

Myths, Misconceptions and #MeToo: Expert Evidence in Historic Sexual Offence Trials

Introduction

In the retrial of Bill Cosby, resulting in his conviction on three charges of sexual assault, the prosecution opened their case with the evidence of Dr Barbara Ziv, a forensic psychologist¹. The evidence was adduced to educate the jury on 'rape myths' - incorrect or misleading assumptions or beliefs which can negatively impact upon the jury's decision-making process when considering alleged sexual offences. Under English law, Dr Ziv's evidence would have been inadmissible.

In the wake of recent revelations regarding historic sexual abuse allegedly committed by high-profile individuals, the problems created by rape myths seem likely to increase as complainants are publicly subjected to the prejudices born of such myths: "they didn't report it straight away; they went back to him; they don't remember every detail - it can't be true".

One of many challenges faced by those who prosecute historic sex cases is overcoming such prejudices - a jury's innocent but mistaken preconceptions of how a true allegation 'should' look. There is extensive evidence that truthful complaints frequently do not conform to such expectations.

In English law, these myths are addressed through judicial directions. This is at odds with several other jurisdictions, where expert evidence can be adduced for this purpose. It is suggested that the Court of Appeal has failed to recognise both the importance of dispelling rape myths and the effectiveness of expert evidence in doing so. Given the threats posed by rape myths to successful prosecutions, as well as their contribution to high attrition and low conviction rates, a suitably robust mechanism for dispelling rape myths must now be introduced to English law. Expert evidence, it is argued, is the clear choice.

Current Legal Position

The Court of Appeal in *R v ER*² was clear that expert evidence on the general response of complainants to sexual abuse was not admissible. The case concerned delayed reporting by rape complainants. Three reasons were given for the inadmissibility of expert evidence on this issue: that expert evidence may tend to lend weight to an explanation given by the

¹ 'The Bill Cosby Trial Touches on Common Rape Myths' (<https://www.thelily.com>)
<<https://www.thelily.com/the-bill-cosby-trial-touches-on-common-rape-myths/>> accessed 27 September 2018.

² *R v ER* [2010] EWCA Crim 2522.

complainant; that evidence rather than a direction may be insufficiently balanced; and that the instruction of an expert for the prosecution for these purposes would be likely to lead to defence experts being instructed³. The Court's conclusion was that such evidence was not necessary save in cases where *"there is something very unusual which really does mean that the evidence is directed to something which is quite outside both the experience of the jury and the ability of the judge to explain common understanding and common patterns of behaviour"*⁴. It is argued that the reasons given by the Court of Appeal for this decision are not insurmountable, and that the decision was unduly restrictive.

The rationale for the decision in ER stems from the principle in R v Turner⁵ that:

*"Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life... This is what juries are empanelled to do. The law assumes they can perform their duties properly."*⁶.

The Court in Turner summarised the function of expert evidence as follows:

*"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary..."*⁷.

Criticism

It is suggested that the approach adopted by the Court in ER is unduly restrictive and fails fully to recognise the damage that can be done in sexual offence trials by rape myths⁸. Extensive empirical research has now been conducted as to the impact upon jurors' decisions such misconceptions may have in mock sexual offence trials⁹. The widespread nature of the problem was noted by the then Solicitor-General in a Parliamentary debate on the issue:

*"Every report from the Crown Prosecution Service inspectorate and from the inspectorate of constabulary has talked about the scepticism about rape complainants that is borne of myths, and about the misunderstandings about how complainants will behave after they have been raped."*¹⁰.

The difficulties posed by such myths to prosecutors are clear – a juror who does not feel a case conforms to their expectation of how a sexual abuse case 'should look' may be more likely to

³ HHJ Peter Rook QC and Robert Ward CBE, *Sexual Offences – Law & Practice* (5th edn, Sweet & Maxwell) 1355 et seq.

⁴ *ibid* 1355.

⁵ *R v Turner* (1975) 2 WLR 56, [1975] QB 834.

⁶ *ibid* 841.

⁷ *R v Turner* (n 5).

⁸ For numerous examples of prevalent rape myths, with reference to underlying research, see Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *International Journal of Evidence and Proof* 74, 80.

⁹ See Vanessa E Monroe and Louise Ellison, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17(4) *International Journal of Evidence and Proof* 299; and, for a comprehensive summary, Annie Cossins (n 8).

¹⁰ House of Commons Hansard Debates for 29 Nov 2007 col 525.

reject the Crown's case. However, rape myths could foreseeably prejudice a defendant's case too: the mere fact that a case happens to 'look' how a juror expects it to does not necessarily mean the Crown's case is proved. Perhaps the greatest harm caused by rape myths is to the public: the longer such myths are allowed to remain prevalent, the less likely it is that sexual offences can be successfully prosecuted¹¹. Further, rape myths are recognised to impact upon reporting and attrition rates¹². It is self-evident that fear of robust cross-examination on their delay in reporting or their relationship with the defendant may deter truthful complainants from disclosing their abuse. Similarly, prosecuting authorities when assessing the strength of their case and deciding whether to pursue a prosecution will naturally attempt to adopt a jury's perspective, thereby indirectly applying the same prejudices.¹³

The correction of rape myths is not a new concept. A complainant's sexual history could once be adduced as a basis to assert that they were more likely to have consented to intercourse and that they were less likely to be credible witnesses¹⁴. Such assertions are now rightly condemned as wholly improper, hence the introduction of 'rape shield' legislation such as section 41 of the Youth Justice and Criminal Evidence Act 1999. Similar change is required to address the serious problems caused by other rape myths.

Reform

In *ER* it was not argued that rape myths do not need addressing; rather, it was held that this should be achieved through judicial direction. This is suggested to be misguided. To counter rape myths without creating undue prejudice or advantage to either prosecution or defence, expert evidence which can be weighed, discussed and used by juries in the same way as any other evidence is required.

Such evidence needs to be carefully restricted. 'Oath-helping' evidence, adduced to bolster a complainant's credibility, is plainly inadmissible. This was the error into which the trial judge fell in *WC v The Crown*¹⁵, where a jury was directed that counsellors giving evidence of the complainant's initial complaints could be relied upon as experts testifying as to her credibility. Experts cannot be invited to comment directly upon an individual complainant's credibility; this remains the jury's function. However, 'educational' evidence providing explanations for behaviours which jurors might otherwise explain through rape myths – for example, the vulnerable child repeatedly returning to their abuser's house – cannot be viewed in the same way¹⁶.

¹¹ See, for example, Vanessa E Monroe and Louise Ellison (n 9).

¹² This is discussed in the South African context by Charnelle van der Bijl and Philip N S Rumney, 'Attitudes, Rape and Law Reform in South Africa' (2009) 73(5) *Journal of Criminal Law* 414.

¹³ Annie Cossins (n 8) 76–77.

¹⁴ The 'twin myths' discussed at length in *R v Seaboyer; R v Gayme* (1991) 2 SCR 577 (Supreme Court of Canada).

¹⁵ *WC v The Crown* [2012] EWCA Crim 1478.

¹⁶ The terminology of 'educational' evidence, as contrasted with 'clinical' evidence relating to an individual complainant, is used by Annie Cossins (n 8); in the USA the terminology used is 'general' and 'syndrome' evidence: Louise Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9(4) *International Journal of Evidence and Proof* 239. Both articles consider the distinction between these types of evidence.

Evidence of this type, intended solely to explain in general terms the range of possible responses to sexual trauma, should be admissible in order to counteract the effects of any rape myths which might otherwise cloud a jury's judgment of the case.

Rationale

There are numerous reasons to admit expert evidence to dispel rape myths. Some such arguments are rooted not in considerations unique to this type of evidence, but in simple rules of evidence.

Firstly, evidence to dispel rape myths plainly meets the Turner test for the admission of expert opinion evidence. Its purpose is *"to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury"*¹⁷. This test, it is argued, should not be too narrowly constrained, notwithstanding valid arguments regarding the increased costs and time estimates associated with expert evidence: *"the test fails to secure optimum assistance for the jury who benefit not only from hearing on subjects about which they know nothing but sometimes from hearing about subjects they thought they understood."*¹⁸.

Secondly, such evidence should arguably be admissible as a form of rebuttal evidence. Rape myths are frequently reflected in lines of cross-examination adopted by defence counsel¹⁹. It should be open to the Crown to rebut such propositions. The possibility of adducing expert evidence to rebut challenges to a complainant's reliability, whether made through defence expert evidence or merely put in cross-examination, was contemplated in R v Robinson²⁰.

Opinion differs as to the effectiveness of judicial direction as opposed to expert evidence in countering rape myths. Empirical research appears to suggest the levels of effectiveness may be similar²¹. However, there are several difficulties with reliance upon judicial direction to satisfactorily address the problems created by rape myths.

The principal difficulty is that judicial directions are ill-suited to such a function. Judicial directions are ordinarily used to address specific types of evidence. Examples include Turnbull directions for identification evidence, or Lucas directions regarding lies. Such directions address problems with the evidence itself: identification evidence is inherently susceptible to flaws; it is easy for jurors erroneously to view lies as necessarily indicating guilt. The question is not of any individual's credibility or the reliance to be placed on their evidence, but on the nature of the evidence itself.

A judicial direction to address rape myths is different; it entails a judge telling a jury that the fact a complainant behaved in a particular way does not mean they are untruthful. It might

¹⁷ *R v Turner* (n 5).

¹⁸ David Ormerod and Andrew Roberts, 'Expert Evidence: Where Now? What Next?' [2006] Archbold News 5.

¹⁹ For an illustration of this, see the introduction to Dr Emily Henderson and Judge Duncan Harvey, 'Myth-Busting in Sex Trials: Judicial Directions or Expert Evidence?' (2015) 5 Archbold Review 5; and Annie Cossins (n 8) 79–80.

²⁰ *R v Raymond Robinson* (1994) 98 Cr App R 370, 374.

²¹ Annie Cossins (n 8).

be viewed as a judge giving the jury reasons to believe a complainant, or attempting to give a 'steer' as to their credibility. More fundamentally, it elides the judge's role – summarising the evidence and providing legal directions – with the assessment and weighing of the evidence, which is the sole preserve of the jury. Such problems are avoided if the jury are instead provided with expert evidence which they may consider in their deliberations in the same way as all the other evidence in the case.

Reliance on judicial direction additionally presupposes both that a jury obeys the direction they are given and, secondly, understands it²². It is suggested that neither of these factors can be guaranteed when a judge directs a jury to set aside prejudicial beliefs which they may not necessarily recognise that they hold. The issue is likely to be compounded by juries being repeatedly told that they are the tribunal of fact, and it is their duty carefully to weigh all the evidence in the case in light of their own knowledge and life experience. It is foreseeable that jurors seeking to comply with this duty might diligently, honestly and inadvertently continue to apply damaging prejudices and misconceptions, notwithstanding any direction they may have been given, because they believe them to form part of their own knowledge and experience. It is accordingly suggested that the increased attention and consideration likely to be afforded by jurors to the evidence of an expert are crucial to ensuring that rape myths are effectively dispelled.

As regards the three principal reasons given to justify the decision in *ER*, it is suggested that these can each be overcome through rigorous control of the nature and scope of expert evidence adduced to dispel rape myths.

The risk of such evidence bolstering a complainant's account can, it is suggested, be avoided by ensuring experts are strictly prevented from commenting on an individual complainant's credibility, or from giving 'clinical' evidence specific to the particular facts of the case. This would avoid the risk of experts straying into 'oath-helping' as illustrated by *WC*²³. The approach of the New Zealand courts is in this regard a useful comparator. In New Zealand, evidence of this type is termed "counter-intuitive evidence"²⁴ and is

"admitted in cases involving allegations of sexual abuse of young persons for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning...the purpose of such evidence is "to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance""²⁵.

The importance of ensuring such evidence is general and does not stray into comment on the specific case has been emphasised in the New Zealand context²⁶. A similar approach is adopted in the United States in respect of "general expert evidence"²⁷.

²² Dr Emily Henderson and Judge Duncan Harvey (n 19).

²³ *WC v The Crown* (n 15).

²⁴ Dr Emily Henderson and Judge Duncan Harvey (n 19).

²⁵ *DH v R* [2015] NZSC 35 [2], as quoted by Henderson and Harvey (n 12).

²⁶ Dr Emily Henderson and Judge Duncan Harvey (n 19).

²⁷ Louise Ellison (n 16).

In relation to the Court of Appeal's second and third reasons for refusing to admit evidence of this type in *ER*, it is suggested that evidence of the kind envisaged above is not inherently partisan. Provided such evidence is kept strictly within the limits discussed above and the existing case management requirements applicable to expert evidence are adhered to, it is suggested that the risks of imbalance, extensive delay and increased cost are all sufficiently mitigated.

Firstly, expert witnesses are independent and owe their duty to the court; there is no reason for this to differ in respect of experts giving evidence to dispel rape myths. Secondly, this is a field in which there does not appear (at least at present) to be a wide divergence of expert opinion. In the Parliamentary debate on this topic it was envisaged that rather than an expert being instructed by one side or the other, agreement could be reached as to the material which it would be appropriate to place before juries in order to dispel rape myths²⁸. This illustrates the degree of scientific consensus in this field. It appears likely that such evidence could be approached in an even-handed, appropriately balanced manner, perhaps through the instruction of a single joint expert.

Finally, the fact that evidence of this type can be admitted as a matter of course in other jurisdictions suggests that any practical challenges are not insurmountable. This argument is further supported by the fact that the range of topics on which expert evidence can properly be adduced in England and Wales is not ordinarily restricted. Provided the conditions for the admission of expert opinion evidence are satisfied, evidence can be given on far more complex, nuanced or controversial topics than that currently under discussion. For these reasons it is suggested that the Court of Appeal's concerns as to delay and expense caused by the introduction of expert evidence to dispel rape myths can be overcome and are unlikely to cause difficulty save in the most complex or unusual of cases.

A Comparative Perspective

In South Africa, a jurisdiction with exceptionally high rates of sexual offending, entrenched patriarchal stereotypes and rape myths have been recognised as a fundamental problem. Studies of this issue found that "*Popular understandings of the category of rape were largely incommensurate with legal definitions, with rape popularly defined as a violent sexual act committed by a man who is not a sexual partner and with whom there is no prior sexual 'contract.'*"²⁹. Such findings demonstrate the way in which rape myths combine to create a single, false stereotype of how a sexual offence 'should look'.

In recent years there have been extensive reforms to the prosecution of sexual offences in South Africa³⁰. The Constitutional Court recently found prescription periods³¹ imposed for all sexual offences except rape to be unconstitutional. In doing so the Court considered expert evidence as to 'rape trauma syndrome' and the long-lasting and deep-rooted psychological

²⁸ House of Commons Hansard Debates for 29 Nov 2007 (n 10).

²⁹ Charnelle van der Bijl and Philip N S Rumney (n 12) 421.

³⁰ See Charnelle van der Bijl and Philip N S Rumney (n 12).

³¹ The South African equivalent of a limitation period, time-barring prosecutions after 20 years.

effects of sexual trauma in the context of delayed reporting. Expert evidence was admitted without objection or controversy. Although the case focused on delayed reporting, the systemic injustices which can be created by a legal failure to recognise the psychological impact of sexual abuse were powerfully described by Zondi AJ:

“Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator...is in a position of authority and power...These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened...Combined with this is the frequent impact of deeply-located self-blame, which...disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible.

“All these features of survival of sexual trauma make it rational to be reluctant to report and to avoid reporting. And this is before even considering the effect of rape trauma syndrome, the now recognised patterns of emotional, physical, cognitive and behavioural disturbances that approximately one in three survivors of sexual assault develop. Even if a survivor is fully aware that she was abused, she naturally weighs up the possibility of reprisals from the perpetrator together with the possible lack of support from the police and statistically small eventuality that reporting will actually, eventually, result in a conviction in a criminal court.”³²

It is suggested that by allowing rape myths to go unchecked, the shame, self-blame and fear of disbelief experienced by survivors will continue dramatically to restrict reporting and conviction rates.

Conclusion

It is clear that rape myths can have a seriously deleterious effect on prosecutions for historic sexual offences, both before and during trial. It is suggested that this problem is only likely to increase as historic allegations continue to receive public scrutiny. There appears to be general agreement that this harm must be addressed.

There is no principled legal or evidential reason why expert evidence cannot be adduced to dispel rape myths. The case of ER is respectfully suggested to be overly restrictive and should be reconsidered. As noted by Rook and Ward, however, it is likely that Parliamentary intervention will be required in order to effect reform³³.

As discussed above, judicial directions alone cannot safely be relied upon to dissipate the serious harm which can be caused by rape myths. Other jurisdictions, notably New Zealand and the USA, successfully deploy expert evidence for this purpose, and it is suggested that there can no longer be any argument against a similar model being adopted in English law.

³² *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* [2018] Constitutional Court of South Africa CCT 170/17, ZACC 16 [57–58], emphasis added.

³³ HHJ Peter Rook QC and Robert Ward CBE (n 3).