

# Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases

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*Abstract* Recent Home Office research indicates that complainants in sexual offence cases still struggle to gain credibility in the eyes of police, prosecutors and jurors. This article examines some of the credibility barriers confronting victims of sexual offences within the criminal process. In the USA, prosecutors have utilised expert witness testimony in an effort to educate jurors and restore credibility to complainants' accounts. This article critically assesses these developments and explores the potential admissibility of 'educational' expert witness testimony in criminal courts in England and Wales.

**H**ome Office figures on reported rape cases show an ongoing decline in the conviction rate for England and Wales, putting it at an all time low of 5.6 per cent.<sup>1</sup> The government has expressed concern about the growing 'justice gap' and recent years have seen the publication of a number of detailed studies examining the process of attrition in rape cases.<sup>2</sup> The most recent report, published in February 2005, suggests that suspicion and disbelief continue to operate as significant barriers to the successful prosecution of sexual assault in England and Wales.<sup>3</sup> The report speaks of a 'culture of scepticism' with victims still battling to gain credibility at each stage of the criminal process.<sup>4</sup> This echoes previous findings

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1 L. Kelly, J. Lovett and L. Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases*, HORS 293 (Home Office: London, 2005).

2 J. Harris and S. Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s*, HORS 196 (HMSO: London, 1999).

3 Kelly, Lovett and Regan, above n. 1.

4 *Ibid.* at xii.

of the CPS Inspectorate/HM Inspectorate of Constabulary's *Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape*, which specifically addressed the issue of credibility assessment.<sup>5</sup> The study notably found that complainants' behaviour after an assault was a key feature taken into account by prosecutors in their credibility determinations.<sup>6</sup> Significantly, the report suggested that some factors interpreted by prosecutors as indicators of untruth or unreliability betrayed an inadequate understanding of the impact of rape and the diverse reactions of victims in its aftermath. Accordingly, it recommended that prosecutors receive guidance which could 'help them place what initially might be viewed as illogical or inexplicable responses into context'.<sup>7</sup> The report also concluded that information should be given to jurors 'to overcome the myths and preconceptions that they may have and which the defence so often try and enforce'.<sup>8</sup> There was, however, no exploration of the means by which this information might be conveyed to jurors, with the report merely stating this was 'more problematic'.

Other common law jurisdictions have of course already grappled with this issue. In the USA, for example, expert witness testimony is used routinely to 'educate' jurors about the impact of rape and the complex reactions of complainants. In most cases expert witness testimony has been used specifically to counter defence attempts to portray 'normal' post-offence behaviours as 'unusual' or inconsistent with a rape complaint. This evidentiary initiative has proved controversial with the introduction of so-called 'syndrome' testimony in sexual assault cases provoking particular criticism. This article examines the debate and considers the potential admissibility of 'educational' expert witness testimony in criminal proceedings in England and Wales. Such an analysis is made timely by the publication of a recent report by the Crown Prosecution Service of England and Wales on the potential use of expert testimony in the prosecution of domestic violence.<sup>9</sup> The report focuses on the major problem of complainant withdrawal in domestic violence cases and the difficulties this presents in terms of juror evaluation of complainant credibility.<sup>10</sup> Domestic violence victims, the report states, 'frequently engage in behaviour that may appear inconsistent with claims that they have suffered abuse'.<sup>11</sup> The report concludes by recommending the wider prosecutorial use of expert witness testimony in domestic

5 HMCPSI/HMIC, *A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape* (HMCPSI: London, 2002).

6 *Ibid.* at 55.

7 HMCPSI/HMIC, above n. 5 at 55.

8 *Ibid.* at 12.

9 M. Dempsey, *The Use of Expert Testimony in the Prosecution of Domestic Violence* (CPS: London, 2004).

10 On the evidentiary challenges facing prosecutors in domestic violence cases, see L. Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 MLR 834.

11 Dempsey, above n. 9 at 11.

violence cases to assist the jury in understanding, *inter alia*, ‘the ostensibly “bizarre” behaviour of victims who recant prior statements of abuse’.<sup>12</sup>

### Discrediting techniques

The idea that defence lawyers routinely misrepresent signs of trauma as indicators of falsehood is one that receives considerable support in the wider research literature. Psychological studies, in particular, suggest that commonly assumed credibility cues are potentially misleading when applied to the testimony of those who have witnessed or experienced a traumatic event, such as sexual assault. This article begins by reviewing this research in an effort to both expose and clarify the credibility gap confronting adult and child complainants in sexual assault cases.

### Discrepant accounts

Research indicates that cross-examiners will routinely devote painstaking attention to the minutiae of a witness’s recollection in the search for minor discrepancies. The same standard technique has been observed in rape trials across common law jurisdictions. Temkin, for example, describes how a complainant’s pre-trial statements will be carefully scrutinised and compared to the account ultimately given at trial.<sup>13</sup> Where a complainant reveals confusion or appears to be presenting a different version of even the relatively minor details of an assault this will be used to suggest that the complainant’s entire testimony is unreliable.<sup>14</sup> A specific and particularly distasteful example of a defence lawyer seizing on an ostensibly minor discrepancy to discredit a rape complainant’s testimony is provided by Brereton. He recounts the cross-examination of a Vietnamese woman with a limited command of English who claimed to have been forced to have oral sex with her assailant:

Now when you were having oral sex, towards the end something came out of his penis, that is right, is it not?—(Yes.) It is a liquid right?—(Yes.) Did you have your mouth over his penis when that liquid came out?—(Yes.) Do you mean by that you had his penis inside your mouth?—(Yes.) It was not a situation where your mouth was above his penis, and the liquid hit your lips?—(In my mouth.) That’s different to what you told the police, isn’t it?—(I was confused.) Are you sure now?—(Yes.) Well, how are we to know whether to believe you, if you told the police something different?—(I don’t know.)<sup>15</sup>

<sup>12</sup> Ibid.

<sup>13</sup> J. Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 JLS 219, 235.

<sup>14</sup> See also Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Department for Women: Sydney 1996) 167.

<sup>15</sup> D. Brereton, ‘How Different Are Rape Trials? A Comparison of the Cross-examination of Complainants in Rape and Assault Trials’ (1997) 37 Brit J Criminol 242.

The same device is used to equal effect during the cross-examination of child complainants of sexual abuse. Studies confirm that defence lawyers will seize upon any subsequent elaboration of a child's allegation to suggest that a child's entire evidence is untruthful.<sup>16</sup> Taylor uses the term 'forced errors' to describe how defence lawyers plan their attacks on the credibility of a child complainant's evidence 'through the narrow and highly selective use of minor errors in evidence'.<sup>17</sup> Commenting on observed practice in the Australian courts, she reports that trials were replete with examples of defence barristers highlighting inconsistencies, then feigning outrage and indignation at these evidentiary 'faults' in the complainant's testimony. These stylised performances were typically juxtaposed with repeated reminders to children that they had 'sworn to tell the truth'.<sup>18</sup>

The secrecy surrounding the jury room and the lack of research on juror decision-making make it difficult to determine what effect such discrediting tactics have on actual juror deliberations. The influence of testimonial inconsistencies on juror judgments has, however, been specifically examined in several mock-juror studies. This research indicates that highlighting or eliciting inconsistencies in a witness's statements is likely to be 'an extremely effective means of discrediting the witness'.<sup>19</sup> Berman and Cutler, for example, found that mock-jurors exposed to any form of inconsistent testimony (whether in the form of contradictions between in-court and pre-trial statements or contradictions in the witness box), were less likely to convict and rated eyewitnesses less effective and less credible as compared with those exposed to consistent testimony.<sup>20</sup> Other studies support these findings.<sup>21</sup> At the same time, psychologists have cautioned legal decision-makers on the significance attached to inconsistency in credibility assessment. The basic notion that inconsistency implies deception is based on a prevalent but erroneous view of memory working passively much like a video recorder, forensic psychologists claim. According to this view, individuals are able simply to 'play back' information in exactly the same form it

16 E. Davies, E. Henderson and F. W. Seymour, 'In the Interests of Justice? The Cross-examination of Child Complainants of Sexual Abuse in Criminal Proceedings' (1997) 4 *Psychiatry, Psychology and the Law* 217, 220.

17 C. Taylor, *Court Licensed Abuse, Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang: New York, 2004) 225.

18 *Ibid.* at 232. In England and Wales, children under the age of 14 give unsworn evidence (Youth Justice and Criminal Evidence Act 1999, s. 55).

19 N. Brewer, R. Potter, R. Fisher, N. Bond and M. Luszcz, 'Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony' (1999) 13 *Appl Cognitive Psych* 297, 310.

20 G. Berman and B. Cutler, 'Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making' (1996) 81 *J Appl Psychol* 170.

21 See R. Potter and N. Brewer, 'Perceptions of Witness Behaviour-Accuracy Relationships Held by Police, Lawyers and Mock-Jurors' (1999) 6 *Psychiatry, Psychology and Law* 97; N. Brewer and A. Burke, 'Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments' (2002) 26 *Law & Hum Behav* 353.

was 'recorded', providing an accurate and objective record of the world.<sup>22</sup> In reality, memory research supports the variability of a person's memories of autobiographical details on retelling. Recent studies significantly indicate that even when people are trying to recall the same memory the content can change substantially from one occasion to another.<sup>23</sup> Individuals have additionally been shown to take different perspectives when retelling events for different audiences and purposes.<sup>24</sup> Strömwall and Granhag set out specifically to test the belief that deceptive statements are more likely to feature discrepancies. In a series of studies the researchers found deceptive consecutive statements to be equally or even more consistent than truthful consecutive statements.<sup>25</sup> To explain this they advance a so-called 'repeat vs. reconstruct' hypothesis according to which liars will actively try to repeat their initial statements aware that close attention will be paid to what they have stated in previous interrogations.<sup>26</sup> Truth-tellers, in contrast, will try to *reconstruct* what they at some point in time actually experienced and are less likely to be concerned with what they said on previous occasions. The malleable nature of memory means that truth-tellers can be expected to gain, lose and change information over time whereas the repeat-strategy of liars promotes consistency.<sup>27</sup>

Significantly, research suggests that the normal variability of memory can be further exacerbated by the impact of trauma, such as that experienced by victims of sexual assault.<sup>28</sup> The common sequelae of trauma, depression and post-traumatic stress disorder (PTSD) are, for example, associated with impaired memory performance. In a recent British study refugees with PTSD were interviewed about their experiences, and asked the same questions weeks or months later.<sup>29</sup> Discrepancies between the initial and later interviews occurred with every participant. Critics have used the study's findings to caution decision-makers against the reflexive interpretation of

22 D. Putwain and A. Sammons, *Psychology and Crime* (Routledge: East Sussex, 2002) 97.

23 S. Anderson, G. Cohen and S. Taylor, 'Rewriting the Past: Some Factors Affecting the Variability of Personal Memories' (2000) 14 *Appl Cognitive Psych* 435. As long ago as 1932 Bartlett observed that retold stories change with each retelling: F. Bartlett, *Remembering* (Oxford University Press: Oxford, 1932).

24 B. Tversky and E. Marsh, 'Biased Retellings of Events Yield Biased Memories' (2000) 40 *Cognitive Psychology* 1.

25 P. Granhag and L. Strömwall, 'Deception Detection: Interrogators' and Observers' Decoding of Consecutive Statements' (2001) 135 *J Psychol* 603.

26 P. Granhag and L. Strömwall, 'Repeated Interrogations—Stretching the Deception Detection Paradigm' (1999) 7 *Expert Evid* 163.

27 *Ibid.* at 168.

28 J. Petrak and B. Hedge, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (Wiley: Chichester, 2002).

29 J. Herlihy, P. Scragg and S. Turner, 'Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 *British Medical Journal* 324.

inconsistency as an indicator of inaccuracy in asylum seeker cases.<sup>30</sup> A number of studies have specifically sought to explore the impact of rape on the memory of victims.<sup>31</sup> This research suggests that the effects can be significant and long lasting. Studies, for example, report that memory deficits for parts of the rape are not uncommon in the weeks and months after an assault.<sup>32</sup> Comparing memories formed in response to rape with other intensely unpleasant and pleasant memories, Tromp *et al.* found that rape memories can be 'less clear and vivid, less visually detailed, less likely to occur in meaningful order, less well-remembered, less talked about and less recalled either voluntarily or involuntarily'.<sup>33</sup> To explain the lower clarity of rape memories researchers suggest that highly traumatised respondents were using cognitive avoidance, damping down some characteristics while remembering their trauma. This is in line with theories of 'motivated' or active forgetting which maintain that people experience difficulties in recalling disturbing or frightening memories as a conscious effort is made to avoid thinking about the incident each time it comes to mind.<sup>34</sup> In a similar vein, Scheppele describes how victims of sexual assault will often present initial accounts that try to make things normal again: 'They try to smooth out social relations by minimising the harm of abuse, engaging in self blame, telling stories that offer alternative explanations of events so that the full consequences of the abuse do not have to be dealt with at the time, and disguising the brutality through descriptive distortions of events'.<sup>35</sup> Over time these accounts shift as victims come to reinterpret their experiences. A story initially told from a perspective of self-blame may be replaced by a story with another narrative organisation as a victim recovers from abuse and is able to 'make sense' of traumatic events. Indeed, a recognised sign of recovery from abuse is an ability better to synthesise and organise fragmented trauma memories.<sup>36</sup> While these revisions may be considered

30 M. Kagan, 'In the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2003) 17 *Geo Immigr LJ* 367, 389. See further J. Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 *IJRL* 293.

31 M. Jenkins, P. Langlais, D. Delis and R. Cohen, 'Learning and Memory in Rape Victims with Posttraumatic Stress Disorder' (1998) 155 *American Journal of Psychiatry* 278.

32 M. Mechanic, P. Resick and M. Griffin, 'A Comparison of Normal Forgetting, Psychopathology and Information-processing Models of Reported Amnesia for Recent Sexual Trauma' (1998) 66 *Journal of Consulting and Clinical Psychology* 948.

33 S. Tromp, M. Koss, A. Figueredo and M. Tharan, 'Are Rape Memories Different? A Comparison of Rape, Other Unpleasant and Pleasant Memories Among Employed Women' (1995) 8 *Journal of Traumatic Stress* 607.

34 Some have labelled this process dissociative or psychogenic amnesia: J. Yuille and J. Daylen, 'The Impact of Traumatic Events on Eyewitness Memory', in C. Thompson, D. Herrmann, J. Read, D. Bruce, D. Payne and M. Toglia (eds), *Eyewitness Memory* (Lawrence Erlbaum: Mahwah, NJ, 1998) 155.

35 K. L. Scheppele, 'Just the Facts, Ma'am: Sexualised Violence, Evidentiary Habits, and the Revision of Truths' (1992) 37 *NYL Sch L Rev* 123, 139.

36 P. Nishith, T. Weaver, P. Resick and M. Uhlmann, 'General Memory Functioning in Pre- and Post-treatment in Female Rape Victims with Posttraumatic Stress Disorder', in L. Williams and V. Banyard (eds), *Trauma and Memory* (Sage: California, 1999) 47.

‘normal’ in a clinical context, in a court of law they are invariably portrayed as damaging indicators of deception or inaccuracy. In the words of Scheppele:

These later revised stories, replacing either silence or an alternative version of events, lose their social authority as a statement of truth precisely because they are generally late in arriving. They also lose their legal power for the same reason to be believable stories must be told immediately and must stay the same over time. Truth is supposed to be fixed and stable. Real truth doesn’t shift with time. Victims of abuse may tell one story at the time of trauma and another story later. But these later stories are rarely believed.<sup>37</sup>

In the case of children, the impact of trauma can be compounded by less-developed communication skills, research suggests. According to Leippe *et al.*, children ‘may have difficulty reporting lengthy events in an internally consistent manner, omit connecting events they do not consider important, have a relatively poor sense of time, and have trouble expressing comparisons in adult language’.<sup>38</sup> In particular, child sexual abuse complainants can find it difficult to distinguish one incident from another over months or years of victimisation. Their experience of abuse is unlikely to fit into discrete separate events but to merge into one long experience that may have particular triggers or factors that led up to each episode.<sup>39</sup> Yuille and Daylen use the term *script* memory to explain the difficulties children can experience in meeting demands for consistency. A script is an abstracted or generalised form of memory drawn from repeated experiences of a similar nature, they explain: ‘A victim of repeated sexual assaults is likely to remember the script. If any specific episodes are remembered they are likely to be script violations. That is, an episode may become a remarkable memory because it is a significant change or departure from the usual pattern or script of the event’.<sup>40</sup> In addition, sexually abused children contemplating disclosure are often faced with the very real possibility of sweeping consequences in many areas of their lives. Abusers will often play on children’s fears. When children do disclose their accounts are, as a result, often tentative, becoming fuller over time once they ascertain whether they are believed, supported, rejected or punished.<sup>41</sup>

<sup>37</sup> Scheppele, above n. 35 at 144.

<sup>38</sup> M. R. Leippe, A. P. Manion and A. Romanczyk, ‘Eyewitness Persuasion: How and How Well Do Factfinders Judge the Accuracy of Adults’ and Children’s Memory Reports?’ (1992) 63 *Journal of Personality and Social Psychology* 181. See also G. Goodman and V. Helgeson, ‘Child Sexual Assault: Children’s Memory and the Law’ (1985) 40 *U Miami L Rev* 181, 190.

<sup>39</sup> E. Davies and F. Seymour, ‘Questioning Child Complainants of Sexual Abuse: Analysis of Criminal Court Transcripts in New Zealand’ (1998) 5 *Psychiatry, Psychology and Law* 47, 58.

<sup>40</sup> Yuille and Daylen, above n. 34 at 155.

<sup>41</sup> Davies, Henderson and Seymour, above n. 16 at 220. See also T. Goodman-Brown, R. Edelstein, G. Goodman, D. Jones and D. Gordon, ‘Why Children Tell: A Model of Children’s Disclosure of Sexual Abuse’ (2003) 27 *Child Abuse Neglect* 525.

When disclosure occurs, the child may refrain from telling the entire story, and may reveal a little at a time to 'test the waters' and see how adults react. For example, a young child who has been penetrated many times may begin by saying, 'He only did it once'. Or, 'He never put it in me, he just touched me with it'. Or, 'He only did it to the other kids, not to me'.<sup>42</sup>

A child faced with disbelief or a lack of support may withdraw an allegation.<sup>43</sup> Such behaviour is likely to appear 'puzzling' to jurors and to be hailed by the defence during any subsequent cross-examination as a damning indicator of deception. Clinical studies suggest, however, that retraction is a common reaction amongst children who have suffered abuse and does not necessarily support an adverse evaluation of their credibility.<sup>44</sup>

### Omissions and errors

Complainants can also expect to be quizzed on the peripheral details surrounding an alleged assault in an effort to undermine their credibility.<sup>45</sup> The inability of a complainant to provide a full tapestry of detail or sequence will be presented to the jury as evidence of her unreliability as a witness. A New South Wales study, for example, reports how a complainant allegedly sexually assaulted by a gang of young men was ridiculed by the defence for not recalling details of each of her assailants:

Defence counsel:	Did he have a watch on?
Complainant:	I don't remember. ...
Defence counsel:	You didn't pay any attention to his watch?
Complainant:	No
Defence counsel:	You didn't notice whether he had a prominent scar on his leg?
Complainant:	No
Defence counsel:	Well, let's think of other things you might've paid attention to. You didn't pay attention to the penis that was about to enter you, is that right?
Complainant:	No. <sup>46</sup>

42 J. Myers, J. Bays, J. Becker, L. Berliner, D. Corwin and K. Saywitz, 'Expert Testimony in Child Sexual Abuse Litigation' (1989) 68 *Nebraska Law Review* 1, 87.

43 See M. Paine and D. Hansen, 'Factors Influencing Children to Self-disclose Abuse' (2002) 22 *Clin Psychol Rev* 271.

44 See T. Sorenson and B. Snow, 'How Children Tell: The Process of Disclosure in Child Sexual Abuse' (1991) 70 *Child Welfare* 3, M. Rieser, 'Recantation in Child Sexual Abuse Cases' (1991) 70 *Child Welfare* 611. According to Koverola and Foy, children suffering from PTSD often enter an 'avoidance' in which they deny abuse or recant because they cannot cope with the anxiety aroused by the traumatic memories. C. Koverola and D. Foy, 'Post Traumatic Stress Disorder Symptomatology in Sexually Abused Children: Implications for Legal Proceedings' (1993) 2 *Journal of Child Sexual Abuse* 119.

45 L. Holmstrom and A. Burgess, *The Victim of Rape* (Wiley: New York, 1983) 208.

46 Department for Women (NSW), above n. 14 at 169.



Taylor similarly describes the lengthy cross-examination of an 11-year-old child on the model, colour and interior design of the family car in which certain instances of sexual abuse were alleged to have occurred.<sup>47</sup> According to Taylor, relentless attacks on child complainants based on recollection of peripheral details made them ‘easy pickings’ for experienced barristers.<sup>48</sup> A child’s accurate recall of alleged incidents could well be buried ‘under the weight of a long, drawn out litany of minor errors and inconsistencies’<sup>49</sup> as he or she is quizzed about room layouts, precise dates and times, and clothing worn:

Were her ‘undies’ down by the knees or her ankles? Were other items of clothing completely or partially off, and exactly who took them off? ... Were her clothes fully or partially removed across different incidents? Demands for details like this are frequently made of child and adult complainants, and a failure to recall, or the slightest discrepancy in recollection, is lauded as proof of fabrication and lying.<sup>50</sup>

Psychological research suggests that highly detailed witness reports are generally perceived to be more credible than lesser detailed accounts.<sup>51</sup> In mock-juror studies observers have been shown to attach particular importance to a witness’s recall of seemingly peripheral and minor facts.<sup>52</sup> Psychologists explain the persuasive impact of trivial details on credibility assessment in terms of general beliefs about memory and attention. An eyewitness who remembers trivial details is assumed to have been paying close attention to events and to have a good memory for central objects (presumably because the trivial details are perceived to be more difficult to remember).<sup>53</sup> Research on memory in fact suggests a far more complex picture than that commonly painted by defence lawyers. One established theory suggests that heightened focus on the negative emotional aspects of a stressful event limits processing capacity for peripheral information.<sup>54</sup> This is supported by studies in the field of identification which suggest that attention to a criminal’s face during an

47 Taylor, above n. 17 at 231.

48 *Ibid.* at 168.

49 *Ibid.*

50 *Ibid.* at 64.

51 B. Bell and E. Loftus, ‘Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details’ (1989) 56 *Journal of Personality and Social Psychology* 669.

52 G. Wells and M. Leippe, ‘How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading’ (1981) 66 *J Appl Psychol* 682, L. Strömwall and P. Granhag, ‘How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges’ (2003) 9 *Psychol Crime Law* 19.

53 See J. Borckardt, E. Spronhge and M. Nash, ‘Effects of the Inclusion and Refutation of Peripheral Details on Eyewitness Credibility’ (2003) 33 *J App Soc Psychol* 2187.

54 J. Easterbrook, ‘The Effect of Emotion on Cue Utilization and the Organization of Behavior’ (1959) 66 *Psychological Review* 183, J. Brown, ‘Eyewitness Memory for Arousing Events: Putting Things in Context’ (2003) 17 *Appl Cognitive Psych* 93.

event may preclude processing of other less central details and that good memory for trivial or peripheral factors may imply less, rather than more, encoding of the criminal's facial features.<sup>55</sup> Further studies suggest that people recall more central details when an event has a high emotional impact than when an event is emotionally neutral but this is frequently at the expense of recall for peripheral details.<sup>56</sup> Heightened stress at the point of recall has also been shown to have a deleterious effect on the ability and willingness of individuals to retrieve information from memory and translate their memories into verbal responses.<sup>57</sup> Stress has been shown to disrupt both cognitive and communication skills, leading to less complete descriptions of past events and an increase in errors and inconsistencies.<sup>58</sup> This is significant when one considers that rape complainants are often required to testify to events that occurred many months earlier, in circumstances widely accepted to be highly stressful.

### Delayed reporting

Much has been written on delayed reporting in rape cases and the implications for complainants' perceived credibility. Considerable attention has, for example, focused on the doctrine of recent complaint with its implicit assumption that the 'natural' response of a person who has been sexually assaulted is to report the offence, if not immediately, then 'at the first reasonable opportunity'.<sup>59</sup> Defence lawyers exploit this 'timing-myth'; presenting any evidence of delay as behaviour that is not only unusual but inconsistent with a genuine complaint. According to Adler, for example, not making an immediate formal complaint is sometimes referred to by defence lawyers as 'an extraordinary thing to do', going against 'what you'd expect a girl who has been raped to do'.<sup>60</sup> In a similar vein, Brereton reports that failure to complain at the first opportunity was a subject for cross-examination in 40 per cent of the 40 rape trials he observed. In a number of these cases the delay was only of the order of one or two hours.<sup>61</sup> More recently, Davis *et al.* describe how child complainants

55 See S. Christianson, 'Emotional Stress and Eyewitness Memory: A Critical Review (1992) 112 *Psychological Bulletin* 284.

56 S. Christianson and E. Loftus, 'Some Characteristics of People's Traumatic Memories' 28 *Bulletin of the Psychonomic Society* 195.

57 K. Saywitz and R. Nathanson, 'Children's Testimony and their Perception of Stress in and out of the Courtroom' (1993) 17 *Child Abuse Neglect* 613.

58 See generally, E. Loftus, *Eyewitness Testimony* (Harvard University Press: Cambridge, MA, 1979).

59 The doctrine of recent complaint operates as an exception to the rule against narrative; *R v Lillyman* [1896] 2 QB 167, *R v Valentine* [1996] 2 Cr App R 213, *R v Birks* [2003] 2 Cr App R 7. See now Criminal Justice Act 2003, s. 120(7). For critical comment see K. Stanchi, 'The Paradox of the Fresh Complaint Rule' (1996) 37 *Boston College Law Review* 441, S. Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the 'reasonable' Rape Victim', in P. Easta, (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press: Sydney, 1998).

60 Z. Adler, *Rape on Trial* (Routledge and Kegan Paul: London, 1987) 19.

61 Brereton, above n. 15 at 242.

were frequently pressed to explain delays of only a few hours during lengthy cross-examinations. In one reported case the defence counsel relied on a one-hour delay to submit to the jury that a 15-year-old complainant had fabricated an allegation of sexual assault.<sup>62</sup>

Adler examined whether there was any systematic link between the reporting of a rape and the verdict in criminal trials. In her study of 81 rape cases she found that the 'conviction rate for those accused of the rape of late reporters was 38 per cent, as compared to 73 per cent for those whose victims made an immediate complaint'.<sup>63</sup> LaFree similarly found that a conviction in rape cases was less likely where the alleged victim had delayed reporting to the police.<sup>64</sup> Of course, delayed reporting may mean the loss of important forensic evidence which may of itself explain lower conviction rates. However, studies examining mock-juror responses suggest that delayed reporting can have a negative impact on credibility evaluations. Lay persons surveyed by Frazier and Borgida, for example, endorsed the view that delays in rape cases 'raise suspicions'.<sup>65</sup> Field and Bienen surveyed over 1,000 people and found that 41 per cent agreed with the statement 'a charge of rape two days after the act has occurred is probably not rape'.<sup>66</sup> In reality, research suggests that a majority of sexual assault victims never report offences and that many delay reporting abuse, often for significant periods.<sup>67</sup> Typically, the reasons for delaying are complex. One recent study found that the decision to report depended on multiple factors, most of which related to the victim's perception of how credible she would be and how the case would be handled.<sup>68</sup> Many women were fearful of others' judgment and condemnation, believing that they would be blamed or not taken seriously. Some blamed themselves because they had been drinking or taking drugs while others had temporarily blocked the experience from awareness because they 'just couldn't deal with it'.<sup>69</sup> Significantly, a number of women did not initially define their experience as rape and only reported it when persuaded by others to do so. The problem that

62 G. Davis, L. Hoyano, C. Keenan, L. Maitland and R. Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (Home Office: London, 1999) 65.

63 Adler, above n. 60 at 119.

64 G. LaFree, 'Variables Affecting Guilty Pleas and Convictions in Rape Cases: Towards a Social Theory of Rape Processing' (1980) 58 *Social Forces* 833.

65 P. A. Frazier and E. Borgida, 'Rape Trauma Syndrome: A Review of Case Law and Psychological Research' (1992) 16 *Law & Hum Behav* 293.

66 H. Field and L. Bienen, *Jurors and Rape: A Study in Psychology and Law* (Lexington Books: Lexington, MA, 1980). See also M. Kovera and E. Borgida, 'Expert Testimony in Child Sexual Abuse Trials: The Admissibility of Psychological Science' (1997) 11 *Appl Cognitive Psych* 105.

67 See S. Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the 'reasonable' Rape Victim', in P. Eastal (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press: Sydney, 1998) 41.

68 M. Stewart, S. Dobbin and S. Gatowski, "'Real Rapes" and "Real Victims": The Shared Reliance on Common Cultural Definitions of Rape' (1996) 4 *Fem LS* 159.

69 *Ibid.* at 165.

these women faced was that their experience did not fit the stereotypical conception of rape and they did not immediately perceive themselves as ‘real victims’. According to Stewart *et al.*, these responses show the extent to which rape victims continue to be influenced in their decision to report by the various shared myths that surround rape.<sup>70</sup> Victimisation studies offer further structural explanations for victims’ reluctance to report abuse.<sup>71</sup> These include fear of reprisals, fear of the police and fear at the prospect of having to testify in court and face hostile, inevitably intrusive cross-examination.<sup>72</sup> For child victims, delayed disclosure is often the product of threats or psychological pressure exerted by an abuser. As Freckelton observes, perpetrators will often orchestrate a situation in which the child feels ‘so disempowered, fearful and confused that reporting ceases to be a viable option’.<sup>73</sup> In some cases, he notes, a child may not even be aware that the behaviour in which the assailant is indulging with her or him is wrong, so distorted has the child’s sense of normality become by reason of a longstanding course of sexual violation.<sup>74</sup>

### Summary

There are, as Freckelton observes, three responses open to the prosecution to counter suggestions that ‘a genuine victim of sexual assault would have complained and reported promptly, would have a clear and detailed recollection of incidents of sexual abuse, and would not have changed or recanted in respect of allegations’.<sup>75</sup> First, prosecution advocates may appeal to more thoughtful and common-sense empathy for the plight of the complainant during final address to the jury. Secondly, the prosecution may seek to have complainants explain ‘failings’ in their evidence or post-assault behaviour. However, only some complainants may be able to articulate such matters. Finally, the prosecution might seek to call expert evidence in order to disabuse the triers of fact of erroneous assumptions that they might otherwise have had in respect of the behaviour of victims of sexual violence. Prosecutors in England and Wales have yet to opt for this latter approach although expert evidence is used widely in the prosecution of sexual assault in other common law jurisdictions. It is to such developments that discussion now turns.

70 See also G. LaFree, *Rape and the Criminal Justice System: The Social Construction of Sexual Assault* (Wadsworth: California, 1989).

71 See Kelly, Lovett and Regan, above n. 1 at 44–6.

72 D. Smith, E. Letourneau, B. Saunders, D. Kilpatrick, H. Resnick and C. Best, ‘Delay in Disclosure of Childhood Rape: Results from a National Survey’ (2000) 24 *Child Abuse Neglect* 273.

73 I. Freckelton, ‘Sexual Offence Prosecutions: A Barrister’s Perspective’, in P. Eastal (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press: Sydney, 1998) 147.

74 *Ibid.*

75 Freckelton, above n. 73 at 148.

### Restoring credibility: expert witness testimony

Prosecutors in the United States have been at the forefront of using expert evidence to overcome the credibility barriers commonly confronted in sexual assault cases. Studies confirm that a full spectrum of expert witness testimony has been employed. According to Serrato, at one end lies narrowly circumscribed expert testimony designed to refute defence accusations that a complainant's behaviour is inconsistent with sexual assault.<sup>76</sup> At the other extreme, is expert testimony which may be said to vouch directly for an individual complainant's veracity. 'Between these two extremes are various types of expert testimony without sharp categories'.<sup>77</sup> Other commentators have advanced taxonomies of expert evidence identifying up to five different 'levels' or categories of information offered to courts in the form of expert witness testimony.<sup>78</sup> When it comes to analysing criticism directed at the use of expert evidence in sexual offence cases, a useful distinction can be drawn between two principal types of evidence offered by prosecutors: so-called 'syndrome' evidence and evidence that may be given the label 'general' expert testimony. Considerable controversy has, for reasons examined below, surrounded the introduction of syndrome testimony in criminal courts in the USA. The prosecutorial use of general expert testimony has, in contrast, generated little by way of protest even amongst conservative critics.

#### Syndrome evidence

Expert testimony examined under this heading relates to Rape Trauma Syndrome (RTS) and Child Sexual Abuse Accommodation Syndrome (CSAAS).

The term 'Rape Trauma Syndrome' (RTS) was coined by Burgess and Holmstrom in 1974 to explain the reactions and coping mechanisms that rape victims may use to deal with the violation of being raped.<sup>79</sup> The researchers described RTS as 'an acute phase and long-term reorganisation process that occurs as a result of forcible or attempted forcible rape'.<sup>80</sup> The acute phase is a description of the victim's emotional disorganisation that follows rape, concomitantly with the physical consequences of an assault. Emotional reactions at this stage are said to range from fear, shock, disbelief, anger, self-blame and embarrassment. The second 'reorganisation' phase, typically begins two or three weeks after the assault, and is characterised by life-style

<sup>76</sup> V. Serrato, 'Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses' (1988) 8 BUL Rev 155, 164.

<sup>77</sup> Ibid.

<sup>78</sup> See I. Freckelton, 'Child Sexual Abuse Accommodation Syndrome: The Travails of Counterintuitive Evidence in Australia and New Zealand' (1997) 15 *Behavioral Sciences and the Law* 247, K. Fischer, 'Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome' (1989) U Ill L Rev 691.

<sup>79</sup> A. W. Burgess and L. Holmstrom, 'Rape Trauma Syndrome' (1974) 131 *Am J Psychiat* 981.

<sup>80</sup> Ibid. at 982.

changes. Subsequent studies have built on this research, refining the ‘symptoms’ associated with these short- and long-term reactions to rape.<sup>81</sup>

Expert testimony on RTS has been used in the courts in the USA for over 20 years. According to Davis, it has been most commonly used by prosecutors to rebut an express or implied assertion by the defence that the complainant’s post-offence behaviour is ‘unusual’ or ‘abnormal’ for someone who has been raped.<sup>82</sup> In such cases the expert will typically explain the general theory underlying the syndrome and list the constellation of symptoms and behaviours that constitute a diagnosis in an individual. The expert may then go on to proffer an opinion that the complainant’s subsequent reactions are consistent or ‘in keeping’ with RTS.<sup>83</sup> Alternatively, the expert may leave jurors to draw their own inferences, referring to RTS only in the abstract and making no direct reference to the behaviour of a particular complainant. For example, in *State v McCoy*, the West Virginia Supreme Court allowed the prosecution’s expert to testify that the post-rape ‘symptoms’ exhibited by the complainant (which included delayed reporting) were consistent with those normally attributable to RTS.<sup>84</sup> Courts in the USA have generally not allowed expert testimony that renders a diagnosis that the victim is ‘suffering’ from RTS.<sup>85</sup> Such testimony, it has been said, ‘vouches too much for the victim’s credibility and supplies verisimilitude for her on the critical issue of whether the defendant did rape her’.<sup>86</sup>

The term ‘Child Sexual Abuse Accommodation Syndrome’ (CSAAS) was first formulated by Summit in 1983 to help explain the common reactions of children who had been sexually molested by a family member.<sup>87</sup> Rather than provide a precise definition of the syndrome, Summit identified a range of characteristic responses that he divided into five categories: (1) secrecy, (2) helplessness, (3) entrapment and

81 See generally A. Garrison, ‘Rape Trauma Syndrome: A Review of the Behavioral Science Theory and its Admissibility in Criminal Trials’ (2000) 23 *American Journal of Trial Advocacy* 591, T. Massaro, ‘Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony’ (1985) 69 *Minnesota Law Review* 395, P. Rumney and M. Morgan Taylor, ‘The Use of Syndrome Evidence in Rape Trials’ (2002) 13 *Crim L Forum* 471.

82 K. Davis, ‘Rape, Resurrection, and the Quest for Truth: the Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of the Accused’ (1998) *Hastings LJ* 1512.

83 *People v Hampton*, Colo. 746 P.2d 947 (1987), *State v McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984).

84 *State v McCoy*, 366 S.E.2d 731 (W.Va. 1988). See also *State v Taylor*, 663 S.W.2d 235 (Mo. 1984).

85 *People v Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr 450, *State v Saldana* 324 N.W.2d 227 (Minn. 1982), *State v Black*, 109 Wash. 336, 745 P.2d 12 (1987). For discussion, see M. Berger, ‘United States v Scop: The Common Law Approach to an Expert’s Opinion about Witness Credibility Still Does Not Work’ (1989) 55 *Brook L Rev* 612.

86 *State v Taylor*, 663 S.W.2d 235, 241. However, see *State v McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984), *State v Kim*, Hawaii 645 P.2d 1330 (1982).

87 R. Summit, ‘The Child Sexual Abuse Accommodation Syndrome’ (1983) 7 *Child Abuse and Neglect* 177.

accommodation, (4) delayed, unconvincing disclosure, and (5) retraction. The model essentially describes children's fears in disclosing abuse and the response of children to the reactions and pressures from adults after disclosure. CSAAS was proposed, in Summit's words, 'to provide a counter-prejudicial explanation for the otherwise self-camouflaging and self-stigmatizing behavior of the victim'.<sup>88</sup> Expert testimony on CSAAS has reportedly been used in much the same way as RTS testimony.<sup>89</sup> Courts will rarely permit an expert to opine that a child's behaviours indicate that he or she has been the victim of abuse.<sup>90</sup> However, most courts will allow expert testimony to explain seemingly unusual behaviour such as delays in reporting or retraction of allegations.<sup>91</sup> The expert may specifically relate this testimony to a child complainant but the trend is towards 'allowing an expert to testify only to the general attributes of an abused child not as to whether or not the alleged victim exhibits those attributes'.<sup>92</sup>

The use of syndrome evidence in criminal courts has attracted considerable criticism and debate. The most fierce criticism has been reserved for testimony that incorporates a 'diagnosis' or classification in respect of the particular complainant.<sup>93</sup> However, critics have also raised concerns regarding the use of so-called 'profile' or 'consistency' testimony<sup>94</sup>: evidence proffered to show that a complainant's behaviour is consistent with RTS or CSAAS. The problem here, opponents maintain, is the risk that jurors may regard such testimony as affirmative evidence supporting the prosecution case.<sup>95</sup> When syndrome testimony is adduced the jury is typically presented with a list of 'characteristic' responses or behaviours that conform to a particular observed 'pattern'. The danger is that jurors may infer that the complainant was raped or was abused precisely because her behaviour fits the syndrome *profile*. Even if the expert refrains from commenting directly on the complainant's behaviour the

88 Ibid. at 177.

89 See A. Garrison, 'Child Sexual Abuse Accommodation Syndrome: Issues of Admissibility in Criminal Trials' (1998) 10 *Institute for Psychological Therapies Journal*, D. Steele, 'Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions' (1999) 48 *Duke LJ* 932.

90 *State v Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986). See further L. Askowitz and M. Graham, 'The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions' (1994) 15 *Cardozo L Rev* 2027.

91 *People v Bowker*, 203 Cal. App 3d 385, *State v Moran*, 151 Ariz. 378, 728 P.2d 248 (1986), *State v Steward*, 652 N.E.2d 490 (Ind. 1995).

92 M. Stanger, 'Throwing the Baby Out With the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed as a Rehabilitative Tool in the Florida Courts' (2001) 55 *U Miami L Rev* 561, 571.

93 I. Freckelton, 'Child Sexual Abuse Accommodation Syndrome: The Travails of Counterintuitive Evidence in Australia and New Zealand' (1997) 15 *Behavioral Sciences and the Law* 247, 264.

94 See above n. 81. See also D. Dwyer, 'Expert Testimony on Rape Trauma Syndrome: An Argument for Limited Admissibility' (1988) 63 *Wash L Rev* 1063.

95 R. Mosteller, 'Syndromes and Politics in Criminal Trials and Evidence Law' (1996) 46 *Duke LJ* 461, 476. See also J. Norris and M. Edwardh, 'Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility' (1995) 38 *Crim LQ* 73, 89.

danger of the jury misapplying syndrome evidence in this manner remains apparent. As Freckelton notes, consistency testimony is fundamentally dependent upon a correlation being made between the propensity of many victims to behave in a certain way and the behaviour of the victim: 'the invitation is for the trier of fact to conclude that because many victims behave in a certain way, and the complainant has behaved in that same way, it is more likely than might previously have been appreciated that he is telling the truth and is the victim of the accused, as alleged'.<sup>96</sup> To support such an inference syndrome testimony would have to demonstrate diagnostic utility. A review of the research literature indicates that this is lacking in respect of both RTS and CSAAS.<sup>97</sup> It is clear, for example, that not all victims of rape will exhibit RTS behaviours.<sup>98</sup> Moreover, any 'symptoms' that might be exhibited are not offence-specific but are characteristic generally of persons who have suffered a major trauma which has caused a stress disorder. Thus, the development of symptoms of RTS in persons claiming to have been raped can only be said to be consistent with their having experienced a major stressor, of which rape is a potential example.<sup>99</sup> The possibility remains that the behaviours are indicative of other forms of reactions to trauma or indeed of other psychological difficulties. As Sbraga and O'Donohue note, the clinical presentations of victims can overlap with other diagnostic categories including depression and other anxiety disorders.<sup>100</sup> The same may be said in respect of expert testimony relating to CSAAS.<sup>101</sup> In clinical studies, a significant number of abused children have been shown to be asymptomatic and the 'symptoms' of CSAAS have, moreover, been observed in non-abused children.<sup>102</sup> What studies indicate above all else is diversity in the timing and nature of children's disclosures and the absence of any standard patterned response against which the actions of individual children may be reliably assessed.

96 Freckelton, above n. 93 at 264.

97 See, e.g., B. Trowbridge, 'The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding a Battle of Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom' (2003) 27 *Seattle U L Rev* 453.

98 See R. Lawrence, 'Checking the Allure of Increased Conviction Rates: the Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings' (1984) 70 *Va L Rev* 1657, L. Boesch, B. Sales and M. Koss, 'Rape Trauma Experts in the Courtroom' (1998) 4 *Psychol Pub Pol'y & L* 414.

99 I. Freckelton, 'When Plight Makes Right: The Forensic Abuse Syndrome' (1994) 18 *Criminal Law Journal* 29, 30.

100 T. Sbraga and W. O'Donohue, 'Post hoc Reasoning in Possible Cases of Child Sexual Abuse: Symptoms of Inconclusive Origins' (2003) 10 *Clinical Psychology: Science and Practice* 320, 325.

101 A. Bradley and J. Wood, 'How do Children Tell? The Disclosure Process in Child Sexual Abuse' (1996) 20 *Child Abuse Neglect* 881.

102 K. Kendall-Tackett, L. Williams and D. Finkelhor, 'Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies' (1993) 113 *Psychological Bulletin* 164, L. Berliner and J. Conte, 'Sexual Abuse Evaluations: Conceptual and Empirical Obstacles' (1993) 17 *Child Abuse Neglect* 111.



It is worth noting that Summit himself has been quick to concede that CSAAS is not a diagnostic tool to be used by practitioners or courts to prove the existence of sexual abuse.<sup>103</sup> He criticises lawyers for their ‘misapplication’ of CSAAS, ascribing this, in part, to a misunderstanding of the term ‘syndrome’. In medical tradition, he asserts, ‘syndrome’ means a list, or pattern of otherwise related factors which can alert the physician to the possibility of a disorder. ‘In court circles, syndrome evidence seems to mean a diagnosis by which an expert witness contrives to prove an injury’.<sup>104</sup> This is a weak point in Summit’s defence of CSAAS, as Freckelton observes:

The fact is that by cloaking the entity in the language of a medical diagnosis, which is the inevitable connotation of the word ‘syndrome’, Summit originally invested it with a resonance of legitimacy (and no doubt did so advisedly) which it would not have otherwise commanded. The difficulty is that the description is inappropriate from at least two points of view—it is not an entity susceptible of classification in terms of being a constellation of signs or symptoms whose medical aetiology may be unknown; nor is it a pathological condition of any demonstrated kind.<sup>105</sup>

A more general criticism of syndrome testimony rests on fears that jurors may be unduly swayed by the credentials of the expert and the ‘aura of science’ that surrounds such evidence. This is a standard concern relating to the use of expert witness testimony in criminal proceedings that touches on credibility matters.<sup>106</sup> Credibility assessment is within the ‘exclusive province’ of the fact-finder in a criminal trial. When an expert is allowed to give evidence bearing on witness credibility this is said to ‘invade the province of the jury’ to weigh the credibility of witnesses and determine the truthfulness of their testimony.<sup>107</sup> The real concern is that the jury will interpret syndrome testimony as dispositive of trial issues and abdicate its fact-finding function, raising the spectre of trial by expert.<sup>108</sup>

Feminist critics have raised further concerns regarding the use of RTS testimony in rape cases. Raitt and Zeedyk, for example, warn that RTS evidence has the potential

103 R. Summit, ‘Abuse of the Child Sexual Abuse Accommodation Syndrome’ (1992) 1 *Journal of Child Sexual Abuse* 153.

104 *Ibid.*

105 Freckelton, above n. 93 at 260.

106 See M. Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press: Oxford, 2001) 161–97.

107 See S. Friedland, ‘On Common Sense and the Evaluation of Witness Credibility’ (1989) 40 *Case W Res L Rev* 165.

108 N. Vidmar and R. Schuller, ‘Juries and Expert Evidence: Social Framework Evidence’ (1989) 52 *Law and Contemporary Problems* 133, 141.

to become just another normative expectation on victims of sexual assault.<sup>109</sup> Complainants who fail to exhibit the appropriate ‘symptoms’ risk being discredited on this basis, they claim, as reliance on RTS increases.<sup>110</sup> Recent reports from the USA lend support to this argument. According to Davis, defendants in the USA have started to demand the right to present ‘negative evidence’ of RTS, asserting the *absence* of RTS in support of the defence of consent.<sup>111</sup> In addition, the empirical indeterminacy surrounding RTS has exposed complainants to intrusive defence questioning as defence lawyers seek to establish that a complainant’s ‘symptoms’ may be attributable a prior rape, sexual assault or other non-sexual trauma.<sup>112</sup> Raitt and Zeedyk suggest that the use of RTS testimony plays into the hands of the defence in other ways by classifying a complainant’s mental state as pathological, thus *undermining* her credibility.<sup>113</sup>

#### ‘General’ expert testimony

The purpose of general expert testimony is limited to alerting jurors to certain phenomena of which they may not otherwise be aware.<sup>114</sup> Its aim is to be “myth-dispelling”—educative, directed toward enhancing the understanding of the tribunal of fact and toward removing from the evaluative process a source of error.<sup>115</sup> In sexual assault trials, general expert testimony simply serves to inform jurors, who may have no experience of victimisation, about the normal and varied reactions of victims. Jurors are, for example, told that it is not unusual for victims of rape to delay reporting and are provided with possible explanations for the absence of an immediate complaint. As stated above, the fact of delay is invariably seized upon by defence lawyers as evidence of prevarication. By adducing general expert testimony the prosecution seeks to level the evidentiary playing field, by explaining to jurors that

109 F. Raitt and S. Zeedyk, ‘Rape Trauma Syndrome: Its Corroborative and Educational Roles’ (1997) 24 JLS 552, 557.

110 Ibid. at 558. This echoes longstanding feminist criticism of the evidential use of Battered Woman Syndrome in the criminal courts. See, e.g., M. Raeder, ‘The Double-edged Sword: Admissibility of Battered Woman Syndrome by and against Batterers in Cases Implicating Domestic Violence’ (1996) 67 *University of Colorado Law Review* 789.

111 Davis, above n. 82. In *Henson v State*, 535 N.E.2d 1189 the Indiana Supreme Court ruled that it would be fundamentally unfair to allow the use of such evidence by the state and then deny its use to the defendant.

112 Davis, above n. 82 at 1512.

113 F. Raitt and S. Zeedyk, *The Implicit Relation of Psychology and Law: Women and Syndrome Evidence* (Routledge: London, 2000) 103. See also S. Stefan, ‘The Protection Racket: Rape Trauma Syndrome, Psychiatric Labelling and Law’ (1994) 88 Nw U L Rev 1271, 1298.

114 Such evidence is sometimes referred to as ‘social framework evidence’. The term was coined by Walker and Monahan who use it to refer to the use of general conclusions from social science research ‘to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case’. L. Walker and J. Monahan, ‘Social Frameworks: A New Use of Social Science in Law’ (1987) 73 Va L Rev 559. The term is avoided here as it has been used indiscriminately by commentators to refer to all manner of expert testimony, including, on occasion, syndrome evidence.

such behaviour is common and does not necessarily indicate that an allegation is false.

Significantly, the explanations offered for complainants' behaviour are not tied to a medical or psycho-pathological model nor are they profile orientated. The expert draws instead on generalised social science data to provide a context against which a complainant's account can be more fairly assessed. Because of this the criteria for choosing an expert witness are markedly different. Rather than call upon a psychologist or psychiatrist to act in the capacity of expert, the prosecution may turn instead to a rape counsellor, a police officer or a social worker with relevant knowledge and experience. For example, in *State v Horne*, the 18-year-old complainant was kidnapped at gunpoint, subjected to a number of violent sexual acts and raped twice by the defendant in the back of a car. At trial, a police officer called by the defence was asked to confirm that the complainant's initial report to the police made no mention of the complainant having been raped more than once by the defendant. The officer, who had interviewed more than 300 rape complainants, verified that this was the case but significantly added that this was not in itself unusual. When pressed further on this point in cross-examination, the officer was allowed to testify on the common tendency of rape victims to omit specific acts from their descriptions. Victims, the officer explained were often upset and 'reluctant to talk about everything that happened'. The officer noted further that victims are often embarrassed and 'have a very difficult time talking about something like this occurring to them shortly after'. The court rejected defence claims that this amounted to an unqualified opinion on the credibility of the witness. The testimony was relevant, the court stated, to explain the officer's statement on direct examination regarding the victim's omissions. Defence complaints that the testimony amounted to evidence of rape trauma syndrome were also rejected. The court maintained that this was 'not a rape trauma syndrome case'.<sup>116</sup>

In *State v Scadden* the defendant, a high-school teacher, was convicted of the sexual assault of a 17-year-old student. At trial, police detective Reikens, was allowed to testify about her experience of the range of responses exhibited by victims of sexual assault or abuse. Reikens was specifically permitted to state that the victims she encountered often delayed reporting offences and to comment on possible reasons for this:

It's usually a multiple reason of fear, and many times guilt. And the fears vary. Or they may all—one person may experience all the same.

115 I. Freckelton, 'Counterintuitive Evidence' (1997) 4 *Journal of Law and Medicine* 303.

116 See also *State v Staples*, 120 N.H. 278, 415 A.2d 320.

Some of the fears are a fear that if she says anything the offender may go to prison. Another fear is that she may be alienated from her family. That is typically true in intrafamily sexual abuse type cases. ... She may have fear which is instilled simply by the perpetrator that he has threatened to do some type of harm to her. Another fear is that she will break up the family, and that being the family of the perpetrator, whether that's her own family or whether that would be another family, one that she is not related to. However, I have definitely found that the biggest fear that any of the girls or children have is that they will not be believed.

On appeal, the defence claimed that this testimony was improper because it was inadmissible testimony regarding rape trauma syndrome, and, further, that Detective Reikens was not qualified to give such testimony as she was not a psychologist or psychiatrist. The Supreme Court of Wyoming ruled that this case did not involve RTS testimony. The witness testified about the range of responses to sexual assault that she had encountered, the court noted, and the trial court had properly limited her testimony to her experience. The court also took note of Detective Reikens' extensive experience and expertise in the area of sexual abuse and assault:

[S]he testified about the knowledge she acquired in her field and gave the jury general information based on her investigative experience from which the jury could infer that the victims' delay in reporting the sexual assaults was not inconsistent with their claims that they had been assaulted. This sort of expert testimony which serves to rebut a defendant's assertions that delay in reporting sexual assault is inconsistent with its occurrence is admissible.<sup>117</sup>

The aim of general expert testimony is modest, as stated above; it is to alert jurors to certain factors bearing on credibility. There is thus no question of the expert 'usurping the jury's function'. The court is simply offered alternative explanations for specific behaviour 'so that the jury may more accurately judge the credibility of the [complainant]'.<sup>118</sup> The trier of fact is informed that specific behaviours need not give rise to adverse inferences as a matter of course, but an adverse inference may still be warranted on the facts of a particular case. General expert testimony, in other words, assists but does not supplant the jury's assessment of credibility.

117 *State v Scadden*, 732 P.2d 1036 (Wyo. 1987). See also *State v Sandberg* 406 N.W. 2d 506 (Minn. 1987), *State v Robinson* 146 Wis. 2d 315, 413 N.W. 2d 165.

118 *State v MacRae*, 141 N.H. 106, 677, A.2d 698.

This point was expressed by the Supreme Court of Connecticut in *State v Spigarola*.<sup>119</sup> The defendant was convicted of the sexual abuse of his girlfriend's six-year-old son and nine-year-old daughter. At trial, the defence had sought to challenge the prosecution case by querying inconsistencies and incomplete disclosures the complainants had made to the police during the investigation. In response, the prosecution offered testimony of a social worker, Brenda Woods, who explained that it was not unusual for sexually abused children to give apparently inconsistent stories. On appeal, the defence contended that the social worker was not qualified to testify as she did and that the admission of her testimony violated the defendant's constitutional right to a jury trial as it usurped the jury's function of assessing the credibility of witnesses. The appeal court rejected both defence claims. On the question of expertise, the court noted that Brenda Woods was a qualified social worker and had been involved in the evaluation or treatment of over 100 cases of child sexual abuse. On the second point, the court held that the expert testimony had been rightly admitted as it concerned a matter 'beyond the understanding of the average person' and would have assisted the jury in assessing the complainant's evidence. The court cited with approval the decision of the Oregon Supreme Court in *State v Middleton* where it was stated that '[i]t would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behaviour by identifying its emotional antecedents could help the jury better assess the witness's credibility'.<sup>120</sup> The court further noted that Brenda Woods was not asked about the credibility of the particular complainants, nor did she testify as to their credibility. Accordingly, her testimony could not be said to usurp the jury's function of assessing the credibility of witnesses.<sup>121</sup>

In contrast to case-specific applications of syndrome evidence, whereby a particular complainant's behaviour is explained in terms of its 'fit' with a typical pattern or profile, general expert testimony is couched in looser terms. The complainant's behaviour is not explained in terms of 'characteristic responses' or 'typical behaviour patterns' which could give rise to improper inferences. The jury is merely informed that specific behaviour is 'not unusual', thus serving as a counterweight to standard discrediting techniques deployed by defence lawyers. The foundational requirements for general expert testimony reflect its limited purpose. As Mosteller observes, when

119 *State v Spigarola*, 210 Conn. 359, 365, 556 A.2d 112 (1989).

120 *State v Middleton*, 294 Or. 427, 657 P.2d 1215 (1983).

121 In *State v Hicks* 148 Vt. 459, 535 A.2d 776 (1987) the Supreme Court of Vermont ruled that a witness with a masters degree in social work and experience as a case worker with sexually abused children was qualified to testify that it is common for victims to delay reporting. See *People v Foreman*, 161 Mich. App. 14, 410 N.W.2d 289 (1987).

expert evidence is used simply to correct erroneous views, the requirements of scientific validity are much less exacting.<sup>122</sup> The only foundation reasonably required for the evidence given in *State v Scadden*, for example, is that *some* children delay in reporting abuse and that *some* children delay for the reasons cited by Detective Reikens. This is a relatively low evidentiary hurdle to clear. It is for this reason that courts in the USA have generally been willing to exempt such testimony from the complex admissibility rules governing novel scientific evidence.<sup>123</sup>

In sum, general expert testimony appears to avoid the many hazards associated with the admission of syndrome and profile evidence in criminal proceedings. By providing general contextual information regarding the wide range of post-offence reactions victims can experience, the expert is able to create a social framework within which the jury can more fairly and accurately evaluate witness credibility without encroaching on the jury's fact-finding function. Does this then offer a way forward for prosecutors in England and Wales? The potential admissibility of general expert testimony in sexual assault trials in England and Wales is examined in the following section.

### **Admissibility of general expert testimony in England and Wales**

The admissibility of expert testimony in criminal proceedings in England and Wales is governed by common law rules. This section examines the potential admissibility of general expert testimony under the separate headings of (a) relevance, (b) expert qualification, (c) helpfulness and (d) general exclusionary rules of evidence. There is a degree of overlap between these headings, as will become apparent, but they nevertheless serve as useful organising themes when examining relevant authorities. The analysis draws upon a recent report published by the Crown Prosecution Service of England and Wales on the potential use of expert witness testimony in the prosecution of domestic violence.<sup>124</sup> The report recommends the wider use of expert testimony in domestic violence cases as a means of explaining complainant behaviour that jurors (and magistrates) might otherwise find strange or 'puzzling' (recanting allegations, remaining in an abusive relationship, even testifying on behalf of a defendant).<sup>125</sup> Significantly, the report attributes the failure of prosecutors to employ expert witness testimony to date to a false but widely shared assumption that such evidence would be inadmissible.<sup>126</sup> The conclusion reached in the report and supported

122 Mosteller, above n. 95 at 461.

123 See generally P. Roberts, 'The Admissibility of Expert Evidence: Lessons from America' (1996) 4 *Expert Evid* 93; Redmayne, above n. 106 at 94-139.

124 Dempsey, above n. 9.

125 Dempsey, above n. 9 at 7.

126 *Ibid.* at 6.

here is that expert evidence serving an essentially educational function could be accepted in English courts under existing evidentiary rules.

### Relevance

It is a general rule of the law of evidence that evidence must be relevant in order to be admissible. Relevance to the case under consideration is thus a condition precedent to the admissibility of expert evidence in criminal proceedings. It is often maintained that the credibility of a witness only becomes an issue at trial when it is called into question by an opposing party. This is because a party calling a witness is taken to be tendering the witness as a witness of truth.<sup>127</sup> Accordingly, some commentators have argued that the prosecution should be prevented from adducing expert evidence until the defence has ‘opened the door’ for it with a triggering attack. Norris and Edwardh are among those to advance this argument. Until the defence has clearly invited the trier of fact to draw an adverse inference on the basis of a complainant’s behaviour, they argue, expert evidence purporting to explain that behaviour is simply not relevant.<sup>128</sup> As Hunter notes, ‘the problem with this position is that assumptions about the behavior of rape victims not specifically raised by the defendant may still be operating in the minds of the judge and jury and may also need rebutting’.<sup>129</sup> Strategically, the defence may steer clear of direct attacks trusting the trier of fact to draw its own adverse inferences. The claim that a complainant’s behaviour is not relevant in the context of a rape trial until it is specifically raised by the defence is also spurious. A typical absence of eyewitness testimony and limited forensic evidence reduces most sexual assault trials to a credibility contest, with the outcome hinging pivotally on the complainant’s perceived believability.<sup>130</sup> In the USA, some courts have imposed a procedural restriction on the presentation of expert testimony, allowing it only after the defence has specifically attacked the credibility of the complainant.<sup>131</sup> However, other courts allow expert testimony in the absence of a triggering assault by way of ‘anticipatory rebuttal’.<sup>132</sup> Stanger cites the example of *People v Patino* where the California court gave short shrift to defence complaints that expert testimony had been admitted in error simply because it had been used as part of the prosecution case-in-chief rather than in rebuttal:

Denying the prosecution the opportunity to introduce [expert] testimony as part of its case-in-chief rather than in rebuttal could lead to absurd

127 I. Dennis, *The Law of Evidence*, 2nd edn (Sweet & Maxwell: London, 2002) 461.

128 Norris and Edwardh, above n. 95 at 92.

129 R. Hunter, ‘Gender in Evidence: Masculine Norms vs Feminist Reforms’ (1996) 19 *Harvard Women’s Law Journal* 127, 150. Taslitz makes a similar point: ‘Cultural rape narratives are ... omnipresent. There should be no need to await rebuttal’. A. Taslitz, *Rape and the Culture of the Courtroom* (New York University Press: 1999) 132.

130 *R v Funderburk* [1990] All ER 482, 491.

131 *People v Bowker* 203 Cal App 3d 385 (Cal Ct App 1988) cited in n. 92 above at 572.

132 Stanger, above n. 92 at 580.

results ... If it were a requirement of admissibility for the defense to identify and focus on the paradoxical behavior, the defense would simply wait until closing argument before accentuating the jurors' misconceptions regarding the behavior. To eliminate the potential for such results, the prosecution should be permitted to introduce properly limited credibility evidence if the issue of a specific misconception is suggested by the evidence.<sup>133</sup>

In my submission, this must be correct.

### Expert qualification

It is well established that an expert must be qualified in the sense of having specialised knowledge. This is a question for the trial judge in each case. As Roberts notes, expert qualification is essentially a function of relevance: 'The bogus testimony of a charlatan contributes nothing worthwhile to proceedings, and as evidence of neither truth nor falsehood it is, literally, irrelevant'.<sup>134</sup> Courts in England Wales have adopted a notably flexible approach to the issue of expert qualification. An expert must have expert knowledge but there is no requirement of formal training or qualifications. In the leading case of *R v Silverlock* a solicitor, whose expertise was based on his own independent study, was permitted to give opinion evidence on handwriting identification.<sup>135</sup>

The CPS report expresses confidence that domestic violence refuge workers and police officers with specialised knowledge obtained through training and experience would qualify as domestic violence experts in the prosecution of abusers.<sup>136</sup> This would suggest that police officers, rape counsellors and crisis centre workers could qualify as sexual assault experts provided they, too, could demonstrate relevant knowledge and experience. The decision to receive or reject expert evidence must turn on the specific facts of a given case and the precise nature of the evidence proffered by the 'expert'. If an expert offers 'scientific' testimony the court must satisfy itself of the scientific validity of that testimony as well as the credentials of the individual expert;<sup>137</sup> grave results may otherwise follow.<sup>138</sup> However, if expert evidence is offered simply to

133 *People v Patino*, 32 Cal. Rptr 2d 345, 349 (Cal Ct App. 1994). The case dealt with the use of CSAAS evidence, a form of testimony not advocated here.

134 P. Roberts, 'Reflections on Expert Evidence in Canadian Criminal Proceedings: More Lessons from North America', in H. Reece (ed.), *Law and Science: Current Legal Issues* (Oxford University Press: Oxford, 1998) 178.

135 *R v Silverlock* [1984] 2 QB 766. See also *R v Robb* (1991) 93 Cr App R 161, *R v Inch* (1990) 91 Cr App R 51.

136 Dempsey, above n. 9 at 20.

137 See generally above n. 106.

138 As recently evidenced by the cases of *R v Clark (Sally)* [2003] EWCA Crim 1020 and *R v Cannings (Angela)* [2004] 2 Cr App R 7.



alert jurors to little-known or counter-intuitive facts, as in the case of general expert testimony, the foundational requirements are far less exacting, as stated above. A police officer with years of investigative experience may well be qualified to testify that victims of rape *sometimes* delay reporting an assault. Moreover, support for this statement of fact in the social science literature is overwhelming.

The CPS report is clear that people working with a complainant (psychologists, counsellors, victim advocates, etc.) should not be used as experts. This is to protect complainant safety and confidentially, the report states.<sup>139</sup> The report does not rule out the use of experts (such as investigating officers) who have some connection with a case but this may be considered desirable to avoid any possibility of expert testimony being construed as a comment on the personal credibility of an individual witness.<sup>140</sup>

### Helpfulness

The 'helpfulness' of expert testimony is commonly identified as an essential criterion of admissibility.<sup>141</sup> In the leading case of *Turner*, the defendant, who was charged with murder, sought to adduce expert psychiatric evidence to support his plea of provocation. In a well-worn passage Lawton LJ explained that the evidence had been rightly excluded as it would not have assisted the jury in its deliberations:

An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of the judge and jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. ... 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.<sup>142</sup>

139 Dempsey, above n. 9.

140 In Scotland, the Criminal Procedure (Scotland) Act 1995, s. 275 provides for expert evidence relating to the subsequent behaviour or statements of complainants in criminal cases of sexual assault. This new provision was inserted by the Vulnerable Witnesses (Scotland) Act 2004, s. 5, which came into force in April 2005. Such evidence is to be admitted for the purpose of explaining the behaviour of the complainant and rebutting any adverse inference that may otherwise be drawn from her or his behaviour. Section 275 notably applies only to *psychiatric* and *psychological* evidence. For a critique of the provision see L. Gillespie, 'Expert Evidence and Credibility' [2005] *Scots Law Times* 53, F. Raitt, 'Expert Evidence as Context: Historical Patterns and Contemporary Attitudes in the Prosecution of Sexual Offences' (2004) 12(3) *Fem LS* 257.

141 F. Raitt, 'A New Criterion for the Admissibility of Scientific Evidence? The Metamorphosis of Helpfulness', in H. Reece (ed.), *Law and Science: Current Legal Issues* (Oxford University Press: Oxford, 1998) 156.

142 *R v Turner* [1975] *QB* 834.

The reference here to ‘ordinary folk’ has been interpreted by many to mean that expert testimony explaining ‘normal’ human reactions and emotions is inadmissible on the grounds of being unhelpful. Much criticism has been directed at the ruling as a result.<sup>143</sup> A formal ‘abnormality’ rule could act as a potential bar to expert evidence explaining the normal reactions of sexual offence complainants. This interpretation of *Turner* is, however, specifically rejected by Roberts and Zuckerman who dispute the existence of any such *rule*.<sup>144</sup>

*Turner’s* critics rightly observe that expert testimony might still be helpful to jurors even if it concerns matters within the jurors’ broad general knowledge or questions of normal psychology. Jurors are unlikely to share an expert’s detailed, systematic knowledge of specific aspects of normal psychological processes, for example. When ‘common sense’ beliefs are a witches’ brew of popular science and folkloric invention, an expert might be able to help jurors disentangle fact from fiction and to evaluate the disputed evidence more objectively. It is for sound reasons that the courts do *not* insist on any ‘common knowledge’ or ‘abnormality’ criterion: such tests are never more than rules of thumb to guide the application of the helpfulness standard in particular cases.<sup>145</sup>

Adopting a different line but applying a basic ‘helpfulness’ test, the CPS report maintains that expert witness testimony is admissible in prosecuting domestic violence, because although domestic violence victims are ‘ordinary folk’, the abuse to which they have been subjected exceeds the strains of life well understood by the average person.<sup>146</sup> Without the assistance of an expert witness who presents clear, truthful information about the dynamics of domestic violence and its impact on victims, juries and magistrates ‘will likely be unable to evaluate all the evidence in the case properly and impartially’, the report states:<sup>147</sup>

Average jurors—both men and women—believe myths about domestic violence. Average jurors draw incorrect inferences based on victim’s behaviour. These barriers to understanding destroy the ability of jurors to examine the evidence presented at trial rationally and fairly.<sup>148</sup>

143 See R. Mackay and A. Colman, ‘Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience’ [1991] Crim LR 800, R. Mackay and A. Colman, ‘Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense’ [1996] Crim LR 88.

144 P. Roberts and A. Zuckerman, *Criminal Evidence* (Oxford University Press: Oxford, 2004) 311.

145 *Ibid.*

146 Dempsey, above n. 9 at 23.

147 *Ibid.* at 13.

148 *Ibid.* at 24.

It is submitted that a similar argument can be applied to the prosecutorial use of general expert testimony in sexual assault cases. This article has examined at length social science research highlighting common misconceptions surrounding the post-offence behaviour of victims of sexual assault. This research indicates that expert testimony is not only useful but necessary in sexual assault cases if jurors are to make credibility assessments on an informed and proper basis.

### General exclusionary rules

#### *The 'rule against oath-helping'*

Expert evidence of witness credibility is generally inadmissible in criminal proceedings in England and Wales. An exception exists when there is evidence that a witness suffers from some disease or medical abnormality that may affect the reliability of his or her evidence. In such circumstances expert medical evidence is permitted so as to reveal this potentially hidden fact to the jury.<sup>149</sup> Expert witness opinion regarding the ultimate credibility of a witness is, however, generally prohibited.<sup>150</sup> The reason for this exclusionary stance was recently reiterated by Lord Hobhouse in *Pendleton*:

[T]he courts should be cautious about admitting evidence from psychologists, however eminent, as to the credibility of witnesses. The assessment of the truth of verbal evidence is save in a very small number of exceptional circumstances a matter for the jury. ... To admit evidence from psychologists on such questions is not only contrary to the established rules of evidence, but it is also contrary to the principle of trial by jury and risks substituting trial by expert.

In the leading case of *Robinson*, the prosecution called an educational psychologist to testify as to aspects of the complainant's personal credibility; the complainant, who claimed that she had been indecently assaulted, was 15 years old and had learning difficulties.<sup>151</sup> In cross-examination it had been suggested by the defence that the girl's mother had put ideas into complainant's head. In response, the educational psychologist was permitted to testify that the complainant could remember important matters quite well and could not adopt ideas from someone else. The Court of Appeal ruled that the evidence should have been excluded. Citing with approval the Canadian case of *Kyselka* where the use of credibility testimony was likened to the ancient practice of 'oath-helping', the Court of Appeal opined

149 *Toohy v Metropolitan Police Commissioner* [1965] 1 All ER 506, *G v DPP* [1997] 2 Cr App R 78, *R v Pinfold* [2004] 2 Cr App R 5, *R v Ward* [1993] 1 WLR 619, *R v O'Brien* [2000] Crim LR 676. See further, P. Roberts, 'Towards the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials' (2004) 8 E & P 248.

150 *R v Pendleton* [2002] 1 Cr App R 441.

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

that the prosecution could not call a witness ‘and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable’.<sup>152</sup>

General expert testimony does not serve to substantiate a complainant’s account.<sup>153</sup> The expert does not bolster prosecution evidence by claiming that it is reliable or by offering a view on the ultimate credibility of witnesses. General expert testimony thus falls outside the ruling in *Robinson*.<sup>154</sup> This is the line taken in the CPS report. ‘The prohibition against ‘oath-helping’ in English law is a prohibition against bolstering the *personal credibility* of a witness’, the report maintains, ‘it is not a barrier to the admission of [general] domestic violence expert testimony’.<sup>155</sup>

*Police and Criminal Evidence Act 1984, s. 78*

Expert evidence tendered by the prosecution may be excluded under s. 78 of the Police and Criminal Evidence Act 1984 ‘if it appears to the court that ... the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it’.<sup>156</sup> Norris and Edwardh claim a potential risk of unfairness when ‘educational’ expert evidence is adduced by the prosecution in a criminal trial. The reception of such evidence can operate to the potential detriment of defendants, they argue, by insulating the complainant’s evidence from what is often the only effective method of challenging credibility—cross-examination. ‘When a jury is offered the opinion that it should not draw adverse inferences from late disclosure, recantations, incredible allegations, faulty memory and so on, it is difficult to imagine how a complainant’s credibility could ever be challenged effectively’, Norris and Edwardh assert.<sup>157</sup> This argument misconstrues the objective of the prosecution in adducing general expert evidence. The aim is not to ‘neutralise’ inconsistencies or omissions in a complainant’s evidence; it is to offer alternative

152 *R v Kyselka* (1962) 133 CCC 103. ‘Oath-helping or compurgation was ... a method used to prove one’s case in pre-Norman England. The accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators who would swear to the truth of his oath. The compurgators swore a set oath. If they departed from it in the slightest, the “oath burst” and the opposing party won. The practice fell into desuetude in the 13th Century’, per Spence J in *R v Beland and Phillips* (1987) 43 DLR (4th) 641.

153 F. Raitt, ‘Credibility and the Limits of Expert Evidence in Scots Criminal Law’ [2003] Jur Rev 29, 41.

154 See P. Rumney and M. Morgan Taylor, ‘The Use of Syndrome Evidence in Rape Trials’ (2002) 13 Crim L Forum 471, 502.

155 Dempsey, above n. 9 at 15. Redmayne draws a distinction between ‘personal’ and ‘factual’ credibility. Personal credibility relates to the truthfulness and perceptual reliability of a witness whereas factual credibility relates to the plausibility of evidence, above n. 106 at 162.

156 The discretion to exclude evidence that it more prejudicial than probative might also provide a basis for exclusion, *R v Sang* [1980] AC 402. See Redmayne, above n. 106 at 94–9.

157 Norris and Edwardh, above n. 95 at 89.

explanations for such ‘defects’ so that the jury may better evaluate a complainant’s testimony. If an expert witness does overstep the mark this may be addressed by the trial judge or by the defence during cross-examination.

### Jury directions

It has been suggested that the type of information presented in sexual assault trials in the USA might be conveyed more effectively and efficiently by trial judges in the form of a jury direction.<sup>158</sup> This has been the approach in Australia where a number of states have introduced legislation ‘designed to counter the commonly-held assumption that a person who has been sexually assaulted would complain “immediately” to someone about what had happened’.<sup>159</sup> The provision in the Crimes Act 1900 (NSW) is typical of these provisions.<sup>160</sup> Section 405B of the Act provides that a trial judge must warn the jury that any delay in complaining does not necessarily indicate that the allegation is false and must inform the jury that there may be ‘good reasons’ why a victim of sexual assault may hesitate in complaining about it.<sup>161</sup> Both of these directions are mandatory.

Reports from Australia on the implementation of mandatory directions are not encouraging. An evaluative study conducted in New South Wales reports that mandatory directions were given in only half of all the trials which by law required them.<sup>162</sup> The study found considerable resistance amongst trial judges and a perception that counter-intuitive directions tilted the balance in favour of complainants at the expense of the accused.<sup>163</sup> A similar study conducted in Victoria revealed that one in three trial judges thought the directions were ‘unhelpful’. They complained that the direction introduced an undue and unnecessary interference by the judge in the process of fact-finding which ‘could definitely introduce an element of unfairness’.<sup>164</sup> More fundamentally, commentators question whether the delivery of a bare statement that there may be ‘good reasons’ for ostensibly unusual behaviour is capable of correcting wrong assumptions. Bronitt argues persuasively

158 Roberts, above n. 134 at 201.

159 M. Heenan and H. McKelvie, ‘Towards Changing Procedures and Attitudes in Sexual Assault Cases’, in P. Easteal (ed.), *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology: Canberra, 1993) 368.

160 The provision was introduced in 1981.

161 In 1996, Tessa Jowell MP proposed a failed amendment to the Criminal Procedure and Investigations Bill that would have introduced an equivalent provision. *Commons Hansard*, 12 June 1996, col. 355.

162 Department for Women, above n. 14 at 211.

163 Bronitt, above n. 67 at 54.

164 M. Heenan and H. McKelvie, *Evaluation of the Crimes (Rape) Act 1991* (Department of Justice: Melbourne, 1997) 331. The Crimes Act 1958 (Vic), s. 61 provides for a mandatory direction in more or less identical terms to the NSW legislation. The provision has been in operation since 1991.

that an alternative narrative must be generated to explain complainant behaviour and that this can only be achieved effectively through expert witness testimony.<sup>165</sup>

### Conclusion

Recent studies have criticised prosecutors in England and Wales for their general handling of sexual assault cases. The HMCPSI/HMIC *Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape* concluded that the prosecutor's approach 'too often tended to be one of considering any weaknesses, rather than playing a more proactive role in seeking more information and trying to build or develop the case'.<sup>166</sup> The latest Home Office study to examine attrition in rape cases raised similar concerns, recommending 'a shift from a focus on the discredibility of complainants to enhanced evidence gathering and case-building'.<sup>167</sup> No one initiative will bring about this necessary change in emphasis. The prosecutorial use of general expert testimony in sexual assault cases would nevertheless constitute an important step towards the development of a more constructive approach. It is for this reason hoped that the CPS's pledge to utilise expert testimony more widely in the prosecution of domestic violence cases will be extended in the near future to sexual offences.

<sup>165</sup> Bronitt, above n. 67 at 57.

<sup>166</sup> HMCPSI/HMIC, above n. 5 at 9.

<sup>167</sup> Kelly, Lovett and Regan, above n. 1 at 89.