

# **The Use of Expert Witnesses in Cases Involving Sexual Assault**

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## **The Use of Expert Witnesses in Cases Involving Sexual Assault** **Kimberly A. Lonsway, Ph.D.**

Based on the widespread and powerful rape myths in society, jurors often have certain expectations about the dynamics of sexual assault, including stereotypes about victims and perpetrators. As described by Estrich (1987), jurors expect the case to fit their stereotype of “real rape,” with a violent rape being perpetrated by a stranger, in a dark alley, using a weapon, and resulting in physical injury. Jurors expect the victim to be extremely emotional or hysterical after the incident and then report it to police immediately. When presented with a case and victim that do not fit this stereotype, jurors may doubt the credibility of the victim and the veracity of the case. It can therefore be extremely helpful for jurors to have a sexual assault expert explain the realistic dynamics of the crime and common reactions of victims.

The purpose of this paper is to summarize existing knowledge on the use of expert witnesses in cases involving sexual assault. The focus is primarily on expert testimony that is provided for the prosecution in a criminal case discussing the general dynamics of sexual assault and common reactions of victims. This paper was written both on the basis of a literature review of published material and contributions provided by numerous experts in the field (please see the Appendix for a list of contributing experts). Ultimately, it is expected that expert witnesses will be used increasingly in cases involving sexual assault and we must proceed carefully to insure that they serve in responsible ways that truly assist both individual victims as well as the criminal and civil court systems.

### **Who, What, When, and How to Use Expert Witnesses**

Although expert witnesses have historically played a prominent role in cases of domestic violence, they are used only rarely in cases involving a sexual assault. There are likely a number of reasons for this. Some attorneys probably avoid using experts in cases involving a sexual assault because they fear that the expert will not be qualified, that the testimony will be severely limited, or that it will result in a reversal (David Lisak, personal communication, January 2004). Attorneys are also likely concerned about the expense involved. In addition, many attorneys believe (and perhaps rightfully so) that the information can be more persuasively communicated to the jury through proper questioning of witnesses rather than through expert testimony (David Lisak, personal communication, January 2004).

However, the most common reasons for not using an expert are likely that the attorney simply does not think of using one, doesn't know how their testimony could be useful, and/or does not know how to locate someone who would be qualified (Alice Vachss, personal communication, January 15, 2004). This paper is written to address a number of these concerns, by providing a better sense of who can serve as an expert witness and the ways in which their testimony and other services can be utilized for cases involving sexual assault.

## What types of cases can involve expert testimony on sexual assault?

Expert testimony is typically used in criminal cases to support the prosecution of sexual assault. Such testimony is used to demonstrate that the victim's behavior is consistent with that of someone who has been sexually assaulted. Courts are most likely to admit the testimony to rebut a defense claim that the victim did not react like a "real rape victim" (Taslitz, 1999).

Less commonly, expert testimony is used by the defense in a criminal case to establish diminished capacity or incompetence to stand trial when sexual assault victims are charged with a crime. Expert testimony on sexual assault victimization is also provided in capital homicide cases, especially when there are sex crimes charged in addition to the homicide(s). In these cases, the expert provides mitigation evidence based on the defendant's history of sexual assault victimization and other forms of trauma (David Lisak, personal communication, January 2004).

In civil cases, expert witnesses help to establish damages resulting from a sexual assault through clinical assessment and diagnosis (Frazier & Borgida, 1992). Experts in civil cases also provide a general framework for understanding the dynamics of sexual assault victimization. This type of testimony is presented in cases where a victim sues the person who committed the sexual assault, in sexual harassment cases involving an actual or threatened sexual assault, in lawsuits against prisons, jails or other institutional facilities where a resident has been sexually assaulted, and in numerous other types of court proceedings such as divorce, child custody, bankruptcy, or other matters.<sup>2</sup>

## Who can serve as an expert witness?

Federal Rules of Evidence state that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."<sup>3</sup> Most states have either adopted this federal rule or drafted one that is substantially similar.<sup>4</sup> State court rules are thus broadly construed so professionals with a range of expertise can testify, but the testimony can only be admitted if its probative value outweighs its potential for prejudicial impact on the defendant (Garrison, 2000).

For cases involving sexual assault, most expert witnesses called to testify are medical professionals such as physicians, physicians' assistants, or Sexual Assault Nurse Examiners (SANE). Psychologists, psychiatrists, clinical social workers, psychiatric nurses, and other mental health professionals also commonly serve as expert witnesses. Less common are victim advocates, law enforcement professionals, counselors, researchers, and college professors with expertise in the dynamics of sexual assault crimes and the impact of sexual assault victimization.

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<sup>2</sup> It is worth noting that much of the information in this paper is equally relevant to cases of childhood sexual abuse (Joan Zorza, personal communication, February 6, 2004), although this is not discussed explicitly.

<sup>3</sup> Federal Rules of Evidence, 1997, 28 U.S.C.A. Rule 702.

<sup>4</sup> As reviewed by Garrison (2000), the following states have adopted a rule on the admissibility of expert testimony patterned after Federal Rule 702: Alabama, Alaska, Arkansas, Florida, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Virginia, and Wisconsin. Citations to the relevant state statutes are provided by that author (Garrison, 2000, p. 642).

To illustrate, Bayliff (2000) cites a number of prior cases involving sexual assault where expert testimony was provided by a variety of individuals, including:

- A supervisor in a Victim Services Unit in a police department<sup>5</sup>
- A rape crisis counselor<sup>6</sup>
- A counselor from a police department's Victim Services Unit<sup>7</sup>

In at least one case, the victim herself was allowed to testify that she suffered from PTSD as a result of the assault.<sup>8</sup> In fact, some have advised that expert witnesses should generally *not* be used in cases where the victim can effectively educate the jury on the relevant issues. “In these situations, an expert’s testimony may actually do harm by detracting from the power of the victim’s experience and negatively impacting the jurors’ perceptions” (Munch, 1999, p. 4).

In general, expert witnesses are likely to be most effective when they have testified on both sides of the issue in prior court cases (i.e., both for the prosecution/plaintiff and defense). When selecting a potential expert witness, attorneys should therefore consider questions of cost efficiency in relation to the time and effort required and read carefully anything that the expert has written on the topic of sexual assault. Additional recommendations on how to be or use an expert witness in a sexual assault case are beyond the scope of this paper. Therefore, the interested reader should consult more detailed resources such as Bayliff (2000), Boesch, Sales, and Koss (1998), Munch (1999), Garrison (2000), and the manual on the use of experts developed by the American Prosecutors Research Institute and National District Attorneys Association (2004).

### **How can expert testimony be introduced?**

The need for an expert witness is typically addressed in pre-trial hearings by discussing the research on common juror misunderstandings regarding sexual assault (APRI/NDAA, 2004). Common objections typically center on the arguments that there is no need for such testimony or that it is prejudicial because jurors place too much weight on the expert opinions (Munch, 1999). In response, the need for an expert witness can be demonstrated to the court by highlighting the answers of potential jurors to voir dire questions regarding stereotypes about sexual assault. Attorneys can also note if the opposing side has argued that the victim’s behavior was “unusual” (APRI/NDAA, 2004; Munch, 1999).

To address concerns regarding the prejudicial nature of the testimony, research findings can be presented to the court to show that jurors do not in fact substitute expert opinion for their own judgments and that they are responsive to the issues raised in cross-examination. Attorneys can also highlight the importance of jury instructions provided at the end of the trial to caution jurors not to place too much weight on the testimony of expert witnesses (Munch, 1999). An expert can work with the attorney(s) in a case involving a sexual assault to prepare for these pre-

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<sup>5</sup> *State v. Hampton*, 746 P.2d 947 (Colo. 1987) (cited in Bayliff, 2000).

<sup>6</sup> *State v. DeSantis*, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990); *State v. Robinson*, 146 Wis. 2d 315, 431 N.W.2d 165 (Wis. 1988) (cited in Bayliff, 2000).

<sup>7</sup> *Farley v. People*, 746 P.2d 956 (Colo. 1987) (cited in Bayliff, 2000).

<sup>8</sup> *State v. Hickmott*, Case No. 98 CA 01 (Ohio App. Feb. 5, 1999) (cited in Bayliff, 2000).

trial hearings by reviewing the research literature and crafting appropriate voir dire questions (APRI/NDAA). Even when an expert does not provide testimony for jurors, however, the information presented in pre-trial hearings can have the benefit of educating the judge and other attorneys present.

### **When should expert testimony be introduced?**

Arguments based on rape myths are typically raised *by the defense* either in the prosecution's case-in-chief during cross-examination of the victim, or in their presentation of the defense case (Bayliff, 2000; APRI/NDAA, 2004). Therefore, expert testimony is usually introduced *by the prosecution* either during their case-in-chief following the defense's cross-examination of the victim, or in the rebuttal following the defense's presentation of their case (Roger Canaff, personal communication, June 14, 2004).

However, some have suggested that it is a mistake for prosecutors to wait for rebuttal following the defense's presentation of their case, because jurors will inevitably have pre-existing assumptions that will affect their perceptions of the evidence and testimony presented. These authors thus recommend that the best way for the prosecution to utilize experts is to have them discuss the dynamics of sexual assault crimes and common victim reactions during their case-in-chief (Bayliff, 2000; Frazier & Borgida, 1992; Goldberg-Ambrose, 1992; Taslitz, 1999; Tetreault, 1989). With accurate information about sexual assault and its effects, they argue, jurors will better understand the case and fairly interpret the evidence and testimony presented.

### **What other role(s) can an expert play in a sexual assault case?**

The role of the expert in a sexual assault case can include more than simply providing courtroom testimony. In fact, even if the expert is not going to be called to testify he or she can assist the attorney(s) by:

- Helping to evaluate the case and develop trial strategy
- Crafting voir dire questions
- Assisting with jury selection
- Conducting a clinical assessment of the victim
- Writing an expert report to outline the issues and arguments to be made
- Helping to prepare the victim for trial
- Preparing for examination of the victim, defendant, and/or other expert witnesses
- Polling jurors after the case is decided
- Supporting the victim throughout the court process (Bayliff, 2000; David Lisak, personal communication, January 2004)

An expert can even meet with the victim after the trial process is concluded, to address questions or concerns regarding the testimony that was provided. This can be particularly helpful, especially because some victims can feel that they have been disempowered and their voice silenced compared to that of the "expert" (Des Rosiers, Feldthusen & Hankivksy, 1998).

## **Types of Expert Witnesses**

### **Expert Testimony by Medical Professionals**

In their testimony regarding a forensic examination, medical professionals such as physicians, physicians' assistants, and SANE nurses typically describe the process of examining the victim, the physical findings that were observed, and their interpretation. As described by Green (1988), Ledray (1999) and others, physical findings documented during a forensic medical examination usually include: physical injury, subjective tenderness described by the victim, stains or substances found on the victim's body, and other physical evidence collected from the scene of the sexual assault or from the victim's body or clothing. When the findings from the medical examination are consistent with the account of events given by the victim, the medical professional can note this in his or her testimony. This is done by simply stating that the physical findings are "consistent" or "congruent" with the victim's account of events (Green, 1988; Ledray, 1999).

While jurors and others may expect the medical professional to be able to "diagnose" a sexual assault, it is critical to note that this is impossible. Rather, medical professionals cannot make any definitive conclusions regarding the degree of force used by the assailant or whether the victim consented to any sexual activity. What the forensic examiner can appropriately conclude is whether there is evidence of sexual contact and/or recent trauma. The forensic examiner can also make a conclusion regarding consistency between the physical findings and the victim's account of what happened, as previously described (Green, 1988; Ledray, 1999).

It is critically important that any medical professional who testifies in a sexual assault case regarding the forensic evidence has specialized training and experience – including extensive experience with "normal" gynecological examinations and findings – as well as a critical understanding of the research literature and its limitations. Without such specialized training and experience, it is difficult for medical professionals to make conclusions about the physical findings that are typical of "normal" gynecological examinations and how these might differ from the findings seen with patients who have been sexually assaulted (William Green, personal communication, January 2004).

Because the issues of medical/forensic testimony are addressed elsewhere (e.g., Green, 1988; Ledray, 1999), the interested reader is referred to those sources for more information. The rest of the paper will focus primarily on expert testimony focused on the general dynamics of sexual assault crimes and common victim reactions.

### **Expert Testimony by Law Enforcement Experts**

In their guidelines on the use of experts, the American Prosecutors Research Institute and National District Attorneys Association (2004) recommend using investigators and other law enforcement professionals with a background in sexual assault cases as expert witnesses. Such experts will typically be qualified by the courts based on their extensive experience with sexual assault cases and victims, and their testimony can be extremely helpful for jurors seeking to make sense of victim behaviors that may be seen as confusing or unexpected (APRI/NDAA,

2004). For example, law enforcement experts can counter the common assumptions by jurors that sexual assault victims will always have visible signs of injury or “hysterical” emotional reactions. They can also testify to the dynamics of sexual assault perpetrators, including their motivations and methods used to identify potential victims and commit the crime. Such testimony helps jurors to better understand the actual characteristics of sexual assault crimes.

When using a law enforcement professional as an expert, it is typically best to use someone other than the person responsible for investigating the case at trial to discuss the general dynamics of sexual assault crimes and common reactions of victims. In fact, it is preferable that the expert witness be drawn from another law enforcement agency entirely. Retired law enforcement professionals are often ideal for this purpose.

Law enforcement experts can also explain to jurors the process for collecting and analyzing evidence. For example, many jurors have unrealistic expectations regarding the types of evidence collected and analyzed in a sexual assault case. These expectations are based on the depictions in television and movies where detectives have unlimited access to state of the art technology. On this basis, jurors may assume that DNA evidence is always collected and immediately analyzed in a sexual assault case – and the absence of DNA evidence may lead them to doubt the truth of the victim’s story. A law enforcement expert can explain the realities of the process and correct false assumptions regarding DNA and other types of crime scene evidence (Joanne Archambault, personal communication, January 2004).

Finally, toxicologists and law enforcement experts can testify in cases of drug-facilitated sexual assault. This type of testimony is not often used in cases involving a sexual assault, but it may be under-utilized as it is extremely helpful for understanding the victim’s reactions and demeanor after ingesting various kinds of narcotics (Joanne Archambault, personal communication, January 2004).

### **Expert Testimony by Victim Advocates**

Victim advocates are frequently asked to testify in cases involving a sexual assault, based on their experiences with common reactions of sexual assault victims. Fueled by cultural rape myths, these reactions are sometimes seen by jurors as evidence that the victim’s credibility is questionable and her claim dubious. The victim advocate can therefore address general dynamics of sexual assault, including empirically documented characteristics that differ from the stereotype of “real rape” (Benitez, 2001).

In some areas, experts such as victim advocates can even be qualified by the court to address the behavior of the defendant or the characteristics of the crime. However, the admissibility of this kind of testimony varies around the country. In some places, testimony regarding the defendant may be used only at the sentencing hearing and not before a jury – due to the prejudicial nature of the information and the prohibition against admitting character evidence in most courts (Anne Munch, personal communication, February 10, 2004).

Benitez (2001) has discussed several advantages and disadvantages of using a victim advocate as an expert witness in a case involving sexual assault. Some of the *advantages* of

using a victim advocate are that they are generally accessible and cooperative, and may not expect to be paid for their services. Victim advocates are typically qualified to testify regarding their own personal observations and conclusions, as supported by the length of the time in the field and number of victims assisted. Their testimony can therefore be extremely effective.

Unfortunately, one of the *disadvantages* of using victim advocates in the role of expert witness is that their testimony can sometimes be tarnished with cross-examination regarding the reputation of the individual and/or the rape crisis agency (Benitez, 2001). Because victim advocates have the stated mission of working on behalf of victims, this is sometimes used to undermine their credibility by suggesting that their testimony is biased. An advocate might also inadvertently harm the victim's credibility or case when questioned by the opposing side, due to lack of experience with expert testimony and other courtroom procedures.

There are even more critical disadvantages when the victim advocate serving as an expert witness has provided direct services to the victim. First, this advocate is too closely involved in the case to be an effective witness, because the testimony can be easily characterized as biased. More importantly, the victim advocate cannot protect the confidentiality of any privileged communications with the victim. In fact, the rule on witnesses observed in most jurisdictions dictate that the victim advocate cannot provide direct services to the victim once subpoenaed to testify in the case. Because both the victim and advocate serve as witnesses in the trial, they would thus be prohibited from discussing any evidence or testimony, reviewing trial developments, and even processing emotional reactions. This can serve to further isolate the victim from much needed support (Roger Canaff, personal communication, June 14, 2004).

For all of these reasons, it is recommended that a victim advocate serving as an expert witness should not be the advocate who worked with the victim personally (Bayliff, 2000; Roger Canaff, personal communication, June 14, 2004). Ideally, the expert witness should be drawn from another agency entirely. This strategy is likely to increase the effectiveness of a victim advocate as an expert witness, by decreasing the perception of bias in the case. More importantly, this will protect the confidentiality of privileged communications and allow the advocate to continue providing direct services throughout the litigation process. By designating certain advocates as potential expert witnesses, these individuals will also be able to develop specialized expertise in providing courtroom testimony.

### **Testimony by Psychologists, Psychiatrists, Clinical Social Workers, and Other Counselors**

In contrast with victim advocates, an independent professional (such as a psychologist, psychiatrist, counselor, college professor or other expert) may appear to jurors to be more objective and therefore less likely to damage the victim's credibility. This is particularly true if the information is provided at the general level rather than linking the expert testimony to case-specific details. However, this type of expert witness runs the risk of being perceived as a "hired gun" if their testimony is not framed appropriately and their role negotiated carefully (Benitez, 2001). In other words, jurors may discredit the testimony of an expert who is being paid, based on the perception that they may be simply providing the testimony that is most favorable to the party who is paying them. The advantages and disadvantages of using a victim advocate must

therefore be carefully considered, in comparison with another independent professional who can testify to the general dynamics of sexual assault and common reactions and behaviors of victims.

Traditionally, psychologists, psychiatrists, clinical social workers, psychiatric nurses counselors, and other experts testifying in a sexual assault case have presented information on Rape Trauma Syndrome (RTS) – the behavioral, physical, and psychological reactions to sexual assault (Taslitz, 1999). However, many researchers and legal scholars have recommended against using the RTS terminology and framework, relying instead on more general testimony that simply describes common behaviors and reactions of sexual assault victims (Bayliff, 2000; Boesch et al., 1998; Stefan, 1994; Torrey, 1995).

Some arguments against the use of RTS rest on its lack of clear definition and scientific reliability (Boesch et al., 1998), whereas others criticize the political and social implications of the syndrome framework (Stefan, 1994; Torrey, 1995). These authors are concerned that an overly simplified model of victim response will ultimately damage the credibility of any victim whose reactions do not conform to the RTS model. The characterization of “typical victim reactions” may be particularly harmful to women of color and women who are otherwise marginalized as their experiences may not be equally represented in the cultural expectations regarding how sexual assault victims “typically respond.”

Some courts have also raised concern regarding RTS testimony because the language of the syndrome suggests the conclusion that the victim was in fact sexually assaulted (Boesch et al., 1998; Garrison, 2000). As a result, at least three state supreme courts have allowed expert testimony regarding common reactions of victims only when the terminology of RTS was *not* used (Garrison, 2000).<sup>9</sup> It is therefore appropriate to advise against using the framework and terminology of RTS in expert testimony. Where relevant, experts can instead provide a general description of Post Traumatic Stress Disorder (PTSD), discuss the criteria for being diagnosed with PTSD, and/or offer an opinion regarding whether or not the victim qualifies for that diagnosis (Boesch et al., 1998). This type of testimony can be provided at five different levels, as summarized below.

## Five Levels of Expert Testimony

There are five levels at which an expert witness can provide testimony regarding the mental health, behavior, and demeanor of sexual assault victims (Boesch et al., 1998). This type of information can be useful in either criminal or civil cases, and can be presented by experts from a variety of disciplines. The following section is adapted from the Boesch et al. (1998) review that was based on a classification system previously developed by Fischer (1989).

### **(1) Testimony on victim behaviors described by the defense as “unusual”**

The first level of expert testimony in sexual assault cases includes testimony regarding specific behaviors of sexual assault survivors that are characterized as “unusual” by the defense

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<sup>9</sup> As reviewed by Garrison (2000), examples include: *Hilburn v. State*, 765 P.2d 1382, 1386 (Alaska Ct. App. 1988); *State v. Gettier*, 438 N.W.2d 14 (Iowa 1989); *State v. Allewalt*, 517 A.2d 741, 751 (Md. 1986). See also *State v. Horne*, 710 S.W. 2d 310 (1986) (cited in Boesch et al., 1998).

(Boesch et al., 1998). For example, the defense might argue that it is “unusual” for a victim of sexual assault to delay reporting or to blame herself. Based on common cultural rape myths, such behaviors are highlighted to undermine the victim’s credibility and suggest that she was not “really raped.” In fact, the research clearly demonstrates that behaviors such as these are quite common among sexual assault victims. These are behaviors that an expert witness can therefore describe in their proper context, based on research and/or professional experiences with victims of sexual assault. Other examples of common – yet counterintuitive victim behaviors – include:

- Failing to fight or otherwise physically resist during the assault
- Experiencing “frozen fright” during the assault
- Exhibiting no physical evidence of injury from the assault
- Delaying a report to the police or reporting only under pressure from family or friends
- Failing to recall or deliberately omitting specific details about the assault
- Being unable to identify the perpetrator to police
- Denying or minimizing the assault to friends and family members
- Exhibiting no apparent emotional expression following the assault
- Exhibiting a loss of memory for events preceding the assault
- Providing apparently inconsistent statements at different points in time
- Having a relationship with the perpetrator prior to the assault
- Blaming oneself for the assault
- Recanting (Bayliff, 2000; Boesch et al., 1998; David Lisak, personal communication, January 2004)

Correct information on these common victim behaviors could be provided by an expert witness drawn from any number of fields, including psychology, psychiatry, clinical social work, psychiatric nursing, victim advocacy, law enforcement, and even researcher or college professors with expertise in this area. Of course, when testifying to the prevalence of such behaviors among sexual assault victims, expert witnesses are bound by ethical guidelines to acknowledge the limits of their knowledge, data, and conclusions. To illustrate, guidelines provided by the American Psychological Association (1992) state that psychologists cannot ethically testify that behaviors are common unless they are documented in the research (Boesch et al., 1998).

Courts have typically admitted this type of testimony (Bayliff, 2000; Boesch et al., 1998; Garrison, 2000),<sup>10</sup> but some have sought to limit it to rebutting only those behaviors

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<sup>10</sup> As reviewed by Bayliff (2000), Garrison (2000), and Boesch et al. (1998), examples include: *Hilburn v. State*, 765 P.2d 1382 (Alaska Ct. App. 1988); *State v. Huey*, 699 P.2d 1290 (Ariz. 1985); *People v. Hampton*, 746 P.2d 947 (Colo. 1987); *State v. Ali*, 660 A.2d 337 (Conn. 1995); *Division of Corrections v. Wynn*, 438 So. 2d 446 (Fla. Dist. Ct. App. 1983); *Edmond v. State*, 442 S.E.2d 300 (Ga. 1994); *State v. Roles*, 832 P.2d 311 (Idaho 1992); ILL REV. STAT ch. 38, 115-72.2 (1989); *People v. Wheeler*, 602 N.E.2d 826 (Ill. 1992); *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989); *Simmons v. State*, 504 N.E.2d 575 (Ind. 1987); *State v. Gettier*, 438 N.W.2d 1 (Iowa 1989); *State v. Marks*, 647 P.2d 1292 (Kan. 1982); *State v. Allewalt*, 517 A.2d 741 (Md. 1986); *Commonwealth v. Mamay*, 553 N.E.2d 945 (Mass. 1990); *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990); *People v. Christel*, 537 N.W.2d 194 (Mich. 1995); *State v. Booker*, 348 N.W.2d 753 (Minn. 1984); *State v. Liddell*, 685 P.2d 918 (Mont. 1984); *State v. Staples*, 415 A.2d 320 (N.H. 1980); *State v. Barraza*, 791 P.2d 799 (N.M. Ct. App. 1990); *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990); *State v. Hall*, 412 S.E.2d 883 (N.C. 1992); *State v. Whitman*, 475 N.E.2d 486 (Ohio Ct. App. 1984); *State v. Schumpert*, 435, 435 S.E.2d 859 (S.C. 1993); *Key v. State*, 765 S.W.2d 848 (Tex. Ct. App. 1989); *Perez v. State*, 653 S.W.2d 878 (Tex. Ct. App. 1983); *State v. McCoy*, 366 S.E.2d 731 (W.Va. 1988);

specifically raised by the defense (Boesch et al., 1998).<sup>11</sup> Unfortunately, such a limit does not allow experts to address the full range of myths that may prejudice juror decision-making regarding the victim (Boesch et al., 1998). Rather, “the state is merely using the evidence to rebut the defendant’s attempt to benefit from the common misconceptions about rape victims” (Gaines, 1997, p. 251).

## (2) Testimony on common victim reactions and general criteria for PTSD

The second level of testimony includes common victim reactions and behaviors, as well as a general description of the criteria for PTSD (Boesch et al., 1998). The testimony can therefore be provided by a psychologist, psychiatrist, clinical social worker, psychiatric nurse, victim advocate, counselor, researcher, or college professor with expertise in these issues.

At this level, the expert does not personally interview the victim, discuss the victim’s specific behaviors, or make a conclusion regarding the victim’s possible diagnosis for PTSD (Boesch et al., 1998). As with the first level of testimony described above, such discussion of general symptomology and diagnostic criteria for PTSD can help jurors to understand behaviors by the victim that might not otherwise make sense or be characterized by the defense as “unusual.” This type of testimony is often admissible<sup>12</sup> and even permitted by statute in some states (Garrison, 2000). For example, Illinois statute states that: “In a prosecution for an illegal sexual act perpetrated upon a victim, testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.”<sup>13</sup>

This second level of testimony is thus increasingly common, addressing both general victim behaviors and diagnostic criteria for PTSD. Empirical research documents that as many as “90% of rape survivors experience PTSD symptoms immediately after the rape and 15% of rape survivors are diagnosed with lifetime PTSD, making rape survivors the largest group of trauma victims who suffer from PTSD” (Boesch et al., 1998, p. 11). However, it is important that experts note in their testimony that not all sexual assault victims qualify for a diagnosis of PTSD and victims often suffer from symptoms other than those included in the PTSD diagnosis (Boesch et al., 1998).

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*State v. Robinson*, 431 N.W.2d 165 (Wis. 1988); *Rivera v. State*, 840 P.2d 933 (Wyo. 1992); *United State v. Carter* 26 M.J. 428 (C.M.A. 1988); *State v. DeSantis*, 155 Wis. 2d 774, 456 N.W.2d 600 (Wis. 1990); *State v. Moran*, 728 P.2d 248 (1986). However, many of the examples provided by Garrison (2000) are focused primarily on issues of Rape Trauma Syndrome.

<sup>11</sup> As reviewed by Boesch et al. (2000), examples include: *Commonwealth v. Mamay*, 553, N.E.2d 945 (1990); *State v. Hall*, 406 N.W.2d 503 (1987).

<sup>12</sup> As reviewed by Garrison (2000), examples include: *State v. Liddell*, 211 Mont. 180, 685 P.2d 918 (1984); *State v. Roles*, 832 P.2d 311 (Idaho 1992); *State v. Allewalt*, 517 A.2d 741 (Md. 1986); *State v. Hall*, 412 S.E.2d 883 (N.C. 1992). In California, the rules for the admissibility of this type of evidence are established in the California Evidence Code and a number of cases decided by the California Supreme Court. As reviewed by the American Prosecutors Research Institute and the National District Attorneys Association (2004) in their joint publication, these cases include: *People v. Bledsoe*, 36 Cal.3d 236 (1984); *People v. McAlpin*, 53 Cal.3d 1289 (1991); *People v. McDonald*, 37 Cal.3d 351, 367 (1984).

<sup>13</sup> ILL. REV. STAT. Ch. 5 §115-7.2.

### **(3) Testimony that the victim's behavior or symptoms are consistent with PTSD diagnosis**

The third level of testimony extends beyond the previous one by not only describing common victim reactions and PTSD diagnosis, but also making the link to the specific case by concluding that the victim's reactions are consistent with the criteria for PTSD diagnosis (Boeschen et al., 1998). As with the second level of testimony, this information can be provided by a psychologist, psychiatrist, clinical social worker, psychiatric nurse, victim advocate, counselor, researcher, or college professor with expertise in these issues.

Although this type of testimony is somewhat more controversial than the general educational information of the previous level, it is sometimes admitted because it can assist jurors in seeing the consistencies between the victim's reactions and those that are commonly seen among people who experience sexual assault victimization (Bayliff, 2000; Boeschen et al., 1998).<sup>14</sup> However, other courts have found it too prejudicial to the defendant because it inappropriately boosts the victim's credibility (Boeschen et al., 1998).<sup>15</sup> This conclusion is bolstered to some extent by research documenting increased influence when expert testimony is specifically linked to the issues of the case (Brekke & Borgida, 1988).

### **(4) Testimony that the victim suffers from PTSD**

At this level, the expert not only testifies about the victim's reactions but also offers an opinion about whether the victim meets the criteria for a diagnosis of PTSD. This type of testimony can therefore only be provided with a mental health professional with a background in clinical assessment and diagnostic criteria for PTSD, such as a psychologist, psychiatrist, clinical social worker, psychiatric nurse, counselor, or other professional with relevant expertise. Although the testimony includes a conclusion regarding whether or not the victim suffers from PTSD, the expert witness nonetheless stops short of concluding that the victim was in fact sexually assaulted (Boeschen et al., 1998).

Some courts have allowed such testimony on the basis that the expert can be cross-examined by the defense or countered with the testimony of a defense expert (Boeschen et al., 1998; Garrison, 2000).<sup>16</sup> However, this raises concern that the victim's medical and mental health history are opened up for the trial (Stefan, 1994). For example, expert testimony at this level may open the victim up to the possibility of a compulsory examination by an expert for the defense (Garrison, 2000). The decision to introduce testimony that the victim suffers from PTSD must therefore be very carefully considered with these issues in mind.<sup>17</sup>

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<sup>14</sup> As reviewed by Bayliff (2000) and Boeschen et al. (1998), examples include: *People v. Douglas*, 538 N.E.2d 1335 (1989); *State v. Doport*, 935 P.2d 484 (Utah 1997); *State v. Rogers*, 992 P.2d 229 (Mont. 1999).

<sup>15</sup> The example cited by Boeschen et al. (1998) is *People v. Gray*, 187 Cal.App.3d 213 (1986).

<sup>16</sup> As reviewed by Bayliff (2000) and Garrison (2000), examples include: *State v. Allewalt*, 517 A.2d 741 (Md. 1986); *State v. McQuillen*, 689 P.2d 822 (1984); *State v. Ashburn*, 914 S.W.2d 108 (Tenn. Ct. App. 1995); *United States v. Carter*, 26 M.J. 428 (C.M.A. 1988).

<sup>17</sup> This issue was raised but not decided in *State v. Allewalt*, 517 A.2d 741 (Md. 1986). In Illinois, the question was addressed by the state supreme court which ruled that "unless the victim consents to an examination by an expert chosen by the defendant, the State may not introduce testimony from an examining expert that the victim of an alleged sexual assault suffers from a 'recognized and accepted form of post-traumatic stress syndrome'" [*People v. Wheeler*, 602 N.E.2d at 833 (citing ILL. REV. STAT 1989, ch. 38 ¶ 115-7.2 (1992))].

Of course, any expert testifying that a victim qualifies for a PTSD diagnosis can only do so on the basis of an assessment tool that has been demonstrated to be reliable and valid, and the limitations of the instrument must be discussed (Boesch et al., 1998). The expert must also note that even a diagnosis of PTSD does not definitively establish that it is the result of the sexual assault and not some other traumatic experience (Boesch et al., 1998; Stefan, 1994).

It is critically important to note that serious confidentiality issues arise if the expert witness testifying is the same person who has therapeutically treated the victim. As reviewed by Bayliff (2000), any communication between the victim and a therapist is privileged unless waived by the victim. The same is true for communication with a victim advocate or rape crisis counselor in several states. Therefore, it is typically best to use an expert witness who has not therapeutically treated the victim, but rather conducted only a clinical assessment to determine symptoms and possible diagnosis for PTSD and/or other psychological disorders (Bayliff, 2000; Roger Canaff, personal communication, June 14, 2004).

### **(5) Testimony that speaks to the “ultimate issue”**

Although there are some exceptions, almost all states refuse to admit testimony that speaks to the “ultimate issue” in a sexual assault trial -- testimony that “states that the victim is telling the truth, states that the victim was raped, or both” (Boesch et al., 1998, p. 13; see also Bayliff, 2000; Garrison, 2000; Taslitz, 1999). As Bayliff (2000) indicates, “this type of testimony almost always results in a mistrial of the case or the reversal of a conviction on appeal” (p.2).<sup>18</sup> Experts must therefore *never* state that the victim is telling the truth or that the victim was sexual assaulted (Bayliff, 2000; Garrison, 2000; Munch, 1999).

## **Issues of Admissibility**

In order for any type of expert testimony to be admitted, it must be consistent with federal standards outlined in *Daubert v. Merrell Dow*<sup>19</sup>, and further articulated in both *General Electric v. Joiner*,<sup>20</sup> and *Kumho v. Carmichael*.<sup>21</sup> Trial judges have considerable discretion in deciding whether or not to admit expert testimony, but it will generally be allowed if it is both (1) scientifically valid and (2) beyond the common understanding of jurors.

### **Is expert testimony scientifically valid?**

With respect to the first criteria for admissibility, there is some degree of consensus regarding the general dynamics of sexual assault and the typical reactions of victims. For example, one survey of 22 sexual assault experts in such diverse fields as mental health, social work, nursing, and the clergy showed considerable consistency when responding to an 18-item

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<sup>18</sup>As reviewed by Bayliff (2000) and Garrison (2000), examples include *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc); *State v. Black*, 109 Wash. 2d 336, 745 P.2d 12 (1987), *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984); *State v. Saldana*, 324 N.W. 2d 227 (Minn. 1982); *State v. Brodnyak*, 718 P.2d 322, 326 (Mont. 1986); *Nichols v. State*, 177 Ga. App. 689, 340 S.E.2d 654 (1986); *Smith v. State*, 259 Ga. 135, 377 S.E.2d 158 (1989); *State v. Hall*, 412 S.E.2d 883 (N.C. 1992).

<sup>19</sup>*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>20</sup>*General Electric v. Joiner*, 118 S.Ct. 512 (1997).

<sup>21</sup>*Kumho v. Carmichael*, 526 U.S. 137 (1999).

*Sexual Assault Questionnaire* (Frazier & Borgida, 1992). No such consensus has been demonstrated, however, with respect to Rape Trauma Syndrome (Bayliff, 2000), providing further support to the recommendation that expert witnesses should avoid the terminology and framework of RTS in favor of more general discussion of sexual assault dynamics and common victim reactions.

### **Is expert testimony beyond the common understanding of jurors?**

With respect to the second criteria for admissibility, expert testimony is traditionally allowed only when it will clarify issues that are beyond the common understanding of the average juror. It is therefore important to note that a voluminous body of research has documented that the general population holds a number of myths and misconceptions about sexual assault, perpetrators, and victims (Burt, 1994; Frazier & Borgida, 1988; Lonsway & Fitzgerald, 1994; Ward, 1995). In the study cited above where experts demonstrated consistency in their responses to the *Sexual Assault Questionnaire*, the scores of the laypeople were considerably lower than the experts (Frazier & Borgida, 1988). In fact, the scores of the laypeople were almost no better than chance, as if they had provided completely random guesses to the questionnaire (Boeschen et al., 1998). Yet two early studies found that such attitudes were the best predictors of decision-making in a simulated sexual assault case (Feild, 1978; Feild & Bienen, 1980). It is therefore clear that expert testimony on the general dynamics of sexual assault and common victim reactions are not only scientifically valid but also beyond the common understanding of the average juror.

### **In which states is this kind of expert testimony admitted?**

There have been numerous legal reviews of the propriety and admissibility of expert testimony in cases involving sexual assault, typically focused on the issues of Rape Trauma Syndrome (e.g., Fischer, 1989; Gaines, 1997; Garrison, 2000; Massaro, 1985; Stefan, 1994; Torrey, 1995). The most recent of these, conducted by Garrison (2000), includes a summary of which state courts currently admit testimony regarding Rape Trauma Syndrome (RTS), which exclude it, and which have not yet ruled on the question. Despite the recommendation to avoid the RTS terminology and framework, the review by Garrison (2000) is nonetheless helpful in concluding that “a total of twenty-five states and the military have ruled expert testimony on RTS syndrome evidence admissible, seven states have ruled expert testimony on RTS evidence inadmissible, and eighteen states and the District of Columbia have not directly ruled on the admissibility of RTS” (p. 629).<sup>22</sup>

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<sup>22</sup> As summarized by Garrison (2000), testimony on RTS or general victim reactions have been ruled admissible in the following states: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, South Carolina, Texas, West Virginia, Wisconsin, Wyoming, and the Military. A smaller number of state courts have specifically excluded this type of testimony or limited it, primarily because it was used to establish that the rape occurred (i.e., California, Minnesota, Missouri, New Jersey, Pennsylvania, Tennessee, and Washington). In California, for example, expert testimony is limited to discussion of victims as a class, and not the victim in the case at hand (Garrison, 2000).<sup>22</sup> The remaining states and the District of Columbia had not yet ruled on the issue as of 2000 (i.e., Alabama, Arkansas, Delaware, Hawaii, Kentucky, Louisiana, Maine). For detailed information on the state courts decisions and the limitations on testimony in sexual assault cases, please see Garrison (2000).

### What types of testimony are typically NOT admissible?

As previously discussed, courts generally do not allow experts to testify to the "ultimate issue" of whether the victim is telling the truth and/or actually sexually assaulted (Bayliff, 2000; Boesch et al., 1998; Garrison, 2000; Taslitz, 1999). Such testimony is likely to result in a mistrial or reversal of a conviction on appeal (Bayliff, 2000; Garrison, 2000).<sup>23</sup>

Other types of testimony typically excluded address issues of false reporting and "profiles" of either rape victims or sex offenders (Bayliff, 2000; Garrison, 2000). For example, testimony on the incidence of false reporting was ruled inadmissible in at least two recent cases because it improperly addresses the issue of victim credibility (Bayliff, 2000).<sup>24</sup> Although several appellate decisions have upheld the use of expert testimony suggesting that the defendant does not fit the profile of a sex offender, many researchers have concluded that there is no reliable or scientifically accepted concept of a sexual offender "profile," and this type of testimony should therefore not be used in a sexual assault trial (Bayliff, 2000). For similar reasons, testimony regarding the "profile" of a rape victim or the statistical percentage of victims suffering from RTS is likely to be considered inappropriate (Garrison, 2000).

### Effects of Expert Testimony on Jurors

There is a limited body of research suggesting that juror decision-making can be influenced by expert testimony in sexual assault cases. In a few studies, mock jurors have provided more guilty verdicts when experts testified about the general dynamics of sexual assault and its effects on victims (Brekke, 1985; Brekke & Borgida, 1988; Spanos, Dubreuil & Gwynn, 1991-92). This effect was seen despite the fact that mock jurors hardly discussed the testimony itself (Brekke & Borgida, 1988). It was particularly pronounced when the expert explicitly linked general information to the case-specific facts, and when the testimony was provided earlier in the trial (Brekke & Borgida, 1988). These researchers concluded that the early introduction of expert testimony on the general dynamics of sexual assault served as a framework for understanding the facts and issues in the trial, but that introducing such testimony late in the trial was insufficient to overcome the commonly held stereotypes and myths that otherwise framed juror understanding (Brekke & Borgida, 1988).

In contrast, at least one study found that the effect of the expert testimony was reversed on cross-examination. That is, mock jurors who heard only the direct examination of a sexual assault expert were less likely to believe that the sex was consensual and were more likely to vote for a guilty verdict. However, this increase in guilty votes was not seen in cases where an expert was subjected to cross-examination by the defense (Spanos et al., 1991-92). This research

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<sup>23</sup> As reviewed by Bayliff (2000) and Garrison (2000), examples include *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc); *State v. Black*, 109 Wash. 2d 336, 745 P.2d 12 (1987), *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984); *State v. Saldana*, 324 N.W. 2d 227 (Minn. 1982); *State v. Brodniak*, 718 P.2d 322, 326 (Mont. 1986); *Nichols v. State*, 177 Ga. App. 689, 340 S.E.2d 654 (1986); *Smith v. State*, 259 Ga. 135, 377 S.E.2d 158 (1989); *State v. Hall*, 412 S.E.2d 883 (N.C. 1992).

<sup>24</sup> As reviewed by Bayliff (2000): *State v. Kinney*, No. 99-122 (Vt. Oct. 13, 2000); *State v. Brodniak*, 718 P.2d 322, 326 (Mont. 1986).

can therefore be used to reassure the court that expert testimony is not unduly prejudicial to the defendant in a sexual assault case, as it can be effectively countered through cross-examination.

While the expert testimony in these studies influenced judgments of the credibility of the victim, it did not seem to affect the perceived credibility of the defendant (Brekke, 1985; Brekke & Borgida, 1988). This is important because it can be used to address the concern of judges that the testimony is prejudicial to the defendant. Rather, the effect seems to be limited to the perceptions and judgments of the victim (Boeschen et al., 1998).

In sum, there is a small body of research suggesting that expert testimony can influence the decision making of mock jurors in a sexual assault trial. This effect may be more pronounced if the testimony is focused on the specific issues of the case and presented earlier in the trial. However, there are a number of concerns regarding the research literature that warrant caution when interpreting the conclusions. First, there are only a small number of studies examining this phenomenon, all of which were conducted over ten years ago using undergraduates as research participants. The research is also typically focused on the framework and terminology of Rape Trauma Syndrome rather than the more general dynamics of sexual assault victimization (Boeschen et al., 1998). Therefore, it is reasonable to conclude that more research is needed to determine the specific impact of expert testimony in both criminal and civil cases involving a sexual assault.

Future research could examine the question of whether jurors typically make the connection between general testimony and the specific facts of the case (Boeschen et al., 1998), or whether this connection needs to be made explicitly by the expert during his or her testimony. If jurors can typically make the determination that a victim's reactions are consistent with those described in expert testimony, than it would seem to be unnecessary for the expert to make the connection explicitly and provide only the general educational information. Other questions for future research include the effect of different types of expert testimony, the timing and presentation of the testimony, and the variation in specific case characteristics.

## **Conclusion**

There are likely a number of reasons why attorneys do not use expert witnesses more often in cases involving sexual assault. Yet research and practical experience demonstrate that such expert testimony can be helpful in educating judges and jurors about the realistic dynamics of sexual assault crimes and the impact of sexual assault victimization. It is therefore hoped that this paper addresses a number of these concerns, by providing a better sense of who could serve as an expert witness and the ways in which their testimony and other services can be utilized. The paper focuses primarily on expert testimony provided for the prosecution in a criminal case to discuss the general dynamics of sexual assault and common reactions of victims. However, it is hoped that the information is useful for other types of criminal and civil cases where sexual assault is involved. There is every indication that expert witnesses will be increasingly used in such cases, and it is therefore important to proceed carefully in the most responsible and beneficial way.

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## **Appendix: List of Expert Contributors**

Many thanks are due to the thoughtful contributions of the experts who agreed to be interviewed and/or reviewed drafts of the manuscript while it was in development. Because there is so little published information on this topic, the thoughts and reflections of these experts represent a critically important source of information.

- Sgt. Joanne Archambault (Retired, San Diego Police Department), now Training Director of Sexual Assault Training & Investigations (SATI) and Chief Executive Officer of End Violence Against Women International (EVAW).
- Dr. David Lisak, Psychology Department, University of Massachusetts, Boston.
- Diana Schunn, RN, BSN, SANE/SART Director, Via Christi Regional Medical Center, Wichita, Kansas.
- Dr. William M. Green, Associate Medical Director of Healthwise, and Clinical Professor in the Department of Internal Medicine, University of California, Davis.
- Marc LeBeau, Chief of the Chemistry Unit, FBI Laboratory.
- Dr. Toby Myers, founding Board member and current Vice-Chair of the National Center on Domestic and Sexual Violence in Austin, Texas.
- Alice Vachss, J.D., former Chief of the Special Victims Bureau of the Queens (NY) District Attorney's Office.
- Dr. Mary Koss, Professor of Public Health, Psychiatry and Psychology, University of Arizona.
- Joan Zorza, Editor of *Sexual Assault Report and Domestic Violence Report*, and the book, *Violence Against Women*.
- Robert Gevers II, Attorney at Law with Arata Law Firm and Director of Training with the Justice Training Institute in Fort Wayne, Indiana.
- Dr. David Fago, Maryland Institute for Individual & Family Therapy.
- Anne Munch, J.D., former Chief Deputy District Attorney for the 7th Judicial District in southwestern Colorado and current director of the Ending Violence Against Women project in Colorado.
- Roger A. Canaff, J.D., Senior Attorney, National Center for Prosecution of Child Abuse.