

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

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Section 6

1. We submit this evidence in response to the Justice Committee's call for views on whether the introduction of tailored judicial directions on delay and non-resistance, under section 6 of the Abusive Behaviour and Sexual Harm (Scotland) Bill 2015, would 'make it more likely that justice would be delivered in individual cases.' The authors conducted an ESRC funded study to consider precisely this question in relation to rape trials in England and Wales. Our findings indicated that the introduction of this provision would increase prospects for justice. They played a key role in informing the decision to introduce extended judicial directions in England and Wales, and we believe that they are equally relevant and valuable for Scotland.

2. Since the terms of the Contempt of Court Act 1981 prohibit such research with 'real' jurors, a simulation was undertaken in which 9 different mini-trials were scripted and reconstructed by actors and barristers in front of an audience of members of the public. Across these trials, key facts and role-players were constant but variables were introduced. In three of the trials, the (female) complainant displayed signs of bruising and scratching and reported the attack immediately, but was emotionally 'flat' and calm during testimony. In another three of the trials, she displayed signs of bruising and scratching – this time, she was visibly upset during testimony but had waited 3 days after the incident before reporting it to the police. In the final set of three trials, the complainant reported immediately and was visibly upset during testimony but displayed no signs of physical injury, and sought to explain her lack of resistance on the basis that she had 'frozen' during the attack.

3. Procedural variables were also introduced to cut across these substantive scenarios so that in each sub-set of three mini-trials, the extent to which jurors were provided with educational guidance differed. In some trials, an extended judicial instruction (drafted in the balanced tone that was outlined and approved of by the Court of Appeal in *R v Doody* [2008] EWCA Crim 2394) informed jurors about the different emotional reactions that victimisation might elicit, the reasons why a complainant may delay reporting, or fail to resist physically during an attack. In other trials, this information was provided by an expert called by the prosecution and cross-examined by the defence. This expert (who was a chartered clinical psychologist with experience of counselling rape survivors) gave testimony that was well-supported by research literature and general in nature. Without vouching for the complainant's veracity, he emphasised that some victims of rape may appear calm, delay reporting or fail to resist for a range of reasons, and during cross-examination he specifically conceded that one such reason may be on account of her having fabricated the allegation. In the remaining trials, no such educational guidance was provided to participants.

4. Each reconstruction lasted approximately 75 minutes and was observed simultaneously by 24-26 volunteer participants from the local community. Having observed the trial simulation, jurors were separated into three different juries to reach a unanimous, or failing that majority, verdict. These deliberations, which lasted up to 90 minutes, were recorded and analysed. Prior to embarking on deliberations, and again at the close, jurors were provided with a brief questionnaire to explore their views in regard to the deliberative process, group verdict, and relevance of the variables under analysis (delay, resistance and demeanour), as well as the perceived value of the expert testimony / judicial instruction.

5. Our findings supported concerns regarding the limits of current public understanding as to what constitutes a 'normal' reaction to sexual attack. In the absence of educational guidance, the (relatively short) three day delay between assault and report presented in trial scenarios proved to be a significant stumbling block for many jurors, who were adamant that their instinctive reaction would have been to phone the police immediately. It was apparent, however, that the issue of timing could, and would, be viewed somewhat differently depending on the circumstances – thus, in trials in which the complainant claimed to have 'frozen' during the attack, jurors often questioned whether a genuine victim in this position would not have been more likely to turn first to a friend or family member.

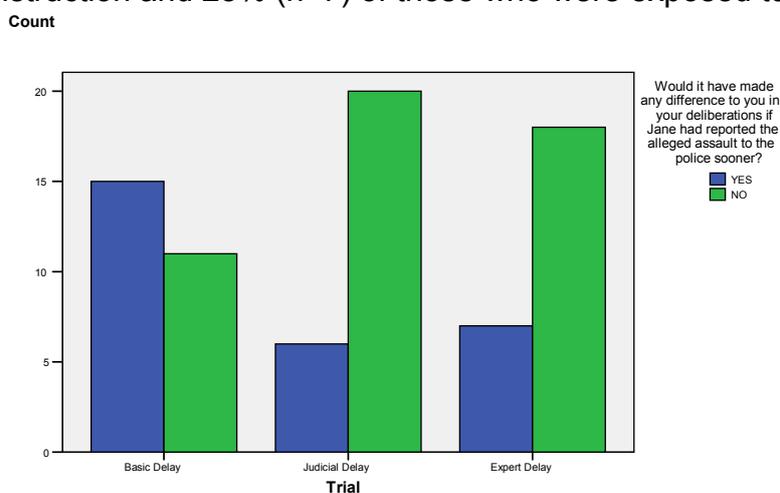
6. Likewise, in regard to demeanour, it was clear that participants who did not receive educational guidance were often perplexed by the calmness exhibited by the complainant during her testimony. The majority of jurors expected a visible display of emotion, and several suggested that the calm complainant's testimony was 'too precise' – a concern not raised in the other trials, despite the fact that the content of her evidence was unchanged. At the same time, there were some jurors who – though not disputing the expectation of emotional distress – were quick to caution against giving such demeanour too much probative weight, on the basis that a tearful complainant may simply be a 'good actress'.

7. Despite being directed that the use of force is not a requirement of the law of rape, in scenarios in which the complainant showed no signs of physical injury, jurors routinely emphasised the significance of this to their not guilty verdicts. There was a strong belief that a 'normal' response to sexual attack would be to struggle physically, and jurors' comments were often accompanied by demanding expectations in regard to a woman's capacity to inflict defensive injury. While there were some jurors who were more receptive, in principle, to the idea that a woman might freeze, for many, the credibility of this only held in cases where the perpetrator was unknown to the victim. Moreover, for those who were willing to countenance a 'freeze' response, expectations often transferred to signs of internal trauma. In scenarios in which there was some bruising and scratching upon the complainant, moreover, many jurors continued to expect higher levels of injury, and went to considerable lengths to provide alternative explanations for how the injuries may have been incurred.

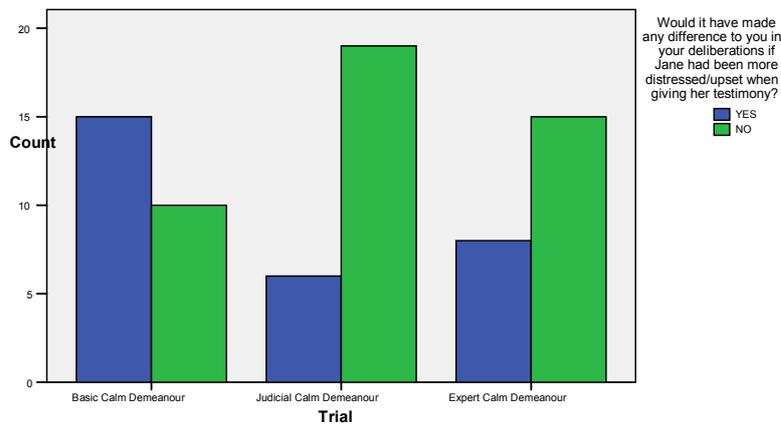
8. Overall, while jurors in the no-education condition paid lip-service to the notion that 'different people will react differently' to traumatic experiences, such as rape, assumptions regarding the instinct to fight back, the compulsion to report

immediately and the inability to control one’s emotions continued to influence their deliberations.

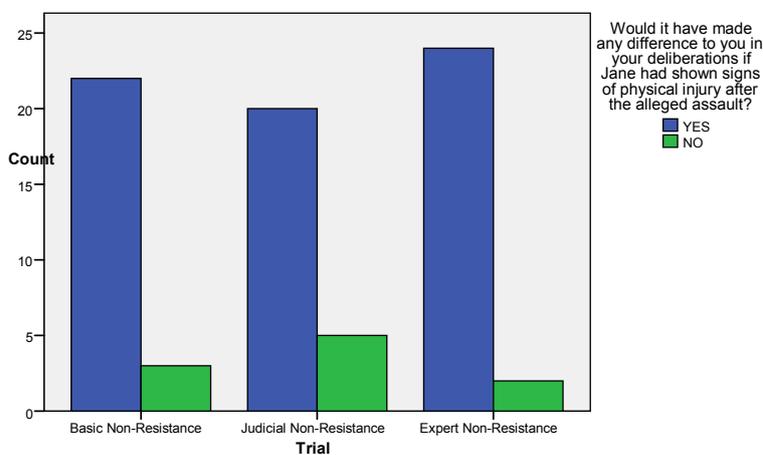
9. By contrast, jurors who received educational guidance were significantly more likely to state that they were untroubled by the three day delay in the trial scenarios, and to question more generally the significance that could reasonably be attached to the timing of a rape complaint. While jurors in the no-education condition tagged the complainant’s response ‘odd,’ ‘strange’ and ‘disturbing’, few in the education condition expressed either surprise or consternation at her delayed reporting. As one put it, ‘whether she waits three days, three months or three years, you can’t use that to say that it was or wasn’t rape.’ This shift was reflected in questionnaires. While 58% (n=15) of jurors in the no-education condition reported that it would have made a difference to their deliberations if the complainant had reported the assault to the police sooner, this fell to 23% (n=6) amongst jurors who had received judicial instruction and 28% (n=7) of those who were exposed to expert testimony.



10. Again, in relation to the question of emotional demeanour, jurors exposed to guidance detailing the reasons why a rape victim may appear calm when communicating her experiences were far more likely than ‘non-educated’ counterparts to draw a negative inference on this basis. Although some (approximately one-sixth) continued to support a more negative assessment, the overall tenor of contributions suggested that those who had received education displayed a greater understanding of emotional reactions to rape and were more willing to accept that a ‘genuine’ victim could exhibit few signs of visible distress whilst testifying in court. While 60% (n=15) of jurors in the no-education condition said that it would have influenced their decision if the complainant had been more obviously distressed when giving her testimony, only 24% (n=6) of jurors who received judicial instruction, and 35% (n=8) of jurors who were exposed to expert testimony shared this view.



11. By contrast, in regard to non-resistance, we were unable to identify any clear impact upon deliberations as a result of educational guidance. Most jurors continued to expect the complainant to offer physical resistance and / or to have sustained injury as a result of the defendant’s use of force against her. This was confirmed by the questionnaire data – when asked whether it would have made any difference to their deliberations if the complainant had shown signs of physical injury after the alleged assault, 88% (n=22) of jurors in the no-education condition answered in the affirmative, compared to 80% (n=20) of those who received judicial instruction and 92% (n=24) of those who exposed to expert testimony.



12. Significantly, jurors often failed to connect the ‘freezing’ response described by the complainant, and explained in the educational guidance, with the type of acquaintance rape under review. Educated jurors continued to hold that such a response would be credible only in situations where the attacker was unknown to the victim. Thus, while it is possible that the apparent inefficacy of the guidance on this issue of complainant non-resistance is attributable to the tenacity of jurors’ expectations of force, injury and resistance simpliciter, it is also possible that – with some adjustments to the guidance in order to emphasise its relevance in acquaintance as well as stranger rape scenarios – it would have had a more

pronounced impact, akin to that evidenced in relation to the issues of delay and demeanour.

13. Jurors responded in similar ways to the educational guidance, regardless of whether it was presented by an expert near the start of the trial or by the judge towards the end. Given the impossibility, in the present study, of replicating the parallel stages of a real trial that may last for days or weeks, the exact significance of this finding is unclear. There is, however, reason to suspect that the guidance may have greatest impact when general expert testimony and judicial instructions are utilised together, rather than in the alternative.

14. Further details and discussion of these findings can be found in the Briefing Report submitted to the ESRC and key stakeholders – attached to this submission and available at <http://www.researchcatalogue.esrc.ac.uk/grants/RES-000-22-2374/outputs/read/c6a0191d-6911-4ccd-9a55-d6777e96b649>; and in the attached publications as listed below:

Ellison, L. & Munro, V. (2010) 'A Stranger in the Bushes or an Elephant in the Room?: Critical Reflections on Received Rape Myth Wisdom in the Context of a Mock Jury Study' 13(4) *New Criminal Law Review* 781 – 801
http://www.jstor.org/stable/10.1525/nclr.2010.13.4.781?seq=1#page_scan_tab_contents

Ellison, L. & Munro, V. (2009) 'Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' 18 (3) *Social & Legal Studies* 1 – 22 <http://sls.sagepub.com/content/18/3/291.abstract>

Ellison, L. & Munro, V. (2009) 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' 49 (3) *British Journal of Criminology* 363 – 383 <http://bjc.oxfordjournals.org/content/49/3/363.short>

Ellison, L. & Munro, V. (2009) 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' 49 (2) *British Journal of Criminology* 202 – 219 <http://bjc.oxfordjournals.org/content/49/2/202.short>