal offender'.[1542] Presently, little is known about the effects of rape myths concerning defendants and whether these beliefs are refutable. Though, interviews with men convicted of rape have found that they took satisfaction in having power over their victims, and viewed women as 'opponents to be reduced as abject powerlessness' or 'meaningless objects'.[1543] As previously discussed, the majority of questions enabled both parties to advance their case. However, questions that clearly utilise stereotypes and have no factual basis in a given case, should be regulated to provide fair treatment to both parties.

Notwithstanding the broad similarities observed, the questions examining aspects of the complainants' and defendants' character targeted different issues. An interesting example of this relates to how barristers referenced the complainants' and defendants' mental health problems in cross-examination. Defence barristers made reference to

[1540] See Chapters Five and Six, section 5.4.3 and 6.4.3.

[1541] As found in much earlier research from Adler Z, *Rape on Trial* (Routledge 1987) 102.

[1542] Schafran L.H, 'Barriers to Credibility: Understanding and Countering Rape Myths' (National Judicial Education Program Legal Momentum 2015) 15; Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 298-299.

[1543] Scully D, Convicted Rapists' Perceptions of Self and Victim: Role Taking and Emotions (1988) Gender and Society 200, 210-211.

the complainants' mental health when examining other matters, including background evidence. However, two barristers insinuated that this evidence demonstrated the complainant was a 'fantasist' or in a 'bad place', and thus made a false allegation of rape. Temkin *et al* similarly observed this strategy, and found one judge was critical of these questions and deemed them to be irrelevant.[1544] Mental illness can be relevant to the credibility of witnesses.[1545] This evidence, in some cases, may support the defence's position that the allegations are false. For instance, research suggests false allegations are made due to mental illness.[1546] In contrast, only one defendant's mental health was cited when examining other matters in dispute.[1547] The questions did not depict the defendant as a fantasist and capable of telling untruths. Neither were connections made to stereotypes that rapists are mentally unstable individuals.[1548]

Analysing cross-examination questions with account for the context of each case is important, as references to mental health and other vulnerabilities are not used in homogenous ways for complainants or defendants. The disparity appears to reflect the different stances of the prosecution and defence, in terms of their case arguments. The defence will be creating doubts in the complainant's evidence, achieved by examining their reliability. The prosecution will be building a narrative to prove that the defendant committed rape, and a defendant's mental health problems may not support their narrative about the nature of his alleged offending. Rather than focusing on this differential treatment, it is important to consider whether using evidence of a

[1544] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 218

[1545] Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.16.

[1546] For an overview see, Rumney P and McCartan K, 'Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications' (2017) Journal of Criminal Law 1, 26; O'Neal E.N *et al*, 'The Truth Behind the Lies: The Complex Motivations for False Allegations of Sexual Assault' (2014) 24 *Women and Criminal Justice* 324.

[1547] As discussed within Chapter Six, section 6.4.3.2.

[1548] Schafran L.H, 'Barriers to Credibility: Understanding and Countering Rape Myths' (National Judicial Education Program Legal Momentum 2015) 15; Sanghani R, 'Six Rape Myths which Need Busting. Badly' (*The Telegraph*, 10 June 2014).<https://www.telegraph.co.uk/women/womens-politics/10888758/6-rape-myths-which-need-busting.-Badly.html> accessed 28 May 2018.

complainant's vulnerabilities and mental illness to undermine credibility is problematic. The defence should not be prevented from examining the credibility of complainants, to ensure a fair trial. However, the evidence must be relevant and not be misused.

Complainants with vulnerabilities experience high levels of attrition,[1549] and such questioning may further this attrition, if it creates doubt in a complainant's reliability among jurors.[1550] This argument is theoretical, as research is yet to examine whether mental health and other vulnerabilities impact juror decision-making and assessments of complainants. Barristers must not aimlessly examine these issues as T4DC did, to undermine a complainant's credibility by encouraging stereotypes that vulnerabilities inherently make a complainant unreliable, and likely to be telling lies.[1551] This may reflect T4DC's zeal for persuasive advocacy, a feature of traditional cross-examination.[1552] This poor practice should have been prevented. Presently, there is limited guidance on when mental illness is relevant. As Ellison argues, clearer guidance is required and could be provided by enforcing a specific admissibility test to regulate this evidence.[1553] Before this, wider consultation on whether this evidence requires regulation, and how this could be possible, is required.

[1549] Rumney P, McPhee D, Fenton R.A, Williams A, and Soll J, 'A Comparative Analysis of Operation Bluestone: A Specialist Rape Investigation Unit: Summary Report' (Project Report UWE, Bristol 2016) 4-5; Ellison L, Munro V.E, Hohl K and Wallang P, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (2015) 15(2) Criminology and Criminal Justice 225.

[1550] This possibility is discussed within: Ellison L, Munro V.E, Hohl K and Wallang P, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (2015) 15(2) Criminology and Criminal Justice 225, 234.

[1551] As discussed within: Ellison L, Munro V.E, Hohl K and Wallang P, 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (2015) 15(2) Criminology and Criminal Justice 225, 234.

[1552] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931; Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 184.

[1553] Ellison L, 'The Use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13(1) E. & P. 1.

Although the complainants' vulnerabilities were often cited in the trials observed, they were afforded greater protection from being cross-examined on their bad character, in the form of previous convictions. Only one complainant's previous convictions were adduced, and cited in cross-examination.[1554] More often defendants had their previous convictions adduced, which included violent and sexual offences, following applications under s.101 CJA.[1555] Three defendants avoided such questioning, as the judges ruled the evidence was inadmissible in relation to propensity under gateway (d), or the defendant's attack on the complainant's character under gateway (g). For these trials, the convictions of the complainant and defendants were adduced following applications, which took place during the trials. Arguably, this demonstrates the statutory procedures for adducing bad character are approached strictly.

While five complainants were questioned on proven and accepted falsehoods within their evidence, only two defendants were examined on alleged lies within their evidence, which they refuted. Two complainants were also cross-examined on their previous 'false allegations', to target their credibility, following successful bad character applications.[1556] Within T13, the complainant accepted her admissible previous allegations were false, whereas T4C did not. The defence examined T4C's reluctance to engage with the CJS, as part of showing the previous allegations were false.[1557] The evidential basis for 'falsity' does not need to be strong,[1558] and T4C's failure to cooperate with the police meets this threshold.[1559] However, research demonstrates that withdrawals from police investigations are common and occur for many reasons, such as wanting to move on, health concerns, and pressure from third

[1554] See Chapter Five, section 5.4.3, for an analysis of this.

[1555] See Chapter Six, section 6.4.4, which discusses how the defendants' previous convictions were admitted within six trials and cited within the cross-examination of four defendants.

[1556] See Chapter Five, section 5.4.3, for a discussion.

[1557] The defence also successfully argued that inconsistencies in the complainant's account and CCTV evidence that contradicted aspects of her account, met the threshold of 'falsity' meaning the previous 'false' allegations were admissible.

[1558] As stated in *R v Murray* [2009] EWCA Crim 618; *R v All-Hilly* [2014] EWCA Crim 1614, para 13.

[1559] The Court of Appeal in *R v V* [2006] EWCA Crim 1901 citing *R v Garaxo* [2005] EWCA Crim 1170, explained that a complainant's failure to cooperate with the police is some evidence of falsity. However the Court of Appeal in *R v V* recognised that this would depend upon the circumstances.

parties to withdraw.[1560] To redress this, jurors should be advised that reluctance to engage and withdrawals from complainants, resulting in filed police investigations, is not necessarily indicative of a false allegation, where appropriate.[1561] Incorporating this within existing model directions on bad character evidence of witnesses, could endorse this approach.[1562] This would encourage jurors to consider the evidence carefully, without reliance upon stereotypes. This would prevent a complainant's best evidence from being undermined, which is compatible with a fair treatment approach.

The low threshold to adduce previous false allegations was not established within two other cases, where unsuccessful applications were made. The defence unsuccessfully relied upon medical and social service records indicating previous allegations were made, albeit not to the police. While disclosure is essential for the defendant to have a fair trial, boundaries to protect the privacy of complainants must be in place.[1563] Herewith, material must not be disclosed excessively.[1564] Within the present sample, the records were not disclosed in their fullest detail. This, alongside careful decision-making around the admissibility of the material, promoted the complainants' privacy. This afforded the complainants with fair treatment, as respect was shown to their privacy throughout the trial and in their absence. This must continue across all rape

[1560] Rumney P *et al*, 'A Police Specialist Rape Investigation Unit: A Comparative Analysis of Performance and Victim Care' (2019) Policing and Society 1 citing Kelly L, Lovett J and Regan L, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (Home Office 2005) 55-56.

[1561] The Court of Appeal appears to appreciate that the courts must have understanding of the difficulties complainants may face when making allegations of sexual offences. *R v All-Hilly* [2014] EWCA Crim 1614, para 19.

[1562] At present, trial judges may caution jurors on this issue at their own discretion, but there is not a distinct model direction provided in the Crown Court Compendium that addresses this subject matter. Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 12-25.

[1563] Judiciary of England and Wales, *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (December 2013); *R v Stafford Crown Court* [2006] EWHC 1645.

[1564] Only material, whether in part or full, that meets the requirements under the or part of material that meet the requirements of the Criminal Procedure and Investigations Act 1996 should be disclosed. HMCPSI, *Disclosure of Medical Records and Counseling Notes: A Review of CPS Compliance with Rules and Guidance in Relation to Disclosure of Complainants' Medical Records and Counseling Notes in Rape and Sexual Offence Cases* (HMCPSI 2013).

trials, since previous research demonstrates this balance is not always achieved.[1565] Observations also demonstrated that importance is generally being attached to the procedures to adduce this evidence, where relevant. However, this was not apparent within T2, as demonstrated below.

T2DC: Scared of what exactly?

T2C: Scared [I had] been through the same before when I was fourteen

T2DC: Have you mentioned before the incident when you were fourteen?

T2C: Went to court, happened before when mum married… went to court when I was fourteen.

T2DC: (*Pause*) Sorry to ask this and the learned judge will stop if I'm going too far, are you saying when you were fourteen you were raped then?

T2C: No.

T2DC: All right.

These cases highlight evidential and procedural rules were generally respected, in relation to previous complaint evidence. This good practice could have been applied more consistently. Within T2, defence counsel was aware of the contentious nature of his questioning, yet continued to examine this issue. The judge's advice should have been sought in the absence of the jury.

7.3.3 Sexual History

The previous chapters have provided an understanding of how sexual history evidence was utilised during the cross-examinations observed. The research findings enrich the existing research on this issue, while providing new insight into how this evidence can feature within the defendants' cross-examinations. Observations found that sexual history between the complainants and defendants were commonly cited within both of

[1565] HMCPSI, *Disclosure of Medical Records and Counseling Notes: A Review of CPS Compliance with Rules and Guidance in Relation to Disclosure of Complainants' Medical Records and Counseling Notes in Rape and Sexual Offence Cases* (HMCPSI 2013). For a discussion of the issues surrounding the use of psychiatric evidence within rape trials see, Ellison L, 'The use and abuse of psychiatric evidence in rape trials' (2009) E. & P. 1.

their cross-examinations. More often, this related to their on-going sexual relationship, as this pertained to background evidence, and was cited in general terms.[1566] Complainants and defendants were seldom examined on their sexual history with third parties, although this did occur more frequently for defendants.[1567] Despite these broad similarities, different implications arise for complainants and defendants. Most significantly, only a complainant's sexual history is regulated under section 41.

Conflicting evidence about the prevalence that complainants' sexual history features at trial has been presented within existing literature. The Ministry of Justice recently asserted that 'section 41 is working as intended', since sexual history evidence was not permitted within 92% of the 309 cases analysed.[1568] This conclusion is not definitive, since this research only analyses completed CPS case files. The evaluation did not consider the actual use of sexual history at trial, where the evidence could be adduced without an application or questioning goes beyond a judge's ruling. Other empirical studies, conducted between 1987 and 2017, have found that a complainant's sexual history is often cited at trial.[1569] These studies range in scale and methodology, and are not without their limitations.[1570] Therefore, they cannot provide conclusive evidence that the use of sexual history evidence is widespread. In contrast, a recent

[1566] See Chapters Five and Six, sections 5.3.1 and 6.3.1, for a discussion.

[1567] See Chapters Five and Six, sections 5.3.1 and 6.3.1, for a discussion.

[1568] Ministry of Justice, *Limiting The Use of Complainants' Sexual History in Sex Cases* (MoJ December 2017) 3 and 11.

[1569] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 152, citing Brown B, Burman M, and Jamieson J, Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials (Scottish Office Central Research Unit 1992); Kelly L, Temkin J and Griffiths S, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office 2006) 45 and 47; Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 213-214; LimeCulture, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: A Survey of Independent Sexual Violence Advisers (ISVAs)* (LimeCulture, September 2017).

[1570] For a discussion of some of these limitations see section 3.4.1 and Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 20-46

large-scale survey found that only 18.6% of 565 complainants in the sample were subjected to successful s.41 agreements or orders.[1571]

Within the present study, 78% of complainants were cross-examined on some aspect of their sexual history.[1572] This figure, obtained from a small sample of trials, cannot be extrapolated to make generalisation about all rape trials in England and Wales. To overcome this, an evaluation of the use and admissibility of sexual history evidence that joins together the pre-trial and trial stages, and uses trial observations, would be desirable. Nonetheless, the high frequency of admissibility within the current study may appear concerning at first glance. For instance, McGlynn argues that high levels of admissibility suggest s.41 is not operating to restrict sexual history evidence as intended.[1573] However, the frequency in which evidence is admitted at trial cannot determine whether the statutory provisions are operating effectively or ineffectively. From applying s.41 to the complainant's sexual history in Chapter Five, much of this evidence was legally admissible because it was relevant. A significant proportion of their sexual behaviour was admissible as rebuttal evidence, meaning gateway s.41(5) appeared to easily open. To uphold a defendant's fair trial, the defence must be able to refute the prosecution's evidence, which this gateway permits.[1574]

Lees observed that the sexual reputation of complainants was central at trial in the 1990s, not the defendants.[1575] Such claims must be viewed with caution, as Lees did not report on the experiences of defendants within rape trials and her findings may not reflect current practices. The present study found that vast majority of the defendants were cross-examined on their sexual history, either with the complainant or third parties. Nonetheless, this may have different implications on the parties' interests. For

[1571] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 9, 52-55.

[1572] The length of questioning on aspects of their sexual history was fairly brief for T10C, T16C, T17C and T18C, in comparison to the other complainants.

[1573] McGlynn C, 'Commentary on *R v A* (No 2)' in Hunter RC, McGlynn C and Rackley E (Eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 214.

[1574] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 74.

[1575] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 133.

example, Lees argued that sexual history evidence has more damaging implications for complainants, whereas men are discredited if they are sexually inexperienced.[1576] However, this may not necessarily reflect current opinions regarding the sexual experience of complainants and defendants today. Research suggests this evidence influences mock juror's decision-making, as they assess complainants negatively and are critical of her promiscuity.[1577] It is also possible that a defendant's own sexual history impacts his credibility, although mock jury research has yet to explore this issue.

As Ashworth notes, both parties do not have a legitimate interest in preventing relevant evidence being adduced and examined.[1578] Complainants and defendants should only be examined on relevant and admissible evidence, to ensure each party can advance their case and allow the opposition to respond.[1579] Although these principles were largely adhered to, a small amount of irrelevant questioning was observed on both sides,[1580] which usually pertained to sexual history with third parties. Moreover, some examinations went further than was necessary to address the relevant issues in dispute, in terms of the detail cited and volume of questions.[1581] Such questioning reflects a traditional cross-examination approach, which examines

[1576] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 133.

[1577] Schuller R.A and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252, 257-259; Ellison L and Munro V.E, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) E. & P. 299, 312-313; Ellison L and Munro VE, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 797.

[1578] Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

[1579] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 185 and 192.

[1580] See Appendix Five, which shows four complainants and two defendants were cross-examined on some irrelevant sexual history evidence. See Chapters Five and Six, section 5.3 and 6.3, for a discussion of these findings.

[1581] See Appendix Five, which shows three complainants and five defendants were examined on their sexual history in a lengthy manner. See Chapters Five and Six, section 5.3 and 6.3, for a discussion of these findings.

evidence in a lengthy and repetitive manner.[1582] In general, irrelevant sexual history must be prevented, and the length of questioning on relevant sexual history must be controlled. Temkin suggests these irrelevancies create scope for prejudicial beliefs that discredit complainants.[1583] Thus, these questioning strategies could 'play to the jury', further reflecting traditional cross-examination practices.[1584] For defendants, irrelevancies may portray them unfavourably. However, research suggests mock jurors believe it is natural for men to have relaxed views towards sexual relationships.[1585] In addition, research has found that sexual history between a complainant and defendant is seen to more negatively affect a jury's view of the complainant's credibility.[1586] It appears sexual history may discredit complainants and defendants but result in different insinuations about their morality and character. Without robust research into the influence a defendant's sexual history has on assessments of his credibility, it remains unclear whether these practices indeed 'play to' the jury's attitudes.[1587]

Although this study cannot resolve the complex debate surrounding the relevance of sexual history evidence, a number of lessons may be learned from the cross-examination practices observed. Overall, the barristers were adducing admissible and relevant sexual history evidence, in accordance with the current legislation. Despite this positive finding, some irrelevant evidence and protracted questioning was

[1582] Henderson Emily, 'Best Evidence or Best Interests? What Does the Case Law Say About The Function of Criminal Cross-Examination?' (2016) E. & P. 183, 185; *R v B (Ejaz)* [2005] EWCA Crim 805; Professor David Ormerod QC and David Perry QC (eds) 'Part F: Evidence' in *Blackstone's Criminal Practice* (OUP 2018) para F7.15.

[1583] Temkin J, Gray J.M and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 214.

[1584] Henderson Emily, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

[1585] Ellison L and Munro V.E, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) New Criminal Law Review International and Interdisciplinary Journal 781, 797.

[1586] Schuller R.A and Hastings P.A, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors Decisions' (2002) 26 Psychology of Women Quarterly 252, 257.

[1587] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

observed. This potentially indicates shortcomings within existing training programmes or compliance with training. At present, training and seminars delivered to prosecution advocates, in order to become accredited RASSO panel members, addresses s.41.[1588] As advocates often prosecute and defend, many defence advocates in rape cases will receive this training and become accredited.[1589] All advocates must have the appropriate skills to undertake sexual offence cases.[1590] Though, counsel exclusively defending may not receive this training, unless they undergo training on their own accord.[1591] To overcome this aperture in training provisions, a wider accreditation system could be adopted. However, the VWTP has, in effect, produced a ticketing system for all advocates in vulnerable witness cases.[1592] This programme could be developed to address issues relating to sexual offence cases, including section 41. Meanwhile, existing training provisions should continue, and advocates' performance should continue to be monitored and observed, albeit more regularly.[1593]

The prosecution barristers in the trials sampled may also require further encouragement to exercise their responsibility to intervene and protect the complainants from irrelevant questions on their sexual history.[1594] This is because interventions were not observed when irrelevant sexual history was used or when defence barristers excessively examined relevant sexual history. As Hoyano explains, interventions may not occur where s.41 applications have been made or discussed

[1588] CPS, *Advocate Panel Scheme* 2016-2020, 4.

[1589] Ministry of Justice, *Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence* (MoJ Report, March 2014) 16.

[1590] HH Peter Rook QC, Prosecuting Sexual Offences (Justice 2019) 62 citing *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 para 226.

[1591] The Bar Council and Law Society have advised defence advocates to undertake training, Ministry of Justice, *Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence* (MoJ Report, March 2014) 16.

[1592] See Chapter Two, section 2.3.3, for a discussion.

[1593] CPS, Rape and Sexual Offences, Chapter 16: Briefing and Monitoring the Advocate <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-16-briefing-monitoring-advocate> accessed 29 July 2019; CPS, *Advocate Panel Scheme* 2016-2020.

[1594] This duty is outlined within CPS, Policy for Prosecuting Rape (CPS, September 2012) section 38.

during pre-trial hearings, or the evidence is not objectionable.[1595] However, the findings could also reflect the reluctance of some legal personnel to intervene. Where evidence is clearly objectionable, judges and barristers should actively intervene to protect complainants and defendants. This forms part of the existing professional duties of judges and prosecutors,[1596] and would also be widely encouraged under a fair treatment approach.

Both parties must communicate with each other and identify the issues in a case.[1597] As Hoyano's findings show, prosecution barristers often agree to introduce sexual history evidence through their speeches or the complainant's ABE interview, particularly when the evidence provides important background information.[1598] This is intended to limit the scope of questioning for complainants, and unnecessary distress questioning can cause.[1599] Subsequently, some complainants will not need to undergo cross-examination on this topic.[1600] Within the cases observed, the prosecution often introduced sexual history and, on occasion, the evidence was excessively repeated within the cross-examination of both parties. Barristers should continue to communicate and minimise potential distress by ensuring questions on sexual history evidence are appropriately contained.

[1595] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 31.

[1596] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2, 3.9 and 3.11; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.1; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; CPS, 'Rape and Sexual Offences – Chapter 4: Section 41 Youth Justice and Criminal Evidence Act 1999' (CPS, December 2018) para 4 <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-4-section-41-youth-justice-and-criminal-evidence> accessed: 8 September 2019.

[1597] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.3(2).

[1598] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 31.

[1599] Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018), para 104 and 124

[1600] As explained within Hoyano L, 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: Views from the Barristers' Row (Criminal Bar Association 2018) 80.

Where a complainant's sexual history is not central to the case or important background information, references to this behaviour should be removed from ABE interviews.[1601] Reflecting upon recent disclosure failings within rape cases,[1602] this suggestion may cause anxiety for defendants. However, interviews are commonly edited to reduce repetition and remove references to other inadmissible evidence, such as a defendant's bad character, which the present study also found.[1603] As ABE interviews have a dual function for aiding investigations and providing evidence,[1604] this is not surprising. The editing process usually occurs with consultation between the prosecution and defence.[1605] Where conflicts arise, this should be dealt with during pre-trial proceedings. The prosecution are currently required to make a formal application to adduce an ABE interview as evidence-in-chief, indicating the aspects not relied upon.[1606] At this pre-trial stage, the defence have the opportunity to challenge the removal of sexual history references, and make a formal s.41 application to adduce and cross-examine the evidence.

Lastly, judges should provide directions explaining how jurors should use sexual history evidence, as already outlined within the Crown Court Compendium and exemplified by T17J below.[1607] Despite the wide use of this evidence, the judges

[1601] Of the trials observed, T5 is an example of where this approach could have been adopted.

[1602] CPS, *Rape and Serious Sexual Offence Prosecution: Assessment of Disclosure of Unused Material Ahead of Trial* (CPS June 2018).

[1603] Professor David Ormerod QC and David Perry QC (eds) *Blackstone's Criminal Practice* (OUP 2018) para D14.33.

[1604] Westera N.J, Powell M.B, and Milne B, 'Lost in the Detail: Prosecutors' Perceptions of the Utility of Video Recorded Police Interviews as Rape Complainant Evidence' (2015) Australian and New Zealand Journal of Criminology 1.

[1605] Criminal Justice Joint Inspection, *Achieving Best Evidence in Child Sexual Abuse Cases: A Joint Inspection* (HMCPSI/HMIC December 2014) 40.

[1606] Criminal Procedure (Amendment) Rules 2019, Part 18: Measures to Assist A Witness or Defendant to Give Evidence, CrimPR 18.10(g).

[1607] Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 20-8.

observed seldom exercised their discretion to provide this existing direction to jurors.[1608]

> **T17J:** Ladies and gentlemen there are a couple more things to say about that. It is agreed that Ms [T17C] and the defendant had sexual intercourse previously. It is important to [record] that the mere fact Ms [T17C] had sexual intercourse with the defendant previously doesn't mean she consented to sexual intercourse with him on this occasion or that this would give him grounds to believe she consented to it. A person that freely chooses to have sexual activity in the past does not give general consent to sexual intercourse or other sexual activity on another occasion. Each occasion is specific. [It might be that] a person one time may want to have sex and another time may not want to at all and may not consent to it. You have to consider if the defendant had a reasonable belief that Ms [T17C] consented. You must not assume that because she had had sexual intercourse and sexual activity with him on a number of previous occasions that in itself is grounds for belief on this occasion.

7.3.4 Shifting the Focus From Complainants

Within the scholarly literature, cross-examination is described as placing a greater focus on the complainant than the defendant.[1609] The absence of research into the cross-examination of defendants makes this depiction somewhat speculative. The present study demonstrates that the defendants' behaviour and character were also a focus during the cross-examinations observed. In particular, two questioning strategies were observed, which placed focus on the behaviour of the defendants and reflected the 'offender-centric' approach to cross-examination. [1610] Firstly,

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[1608] Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 20-8.

[1609] Berger V, 'Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom' (1977) 77(1) Columbia Law Review 1; Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 8.

[1610] For a more detailed explanation of the offender-centric approach refer to Chapter Six, section 6.2.2. Burrowes N, *Responding to the Challenge of Rape Myths in Court* (NB Research 2013) 16; CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable*

observations found prosecutors questioning challenged stereotypes about rape and provided an alternative narrative. Their questions focused upon the tactics that the defendants allegedly adopted to commit rape, and their behaviour before and after the alleged offence. For example, defendants were examined about their alleged coercive strategies, including their control and exploitation of the complainant, and the complainant's fear of him.

Secondly, the 'offender-centric' approach was observed where prosecution barristers sought to undermine the defendant's reasonable belief in consent. This was achieved by examining the steps he took to ascertain consent.[1611] However, prosecution barristers seldom challenged this in explicit or direct terms. Some questions, as exemplified by the extract below, continued to focus on what the complainants did to communicate their lack of consent. This appears to place the onus on the complainants to prevent unwanted intercourse.[1612] To alleviate this, barristers are already encouraged, under the offender-centric approach, to enquire into what the defendant specifically did to obtain consent.[1613] Opportunities for this approach would arise where a complainant did not physically or verbally resist. Although judicial directions address this issue,[1614] the prosecutors observed could have explicitly examined defendants on how they understood the complainant's behaviour, and her silence, as affirming consent.[1615] Of course, some defendants would respond with suggestions that the complainants were enthusiastic participants. However, two defendants observed accepted there was an absence of verbal communication.

Victim<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1611] Sexual Offences Act (2003), s.1(2).

[1612] This effect was observed within: Ellison L and Munro V.E, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18(3) Social and Legal Studies 291, 296.

[1613] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1614] Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 20-9.

[1615] This would have been appropriate within five of these cases, as the defendants disputed penetration within the remaining cases.

T17PC: Did she say no stop or get off?

T17D: No.

T17PC: What did she say?

T17D: Nothing she was kissing me–

T17PC: –Nothing at all.

T18D: No.

In light of the complainant's silence in these cases, a prompt and direct challenge on the steps the defendant took to ascertain consent should have followed. This strategy would reflect the 'offender-centric' approach, as the focus shifts towards the defendant's behaviour.[1616] The CPS considers this an important strategy in proving a defendant did not have a reasonable belief in consent.[1617] Within the present study, more barristers could have followed this approach, or have done so with greater directness, when consent was disputed. Evidence shows that limited attention is given to 'reasonable belief in consent' within mock jury deliberations.[1618] Scholars are also concerned about how jurors understand and interpret this element of the offence.[1619] Therefore, explicitly cross-examining defendants on how they understood intercourse to be consensual and specifically questioning them on what they did to determine that consent was given may clarify and emphasise this issue to the jury.

As research has not previously reported on these observations, it cannot be concluded that a defendant's behaviour and credibility have become a greater focus in cross-examination than recent years. Ensuring prosecutors widely adopt these 'offender-centric' practices could alleviate concerns that a disproportionate focus is placed on

[1616] CPS, What is Consent? <https://www.cps.gov.uk/publications/equality/vaw/what_is_consent_v2.pdf>

[1617] CPS, What is Consent? <https://www.cps.gov.uk/publications/equality/vaw/what_is_consent_v2.pdf>

[1618] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within The (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 212.

[1619] Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within The (Mock) Jury Room' (2015) 35(2) Legal Studies 201, 212; Larcombe W *et al*, '"I Think it's Rape and I Think He Would be Found Not Guilty": Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) Social and Legal Studies 611.

complainants. The 'offender-centric' approach for defendants would be compatible with a fair treatment approach, as these questions allow for a full inquiry into relevant matters within the defendant's knowledge.[1620] Importantly, implementing these practices would not remove fair trial safeguards for defendants or reverse the burden of proof. Instead, it provides alternative explanations for the jury. As jurors are believed to 'schematically process' evidence, this approach may encourage them to consider a different narrative of events.[1621] However, as little is known about the attitudes of actual jurors towards defendants, the effect of this questioning strategy is unclear. Despite this, opportunities to address the steps taken to ascertain consent were missed within the trials observed. This, therefore, was an area for improvement in the cases observed.

7.3.5 The Quality of Evidence

Research indicates that targeting consistency, reliability and plausibility is a standard defence cross-examination strategy across jurisdictions with adversarial trials.[1622] The current study provides additional insight into the specific cross-examination tactics adopted to target these areas, for a small sample of complainants and defendants. Broadly, similar questioning strategies were utilised to challenge the quality of the complainants' and defendants' evidence. The findings provide evidence that these strategies were 'bread and butter' tactics within the cross-examinations studied,[1623] regardless of the party conducting the questioning. However, different implications and problems may surface for complainants and defendants. These findings, and their implications, will now be critically discussed.

[1620] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) *E. & P.* 183, 192.

[1621] Temkin J and Krahé B, *Sexual Assault and The Justice Gap: A Question of Attitude* (Hart 2008) 65-66; Ellison L and Munro V.E, 'Telling Tales: Exploring Narratives of Life and Law within The (Mock) Jury Room' (2015) 35(2) Legal Studies 201 225.

[1622] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1.

[1623] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 244.

Firstly, observations found both barristers targeted the plausibility of their accounts about events, varying in proximity, and background matters.[1624] Both parties were examined on the logistics of consensual or non-consensual sexual activity that they described, which seemed implausible or illogical to the barristers.

T11PC: How did you get your hand on top of her t-shirt?

T11D: It was a built into the t-shirt…I don't know how to explain not you…it was a t-shirt like a sports bra.

T11PC: I am just trying to picture it.

T11D: I've only ever seen two of them before.

T11PC: No not the bra, the position you were in on the bed (*slightly abrupt* tone, laughter from the jury follows).

The below extract demonstrates how the complainant was similarly questioned on the logistics of the alleged rape.

T7DC: I want to understand what you are saying, are you saying he knelt on your arms.

T7C: On my wrists…he was talking to me saying basically who are you giving sex to if your not giving sex to me…said I was just tired and wanted to go to sleep…basically hurt…I wanted him off me it was hurting he said he wasn't on my chest.

Smart reasons that the talk of body parts render complainants a sight of sexuality.[1625] Resultantly, the complainant becomes part of a 'pornographic vignette', which disqualifies her account of rape by turning it into sex.[1626] The present findings demonstrate the logistics of sexual intercourse and body parts were implicated in challenging implausibility. While significant focus remained on the complainants, the defendants' bodies were also cited. For example, this occurred when a complainant was asked to describe the defendant's penis, to challenge the plausibility of her

[1624] This occurred for thirteen complainants and fifteen defendants.

[1625] Smart C, *Feminism and The Power of The Law* (Routledge 1989) 39.

[1626] Smart C, *Feminism and The Power of The Law* (Routledge 1989) 39; Edwards S.S.M, *Sex and Gender in the Legal Process* (Blackstone 1996) 334.

allegations. Both their bodies also became visualised when barristers advanced their version of events to 'put their case'. However, as the complainants are recalling the logistics of alleged sexual violence in detail, there is potential for distress and re-traumatisation. Smart explains this may trigger a 'second violation', since the alleged rape is visualised and re-enacted.[1627] While this is something that defendants will not experience, there is potential for defendants to feel embarrassed or humiliated when questions implicate their own bodies. Distress from complainants, in response to this questioning strategy, was observed within the present study. Positive responses to this distress were also observed. For example, judges instructed that these questions were to be restricted. Judges and defence counsel also provided reassurances. As previously discussed, providing reassurances, checking welfare and confining questions that cause distress are not explicitly encouraged for 'robust' complainants under the best evidence model.[1628] Accordingly, the FTM would encourage these practices and the sensitivity displayed, particularly when difficult and potentially distressing topics are examined.

Secondly, the consistency and reliability of the complainants' and defendants' recall and accounts were examined. Thirteen defendants and twelve complainants were examined on some form of inconsistency. Thus, both parties were expected to 'stick to' their initial accounts entirely, even for non-central matters. Equally, they were both expected to explain their version of events fully at the first opportunity, as questions explored matters that were missing from their initial accounts but featured within their later accounts. The 'omissions' within the defendants' police statements or interviews were treated as indicators of untruthfulness, where they have developed a fabricated story. Research suggests that omissions and inconsistencies are typically portrayed as advantageous to defence barristers, and are commonly exploited to create

[1627] Smart C, *Feminism and The Power of The Law* (Routledge 1989) 39.

[1628] See Chapter Two, section 2.3, for a discussion. The court in *R v SG* went so far as suggesting breaks would usually enable distressed witnesses 'to return to court refreshed and better able to give evidence'. A witness's distress was not considered sufficient ground for requiring advocates to prepare their questioning in writing, for the trial judges approval, and confining cross-examination to this extent. *R v SG* [2017] EWCA Crim 617 para 56; *R v Stephen Pipe* [2014] EWCA Crim 2570.

doubt in her evidence.[1629] Yet, the present study further supports Brereton's findings that these strategies are not exclusive to rape complainants.[1630]

The complainants often provided more accounts of events than the defendants. With the exception of T6C, they also provided evidence-in-chief a significant time before cross-examinations. These factors together are a perceived disadvantage for complainants, as greater scope for inconsistencies and incompleteness is created for the defence to exploit.[1631] Despite these expressed concerns, the present study demonstrates defendants are equivalently scrutinised on their inconsistencies and incompleteness, having provided fewer accounts of events.[1632] Thus, a correlation between the number of accounts provided and scrutiny in cross-examination is not necessarily inevitable. Notwithstanding these findings, efforts should still be made to ensure the quality of a complainant and defendant's evidence is not unfairly undermined.

As previously suggested, providing a written statement and live evidence-in-chief could reduce this difficulty and ensure familiarity with their account. However, the benefits of pre-recording evidence-in-chief, including the reduction of stress and ability to capture a fresh account, cannot be overlooked.[1633] Thus, the statement-taking process may not be suitable or desirable for all complainants. To uphold fair treatment, complainants must give their best evidence without feeling intimidated or

[1629] This has been found within empirical research conducted across jurisdictions since the 1980s, including: Adler Z, *Rape on Trial* (Routledge 1987) 44; Taslitz A.E, *Rape and The Culture of The Courtroom*, (New York University Press 1999) 24; Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1.

[1630] Brereton D, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37(2) The Brit. J. Criminol 242, 244 and 255.

[1631] Burton M, Evans R and Sanders A, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies* (Home Office 2006) 54.

[1632] Twelve complainants and fourteen defendants were cross-examined on their inconsistencies. Eight complainants and seven defendants were cross-examined on omissions within their accounts.

[1633] Burton M, Evans R and Sanders A, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence From The Criminal Justice Agencies* (Home Office 2006) 53.

unduly stressed. This principle must extend to evidence-in-chief, and ensuring complainants are comfortable must be the priority.

Inconsistencies and incompleteness can be attributable to trauma, which complainants may experience from the alleged rape. Adopting a 'trauma-informed lens', as advocated by Ellison and Munro, would better safeguard the quality of their evidence and accord with a fair treatment approach.[1634] This entails understanding the prevalence of trauma among complainants and providing them with appropriate support throughout the criminal justice process to overcome the negative effects of trauma.[1635] This would include support before producing an ABE interview or statement. Such safeguarding must also be afforded to defendants, who experience stress and potential trauma from the criminal justice process and giving evidence. As Ellison and Munro suggest, a defendant's trauma or vulnerability may give rise to inconsistencies and incompleteness.[1636] The extent to which complainants and defendants were inconsistent and incomplete, and subsequently undermined on this, may provide some indication of the difficulty involved in giving evidential accounts. Thus, these findings help endorse Ellison and Munro's proposals for equivalent 'trauma-informed' support.[1637]

Lastly, despite observing declarations that cross-examination is not a memory test, the fallibility of the complainants' and defendants' memories were examined. Gaps in both their recollections of what happened, including relatively minor occurrences, were questioned. However, twice as many complainants faced these questions than defendants.[1638] Within these occurrences, only complainants underwent direct

[1634] Ellison L and Munro V.E, Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process (2016) E. & P. 1, 26.

[1635] Ellison L and Munro V.E, Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process (2016) E. & P. 1.

[1636] Ellison L and Munro V.E, Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process (2016) E. & P. 1, 54.

[1637] Ellison L and Munro V.E, Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process (2016) E. & P. 1.

[1638] This occurred for ten complainants (T3C, T5C, T8C, T11C, T12/13C(1), T12/13C(2), T14C, T16C, and T17C) and five defendants (T3C, T7C, T8C, T12/13C and T14C). In addition, T6C was examined on her perfect recall, as discussed within Chapter Five section 5.4.2.

challenges about the effect alcohol and drugs had on their memories of the alleged rape, as illustrated below.[1639] Where a complainant is alleging rape, their memory of these events become central. Therefore, such tactics are perhaps unsurprising.

T13DC: Does drinking bottle of wine on top of anti-depressants have any affect on your memory?

T13C2: No.

Complainants and defendants, who had consumed some level of alcohol or drugs at the time, were examined on fallibilities in their memories of events relating to the alleged rape, but without this direct association with intoxication.[1640]

T3PC: You like to think you haven't done it (*quick accusing tone*).

T3D: I know within myself I haven't done it (*immediate response, slow speech*).

T3PC: You've recovered your memory now have you?

Other complainants and defendants had consumed alcohol and drugs but were not examined on their memory.[1641] For these complainants, this may be an unconvincing line of questioning, since they consumed a minimal level of alcohol or cannabis at the time. Some of these defendants were described as, or accused of being, 'drunk'. These findings provide evidence that the barristers observed did not attempt to undermine the parties' reliability by any means possible, which would otherwise reflect the traditional approach.[1642] Thus, the present study negates suggestions that all defence barristers create doubt within a complainant's evidence by any means necessary, and any strategies available to them.[1643] Furthermore, the diverging ways barristers cited

[1639] These complainants were T3C, T5C, T12/13C(1) and T12/13C(2).

[1640] This related to four complainants (T3C, T5C, T8C, T12/13C1 and T15C) and three defendants (T3D, T8D and T12/13D).

[1641] This related to two complainants (T7C and T16C) and five defendants (T4D, T6D, T7D, T16D and T18D).

[1642] See Chapter Two, section 2.3.1 to 2.3.2, for a discussion.

[1643] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1, 16.

alcohol and drugs demonstrates the importance of contextual nuances within cross-examination practices.[1644]

During cross-examination, defence barristers ensured complainants did not guess answers, particularly when putting their case, as demonstrated below. Although this may emphasise uncertainty in the evidence provided, this approach discourages complainants from guessing, which may safeguard truthful and reliable evidence. This good practice could have been more widely implemented for complainants and defendants in the trials observed, which would have adhered with a fair treatment approach.

> **T13DC:** This night, tell me if you agree with me, disagree with me, or can't remember, I suggest you took each other's clothes off.
> **T13C1:** No.

Overall, both barristers appeared to utilise the dichotomy that inconsistencies, incompleteness, and incoherence demonstrates weakness in evidence, and consistent, complete, and coherent accounts are viewed as credible and truthful. Despite the broad similarities observed, the practices may have different implications for the parties. Defendants and complainants in the same trial may both provide inconsistent or incomplete accounts of events, yet this could be more detrimental to the prosecution since they carry the burden of proof. Highlighting these weaknesses may show the defendant is incapable of belief, however this must accompany other efforts to demonstrate the defendant committed rape. In contrast, the defence do not need to convince the jury of their case. Simply highlighting doubts in the prosecution's case, by examining these 'weaknesses' in a complainant's account, may prevent the burden of proof from being discharged. Kennedy suggests inconsistencies may cause jurors to worry about whether they can believe a complainant but recognises 'the quality of detail and sheer conviction within which the witness testifies on the crucial aspects of a case leaves them in no doubt as to where the truth lies'.[1645] Thus, Kennedy

[1644] As demonstrated within Chapters Five and Six, alcohol and drugs were cited elsewhere, in ways that did not undermine the reliability of the complainants and defendants recall.

[1645] Kennedy H, *Eve was Framed: Women and British Justice* (Chatto and Windus 1992) 119.

persuasively acknowledges these 'weaknesses' are not inevitably damaging to the prosecution. As the complainants and defendants observed were the only direct witnesses to the alleged offences, the quality of their evidence and recall may have heightened significance.

Evidence suggests consistency is frequently used as an indicator of truthfulness.[1646] Mock jurors view eyewitnesses to be less effective when they provide inconsistent and incomplete accounts, and are less likely to convict in these circumstances.[1647] Scholars commonly discuss these findings, with concern for complainants in rape trials.[1648] Feminist literature explains that rape complainants are expected to recall the alleged rape in detail without inconsistency.[1649] Much earlier, Lees argued that the defendants in her sample of trials were immune from some cross-examination tactics, including the interrogation of inconsistencies and challenges to their credibility, which the complainants endured. [1650] However, scholars have not robustly examined the tactics defendants face, particularly in modern rape trials. Neither have they considered whether a defendant's inconsistency and incompleteness impacts assessments of his credibility. The use, and potential influence, of this dichotomy seems to endure, despite evidence showing that inconsistent, incomplete and incoherent evidence is not always an indicator of untruthfulness and inaccuracy.

[1646] Granhag P.A and Stromwall L.A, 'Effects of Preconceptions on Deception Detection and New Answers to why Lie- Catchers Often Fail' (2000) 6 Psychology, Crime, and Law 1978; Zajac R and Cannan P, 'Cross-Examination of Sexual Assault Complainants: A Developmental Comparison' (2009) 16(1) Psychiatry, Psychology and Law' 36, 50.

[1647] Berman G.L and Cutler B.L, 'Effects of Inconsistencies in Eyewitness Testimony on Mock-juror Decision-making' (1996) 81(2) *Journal of Applied Psychology* 170.

[1648] Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 245-246; Wheatcroft J.M and Woods S, 'Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence' (2010) 14(3) E. & P. 187, 205; Zajac R and Cannan P, 'Cross-Examination of Sexual Assault Complainants: A Developmental Comparison' (2009) 16(1) Psychiatry, Psychology and Law' 36, 50.

[1649] Temkin J, '"And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Law Review 710, 715 and 717; Ellison L, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 E. & P. 239, 241.

[1650] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 108 and 155-17.

These features can be normal aspects of recall, or alternatively attributable to confusion, anxiety, genuine poor memory or stress experienced by complainants.[1651] This must equally apply to defendants. However, complainants may have experienced trauma from the alleged rape, which can further impair memory and ability to provide a coherent and consistent account.[1652] Despite this, these features could also result from truthfulness of complainants or defendants. Therefore, it is not surprising that the complainants and defendants were examined on these issues to undermine their credibility. Judicial directions addressing inconsistencies were observed, including the extract below, which could help redress the prejudicial influence this dichotomy may have.[1653] The model judicial direction on inconsistent accounts should be developed to address the issue of inconsistency and incoherence for both complainants and defendants.[1654]

> **T10J:** The defence point out inconsistences of complainant's account, they are not necessarily an indicator if a person is telling the truth. Extreme stress can make it difficult for the brain to cope with trauma and not remember in a chronological order. Very few people have the gift of perfect chronological recall. The inconsistencies in her account the prosecution say are nothing other than person giving a truthful account. The same can be

[1651] Wheatcroft J.M and Walklate S, 'Thinking Differently about 'False Allegations' in Cases of Rape: The Search for Truth' (2014) 3 International Journal of Criminology and Sociology 239, 245-246; Burton M, Evans R and Sanders A, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) E. & P. 1, 16 citing J. McEwan, 'Adversarial and Inquisitorial Proceedings' in R. Bull and D. Carson (Eds), *Handbook of Psychology in Legal Contexts* (John Wiley 1995) 495.

[1652] Hohl K and Stanko E.A, 'Complaints of Rape and The Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales' (2015) 12(3) European Journal of Criminology 324, 328 citing Tromp S, Koss M, Figueredo A and Tharan M 'Are Rape Memories Different? A Comparison of Rape, Other Unpleasant and Pleasant Memories Among Employed Women (1995) 8(4) Journal of Traumatic Stress 607.

[1653] In accordance with: Judicial College, *The Crown Court Compendium, Part 1: Jury and Trial Management and Summing Up* (December 2018) 20-6.

[1654] The current model direction for inconsistent accounts does include reference to a witness's ability to recall events and how their memory may be affected in different ways. This direction could be furthered to include defendants, and reference to how incoherence in accounts may also develop.

said for someone wrongly accused, human response and recall may vary widely.

Overall, questioning that places unrealistic demands on complainants and defendants to give entirely complete, coherent, and consistent evidence, particularly on very peripheral details, would be problematic. Training, including the VWTP and its 'twenty principles of questioning', could be developed to discourage barristers from wasting time examining 'imperfections' pertaining to very minor details. These details do not provide a useful indicator of the complainant or defendant's credibility, or relate to the core issues, such as consent. This should ensure that poor practices are recognised and prevented through intervention.

7.4 Conclusion

The treatment of rape complainants during cross-examination has undergone recurrent scrutiny.[1655] Scholars argue that the needs of complainants and their expectations for considerate treatment at trial are not met; this has been attributable to poor attitudes of barristers.[1656] It has been claimed that poor attitudes of legal personal and inconsistent implementation of policy have purportedly led to a 'best practice plateau' across numerous jurisdictions, including England and Wales, whereby the conduct of rape trials and treatment of rape complainants remain unchanged.[1657] However, the present study provides clear examples of barristers and judges approaching cross-examination with sensitivity. The cross-examinations observed were largely removed from the traditional cross-examination approaches frequently criticised, which literature must not overlook. Best evidence considerations were implemented for complainants, in addition to other positive practices that are not clearly endorsed by this approach. This

[1655] Ellison L, 'Witness Preparation and the Prosecution of Rape' (2007) 27 Legal Studies 171; Jordan J, 'Here We Go Round The Review-Go-Round: Rape Investigation and Prosecution: Are Things Getting Worse Not Better?' (2011) 17(3) Journal of Sexual Aggression 234, 238-24; Stuart D, 'No Real Harm Done: Sexual Assault and The Criminal Justice System' (Paper presented at the Without Consent: Confronting Adult Sexual Violence Conference. Canberra: Australian Institute of Criminology, October 1992)

[1656] Temkin J, *Rape and The Legal Process* (2nd Edn, Oxford University Press 2002) 271-272.

[1657] As discussed within: Russell Y, 'Woman's Voice/Law's Logos: The Rape Trial and the Limits of Liberal Reform' (2016) 42(2) Australian Feminist Law Journal 273, 278.

goes some way to challenge claims that little has changed in how the CJS is responding to rape. Together, the expansive use of Special Measures, introductions, welfare checks, interventions, welfare breaks, and modifications observed, exemplifies adherence to the best evidence approach and beyond. These practices set a courteous tone for cross-examination, provide support to complainants, and assist in reducing their stress. Together, they afford complainants with fair treatment, while improving the prospect of their best evidence. Such positive practices should continue under a FTM of cross-examination, and with consistency for all complainants.

However, these fair treatment practices were not implemented for the defendants observed. Instead, defendants appeared to experience a more hostile cross-examination environment, reflecting a traditional approach. It appeared that emphasis was not placed on the wellbeing of the individual defendants observed.[1658] The model must extend to defendants, as they should equally be able to give their best evidence without feeling intimidated, confused, or unduly stressed. The courtroom environment must promote respect, 'calmness and care', and dignified treatment.[1659] To be successful, barristers and judges must acknowledge the difficulties 'vulnerable' and 'robust' defendants experience during cross-examination and the trial, which may be concealed or manifest in different ways. Reforms were suggested to help achieve this and encourage the fair treatment of defendants. These reforms ranged from mandatory implementation of introductory remarks and other welfare considerations,[1660] improved infrastructure for identifying defendants' needs, and statutory reform to provide Special Measures to vulnerable defendants.

[1658] Similarly, Fairclough suggests that 'greater emphasis seems to be placed on tactical advantage than on the well-being vulnerable defendants'. Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 225.

[1659] The notion of 'calmness and care' within adversarial trials is discussed within: Elias S, *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, 2018) 158.

[1660] While acknowledging the courts are under resource constraints, it has been recently suggested that judges and advocates should consider whether GRHs are required in sexual offence cases, HH Peter Rook QC, *Prosecuting Sexual Offences* (Justice 2019) 48.

Questioning strategies utilised by defence barristers in cross-examining complainants also receive recurrent scrutiny within scholarly literature.[1661] Defence barristers have been criticised for focusing upon the complainant's behaviour and credibility, to effectively put them on trial.[1662] Yet, the present study found that prosecution barristers utilised broadly similar questioning strategies when cross-examining defendants, particularly when challenging their credibility and quality of their evidence. Despite these broad similarities, some poor questioning was observed for complainants and defendants. This included questions that clearly utilised rape myths and stereotypes; cited irrelevant evidence, including sexual history; covered relevant matters to unnecessary length; and focused on peripheral details, which would not have assisted in resolving the core issues in dispute. Some of these practices reflected a traditional approach.

Across jurisdictions, scholars have questioned whether, at present, more could be done to address problematic questioning for complainants, particularly those strategies that cite rape myths and utilise sexual history.[1663] The current research findings go some way towards challenging the pessimism that best practice has 'plateaued'.[1664] While generalisations cannot be made to all trials, the study has shown that the complainants and defendants observed were robustly and properly examined on central and relevant matters. Moreover, the complainants did not encounter some of the humiliating lines of questioning identified in earlier research;

[1661] Such criticisms have been raised throughout literature, since the 1980s and across jurisdictions where adversarial trials and cross-examination are employed. Examples include: Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1; Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996); Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219.

[1662] See: Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 8.

[1663] Zydervelt S, Zajac R, Kaladelfos, A and Westera N, 'Lawyers Strategies For Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?' (2016) 56(3) Brit. J. Criminol 1.

[1664] Russell's theoretical paper critically examines existing scholarship on rape which asserts that the law, in England and Wales, has reached a best practice plateau; Russell Y, 'Woman's Voice/Law's Logos: The Rape Trial and the Limits of Liberal Reform' (2016) 42(2) Australian Feminist Law Journal 273, 278.

this includes questions about their revealing clothing and their martial status.[1665] This provides some indication that questioning strategies may have changed.

The research findings informed the development of a fair treatment model of cross-examination. Reforms were advanced, which, if implemented, promote the holistic notion of fair treatment for complainants and defendants. These reforms included strengthening the vulnerable witness accreditation programme, wide implementation of welfare considerations, and encouraging further intervention by judges and barristers, for example. While some of these suggested changes have been considered within existing literature,[1666] the reforms proposed within this chapter collectively seek to enable complainants and defendants to provide their best evidence, under conditions that promote equal and dignified treatment. Moreover, where best evidence is provided, it is not unfairly undermined or obscured with refutable stereotypes, irrelevant evidence, and unfair attacks on credibility. The following, and final, chapter will summarise the proposed reforms advanced within this thesis, before drawing final conclusions.

[1665] Lees S, *Carnal Knowledge: Rape on Trial* (Women's Press 1996) 134-148 and Adler Z, *Rape on Trial* (Routledge 1987) 102-112.

[1666] See Chapter Three, section 3.5.4.1, for a discussion of central reforms suggested within the literature. Also see: Hoyano L, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' (2015) Criminal Law Review 107.

Chapter Eight: Conclusion

8.0 Introduction

Cross-examination is a significant part of the evidence giving process for complainants and defendants. The role and conduct of cross-examination receives continual scrutiny, particularly how defence barristers question and treat rape complainants. Yet, few academics have conducted empirical research into how it operates in practice. Far less attention has been paid to how defendants are cross-examined, and their subsequent treatment, within scholarly debate or public discourse. This thesis provides a contribution towards addressing these significant apertures in knowledge. The overarching aim of this study was to critically examine how cross-examination is currently conducted in practice, for complainants and defendants within rape trials. Three research objectives guided this central research aim:

(1) Investigate how cross-examination operates in practice, including the questioning strategies adopted by counsel.

(2) Examine how cross-examination practices impact the interests of complainants and defendants.

(3) Consider whether any modifications are required to improve the conduct of cross-examination for complainants and defendants.

By considering the data derived within this study and analysing the research findings in light of these questions, it is argued that the complainants and defendants observed were robustly and fairly examined on their evidence. Though, areas of improvement were identified, which if addressed, would have provided the complainants and defendants with a greater opportunity to give their best evidence. A small number of complainants and defendants faced lines of questioning that appeared to be irrelevant, and, on occasion, inadmissible. The cross-examinations also featured traditional advocacy techniques, including repetitive and lengthy questioning, which did not

promote a 'reliability focused best evidence approach'.[1667] However, many practices were observed, which appeared to safeguard the welfare of complainants, and some defendants, and promote their best evidence. In particular, great sensitivity was displayed towards the majority of the eighteen complainants. Barristers and judges demonstrated flexibility and willingness towards adapting the cross-examination process for the complainants, in a variety of ways. There was some scope for the best evidence features and other positive practices observed to have been adopted more consistently and widely, particularly for the defendants. The best evidence model, while useful, does not ameliorate the examples of poor practice observed within this study. Neither does the best evidence model emphatically embrace all of the positive practices identified. It is argued that a holistic fair treatment model of cross-examination is required to address this gap.

8.1 The Research Findings and Recommendations

The central research findings were embodied within the themes of 'welfare considerations', 'expected behaviour', 'sexual history' and 'impugning credibility', and were critically discussed across the previous three chapters. This chapter will demonstrate how the findings, namely the practices identified across these themes, support a FTM of cross-examination. Herewith, the principles and characteristics of the model will be cemented.

8.1.1 Welfare Safeguards

This study's investigation into current cross-examination practices included, but was not limited to, the questioning strategies of barristers. The trial observations also identified other important practices contributing to the overall conduct and tone of cross-examination, which were embodied within the theme of 'welfare considerations'. The central findings from the observations are summarised below.

(a) Special Measures, including ABE interviews, screens, and live links, were extensively used for the complainants. There was some evidence that the measures utilised were influenced by the complainants' choice.

[1667] Henderson E, 'Best Evidence or Best Interests? What Does The Case Law Say About The Function of Criminal Cross-Examination?' (2016) 20(3) E. & P. 183, 183 and 185.

(b) The availability of Special Measures in all courtrooms was inconsistent, and some inadequacies in their quality were observed.

(c) Across the small sample of trials, acquittals resulted where the complainants used the live link for cross-examination. However, a causal link between acquittals and use of the live link are not established.

(d) There was some evidence indicating that the needs of the complainants and defendants, whether medical or intellectual, were not always identified in advance of them giving live evidence.

(e) Support for the complainants, from ISVAs and the Witness Service, was available and provided within the courtroom. No such support was in place for the defendants in court.

(f) The complainants were provided introductory remarks before cross-examination began, by defence counsel and judges. This was not observed immediately before the defendants' cross-examinations.

(g) The judges and defence barristers were willing to adapt cross-examination when the complainants experienced difficulties and became distressed. These adaptations included curtailing questions and taking breaks.

(h) Breaks during cross-examination were offered to the complainants and were frequently taken. This seldom occurred for the defendants.

(i) Argumentative resistance by the defendants, towards cross-examination questioning, was met with more hostility from counsel, compared to complainants.

The best evidence model of cross-examination is particularly empathetic to the difficulties that traditional cross-examination techniques can cause for vulnerable witnesses and defendants.[1668] While vulnerable witnesses and defendants are primarily discussed as the primary beneficiaries of best evidence provisions,[1669] it is equally recognised that many other people may require assistance.[1670] Traditional

[1668] See Chapter Two, section 2.3 and 2.3.3.

[1669] Also argued within: Gillespie C, 'The Best Interests of the Accused and the Adversarial System' in Cooper P and Hunting L (Eds), *Addressing Vulnerability in Justice Systems* (The Advocates Gateway, Wildy, Simmonds and Hill 2016) 108-109.

[1670] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2.

advocacy can be intimidating and highly formalised, which can result in acquiescence, misunderstanding and distress.[1671] This may inhibit the giving of accurate, complete, and coherent evidence. Therefore, a best evidence approach requires cross-examiners to adapt to the needs of those witnesses and defendants.[1672] The Court of Appeal, in endorsing this approach, has encouraged practical steps to be taken from simplifying questions to active judicial intervention.[1673] Alongside this, the Advocates Gateway toolkits are central in providing guidance on how to implement a best evidence approach.[1674]

Many of the research findings summarised above, pertaining to the complainants, closely align to established best evidence features. Special Measures were extensively adopted, alongside the curtailing of distressing and complex questioning, and frequent welfare breaks. Other cross-examination practices were also identified that have not been clearly embraced within the existing model, including welfare checks, reassurances, and introductory remarks.[1675] Notably, barristers and judges were responsive to complainants, and displayed sensitivity and concern towards them and their welfare. This was achieved through reassurances, welfare checks, introductory remarks, prioritising the complainant's choice of Special Measures, and adapting the courtroom set up. The majority of the cross-examinations observed were conducted with politeness, and were far removed from the aggressive tones of traditional advocacy. Together, these are significant adaptations from traditional cross-examinations. These observations provide evidence of the best evidence approach operating in practice, and going further. The positive practices observed established a courteous tone for cross-examination, and demonstrate sensitivity to the emotional

[1671] *R v Barker* [2010] EWCA Crim 4; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064; Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[1672] Criminal Practice Directions Amendment No.6 [2018] EWCA Crim 516, CPD 3D.2; *R v Cokesix Lubemba and JP* [2014] EWCA Crim 2064, para 45*; R v Barker* [2010] EWCA Crim 4*; R v Cox* [2012] EWCA Crim 549.

[1673] See Chapter Two, section 2.4.

[1674] Advocate's Gateway Toolkits <http://www.theadvocatesgateway.org/toolkits> accessed: 23 July 2018

[1675] See Chapter Five, section 5.3.1.

difficulties of complainants. Many complainants value dignified treatment,[1676] which the practices described above, appear predisposed to meeting. In addition to enhancing their best evidence, these practices safeguarded the fair treatment of the complainants.

The extensive use of Special Measures for complainants appears to be very positive, as existing studies have shown that complainants value these measures, for reducing feelings of intimidation and stress, and enabling them to give evidence.[1677] This should continue, with a sustained focus on the complainant's choice, as observed. To improve efficiency and decrease the potentially unsettling delays and courtroom moves, all Special Measures should have been available in every courtroom within the Crown Court observed. This research observed problems with the screens, in their tired appearance, which could be considered as cosmetic. However, improvements should be made to professionalise their appearance, to ensure complainants feel they are being taken seriously. When screens were used, all judges properly ensured the defendants waited outside the courtroom, in a private corridor to the dock. This practice should have been furthered, by clearing the public gallery.[1678] This additionally allows complainants to enter and exit without sight of the defendant's supporters, which could be intimidating.[1679] It is essential that Special Measures are

[1676] Payne S, *Rape: The Victim Experience Review* (Home Office 2009) 13.

[1677] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 78; Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS, April 2012); Kebbell M.R, O'Kelly C.M.E, and Gilchrist E.L, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 Psychiatry Psychology and Law 111, 118.

[1678] The Gillen Report has recommended restricting public access to the courtroom for the whole duration of rape trials, with the exception of permitting access to the press and close family members of the complainant and defendant. Sir John Gillen, 'The Gillen Report: Preliminary Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland - Executive Summary and Key Recommendations' (Gillen Review 2018) <https://gillenreview.org/sites/gillenreview/files/media-files/Gillen%20Report%20-%20Executive%20Summary.pdf> accessed: 30th November 2018

[1679] Hamlyn B, Phelps A, Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004) 21-22; Smith O, 'The

regularly audited and tested in court before proceedings, with technology being updated and snags to screens being repaired. For instance, the barristers observed often stated they had tested ABE interviews on their own laptops, yet the audio quality deteriorated when played in the courtroom.

Cross-examination can be a difficult experience for complainants, which was apparent from the observable distress, upset and frustration of fifteen complainants. From the outset, the widespread provision of opening remarks for complainants was positive, in establishing politeness, providing helpful information to complainants, and allowing them to 'warm up' before questioning. This practice should continue under a fair treatment approach, with all defence barristers beginning cross-examination in this manner. Checking their welfare and providing reassurance, alongside the willingness of judges to provide welfare breaks, intervene, and modify questioning when complainants encounter difficulties should also continue, and would be embraced within a fair treatment approach. These practices afford complainants with polite and dignified treatment, creating a less intimidating environment, which in turn should help to safeguard their best evidence.

However, these positive practices and the best evidence features were not commonly implemented for the defendants, which was concerning. Defendants were most often protected from compound questions, prolix language, through active judicial intervention. However, there was a general absence of visible support, introductory remarks, Special Measures, welfare checks, and welfare breaks for defendants within the sample of trials observed. Only one defendant observed was considered 'vulnerable' and received Special Measures and modified questioning. This defendant, along with one other, received welfare breaks. Affording complainants with these practices does not, in itself, create an imbalance because the defence have no interest in complainants giving unreliable evidence, being treated poorly or feeling distressed and intimidated.[1680] However, this must also apply to the prosecution.

Practicalities of English and Welsh Rape Trials: Observations and Avenues for Improvement' (2017) Criminology and Criminal Justice 1, 4.

[1680] As explained within: Ashworth A and Redmayne M, *The Criminal Process* (4th Edn, OUP 2010) 44.

There can be no logical reason against affording defendants with welfare safeguards, to ensure they are treated fairly and supported, so their best evidence can be provided.

It must continue to be acknowledged that all defendants may experience difficulties within cross-examination,[1681] which may be concealed or manifest as frustration rather than distress. The absence of these welfare considerations for defendants would not necessarily violate their fair trial. However, certain practices must be implemented to establish fair treatment. A fair treatment approach would require all judges to address defendants before they give evidence, to provide explanations and instructions, and establish that they may have breaks or sit down. These remarks, from a judge, may reinforce to the jury that defendants should not be disadvantaged, simply by virtue of being a defendant. This should be promoted as best practice within the Judicial College's SSOS, and included within the CrimPD, to ensure compliance.

Where defendants experience difficulties, this must be responded to with welfare checks, reassurances, and welfare breaks, under a fair treatment approach. This is regardless of whether these difficulties can be 'tactically beneficial' to the defence.[1682] For this to be successfully implemented, legal personnel must appreciate the different ways that difficulties manifest for 'robust' and 'vulnerable' defendants. The timely identification of a defendant's needs is an established case management requirement.[1683] At present, toolkits are available to assist advocates in fulfilling this duty.[1684] However, improved support for defence solicitors and counsel, and an infrastructure for identifying a defendant's individual difficulties should be

[1681] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[1682] Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209, 222-223.

[1683] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.2(2)(b); Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-9.

[1684] The Advocates Gateway, Identifying Vulnerability in Witnesses and Parties and Making Adjustments: Toolkit 10 (March 2017)

considered. However, it is recognised that the CJS is presently under immense strain to conduct trials efficiently with limited resources available. Therefore, such changes may take time to come into fruition.[1685] Meanwhile, the VWTP could provide additional guidance on how to effectively identify a defendant's vulnerabilities and needs. Affording defendants with statutory Special Measures, using the same eligibility criteria as vulnerable witnesses under s.16 YJCEA 1999, would be another positive step towards improving their best evidence. Together, these reforms seek to improve the allocation of appropriate support to vulnerable and robust defendants, where required. The eighteen trial observations highlight some potential issues with the adequacies of identifying defendant's intellectual difficulties and the use of non-registered defence intermediaries.[1686] Whist these findings are limited, they appeal to existing literature, which highlights the inadequacies of the support provisions afforded to defendants and their implementation.[1687]

A fair treatment model of cross-examination should be enacted for complainants and defendants. In accordance with the Equal Treatment Bench Book, fair treatment

[1685] Since 2010, spending by HM Courts and Tribunal Service has fallen significantly, yet the complexity of cases is purportedly increasing. The Institute for Government, Criminal Courts (2018) <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2018/criminal-courts> accessed: 17 August 2019.

[1686] As discussed within: Cooper P and Mattison M, 'Intermediaries, Vulnerable People and The Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) E. & P. 351, 364; Talbot J, *Fair Access to Justice? Support For Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust 2012); Cooper P and Wurtzel D, 'A Day Late and A Dollar Short: In Search of An Intermediary Scheme for Vulnerable Defendants in England and Wales' (2013) Criminal Law Review 4; Henderson E, '"A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales' (2015) E. & P. 154.

[1687] Cooper P and Wurtzel D, 'A Day Late and A Dollar Short: In Search of An Intermediary Scheme for Vulnerable Defendants in England and Wales' (2013) Criminal Law Review 4; Hoyano L and Rafferty A, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' (2017) Criminal Law Review 93; Cooper P and Mattison M, 'Intermediaries, Vulnerable People and The Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) E. & P. 351; Fairclough S, '"It Doesn't Happen...And I've Never Thought It Was Necessary For It To Happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 2(3) E. & P. 209.

means treating complainants and defendants equally.[1688] As explained previously, equality does not mean complainants and defendants will always receive the same treatment.[1689] Though, similarly situated complainants and defendants should receive comparable treatment.[1690] Their interests must also be balanced where tensions arise.[1691] For instance, each party must be able to rigorously test the evidence of the complainant and defendant, while safeguarding their welfare and best evidence. Cross-examination should enable the giving of best evidence,[1692] under conditions that promote dignified treatment and respect for their individual experiences and needs. This requires a calm courtroom environment that is not intimidating and unduly stressful.[1693] In addition, efforts must be made to reduce the risk of confusion, acquiescence, and distress. It is recognised all complainants and defendants may have needs and require assistance.[1694] Barristers and judges must take account of their background, and the general anxiety and trauma they may experience.[1695] Some steps have been advocated to alleviate these difficulties, including the provision of information and advice, avoiding legal jargon and inappropriate remarks.[1696] Beyond this, there is limited discussion and guidance on the steps that can be taken to safeguard the best evidence of robust complainants and defendants. The present study has identified additional cross-examination practices that would ensure the fair treatment of vulnerable and 'robust' complainants and defendants. The fair treatment

[1688] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[1689] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[1690] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[1691] As established within: *Doorson v Netherlands* (1996) 22 EHRR 330, para 70. The Criminal Procedure Rules also state that to fulfill the overriding objective to deal with cases justly, the interests of witnesses, victims and jurors must be respected. Criminal Procedure (Amendment) Rules 2019, Part 1: The Overriding Objective, CrimPR 1.1(2)(b), (2)(d).

[1692] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[1693] The notion of 'fairness' and 'calmness and care' within adversarial trials is discussed within: Elias S, *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, 2018) 158.

[1694] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3D.2; Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.9(3)(a) and (b).

[1695] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4.

[1696] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5.

model, therefore, embraces the principles of the best evidence model, and goes further by incorporating the other positive practices observed.

8.1.2 Questioning Strategies

Investigating the questioning strategies adopted by prosecution and defence barristers in cross-examination was an important focus of this study. The findings contributing to this objective were represented within the themes of 'expectations of behaviour', 'sexual history' and 'impugning credibility'. The central findings, from the observations, are summarised below.

(a) The defence barristers frequently examined the complainants' behaviour before, during, and after the alleged rape. Most often, questions cited delays in reporting, physical resistance, and verbal resistance. Their behaviours typically had a factual basis within the trials. Questions allowed the defence to advance their case, and did not necessarily encourage rape myths. Though, some questions appeared to create standards of expected behaviour, by clearly relying upon refutable rape myths.

(b) The prosecution barristers frequently examined the defendants' behaviour before, during, and after the alleged rape. This included examining their physical size and strength, sexual attraction towards the complainant, and reactions to the allegations. Where prosecution barristers examined the defendants' alleged coercive strategies and opportunistic tendencies, this advanced alternative narratives that appeared to challenge rape myths. This reflected an 'offender-centric' approach to cross-examination. Questions also appeared to create standards of expected behaviour, including stereotypes of how the 'ideal offender' would appear and behave. However, as these behaviours mostly had a factual basis within the prosecutions' case, these questions did not necessarily encourage refutable rape myths.

(c) Many prosecution barristers missed opportunities to adopt the 'offender-centric' approach to challenge defendants, in direct terms, on how they ascertained consent.

(d) The sexual history of the complainants and defendants featured within many of the cross-examinations observed. For the vast majority of complainants, this evidence was legally admissible. Third party sexual history was rarely utilised. Though, occasionally prosecution and defence barristers cited irrelevant sexual history of the complainants and defendants.

(e) Both prosecution and defence barristers advanced a dichotomy where inconsistencies, incompleteness, implausibilities are indicators of untruthfulness. Barristers also challenged the credibility of the complainants and defendants by targeting aspects of their character. Evidential rules to adduce this material were respected. These questions generally enabled the parties to examine the credibility of the complainants and defendants, and their evidence.

The observations demonstrate that prosecution and defence barristers do utilise some similar and diverging questioning strategies. Overall, the complainants and defendants observed were robustly and fairly challenged on their evidence and credibility, using material that was largely relevant and admissible. However, from analysing the questioning strategies with account of the context of each trial, a small number of barristers adopted problematic lines of questioning. This occurred where barristers appeared to clearly utilise refutable rape myths and stereotypes, examined irrelevant sexual history, and examined relevant evidence to unnecessary length and detail.

In applying the best evidence and traditional theories of cross-examination, some of these strategies reflected a traditional approach. For example, questions that clearly utilised refutable rape myths and stereotypes,[1697] appeared to have persuasive purposes and 'play to the jury',[1698] by appealing to their potential assumptions about how a genuine victims and rapists behave and appear. While questioning strategies reflect traditional principles, the best evidence model does not explicitly tackle or

[1697] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 19.

[1698] Henderson E, 'Theoretically Speaking: English Judges and Advocates Discuss The Changing Theory of Cross-Examination' (2015) Criminal Law Review 929, 931.

seek to ameliorate these problematic strategies. The FTM of cross-examination addresses this gap.

Any true model of cross-examination would require adherence to existing common law and statutory law. This includes ensuring lines of questioning are admissible and cite relevant material. In addition, a FTM disapproves of other poor lines of questioning that fall short of infringing these legal restrictions. For instance, questions that clearly utilise refutable rape myths, where matters do not have a factual basis in a given case, would be problematic, despite being legally admissible. Therefore, a central tenet for fair treatment is ensuring complainants and defendants give their best evidence, and this is not undermined or obscured by refutable stereotypes, irrelevant evidence, and unfair attacks on credibility.

A further tenant of 'fair treatment' means treating complainants and defendants equally.[1699] In addition, 'fairness' may require the balancing of interests between complainants and defendants where tensions arise.[1700] With this, a fair treatment approach must allow both parties to robustly challenge the evidence of complainants and defendants, through asking questions that are admissible, relevant, and assist jurors in resolving the core issues in dispute. Across the eighteen trials observed, the prosecution and defence barristers largely demonstrated regard to these principles. Despite this, observations also revealed some examples of questioning that contravened these rules. For example, irrelevant sexual history was observed in five trials.[1701] Both parties were also examined on relevant sexual history at unnecessary length. In relation to the complainants, this may raise concern about the use of sexual history and interpretations of s.41. However, these findings are limited to a small sample of cases, and therefore do not warrant suggestions that s.41 is not operating as intended.[1702]

[1699] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[1700] As established within: *Doorson v Netherlands* (1996) 22 EHRR 330, para 70. Criminal Procedure (Amendment) Rules 2019, Part 1: The Overriding Objective, CrimPR 1.1(2)(b), (2)(d).

[1701] Appendix Five outlines the number of trials where barristers cited irrelevant sexual history evidence. Four complainants and two defendants were examined on their sexual history, which appeared to be irrelevant based on observations and the evidence presented at trial.

[1702] See Chapter Seven, section 7.3.3, for a discussion.

Observations did reveal some clear, albeit limited, examples where procedural rules were not followed without observable consequence. This included the evidently late application in T16, and questions that went beyond the judicial ruling in T9. Judicial rulings in open court were not always observed following successful s.41 application, but may have been given privately or in writing. Beyond this, it cannot be broadly claimed that procedural rules are not being followed, due to the methodological limitations of this study.[1703] There may be reasons, unknown to the researcher, that justify unintentional breaches of procedural rules observed, such as late s.41 applications.

Nonetheless, a fair treatment model recognises the importance of procedural rules. All judges must ensure s.41 applications that are resisted by the prosecution are heard, and finalised with a judicial ruling.[1704] While this may compete with the need for efficient trial progression,[1705] formal rulings will ensure this evidence is properly and transparently considered.[1706] This would set clear parameters for the use of sexual history evidence, to improve fair treatment, and should be met with intervention if these restrictions are ignored. Although s.41 does not regulate the prosecution's use of sexual history, a number of defendants were examined on their sexual history at unnecessary length. In addition, questions on sexual history appeared to be irrelevant for two defendants. Furthermore, prosecution barristers must not reiterate a complainant's sexual history, when irrelevant to the core issues, as in T5. Irrelevant sexual history has no place within any cross-examination, and must be met with intervention. This approach equally applies to questioning strategies utilising other inadmissible or irrelevant material, including character evidence.

[1703] See Chapter Four, section 4.2.2.

[1704] Where the prosecution and defence have discussed the sexual history evidence prior to the trial, and have reached some agreement out of court, the parties' should inform the judge of this, so a formal judicial ruling can be made.

[1705] Criminal Procedure (Amendment) Rules 2019, Part 3: Case Management, CrimPR 3.3(2)(c)(ii).

[1706] Defence barristers must also state in writing the questions they intend to ask, as established in Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD V Evidence 22A: Use of Ground Rules Hearing when dealing with s.41 YJCEA 1999 evidence of complainant's previous sexual behaviour 22A.1 and 22A.2.

Most barristers robustly and properly examined the complainants and defendants on their evidence and behaviours, without necessarily invoking refutable stereotypes, utilising irrelevant sexual history or placing unrealistic demands on their ability to recall events. Nevertheless, to ensure these problematic strategies are not adopted in future, several measures should be considered. The existing VWTP, which has in effective produced a 'ticketing' system for all advocates undertaking cases involving vulnerable people, could be enhanced. This programme fulfils the Government's manifesto commitment that 'publically funded advocates will have specialist training in handling victims before taking on serious sexual offences'.[1707] From the information available, some issues affecting serious sexual offence trials, for 'vulnerable' and 'robust' complainant and defendants, appear to be absent from the programme. The programme should encourage all complainants and defendants to be questioned with courtesy and greater sensitivity, with compliance to the twenty best evidence principles.[1708] The programme should also promote fair treatment by distinguishing where strategies referring to factually refutable myths are misleading, from questions that allow each party to advance their case. While these distinctions would need to be made on a case-by-case basis, general examples of misleading questions could be provided.[1709] Therefore, the RASSO training that raises awareness about rape myths should be incorporated.[1710]

In addition, the RASSO training delivered to prosecutors should continue to incorporate the offender-centric workshops. This training familiarises prosecutors

[1707] HM Government, *Victims Strategy* (Cm 9700, September 2018) 34.

[1708] As discussed within: Cooper P *et al*, 'One Step Forward and Two Steps Back? The '20 Principles' for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' (2018) International Journal of Evidence & Proof 392.

[1709] For example, questioning a complainant on her lack of external injuries would not be misleading or inappropriate if the complainant alleges the defendant used additional force or violence, as the defence will be properly examining the absence of corroboration to her claims. In contrast, examining a complainant on their lack of physical injuries, when she does not allege additional force was used or suggest that she physically resisted, inappropriately infers that a genuine rape victim would sustain injuries.

[1710] CPS, *Response to HMCPSI Thematic Review of RASSO Units* (February 2016); CPS, Advocate Panel Scheme 2016-2020.

with the tactics offenders adopt to commit rape, enabling them to identify and utilise these features within cross-examination.[1711] Under the offender-centric approach, prosecuting advocates are encouraged to explicitly challenge defendants on how they obtained consent and understood consent to be given, where this issue is disputed.[1712] During this training, prosecutors should be encouraged to 'bust' refutable rape myths directly when relied upon by defendants in cross-examination. Within the small sample of trials observed, more prosecution barristers could have utilised this approach to cross-examination, and adopt offender-centric questioning strategies. Therefore, further evaluation into the effectiveness of these workshops may be required.[1713]

In the observed trials, the majority of judges directed jurors to avoid adopting stereotypes about rape, in line with the Judicial College's *Crown Court Compendium*. Observations found that balanced directions on this issue were not consistently provided. Where observed, balanced directions explained that responses to rape and allegations differ, and the characteristics of rape victims and offenders vary. Since conducting these observations, the Crown Court Compendium has been updated to include a model direction capturing this.[1714] The Judicial College's standard direction on stereotypes also covers expectations about inconsistencies within a complainant's account.[1715] To uphold fair treatment for defendants, this model direction should be

[1711] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1712] CPS, *Toolkit for Prosecutors on Violence Against Women and Girls Cases Involving a Vulnerable Victim*<https://www.cps.gov.uk/sites/default/files/documents/publications/toolkit_for_prosecutors_on_vawg_cases_involving_vulnerable_victims.pdf> accessed 28 March 2018.

[1713] Evaluating this training may prove difficult, as "there are no agreed criteria for measuring the effectiveness of advocacy training or the quality of advocacy". As explained within Cooper P *et al*, One step forward and two steps back? The "20 Principles" for questioning vulnerable witnesses and the lack of an evidence-based approach (2018) International Journal of Evidence & Proof 392, 395

[1714] Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 20-8.

[1715] Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (December 2018) 20-6.

developed to cover a defendant's inconsistency, and address potential assumptions that incoherent accounts demonstrate untruthfulness.[1716]

8.3 Limitations and Future Research

The central limitations of this study, as they pertain to specific findings, will now be discussed. Additional areas for future research will also be identified. A central limitation of this research is the researcher only attended trials. Observations were limited to proceedings in open court, and matters discussed in the researcher's presence. Pre-trial proceedings were not observed. This included PTPHs and GRHs where advocates and judges may have discussed the admissibility of evidence and the modes of questioning, which were later observed during the trials. Additionally, the researcher could not access documentation surrounding the cases, which may have revealed further information about the trial. This restricts how the data were interpreted and utility of the trial observations. For example, seven s.41 applications were observed across the fifteen trials featuring the complainant's sexual history.[1717] With the exception of T16, these may not necessarily be late applications. If these applications were late, there may have been reasons for this, which are unknown to the researcher, such as delayed prosecution disclosure. As suggested in Chapter Seven, a large-scale evaluation of the use and admissibility of sexual history evidence, which joins together the pre-trial and trial stages, and uses trial observations, is required to overcome the limitations of observational research.

Another significant example of how an observational method limits analysis, relates to the defendants' use of Special Measures. Observations cannot reveal whether the defendants had, or were concealing, intellectual difficulties that would have met the restrictive eligibility criteria for Special Measures. As discussed, further large-scale research is required to establish whether the needs of defendants are identified efficiently and effectively in practice, and how they are being supported. This could involve interviewing defendants about their experiences of support, and organisations

[1716] The current model direction for inconsistent accounts does include reference to a witness's ability to recall events and how their memory may be affected in different ways. This direction could be furthered to include defendants, and reference to how incoherence in accounts may also develop.

[1717] The sexual history of sixteen complainants was referenced at some point during these fifteen trials.

working with defendants about how they utilise their services and the support available to them during the trial. This would supplement existing evaluations into the support provisions available to defendants, which highlight the absence of empirical evidence into the actual operation and effectiveness of such provisions.[1718]

The non-participatory nature of trial observations means the cognitions of participants observed cannot be discerned. A primary concern discussed throughout this thesis, was the potential influence that the cross-examination strategies had on jurors. Enquiries could not be made into the jurors' views, and the rationale underpinning the barristers' cross-examination strategies could not be determined. To overcome this, the observations were triangulated with existing research during analysis. In particular, findings from mock jury studies and interviews with legal personnel were discussed. This triangulation is not without its shortcomings, primarily resulting from the methodological limitations of these studies. Notably, mock jury research adopts varying methodologies, which do not necessarily reproduce the realism of actual trials or reflect actual jurors' views.[1719] Current research provides a limited understanding of the impact particular facts and evidence has on perceptions of defendants. Prosecution barristers adopted questioning strategies that drew upon the defendants' infidelity, sexual history with others, attitude towards women, violence, and aggressive dispositions displayed in the witness box. These matters had a factual basis within the trials and the prosecutions' case, and did not necessarily intend to invoke stereotypes. Although relevant to the prosecution's case, questions appeared to present defendants unfavourably and align them with the 'ideal offender', which may appeal to assumptions among jurors about how a rapist behaves and appears.[1720] However, the influence this has on jurors' assessments of defendants is largely

[1718] Cooper P and Mattison M, 'Intermediaries, Vulnerable People and The Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) E. & P. 351.

[1719] Professor Cheryl Thomas has been commissioned by the president of the Queen's Bench Division to conduct empirical research with real jurors. The findings will be published in Autumn 2019. HC Deb, 21 November 2018, vol 631, col 344W; BBC, Rape Myths (BBC Law in Action, June 2019) <https://www.bbc.co.uk/sounds/play/m000671m>

[1720] Christie N, 'The Ideal Victim' in Fattah E.A (Ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st Edn, Macmillan1989) 25.

unknown. Further robust mock jury research should specifically explore how cross-examining a defendant on his sexual history, character, and demeanour affects assessments of the defendant's credibility and trial outcomes.

Lastly, the small-scale nature of this research, which was conducted at a single site, is a significant limitation. Observing a small number of trials at a single Crown Court meant that generalisations could not be made to all Crown Courts and legal personnel operating within them. By selecting one Crown Court, the researcher gained insight into the specific 'court culture' and practices at this site.[1721] Efforts have been made by the researcher to avoid generalisations and suggestions that the findings are typical examples of cross-examination practices. Moreover, the cases selected were a non-representative sample of rape trials, and featured advocates and judges who were observed on multiple occasions. These advocates and judges may have conducted themselves in a particular way during the trials and cross-examinations observed. This limits the utility of the research findings further.[1722]

A particular example of how the sample size limits analysis of the findings relates to the use of Special Measures for complainants. Observations found all trials resulted in acquittals where complainants used the live link for cross-examination. Notwithstanding the personal benefit Special Measures have for complainants, this thesis questioned the tactical benefit that these measures have on prosecuting rape. A larger sample of trials may have confirmed or revealed a different correlation between Special Measures and convictions. The influence of Special Measures on jurors continues to be debated. Professor Cheryl Thomas is conducting the first empirical study into the impact of Special Measures and digital presentation of evidence on

[1721] Kirby A, Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts - A Question of Court Culture (2017) Criminal Law Review 949; Smith O, 'Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials' (PhD, University of Bath 2013) 43 citing Hucklesby A, 'Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' (1997) 36(2) The Howard Journal of Criminal Justice 129.

[1722] Ritchie J and Lewis J, *Qualitative Research Practice: A Guide For Social Science Students and Researchers* (Sage 2003) 269; Firestone W.A, 'Alternative Arguments for Generalising from Data as Applied to Qualitative Research' (1993) 22 American Educational Research Association 16, 16.

actual jury decision-making,[1723] which will enrich this debate further. Despite these limitations, trial observations were essential in achieving the research objectives, because cross-examination naturally occurs at this stage of criminal proceedings. The study has provided some insight into how cross-examination is conducted within eighteen trials, and has uncovered important issues by studying these trials in-depth.[1724]

8.4 Final Conclusions

Prior to this study, limited contemporary empirical evidence was available indicating how cross-examination is conducted in practice within rape trials. Existing literature has presented cross-examination as an adverse process that complainants endure. The adversarial nature of criminal trials and the poor attitudes of defence barristers, reportedly explains the bullying and hostility rape complainants experience in cross-examination.[1725] Temkin has argued that inconsiderate treatment for complainants will endure, as legal personnel remain indifferent to the needs of complainants.[1726] The treatment of defendants during cross-examination has received negligible attention. By critically examining the conduct of cross-examination for complainants and defendants in eighteen trials, this thesis has provided a contribution towards addressing these significant apertures in knowledge. In addition, existing empirical studies have not discussed many of the practices identified within the present study, particularly those relating to welfare safeguards.[1727]

[1723] Nuffield Foundation, *Juries, The Digital Courtroom and Special Measures* <https://www.nuffieldfoundation.org/project/juries-the-digital-courtroom-and-special-measures> accessed: 08 March 2020

[1724] Henn M, Weinstein M, and Foard N, *A Short Introduction to Social Research* (Sage 2006), 171; Bachman R and Schutt R.K, *The Practice of Research in Criminology and Criminal Justice* (Second Edn, Sage 2003) 220.

[1725] See Chapter Three, section 3.6, for a discussion. Temkin J, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society 219, 240; Smith O and Skinner T, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) Feminist Criminology 298, 317; Ellison L, 'Rape and the Adversarial Culture of the Courtroom' in Childs M and Ellison L (Eds) *Feminist Perspectives on Evidence* (Cavendish 2000) 43-44.

[1726] Temkin J, *Rape and The Legal Process* (2nd Edn, OUP 2002) 271-272.

[1727] This is with the exception of research examining the effectiveness of Special Measures for complainants and availability of Special Measures for defendants. For example, Hamlyn B, Phelps A,

The insights generated go some way towards challenging the general scholarly consensus that describes cross-examination in negative and traditional terms. Significantly, the present study revealed the responsiveness and willingness of the barristers and judges to adapt traditional conventions of cross-examination. This was particularly notable for the complainants, and demonstrates the process can be flexible towards their needs. The defendants received limited welfare considerations during cross-examination, which revealed the welfare and best evidence of the complainants was better prioritised in the trials observed. The findings support the notion that the complainants and defendants were robustly and fairly examined on their evidence during the cross-examinations observed. However, some areas of improvement were identified and the positive cross-examination practices observed could have been furthered.

Certain problematic practices remained for a number of complainants, which scholars have previously identified and critiqued. On occasion, defence barristers cited inadmissible sexual history, demanded precise recall of peripheral details, examined relevant matters at unnecessary length, and clearly invoked refutable stereotypes.[1728] However, these problematic strategies were not exclusive to complainants. Some prosecution barristers examined irrelevant sexual history and demanded precise recall and consistency about minor events. They also seemed to invoke their own 'ideal offender' stereotype through examining the defendant's behaviour. Although, these questions, like the complainants, often had a factual basis within the case and did not necessarily entail the invocation of rape myths and stereotypes. As such, both parties were also robustly and properly challenged on their evidence, using material that pertained to the core issues in dispute. During these robust examinations, the defendants were challenged on their behaviour and character, which may ease

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Turtle J and Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004); Charles C, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions Taken by Prosecutors in a Sample of CPS Case Files* (CPS, April 2012); Talbot J, *Fair Access to Justice? Support For Vulnerable Defendants in The Criminal Courts* (Prison Reform Trust 2012).

[1728] Appendix Five outlines the number of trials where barristers cited irrelevant sexual history evidence and clearly utilised refutable rape myths in cross-examination.

concerns that complainants are 'put on trial' and become the central focus. Based on these findings, it would be unconvincing to depict the cross-examinations as exclusively 'bad' for the complainants or defendants.

Cross-examination must provide all complainants and defendants the opportunity to give their best evidence.[1729] This is regardless of whether they are 'robust' or 'vulnerable'. Medical, intellectual, and communication needs of complainants and defendants must be met with the specific modifications encouraged under the best evidence approach. In addition, the general wellbeing of complainant and defendants, which may be exacerbated by their journey through the CJS, must be considered.[1730] Although some steps have been advocated to alleviate these difficulties,[1731] guidance on how to safeguard the best evidence of robust complainants and defendants is more limited. To address this, it has been argued throughout this thesis that cross-examinations should follow a fair treatment approach. In accordance with the Equal Treatment Bench Book, 'fair treatment' means treating complainants and defendants equally.[1732] This does not mean complainants and defendants will receive comparable treatment, unless they are similarly situated.[1733] Their interests must also be carefully balanced where tensions arise.[1734] For example, they must be robustly tested on the evidence they provide, while safeguarding their welfare, best evidence, and a fair trial. Every cross-examination should be conducted under conditions that promote equality and respect for the backgrounds and experiences of individual complainants and defendants. Cross-examination should be conducted within a calm courtroom environment that is not intimidating and unduly stressful.[1735] Efforts must be made to

[1729] Criminal Practice Directions [2015] EWCA 1567 (amended April 2019) CPD I General Matters 3E.4.

[1730] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4.

[1731] Judicial College, *The Equal Treatment Bench Book* (February 2018) 4-5; Advocate's Gateway Toolkits <http://www.theadvocatesgateway.org/toolkits> accessed: 23 July 2018.

[1732] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[1733] Judicial College, *The Equal Treatment Bench Book* (February 2018) 5.

[1734] As established within: *Doorson v Netherlands* (1996) 22 EHRR 330, para 70. Criminal Procedure (Amendment) Rules 2019, Part 1: The Overriding Objective, CrimPR 1.1(2)(b), (2)(d).

[1735] The notion of 'fairness' and 'calmness and care' within adversarial trials is discussed within: Elias S, *Fairness in Criminal Justice: Golden Threads and Pragmatic Patches* (Cambridge University Press, 2018) 158.

reduce the risk of confusion, acquiescence, and distress. In addition, questions that clearly utilise rape myths and stereotype, cite irrelevant evidence, and unfairly attack the credibility of complainants and defendants, may undermine or obstruct where best evidence is given. These strategies must be eliminated, which would go some way towards ensuring complainants and defendants receive dignified treatment, and their best evidence is not impeded or undermined unfairly.

A fair treatment cross-examination embraces the positive practices identified within this study. It would also reject the examples of problematic lines of questioning observed. A number of these positive and negative practices reflected best evidence and traditional characteristics respectively. However, not all observations could be aligned to these existing models, providing further reason for establishing a fair treatment model of cross-examination that addresses these areas. Proposals for change have been advanced, and were informed by the research findings. This included enhancing existing training for advocates, improving the infrastructure for identifying vulnerabilities and needs, and mandating the implementation of fair treatment practices, such as introductory remarks. These reforms seek to encourage a fair treatment approach for both parties, through regulating questioning strategies and implementing wider welfare safeguards. By identifying and unifying these issues under one model of cross-examination, the fair treatment model can be a useful tool for evaluating, guiding, and improving cross-examination within future rape trials.

Appendix One: Trial Outcomes

Trial	Indictment	Verdict	Sentence	Trial Length
T1	2 x Rape (vaginal) 1 x Assault occasioning GBH with intent to cause GBH 8 x Rape of girl under 16 (T1C2, excluded from observations) 1 x Indecency with child under 16 (T1C3, excluded) 1 x Indecent assault with child under 16 (T1C3, excluded)	Not guilty	N/A	Ten days
T2	4 x Rape (vaginal)	Not guilty	N/A	Two days
T3	1 x Rape (vaginal) 1 x Sexual assault (T3C2, excluded)	Guilty (all)	Six years (five years for rape)	Three days
T4	1 x Rape (vaginal) 1 x Attempted rape (oral) 1 x Robbery	Hung jury	N/A	Five days
T5A	2 x Rape (vaginal and oral)	Guilty plea before trial (no trial observed)		
T5	1 x Rape (vaginal)	Not guilty	N/A	Three days
T6	4 x Rape (vaginal) 1 x Rape (anal)	Guilty (all)	Twelve years with additional four year extended licence; sex offenders register and restraining order indefinitely	Five days
T7	4 x Rape (anal and vaginal on two occasions) 1 x Assault by beating	Not guilty	N/A	Six days
T8	1 x Rape (vaginal) 1 x Assault by penetration	Not guilty	N/A	Five days

Trial	Indictment	Verdict	Sentence	Trial Length
T9	2 x Rape (anal)	Guilty (All)	Five years	Three days
T10	1 x Rape (vaginal)	Guilty (all)	Eight and a half years with extended detention period of four years for public protection; sex offenders register indefinitely	Three days
T11	1 x Rape (vaginal)	Not guilty	N/A	Three days
T12	1 x Rape (vaginal, T12C1) 1 x Assault occasioning ABH (T12C1) – guilty plea on day 1 x Rape (vaginal, T12C2)	Jury discharged	N/A	Discharged on day five
T13	Re-trial of T12	Not Guilty	N/A	Six days
T14	2 x Rape (oral and anal) 1 x False imprisonment 1 x Committal of offence with intent to commit sexual offence 1 x Rape (vaginal on six occasions during relationship)	Not guilty	N/A	Three days
T15	1 x Rape (vaginal)	Jury discharged	N/A	Discharged on day three
T16	1 x Rape (vaginal)	Not guilty	N/A	Three days
T17A	1 x Rape (vaginal) 1 x GBH with intent to cause GBH (C's son in law)	Trial cracked on day 2 (no cross-examination observed)		
T17	2 x Rape (vaginal and oral) 1 x Assault by penetration	Not guilty	N/A	Four days
T18	1 x Rape (vaginal) 1 x Assault occasioning ABH	Not guilty	N/A	Three days

Appendix Two: Demographics

Trial	Complainant	Defendant	Prosecution Counsel	Defence Counsel	Judge	Jury
T1	BAME female	BAME male	White female barrister	White male barrister QC White female junior	White male	7 female: 5 male All white
T2	White female	BAME male	White male barrister	White male solicitor	T1J	6 female: 6 male All white
T3	White female	White male	BAME male barrister	White male barrister	White male	5 female: 7 male 1x BAME female
T4	White female	BAME male	T2PC	White male barrister	White male	7 female: 5 male 1x BAME male
T5	White female	White male	T2PC	BAME male barrister	T1J	7 female: 5 male all white
T6	BAME female	BAME male	White male barrister	White female barrister	White male	6 female: 6 male 1x BAME male
T7	White female	White male	White male barrister	White female barrister	White male Recorder	4 female: 8 male 1x BAME male
T8	White female	White male	White male barrister (CPS)	White male barrister	White male	4 female: 8 male all white
T9	White female	White male	White male barrister	White female barrister	White male QC	5 female: 7 male all white

Trial	Complainant	Defendant	Prosecution Counsel	Defence Counsel	Judge	Jury
T10	White female	BAME male	White male barrister (CPS)	White female barrister	T1J	7 female: 5 male all white
T11	White female	White male	T6PC	T1PC	White male Recorder QC	5 female: 7 male all white
T12	White female (C1) White female (C2)	White male	White male barrister	T10DC	White male Resident Recorder QC	9 female: 3 male 1x BAME female
T13	T12C1 and T12C2	T12D	T12PC	T10DC	T12J	8 female: 4 male all white
T14	White female	BAME male	T6DC	T2DC	T1J	5 female: 7 male all white
T15	White female	BAME male	White female barrister	T4DC	White male	7 female: 5 male all white
T16	White female	BAME male	T2PC	BAME female barrister	T8J	9 female: 3 male all white
T17	White female	White male	White male barrister	White female barrister	White male	9 female: 3 male all white
T18	White female	White male	White male barrister	T9DC	T8J	8 female: 4 male all white

Appendix Three: Case Factors

Trial	Case Type	Relationship	Issue Disputed	Intoxicant Consumed	Section 41 Application	Section 100 Application	Section 101 Application
T1	Historic	Relationship	Penetration	No	Yes	Yes	Yes
T2	Historic	Step Parent/ Daughter	Penetration	No	Yes	Not observed	Not observed
T3	Live	Friends	Penetration	Both	Not observed	Not observed	Not observed
T4	Live	Sex Worker/ Client	Penetration	Defendant	Not observed	Yes	Not observed
T5	Live	Relationship	Consent	Both	Not observed	Not observed	Not observed
T6	Historic	Relationship	Both	Defendant	Not observed	Not observed	Not observed
T7	< 1 year	Relationship	Consent	Both	Not observed	Not observed	Yes (unsuccessful)
T8	Live	Met < 24 hours	Consent	Both	Not observed	Not observed	Not observed
T9	Live	Relationship	Consent	No	Yes	Not observed	Defence adduced

The term historic signifies that the case was reported after one year, and the term live signifies that the case was reported within 7-day threshold.

Trial	Case Type	Relationship	Issue Disputed	Intoxicant Consumed	Section 41 Application	Section 100 Application	Section 101 Application
T10	< 3 months	Relationship	Penetration	No	Not observed	Not observed	Yes (unsuccessful) and other evidence agreed
T11	Historic	Family friends	Consent	No	Yes	Not observed	Defence adduced
T12/13C1	Live	Friends/ Relationship	Consent	Both	Not observed	Yes	Not observed
T12/3C2	Live	Friends	Consent	Both	Yes	Not observed	Not observed
T14	< 2 months and historic	Relationship	Consent	No	Not observed	Yes (unsuccessful)	Not observed
T15	< 4 months	Friends (Relationship)	Consent	Both	Yes	Not observed	Not observed
T16	Live	Friends (Relationship)	Consent	Both	Yes	Yes (unsuccessful)	Not observed
T17	Live	Relationship	Consent	No	Not observed	Not observed	Yes (unsuccessful)
T18	Live	Sex Worker/ Client	Penetration	Defendant	Not observed	Not observed	Defence adduced

Friend/Relationship signifies that the defendant and complainant agreed they were friends and had a casual sexual relationship
(Relationship) signifies that the defence argued they were more than friends and there was a sexual relationship, which the complainant disputed

Appendix Four: Trial Narratives

Trial	Prosecution Narrative	Defence Narrative
T1	T1D married T1C for immigration purposes, and agreed to help get T1C's children out of care. He raped T1C on their wedding night and throughout their nine-month marriage. He was violent, and assaulted her with knives and sticks occasioning GBH. The remaining counts were sexual offence allegations against T1C's daughters, X and Y. T1D raped X in her bedroom, on a weekly basis, when she was 13. T1D undid his trousers and tried to put his penis in Y's mouth, when she was 6. T1D put his penis in Y's underwear on another occasion. The alleged offences against each complainant occurred in the same year.	They did not have sex on their wedding night and sex was always consensual. T1C was violent towards him and her children. He did not assault T1C; she became violent when he flushed away her drugs. He was defending himself, when T1C fell over and injured herself. The allegations made by T1C's daughters were false. X's allegations were fabricated because T1D caught her having sex with a man. Y's allegations were fabricated because she did not want to remain in her mother's care. T1C treated Y poorly, and made her sell drugs.
T2	T2C lived with her mother and stepfather, T2D. When T2C and T2D were home alone, T2D came into her bedroom and kissed her. Later, he returned to her bedroom and began touching her. He raped her vaginally. She told him to stop. He gave her a box of condoms and continued to have sex with her every day or every few days, without her consent. T2D had a problem with alcohol, but he was never drunk when he raped her. T2C became pregnant and had an abortion. She moved out of the family home. The relationship between T2D and T2C's mother ended. After this, T2C moved back home. Five years later, T2C disclosed what happened to her sisters. They told their mother. T2C's mother disclosed what happened to her therapist, and the allegations were reported to the police.	T2D never had sexual intercourse with T2C. The events described by T2C never happened. He never went into T2C's bedroom. He would not have given T2C condoms, because he never used condoms. T2C did not have an abortion, as there were no records of it. T2D did not have a problem with alcohol.

T3	T3D and T3C were best friends and had been clubbing. She woke up to find her bottoms removed and him having sex with her. She ran out of the house and called a friend. The police were called. The sexual assault against the second complainant (Z) occurred before the attack against T3C. There was a small gathering at her house with friends, including T3C, where alcohol was consumed. T3D and Z stayed in the spare room, and kissed and cuddled. Z went to sleep and woke with her pyjama bottoms down and T2D's penis close to her vagina.	T3D denies penetration. He was very drunk and has no memory of getting home. He remembers waking up naked and T3C crying with only a t-shirt on. He accepts that he kissed and cuddled Z and suggested nothing further happened.
T4	T4C worked as a sex worker. T4D tried to negotiate a price for sex and left. Eventually he returned and paid £15 for vaginal sex with T4C. She told him to stop when he was becoming rough and forceful, but he carried on. He then tried pushing her head to his penis, for oral sex. He then stole her handbag. The defendant made three cash withdrawals that night. He withdrew £20 before meeting T4C, £10 after initially meeting T4C, and £100 after the alleged rape.	Before meeting T4C, he had two £50 notes with him. He eventually paid T4C £20 for vaginal sex. When T4C told him to stop, he did. He did not attempt to have oral sex with her. A man, who he thought was T4D's boyfriend, appeared and took his money and T4C's handbag. T4D stated he had £80 stolen from him. On his way home, he withdrew £100, as he needed this to give to his daughter. He did not report the theft to the police. He was scared because he had paid for sex.
T5	T5C and T5D were friends and had casual sex on a couple of occasions. T5D would visit T5C's house and bring alcohol and drugs. At T5C's house, they consumed alcohol and drugs. He was angry and jealous on finding out she was sleeping with someone else. There was a struggle, he poured vodka in her eyes and raped her. They both had black eyes from the struggle. He stayed the following day, and T5C's sister visited. An argument between T5C and T5D ensued. T5C confronted him about being raped. He smashed a mirror and began self-harming. T5C is a young mother and was in a previous abusive relationship.	T5D denied being in love and obsessed with T5C. He accepted he brought drugs and alcohol to T5C's flat, which they often consumed together. They had a casual sexual relationship, which occurred more times than T5C suggested. Sexual intercourse that night was consensual. They took drugs and had an argument, but made up before having sex. Their black eyes were from a previous argument. In the following days, T5C did not confront him with allegations of rape but they had an argument, where T5C hit him and he restrained her. He accepts he became angry because of this argument, smashed a mirror, and self-harmed.

T6	T6C had a termination and T6D reacted angrily to this news. After this, he became violent and controlling towards T6C. He was unfaithful to her. On a number of occasions, he turned up at her house drunk in the middle of the night. He raped her, vaginally and anally, in her bed. On one particular morning, there was a struggle, he held her on the floor and raped her. He then threatened to kill himself. He took out a penknife and attacked her with it. She vomited on the carpet. She managed to get out of the flat and call her friend. T6C told her close friends about being raped once their relationship ended. Over the next few years, T6D continued to contact T6C. T6D turned up at her flat, deliverymen noticed she was frightened of T6D and the police were called. T6C then reported being raped.	All sexual intercourse was consensual. He denied any anal penetration, as he never had anal sex for religious reasons. He did not react angrily to hearing T6C had a termination. He did not have a problem with alcohol and was not violent towards T6C. The allegations are fabricated because T6C is jealous because he moved on to have other relationships, and a child. Once their relationship ended, T6C remained in contact with T6D because he supplied her with drugs, which T6C denies.
T7	One evening, after a valentine's dinner, T7C and T7D returned home. T7C had tummy pains, and was knelt on the floor, rocking back and forth, and being sick. During this, T7D raped her by penetrating her vagina and anus from behind. On another occasion, they were in bed and cuddling after a party. He pinned her down and raped her vaginally and anally. He later began moving out, and ten days later pushed her during an argument.	Intercourse in their relationship was always consensual. He has never had sex with her when she was sick. After the party, they had consensual intercourse. Regarding the assault, T7D went over to talk to T7C about the dispute over their property. He did not push her, they had a verbal argument and she threw a brick at his car. He did not know how she got a red mark to her face.

T8	T8C and her friend went to a nightclub. There they met T8D and his friends for the first time. T8C, her friend, and the group went to a house. The group carried on drinking and inhaled balloons, but T8C went to sleep. T8D came into the room, T8C told him to sleep elsewhere. Later T8C woke to T8D removing her underwear and touching her. T8C was drunk and in a daze. She told him to stop. He ignored her, inserted a finger into her anus, pulled her on top of him and raped her. She was scared and froze. He then got dressed and left the room. T8C told her friend, and they were given a lift home in the morning. Later, T8C told her boyfriend what happened. The police were called. T8C also believed that T8D had taken cocaine.	T8D had planned to stay at his friend's house that night. His belongings were already in the room where T8C was sleeping. T8D came into the room to go to sleep. T8C knew he was there. They were spooning in bed and she pushed back into his penis. He instigated the sexual touching and it was consensual. She did not say 'no'. They had consensual sex with her on top of him. He felt guilty for cheating on his girlfriend. He denied taking any cocaine that evening.
T9	T9C and T9D were in bed, after spending an evening at home. T9C told him she was tired and had a headache. He started touching her, and put his penis in her anus. She told him she did not want anal sex but he carried on. She got out of bed, had a cigarette then returned to bed. He gave her a cuddle and started having vaginal sex. He then put his penis in her anus until he ejaculated. She repeated that she did not want anal sex. She was upset, and he apologised. He went to sleep. She left the house without shoes on, and the police were called.	T9D agreed they had anal sex, and T9C got out of bed for a cigarette after. Once back in bed, they had vaginal and anal intercourse. T9C was consenting and did not say 'no'. In evidence, T9D accepted that T9C initially told him she had a headache. T9D also accepted that after intercourse was finished, T9C said she did not want anal sex and sounded upset. The allegations are fabricated, because she wanted the relationship to end.
T10	T10D and T10C met in the library and developed a relationship. He then did not contact her for months. He later contacted her and visited her house on three occasions. To explain his disappearance, he stated he was in witness protection. In fact, he was in prison for possessing indecent images of children. On the third occasion, he became angry and told her she owed him something and raped her.	They met on a dating site and started a relationship. He did not contact her for months because he was in prison. On his release, he met up with her once and there was no sexual contact. He told T10C he was out of prison on licence. He denies telling T10C he was only a witness in the indecent images case and in witness protection. He did not see her on the day of the alleged rape.

T11	T11D and his girlfriend were staying at T11C's flat. They were all family friends. T11D and his girlfriend were sleeping on the floor next to T11C's bed. T11C's boyfriend was sleeping in the living room, because they had an argument earlier that day. T11D got into T11C's bed, and raped her. She said 'no' and froze through fear. Throughout this, T11D's girlfriend remained asleep on the floor. Much later, T11D's sister-in-law overheard T11D saying he was sorry for what he did and did not mean to rape T11C.	T11C was in bed and began stroking T11D's arms. He got into her bed and he had a cigarette. T11C kissed him and they had consensual intercourse. She did not say 'no'. The following day, there was some awkwardness between them because of what happened, but everything was fine. He did admit having consensual sex with T11C. He did not make an admission of rape.
T12/13 (C1)	The complainant had had a long history of drug addiction and had a casual 'on off' relationship with the defendant. He often provided her with crack cocaine and she would have sex with him. She was beginning to rehabilitate herself and was no longer interested in having sex for drugs. On this occasion, she had lapsed and they were drinking heavily and taking cocaine. She made clear she did not want sex. She went to sleep because she had an appointment in the morning. She woke to find him choking her with a cable and raping her, she was drifting out of consciousness. When she woke up, he was gone. He called the police, stating he felt that he forced her and did not give her a choice. The prosecution say this was an admission of guilt. They had never had sadomasochistic sex before.	They had a casual sexual relationship, and would take drugs together. They did not always have sex every time, and were good friends. Their relationship had previously involved sadomasochistic sex. On this occasion, they had consensual sadomasochistic sex, involving punching, kicking and choking. He accepts the violence went too far, and admits he is guilty of ABH. After intercourse, the complainant went to the toilet and told him the police were on their way. He phoned the police because he was drunk and scared. His words did not amount to an admission of rape.

T12/13 (C2)	The second complainant and the defendant were friends. She was not sexually attracted to the defendant. She went to a nightclub with her friend, and saw the defendant there. She was heavily intoxicated and had smoked cannabis. She does not remember getting home. She remembers lying in the foetal position with her lower clothing removed and T12/13D penetrating her from behind. She thinks he spiked her drink. The following morning, she confronts the defendant. He tried convincing her it was consensual and he then confessed. Then, she carried on drinking that day and blacked out. On this day, the defendant suggests they had consensual intercourse again. She does not remember any other sexual intercourse. The next day, T12/13C2 told her friends what happened and the police were called. The complainants in this case did not know each other.	The defendant did not have a complete memory of the sexual intercourse with T12/13C2. He can recall seeing her knickers and T12/13C2 helping him put his penis in her vagina. He was drunk and believes his drinks were also spiked. The following day, T12/13C2 did ask him about what happened between them, he said they had sex and denies admitting to rape. They had consensual intercourse again that evening. He left to see his mother. He did find T12/13C2 attractive, and they had previously kissed at a party. T12/13C2 did not know the other complainant but knew T12/13D was on bail for the rape of T12/13C1.
T14	T14C and T14D were in a relationship. Throughout their relationship, T14D would have sex with her even when she said 'no'. On one occasion, he became rough and forced his penis inside her mouth. Shortly after, he forced her down on the bed, pulling her hair and anally raped her. T14D then left to go to a festival. T14C went to the festival with a friend and met T14D there. A month later, they had broken up and he wanted to talk. She went to his flat and he locked her inside. He told her to remove her clothes and wrestled her. She fought him off and got away. The following day, she disclosed what happened to friends and went to the police.	T14C and T14D were 'friends with benefits'. T14D was beginning a relationship with someone else. All intercourse was consensual. For the first incident, they only had consensual vaginal sex. For the second incident, he wanted to talk about their break up and she came over. He did not lock her inside. He tried to kiss her and she said 'no'. He chased her around the room in a playful way, which was not unusual in their relationship. T14D accepts that T14C slapped him and left.

T15	T15C and T15D were family friends. One evening, they went clubbing with three other friends, and were drinking alcohol. The group went back to T15C's flat and T15C went to bed. T15C woke up to T15D's penis inside her vagina. She got up and went into the living room to sleep on the sofa. Her friends had left. When she awoke in the morning, T15D had left. She found her knickers underneath her pillow and a stain on her bed. T15D called and texted her, she ignored this. Two days later, a friend came over and helped wash her sheets. She was shocked and ashamed, and did not give her friends a full account of what happened for some time.	T15D disagreed they were just friends. They were having a secret sexual relationship when T15C's boyfriend was in prison. Intercourse was consensual. Information began spreading around that T15C and T15D had intercourse. T15C was embarrassed about her secret relationship with T15D and did not want this information to come out.
T16	T16C and T16D were friends, and were chilling out at T16D's flat. T16C was sofa surfing. She went to sleep in T16D's bed wearing her clothes and woke up to him masturbating near her face. She told him to "fuck off" and fell back to sleep. She woke again to him penetrating her from behind through a rip in her jeans that she presumed he made with a stanley knife. She went to the bathroom and left. It was around 6am. She went to see her friend at his corner shop, and put a carrier bag over her jeans. She did not disclose what happened, but told him someone cut her jeans. At 8am, she went to her grandmothers and disclosed what happened. The police were called. T16D previously gave her drugs and demanded money for it.	T16D disagreed they were just friends and suggested they had a previous casual sexual relationship. That evening intercourse was consensual. She first gave him oral sex. T16C already had a rip in her jeans and asked him to have sex with her from behind. It did not last long because he felt guilty about his girlfriend, who he recently split from. She borrowed money from him in the past, and T15C suggest that the sex on this occasion cleared this debt.

T17	T17C and T17D had broken up. T17C visited him to collect her property and wanted to stay to use the toilet and charge her phone. He tried to kiss her and she turned away. He digitally penetrated her vagina without her consent. She masturbated him and gave him oral sex. She felt that she had no choice. She was not consenting and said 'no' to this, but he kept asking her. He then vaginally raped her in two positions. She stayed for 30 minutes and left to get a bus home. When messaging her friend, she disclosed that she had sex with T17D but she did not want it. At college the next day, she was distressed and disclosed what happened. The police were called.	The main sequence of events was accepted. Initially, T17C did refuse to kiss T17D, but eventually they both started kissing. The sexual activity and intercourse that followed was consensual. Everything was fine between them, and he walked her to the bus stop.
T18	T18C and T18D met on the street when she was walking home. The prosecution say they went to a hotel to do business. They had a shower together and she gave him oral sex. She said would not have vaginal sex without a condom, but he continued to have sex with her on the bed and grabbed her throat causing bruising. She left the hotel and sought help from people nearby. T18C describes herself as an escort. In T18C's evidence, she said she did not tell T18D she was an escort but he gave her money.	T18D did not know she was an escort. They met on the street and T18C suggested having a drink. They got a taxi, there was sexual touching and they went to a hotel. They had a shower together, she gave him oral sex and he gave her oral sex. He did not get an erection and no vaginal intercourse took place. He went to the toilet and she ran off with his money.

Appendix Five: The Use of Irrelevant Sexual History Evidence and Refutable Rape Myths in The Cross-Examinations.

Appendix Five illustrates where prosecution and defence barristers explicitly made or clearly implied generalisations about rape, victims, and offenders, which were false. A conservative approach was adopted, and rape myths were not identified where these matters had a factual basis within a case, and helped the prosecution and defence advance their position.

Rape Myths	T1	T2	T3	T4	T5	T6	T7	T8	T9	T10	T11	T12/13	T14	T15	T16	T17	T18
Delayed reporting to police	✓	✓			✓	✓	✓						✓	✓	✓		✓
Delayed disclosure to others i.e. family and friends	✓	✓			✓			✓			✓		✓	✓	✓	✓	✓
Reluctance to engage with police and CJS		✓		✓		✓							✓				
Failure to physically resist		✓			✓	✓	✓	✓					✓				
Absence of injury or torn clothing											✓		✓	✓			
Failure to see a doctor for tests or to treat injuries		✓					✓						✓	✓			
Failure to escape during the alleged rape					✓						✓		✓			✓	✓

✓ indicates that questions covered these topics and utilised refutable rape myths; ✓ indicates that questions covered these topic areas but had a factual basis in the case; 'd' indicates that the questions featured in the defendant's cross-examination; 'c/d' indicates that the questions using rape myths featured in both cross-examinations.

Rape Myths	T1	T2	T3	T4	T5	T6	T7	T8	T9	T10	T11	T12/13	T14	T15	T16	T17	T18
Failure to say 'no'				✓				✓		✓	✓	✓					✓
Genuine victims would scream, shout or call out for help		✓			✓	✓			✓		✓		✓	✓			
People with aggressive temperaments cannot be raped	✓													✓			
Genuine victims would leave the offender immediately after		✓			✓	✓			✓		✓	✓		✓		✓	
Rapists retaliate to resistance					✓								✓				
Rapists are controlling and manipulative	✓[d]				✓[d]	✓[d]	✓[d]		✓[d]								
Rapists are bigger and stronger than victims		✓[c/d]			✓[d]		✓[d]	✓[d]			✓[d]					✓[d]	
Rapists are aggressive, confrontational and violent	✓[d]				✓[d]	✓[d]	✓[d]		✓[d]	✓[d]	✓[d]						✓[d]
Rapists hold negative attitudes towards women	✓[d]											✓[d]					

Sexual History	T1	T2	T3	T4	T5	T6	T7	T8	T9	T10	T11	T12/13	T14	T15	T16	T17	T18
Kissing and flirtation indicates consent								✓[d]			✓[d]						
Complainants were examined on sexual history in unnecessary detail and length					✓								✓	✓			
Complainants faced one or more irrelevant question on their sexual history			✓		✓				✓								✓
Defendants were examined on sexual history in unnecessary detail and length			✓			✓	✓			✓					✓		
Defendants faced one or more irrelevant question on their sexual history				✓	✓												
Defendants faced one or more irrelevant question on the complainant's sexual history					✓												

Appendix Six: University Ethical Approval

University of the West of England
BRISTOL

Faculty of Business and Law
Frenchay Campus
Coldharbour Lane
Bristol
BS16 2QY

Tel: 0117 32886890

UWE REC REF No: FBL.16.01.021

29th January 2016

Dear Anneleise

Application title: Analysis of The Cross-Examination of Complainants and Defendants within Rape Trials

Your ethics application was considered by the Faculty Research Ethics Committee and, based on the information provided, has been given ethical approval to proceed.

You must notify the committee in advance if you wish to make any significant amendments to the original application using the amendment form at http://www1.uwe.ac.uk/research/researchethics/applyingforapproval.aspx.

Please note that any information sheets and consent forms should have the UWE logo. Further guidance is available on the web: http://www1.uwe.ac.uk/aboutus/departmentsandservices/professionalservices/marketingandcommunications/resources.aspx

The following standard conditions also apply to all research given ethical approval by a UWE Research Ethics Committee:

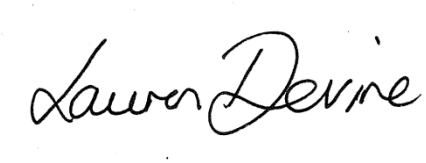
1. You must notify the relevant UWE Research Ethics Committee in advance if you wish to make significant amendments to the original application: these include any changes to the study protocol which have an ethical dimension. Please note that any changes approved by an external research ethics committee must also be communicated to the relevant UWE committee.
2. You must notify the University Research Ethics Committee if you terminate your research before completion;
3. You must notify the University Research Ethics Committee if there are any serious events or developments in the research that have an ethical dimension.

Please note: The UREC is required to monitor and audit the ethical conduct of research involving human participants, data and tissue conducted by academic staff, students and

researchers. Your project may be selected for audit from the research projects submitted to and approved by the UREC and its committees.

We wish you well with your research.

Yours sincerely



Dr Lauren Devine
Chair, Faculty Research Ethics Committee
c.c *Phil Rumney*

Appendix Seven: Research Consent Form

University of the West of England
BRISTOL

CONSENT FORM

Project Title: Rape Trial Research Project

Researcher's Name: Anneleise Williams LLB (Hons)

Supervisor's Name: Professor Phil Rumney

- I have read the Participant Information Sheet and the nature and purpose of the research project has been explained to me.
- I understand that the name and address or any other information that could lead to the identification of the complainant, defendant or any other persons will not be recorded.
- I understand that while information gained during the study may be published, no persons observed will be identified for anonymity and confidentiality reasons.
- I understand that a request to the researcher can be made to stop taking observational notes and/or leave the courtroom at any stage.
- I understand that I am able to look at the field notes taken by the researcher if I request.
- I understand that I may contact the researcher or supervisor if I require further information about the research
- From the information provided I, on behalf of the Crown Court, give permission for the research to be conducted.

Signed ……

Print name …… **Date**……

Contact details
Researcher: *Telephone- XXXXXXXXXXX, Email- Anneleise2.Williams@live.uwe.ac.uk*
Supervisor: *Telephone- XXXXXXXXXXX, Email- Phil.Rumney@uwe.ac.uk*

Appendix Eight: Research Information Sheet

University of the West of England
BRISTOL

PhD RESEARCH INFORMATION SHEET

Project Title: Analysis of The Cross-Examination of Complainants and Defendants within Rape Trials

Researcher's Name: Anneleise Williams LLB (Hons)
Supervisor's Name: Professor Phil Rumney

Aims of the Research Project:

This project aims to observe and compare the cross-examination of complainants and defendants within rape trials in order to examine the content and style of questioning.

Methodology of the Research Project:

This research is conducted as part of a PhD programme at the University of the West of England, examining cross-examination in rape trails. Note taking will be used to record observations throughout each rape trial, although the two key stages whereby extensive notes will be taken for important data collection are the complainant's and the defendant's cross-examination. Adhering to the Contempt of Court Act 1981, field notes of the court observations will be taken by hand, the notes will be stored securely by the researcher.

Following S.4 Sexual Offences (Amendment) Act 1976 providing anonymity for rape and sexual assault complainants, the name and address of the complainant, or any other information that could lead to his or her identification will not be recorded. This strict approach will be extended to the defendant, judge, advocates and any other persons to ensure confidentiality and anonymity.

If further information is required about the PhD project, please do not hesitate to contact the researcher or supervisor using the contact details below.

Contact details of Researcher
Researcher: *Telephone- XXXXXXXXXXX, Email- Anneleise2.Williams@live.uwe.ac.uk*
Supervisor: *Telephone- XXXXXXXXXXX, Email- Phil.Rumney@uwe.ac.uk*

Appendix Nine: Correspondence with the Ministry of Justice

Ministry of Justice

Disclosure Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

data.access@justice.gsi.gov.uk

2 August 2019

Anneleise Williams
By email only to: Anneleise2.Williams@live.uwe.ac.uk

Dear Anneleise Williams,

Freedom of Information Act (FOIA) Request 190716030

Thank you for your request received 16th July 2019 in which you asked for the following information from the Ministry of Justice (MoJ):

Dear Sir or Madam, I am writing to enquire about the current judicial training programmes regarding vulnerable witnesses in the context of your serious sexual offences training. To provide you with some background information, I am a Law PhD student at the University of the West of England, Bristol. My PhD thesis examines how cross-examination is currently conducted for complainants and defendants within rape trials. For my PhD, I have conducted observations of rape trials at one Crown Court and took contemporaneous anonymous notes throughout. I obtained University Ethical Approval and approval from the Ministry of Justice before conducting this research. Within my PhD thesis, I would like to discuss the current judicial training that judges receive before presiding over rape trials. I would also like to discuss the current judicial training programmes on vulnerable witnesses in the context of serious sexual offence trials. However, I have not been able to find literature outlining what is currently involved in these judicial training programmes. Therefore, I am seeking to enquire whether the Judicial College would be able to provide further information about what current judicial training in these areas involve?

Your request has been handled under the FOIA.

I can confirm that the Ministry of Justice (MoJ) does not hold the information that you have requested. In respect of the judiciary, this is because information about training of the judiciary is for their purposes only and the judiciary of England and Wales are not deemed to be a public body for the purposes of FOIA (they are not listed under Schedule 1 of the Act). The request therefore falls outside of FOIA. In addition, information relating to the training history of judges is personal data (judicial training records) and is

therefore exempt from disclosure under section 40(2) of the FOIA.
The following information is therefore provided on a discretionary basis and outside of FOIA
On a discretionary basis and outside of FOIA, I can advise you of the following:

Training in serious sexual offences trials
There is a dedicated seminar run by the Judicial College several times a year for judges who are authorised to try serious sexual offences. The seminar enables judges to try these cases with sensitivity and confidence, equipped with knowledge of current law and practice; to ensure the continued development of a trial process which is fair and appropriate to the needs of all parties and witnesses, whatever their role in the proceedings; and to discuss and share judicial experiences and identify issues of concern. Further, jurisdictional e-letters are sent out regularly to judges and these are also stored in the College's dedicated digital Learning Management System (LMS) with 24/7 access for judiciary. Amongst other things, these e-Letters provide analysis of points of interest that have arisen in recent trials and hearings. For example, the Crime e-Letter published in May 2019 featured an article on Sexual Offences Myths and Stereotypes.

Judicial awareness of the needs of vulnerable witnesses
There are Criminal Practice Directions which provide for statutory special measures to be applied in trials where, for example, witnesses are in fear or distress about testifying; these measures can apply to adult complainants of sexual offences. Options available to the court include the screening of witnesses from defendants and witnesses giving evidence in court by live link from another room in the court or from another location. Judges' awareness of these special measures and related adjustments is heightened by this topic being covered in chapter 2 of the Equal Treatment Bench Book (ETBB) which was comprehensively reviewed and updated by a cross-jurisdictional judicial panel in February 2018, and is updated with significant changes in real-time. Judges are regularly reminded of the ETBB by e-alerts that are sent out roughly every 8 weeks. The ETBB is available to judiciary 24/7 in easily searchable format in the LMS and it is signposted from the LMS home page. This publication is also available in pdf format for the public at this link: https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March- 2019.pdf.

On a general note, some judiciary attend cross disciplinary seminars and conferences which deal with issues around, for example, domestic abuse. However, the Judicial College does not collate any information concerning attendance as these events are not part of the official programme of judicial training. It is also worth noting that these events are considered to be "awareness raising" in their nature rather than being formal training.

Appeal Rights
If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gsi.gov.uk

Disclosure Team, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely,

David Hall

Judicial College

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