Evidencing sexual assault: 
Women in the witness box

Michele Burman, University of Glasgow

Abstract  Drawing on recent research conducted in Scottish criminal courts, this article discusses the evidencing of sexual crimes through victim testimony. Despite significant reforms, complainers in sexual offence trials still find the process traumatic; the amount of sexual evidence introduced into the trial has increased; and the nature of such evidence draws on pervasive and outmoded rape myths.

Keywords  CJ legislations, courts, violence, victims, women

Introduction

At the time of writing this article, a woman called Ann Robertson tried to run from the court room in Edinburgh High Court. She was giving evidence in the week long trial of George Cummings, who was accused of raping her over thirty years previously, when she was just twelve years old. Ann Robertson who, unusually, waived her right to anonymity when this case hit the national newspaper headlines and television news, was undergoing cross-examination by Cumming’s defence counsel when she became distressed during questioning about her sexual history and past sexual relationships. The reason why this case received such intense media attention (see, for example, BBC, 2009a, 2009b; Gordon, 2009; Hamilton, 2009; Sweeney, 2009) was not simply because of the nature of the sexual crimes in the case (Cummings also faced charges of sexually assaulting three other girls over the same period, 1970 to 1979), nor because Ann Robertson was so distressed that she tried to flee the court room, but because, as a result of her actions, she was brought back into court, remanded by the trial judge, and subsequently arrested by police. She was then taken from the court to the police cells and detained there overnight for failing to deliver her evidence. The action of the trial judge in this case is both extraordinary and illuminating; not only did it highlight the ordeal that many women go through in contemporary court rooms, drawing adverse attention to the criminal justice treatment of victims of rape, it also sparked a media debate about...
the ways in which women alleging sexual offences may be held accountable if they try to withdraw from the criminal justice process.\textsuperscript{2}

In many respects, Scotland has been at the forefront of developments tackling violence against women. The Scottish Government has made violence against women a priority (Scottish Executive, 2001c). Its innovative domestic abuse strategy has been in place for several years and has been broadened to cover all forms of violence against women. Last year the Scottish Government announced funding of £22m for services to tackle violence against women. The Government also recently committed funding for a three year pilot of the first Scottish sexual assault referral centre (SARC) in Glasgow, and announced that it will be expanding the Glasgow domestic abuse courts pilot. In recent years there has been a raft of significant reforms in the prosecution and investigation of sexual offences, including the specialist training of prosecutors (COPFS, 2006; 2008; ACPOS, 2008), the introduction of special measures to assist witnesses to give their evidence in court,\textsuperscript{3} the publication of an information pack for those who have been raped or sexually assaulted (Scottish Government, 2008) and, perhaps most relevant here, the introduction of ‘rape shield’ legislation to protect victims from distressing and humiliating questioning during the trial. Since coming to office, the Lord Advocate Eilish Angiolini has made a series of very high profile announcements about her commitment to improve the criminal justice response to rape, and there is an imminent Bill reforming the law on sexual offences, including a broadening of the definition of rape. Yet, as Ann Robertson’s experience attests, the nature of giving evidence in sexual offence trials, particularly that which takes place during cross-examination, remains extremely harrowing and women alleging rape are still subject to harsh treatment by the courts.

Drawing on two recent research studies on sexual offence trials conducted in Scottish criminal courts (Burman et al., 2005, 2007), this article examines the nature of giving evidence in such trials and considers the extent to which recent reforms to the law of rape in particular, and the Scottish criminal justice response to sexual offences more generally, may be considered to have ameliorated the conditions under which victims of such offences (who are overwhelmingly women) are required to testify against their alleged assailant in the court room. In particular it examines the use of questioning and evidence about their lifestyles, their character and crucially, their past sexual relationships, and the ways in which this is used in the proving/disproving of the sexual assault.

The studies were concerned with monitoring the use of two successive legislative attempts (ss. 274 and 275 of the Criminal Procedure (Scotland) Act 1995 and ss.274 and 275 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002) to restrict the use of certain types of evidence about the sexual lives and character of victims (known as ‘complainers’ in Scotland) in sexual offence trials.\textsuperscript{4} The first study (Burman et al., 2005) entailed a mapping of all sexual offence cases heard in the Scottish High Court and the Sheriff Courts over a three-year period (1999–2001) when the 1995 Act was in force. Data were obtained from court records on trial charges, outcomes, and the uses of the relevant provisions of the 1995 Act for 303 High Court sexual offence trials. The taped proceedings of 83 of these trials were obtained, allowing the researchers to listen to and transcribe
the parts of the trial during which the complainer (or complainers) gave their evidence. This study provided a comparative starting point for an evaluation of the effectiveness of the 2002 Act. The second study (Burman et al., 2007) entailed a mapping of the characteristics of all sexual offence cases indicted to the High Court over a twelve month period June 2004 to May 2005 (n = 231) after the 2002 Act had been introduced. The taped proceedings of 30 sexual offence trials (identified from the mapping exercise) and the corresponding case papers were obtained to allow more detailed analysis. The second study also included in-court observation of ten sexual offence trials that took place in 2006 where detailed notes were taken of the entire proceedings. As far as possible the exact sequence of questions and answers were recorded for all witnesses called in the case, but with particular attention paid to the questioning of the complainer(s) during their evidence-in-chief, cross-examination and re-examination. Interviews were also conducted with trial judges, prosecution (known as Advocates Depute in Scotland) and defence counsel, and; with a small number of complainers who had recently given evidence in sexual offence trials.

**Responding to rape and sexual assault**

The ordeal of the witness box is one of a set of interrelated and enduring concerns about the criminal justice response to rape and sexual assault in Scotland. Others relate to the levels of reporting of sexual offences to the police (Scottish Executive, 2000), the high rates of attrition, especially in rape cases (Kelly and Regan, 2001; Regan and Kelly, 2003) and the extremely low conviction rates for rape (Scottish Government, 2008). Although the number of rapes reported to the police in Scotland has increased, the proportion of recorded rapes leading to a conviction has fallen steadily, as Table 1 shows. Depressingly, Scotland currently has one of the worst conviction rates for rape in Europe, with recent figures suggesting less than three per cent of rapes reported to the police lead to conviction. This pattern is

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of rapes reported to police (1)</th>
<th>Total number of cases prosecuted (2)</th>
<th>Total number of convictions for rape (3)</th>
<th>Proportion of reported rapes leading to conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002/03</td>
<td>743</td>
<td>60</td>
<td>39</td>
<td>5.2</td>
</tr>
<tr>
<td>2003/04</td>
<td>845</td>
<td>81</td>
<td>39</td>
<td>4.6</td>
</tr>
<tr>
<td>2004/05</td>
<td>900</td>
<td>94</td>
<td>46</td>
<td>5.0</td>
</tr>
<tr>
<td>2005/06</td>
<td>975</td>
<td>91</td>
<td>41</td>
<td>4.2</td>
</tr>
<tr>
<td>2006/07</td>
<td>922</td>
<td>65</td>
<td>27</td>
<td>2.9</td>
</tr>
</tbody>
</table>
similar to England and Wales (Smith, 1989; Harris and Grace, 1999; HMCPSI and HMIC, 2002; Lea et al., 2003) where the proportion of rape convictions has fallen from one in three in 1977 to one in 20 in 2002 (Kelly, 2002). High attrition rates for rape are not confined to UK jurisdictions but are echoed across Europe (Kelly and Regan, 2001).

In addition to these patterns in the reporting of rape, research in all the UK jurisdictions has shown the continued prevalence of pervasive myths about rape, and the equally pervasive and gendered stereotyping of rape victims which inform both legal reasoning (Brown et al., 1993; Kennedy, 1992; Lees, 1996; Temkin, 2000) as well as wider societal attitudes about rape and those who experience it (ICM, 2005). Recent research undertaken for the Scottish Government found that:

... 27 per cent of respondents think a woman can be at least partly responsible if she is drunk at the time of a sexual assault; 26 per cent thought that a woman bore responsibility if she wore revealing clothing; 32 per cent said that there should be some burden of responsibility for rape if the women is flirting, and 18 per cent believe that rape can be the woman’s fault if she is known to have had several sexual partners. (TNS System Three, 2007)

The harrowing trial process

In sexual offence trials, as in all criminal trials in adversarial systems, the prosecution leads evidence from all witnesses, including the victim, to establish that the elements of the crime have taken place. Following this, the defence has a right to cross-examine on that evidence, and thereafter the prosecution may conduct a re-examination of aspects of the evidence. In terms of legal-evidential procedure, what is involved here is a process of proving, or contesting, not only that a sexual crime has taken place, but that it has been committed by the (accused) person standing in the dock. The fundamental rationale of a trial is to examine the evidence. In Scottish law, standard evidential rules require that all evidence, including the complainer’s testimony, be corroborated, that is, substantiated and supported by some other piece of evidence. Yet the nature of the crime of rape, and the manner in which it is perpetrated, usually in the absence of any witnesses, presents particular evidential challenges for the proof of the crime (Temkin, 2002). In many instances, there is little evidence other than the accounts given by the alleged victim and the accused (Brown et al., 1993; Konradi, 1996; Lees, 1996), and even where there is physical or forensic evidence this can be challenged or re-interpreted. In most rape cases, consent is the main point at issue, with the accused invariably claiming that the victim consented (Baird, 1999; Brown et al., 1993; Burman et al., 2007; Westmarland, 2004). The issue of consent is what most defence arguments focus on. Where the alleged offence occurs in private (as it almost always does) it comes down to the word of the complainer against that of the accused.

It is well-established that for many women, going to court is but part of a chain that requires re-living the entire distressing and traumatic event (see for example, Campbell and Raja, 1999; Chamber and Millar, 1986; Frazier and Haney, 1996;
The sexual assault is the initial ordeal, but the emotional aftermath, the need to decide whether or not to report to the police, the ensuing police investigation and medical examination are all part of a continuing ordeal, which in many ways may replicate aspects of the assault and exacerbate feelings of powerlessness (Brown et al., 1993: 17; Temkin, 2002: 3). Complainers in sexual offence cases undergo much scrutiny during the course of an investigation and the potential for re-traumatization is high (HMCPSI and HMIC, 2007). In order to establish the elements of the crime, complainers are required to recount their experience in detail, both during their examination-in-chief, and then again in cross-examination. This can mean describing body parts and degrading sexual acts in graphic detail. As one woman interviewed as part of the second Scottish study said:

Well there was one question – obviously I can talk about it now: it’s still upsetting a wee bit, but I don’t mind – and it was a question that, how can I put it, they asked me and it was something in the means of, how can I put it, it was a ‘blow job’ but I actually had to say that sort of word in the court room. I had to say that word but I was trying to say it in another way so I didn’t . . . but I had to actually say that for them to understand and it was quite . . . honestly, it was dead embarrassing to stand in front of all those people and say that. I felt ‘oh my God, I can’t . . .’. I did it but I just wanted to run away from the whole thing. (C4)

Women can be in the witness box for relatively long periods of time; in a third of the trials in the first Scottish study complainers were there for between one and two hours; in a quarter of trials, complainers were there for between two and three hours; a small proportion (4%) were there for over five hours (Burman et al., 2005). Moreover, the trial is not an arena in which a victim can recount her experiences in her own way; rather she answers questions which are put to her, by both prosecution and defence. Questioning strategies employed by defence counsel to discredit the complainer have been identified as ‘oppressive and invidious’ (Temkin, 2002: 9). Tactics include asking the same question again and again in an increasing louder voice, with little opportunity for the complainer to answer (Kebbell et al., 2003); the use of a hostile tone; calling the complainer a ‘liar’ and a ‘time-waster’ and suggesting that the allegation was false (Brown et al., 1993; Temkin, 2002). It is a common characteristic of sexual offence trials for the defence to cross-examine complainers testing their credibility and consistency as witnesses (e.g. Chambers and Millar, 1986; Adler, 1987; Brown et al., 1993, 2007; Lees, 1996; Ellison and Munro, 2009; Temkin, 2000, 2002). All of these strategies were found in the Scottish studies. Tests of credibility included continually disputing the complainer’s version of what happened, and putting forward alternative explanations for the source of physical or forensic evidence (e.g. bruising, injuries, torn clothing) as, for example, simply evidence of vigorous consensual sex (Burman et al., 2005; 2007).

A wealth of research evidence points unerringly to the intimidating and often painful nature of giving evidence for complainers in sexual offence trials, so much so that the trial has been characterized as a form of secondary victimization (see, for example Chambers and Millar, 1986; Adler, 1987; Brown et al., 1993; Lees and Gregory, 1996). Taken together, the unfamiliar nature of the courtroom; the
lack of information about the trial process, and the shifts and uncertainties in the scheduling of trials; the lack of control which the complainer has over how her story can be told; the detailed nature in which she must recount what happened to her, and the adversarial response of the defence all add to the ordeal for the complainer. Ann Robertson’s experience of the witness box is therefore not unusual (although her subsequent arrest and overnight detention in police cell certainly is). Distress on the part of the complainer is common. Indeed the first study referred to above found that over three-fifths of complainers were crying or sobbing when giving their evidence (Burman et al., 2005), and a woman interviewed as part of the second study said:

... It was very, very embarrassing, upsetting mostly ... I think I cried all the way through the trial when I was giving evidence. I managed to stop myself but then they would say something and it would kick me off again and, as I said, I marched out and then I got a break and then I went back in and then they were saying ‘would you like another break?’ and I was like that, ‘no, I just want to get this over with’ and God man, I just wouldn’t wish that on anybody. (C3)

Speaking sex: the problem of sexual history and character evidence

Much of the concern about women’s experience of giving evidence in court relates to the use of questioning and evidence about her sexual history and sexual character. Indeed it was at the point at which Ann Robertson was being asked questions about her sexual life and past sexual relationships that she broke down, stark testimony to the distressing nature of having to speak of such matters in a room full of strangers and the accused. In a rape trial a complainer’s sexual history and sexual character are often at the heart of the unfolding case. As stated, invariably the defence to an allegation of rape is that the woman consented to sex, and cross-examination by the defence frequently delves into the woman’s sexual past in order to investigate whether or not she is the kind of woman who would be likely to consent to sex.

For many reasons, questioning and evidence on sexual history and sexual character in sexual offence trials is highly controversial, and has attracted considerable critical attention from those who work with women who have been sexually assaulted, as well as from academics and legal professionals. Women’s support groups have long protested the relevance and necessity of such evidence, arguing that it considerably exacerbates the traumatic experience of the court room for women, and constitutes a further form of sexual degradation. The potential for the use of sexual history and character evidence for undermining policy aims of encouraging women to come forward to the police to report sexual assault has long been recognized (Home Office, 1998; Scottish Executive, 2000), as has its likely impact on the perception of juries (Kalven and Zeisel, 1966) and its consequences in terms of trial outcomes. Feminists have drawn attention to such evidence being used to mount unwarranted attacks on both the credibility and character of women alleging rape and, questions concerning the relevance, admissibility and probative
value of such evidence continue to spark critical attention from academics and legal professionals (Kibble, 2001; Rook, 2004).

Since the early 1970s several jurisdictions around the world (for example, Australia, Canada, England and Wales, New Zealand, USA and Scotland) have enacted what is known as ‘rape shield’ legislation, designed to curtail the use of questioning and evidence about the past sexual history and/or sexual character of the complainer in sexual offence trials. Whilst such laws have varied in scope and procedural detail, they share a broadly similar set of legislative intentions, which are to: restrict the extent to which details of the complainer’s past sexual activities and sexual character (or reputation) can be disclosed to the jury; protect complainers from unnecessary humiliation and distress when giving evidence, and; bring to an end the presumption of admissibility of such evidence. All jurisdictions have encountered broadly similar difficulties in the effective implementation of these provisions, and consequently such legislative attempts are seen as limited in effectiveness (see Birch, 2002; Brown et al., 1993; Temkin, 1993, 2002; McColgan, 1996; Kelly, Temkin and Griffiths, 2006).

There is also a good deal of contention as to the legislative model most appropriate to achieve the right balance between protection of the complainer and the defendant’s right to a fair trial. The role and appropriateness of ‘rape shield’ legislation has led to debates on the role of judicial discretion in this area (Kibble, 2005), on the extent the courts can use the interpretative power conferred by section 3 of the Human Rights Act 1998, and above all how best to resolve the inherent tension between protecting the complainer’s privacy and dignity and the right of the accused to a fair trial in a proportionate manner (Kibble, 2001; Raitt, 2001).

It is worth noting the key differences between evidence of sexual history and sexual character. Whereas sexual history refers to specific information about particular facts, individuals, occurrences, events (some of which may even occur after the alleged assault), sexual character on the other hand involves the typing of a person, usually in moral terms of ‘good’ and ‘bad’ sexual character, and evinces generalized tendencies or reputation (for example, some who is ‘chaste’ or ‘promiscuous’) (Brown et al., 1993). This kind of evidence is problematic because of its prejudicial potential, through the line of reasoning that ‘unchaste’ women are more likely to consent to sex and are, in any event, less worthy of belief. In the past, evidence that a woman is a prostitute or had a ‘bad’ sexual reputation was considered to be relevant to her credibility, and successive legislative reformers have tried to challenge the connection between a woman’s sexual conduct (or character) and her truthfulness and credibility as a witness. Sexual history and character evidence also have the potential for misleading a jury and diverting attention from key issues on the case.

Although modern law reform has largely set its face against the use of sexual character evidence, there remains an acceptance that there will be some relevance for sexual history evidence, and in particular where this concerns a past relationship with the accused (Brown et al., 1993; Raitt, 2001). But keeping to the distinction between the two types of evidence is highly problematic since sexual history evidence can function to connote sexual character. Sexual character may be implied by innuendo and implication and during the course of a trial by reference,
for example, to a women's lifestyle or her dress, to build up a picture of someone who is likely to consent (Brown et al., 1993). This is one of the key problems for the effective restriction of the use of evidence of sexual history and sexual character.

A tale of two Acts: ‘Rape shield’ legislation in Scotland

In Scotland, as in other jurisdictions, there have been long-standing concerns about the relevance and admissibility of evidence concerning sexual history and character in sexual offence trials. Scotland first enacted ‘rape shield’ legislation restricting the use of evidence and questioning concerning the complainers’ sexual history or sexual character over twenty years ago, in 1986. In its design, this legislation resembled other forms of rape shield legislation, in that it did not totally bar such evidence. Rather, it introduced a general prohibition on the defence introducing any sexual history or sexual character evidence concerning a complainer that was not part of the actual subject matter of the charge, and then specified a set of exceptions to which the defence could appeal in making an application to the court to have the prohibition lifted. As in other jurisdictions, the prosecution were exempt from these restrictions and could introduce such evidence, without making an application to do so. A decade later, the restrictions were extended to a slightly wider range of sexual offences by sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, but the procedures remained the same.

A key stated aim of this legislation was to minimize undue questioning of complainers about their sexual life, while continuing to admit all the evidence necessary for justice to be done to the accused. Indeed, one of the grounds for exception was that it would be ‘contrary to the interests of justice’ to exclude the evidence the defence sought to elicit. The legislation attracted early criticism on the grounds that it was far too open to interpretation to be effective (Field, 1988) and this was supported by subsequent research (Brown et al., 1992, 1993; Burman et al., 2005) which found that evidence of the type that the legislation aimed to limit was still being introduced in Scottish courts. A key problem was that the legislation did not require consideration by the court of the relevance of the evidence that the defence sought to introduce to the charges libelled and the guilt of the accused, and the procedures followed when making an application to introduce prohibited evidence did not produce such consideration. During the course of the trial (usually after the complainer’s examination in chief) the defence typically made a verbal application to the trial judge to introduce prohibited evidence and/or address certain questions to the complainer. The subsequent discussion was fairly perfunctory, with the defence largely appealing to the ‘interests of justice’ clause. The legislation gave little leeway for the probative value of the evidence to be considered and weighed against its potentially prejudicial effects. Thus questions of weak relevance, yet with much potential for connotations of sexual immorality or sexual ‘bad’ character could be introduced (Burman et al., 2005). Analysis of trials documented a stock of ways used by the defence to suggest to the jury that the complainer is somebody who is likely to lie, likely to consent to sex with anyone and somebody who has a
motive for a false allegation. Lines of questioning justified as tests of the credibility of the complainer often became attacks suggesting the complainer was of ‘bad’ or dubious sexual character and at the same time also explicitly suggesting a predisposition to consent to sex (Brown et al., 1992, 1993; Burman et al., 2005). In sum, sexual history and sexual character evidence were not effectively limited, and the ordeal for the complainer did not diminish.

Throughout the 1990s, there were calls for a strengthening of the rules of evidence in sexual offence trials in Scotland by feminist groups and academics. In 2000, the Scottish Executive issued a consultation document, *Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials* in which the Justice Minister called for a ‘tightening’ up of the existing statutory measures (Scottish Executive, 2000). Following the consultation (Scottish Executive, 2001a), the Scottish Parliament published the Sexual Offences (Procedure and Evidence) (Scotland) Bill in June 2001, which proposed strengthening the existing prohibitions and exceptions, and limiting the discretion of the trial judge through the introduction of more detailed guidance regarding the circumstances of when sexual character evidence may be adduced (Justice 2 Committee, 2001a, 2001b). The Policy Memorandum of the Bill acknowledged the deficiencies in the existing provisions: namely that they were sufficiently elastic not to discourage the use of sexual history and sexual character evidence; that even where such evidence was relevant, its probative value was frequently weak when compared with its prejudicial effect and that the provisions rely heavily on individual judges to achieve a proper focus on these matters, without providing clear guidance (Scottish Executive, 2001b: 5–6). Other acknowledged deficiencies concerned the lack of any express requirement that evidence or questioning must be relevant before it is admitted; the lack of any weighing up of the potentially prejudicial effect caused by diverting a jury’s attention from the issues it requires to determine in arriving at a verdict; the lack of guidance on how the general ‘interests of justice’ exception is to be interpreted; the lack of guidance on the content of a decision on admissibility; and the fact that the complainer’s privacy and dignity are not accorded any particular status (Scottish Executive, 2001b: 6).

The 1995 Act was duly reformed by means of the Sexual Offences (Procedure and Evidence) (Scotland) Act in 2002. The 2002 Act introduced entirely new evidential and procedural provisions to limit the scope of questioning relating to a complainer’s character and sexual history in sexual offence trials. It not only replaced the text of the statutory provisions of the 1995 Act, it also extended their scope in the process. Now, the prohibition includes evidence that the complainer is ‘not of good character (whether in relation to sexual matters or otherwise)’ rendering it much wider in scope as it extends to more general issues of character or credit. As well as evidence of the complainer’s sexual behaviour outside the subject matter of the charge, it also prohibits any other behaviour (other than shortly before, at the same time as, or, shortly after the acts, which form part of the subject matter of the charge), that might found the inference that the complainer is ‘likely to have consented to those acts’ or ‘is not a credible or reliable witness’. Uniquely, the prohibition now applies to the prosecution as well as the defence. Like its statutory predecessor, the 2002 Act still lists a set of exceptions but only allowing specific facts or occurrences of sexual or other behaviour demonstrating the complainer’s
character, condition or predisposition and only if relevant to establishing whether the accused is guilty as charged and ‘the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice’. Further, the 2002 Act explicitly requires that consideration of justice must include taking account of a complainer’s dignity and privacy and must ensure the relevance of the evidence.

In the latter respect, the 2002 Act attempts to make good the perceived deficiencies of the 1995 Act. The key aim is to ensure that the questioning or evidence introduced is relevant to the issues of fact before the court, rather than calculated to demean or humiliate the complainer by raising tangential and otherwise irrelevant issues (Scottish Executive, 2001b). It is intended to strike a balance between protecting the complainer from indignity and humiliating questions, whilst admitting evidence which is nevertheless so relevant that to exclude it would endanger the fairness of the trial. As such, it potentially provides for a much sharper focus on the relevance of evidence (Jamieson and Burman, 2001).

The 2002 Act also radically alters the procedures for making an application to admit otherwise prohibited evidence or questioning. It is now necessary that a written application is made, normally 14 days before the trial commences, giving both prosecution and defence advance notice of applications by the other. The written submission to the court is required to set out the evidence sought to be admitted or elicited, the nature of any questioning proposed, the issues at the trial to which that evidence is considered to be relevant, the reasons why that evidence is considered relevant to those issues, and the inferences which the applicant proposes to submit to the court that it should draw from the evidence. The court can choose to hear evidence to help it reach a decision. If the court decides to admit the evidence, it must state what it is admitting, the line of questioning allowed, its reasons for allowing the evidence, and the relevance of the evidence. It is possible for the court to only partially allow an application or to indicate limits and restrictions on the subsequent questioning. Furthermore, where the defence does succeed in convincing the court that such evidence should be admitted, there is now a presumption that any relevant sexual offence previous convictions of the accused should be disclosed to the jury. The policy intention here was that the threat of previous convictions being disclosed would deter the defence from seeking to attack the character of the complainer (Scottish Executive, 2000: 10).

A perverse effect?

Yet the introduction of the 2002 Act has had a rather perverse affect. Far from reducing the use of sexual history and character, the volume of such evidence introduced in sexual offence trials has substantially increased. Whereas, under the 1995 Act just over a fifth (21%) of trials involved an application to introduce prohibited evidence (Burman et al., 2005), applications are now made in almost three-quarters (72%) of sexual offence trials heard in the High Court, an increase of three and a half times. Moreover, applications are almost always successful in that the evidence sought is either fully or partially allowed. Indeed, only three per
percent of applications were refused. This high success rate is similar to the situation regarding applications to introduce prohibited evidence in England and Wales (Kelly et al., 2006). It is also important to note that, although applications to introduce sexual history and character evidence are made in most trials, prohibited evidence also continues to be introduced in the absence of any application. Given the significant increase in numbers of applications, and their very high rate of success, and the continued introduction of prohibited evidence in the absence of any application, there is a substantial increase in the amount of sexual history and character evidence being legitimately elicited and admitted. What this means in practical terms is that seven out of ten complainers in serious sexual offences trials are now virtually guaranteed to be questioned on intimate sexual matters. Moreover, the proportion of cases involving multiple applications directed at the same complainer has more than doubled, with successive applications made both pre-trial and at the trial itself.

**The nature of evidence or questioning sought to be admitted**

So what sort of evidence is being introduced? The vast majority of applications are made by the defence, although legislation also applies to questioning by the prosecution. The contents of 47 applications using the 2002 Act were closely analysed to determine the nature of the evidence sought. Most sought to introduce more than one type of questioning or evidence. Some were very lengthy, seeking a range of different kinds of evidence. This is unsurprising as interviews with defence counsel found that they try to ensure that applications are as full and detailed as possible, referring to this strategy as a ‘belt and braces’ or ‘scatter gun’ approach to try to ensure that at least some evidence or questioning will be allowed. As one said:

> I do think that we’re back to covering ourselves again and I want to make sure that I’ve done all that I can, it won’t be left open to criticism in the future, whilst on the one view as you and I sit here we may say how could [sexual history evidence] be all that relevant, I think in the eyes of some people on a jury it might well be. I think that may well ring as quite a strong factor to some people. (Defence 3)

In a case involving two charges of assault with intent to rape and attempted rape, the written application listed 14 separate aspects relating to both sexual history and character matters under *nature of evidence or questioning sought*, all of which were allowed in full:

1. That applicant and complainer formed a relationship in [date]. They lived together [soon after] and purchased property together;
2. That the relationship was characterized by aggressive arguments especially if complainer had been drinking;
3. That complainer frequently used illicit drugs particularly ecstasy and cocaine. On occasion of charge 1, complainer drank alcohol to excess and abused cocaine;
4 That a physical confrontation occurred [charge 1: assault with intent to rape] which involved complainer slapping and scratching the applicant on face and body and kicking him;

5 That complainer denied to police that incident had any sexual element;

6 That a few days after the incident complainer called the applicant and said ‘come and take me away’;

7 That on [date two weeks after incident in charge 1] complainer phoned applicant. Complainant and applicant met and had sexual intercourse;

8 Thereafter for several months, complainant and applicant met once or twice a week and regularly had sexual intercourse in complainant’s flat, applicant’s house or at hotels;

9 On [date one year later] complainer asked applicant for £1000 to help pay for a flat. Applicant declined whereupon complainer stated ‘I’ve got photos to show police, maybe police will help me get a mortgage’;

10 That applicant attended a party in [place] with complainer in [following year] where complainer performed a ‘striptease’ type dance directed towards the applicant;

11 In early hours [same date] during phone call complainer asked applicant to meet at her flat;

12 After arrival at the flat complainer performed a sexually suggestive dance in front of applicant;

13 That a physical confrontation occurred [charge 2 – attempted rape] involving the complainer grabbing the applicant and attempting to slap and scratch him; and

14 That since [date of charge 2] complainer has attempted to contact the applicant by phone (case 172).

All of the evidence cited in the application was pursued during the trial, in much more detail than is conveyed in the written application, resulting in a lengthy cross-examination. For example, in relation to establishing point 1 above, the defence tried to show that the complainer and accused embarked on a sexual relationship very shortly after they first met, that they had sex very frequently, that they had sex in public places including parks, that they had sex in a public place shortly after charge one, and that throughout their relationship sex was often accompanied by excessive drinking and drug-taking.

Evidence or questioning concerning the character of the complainer was a common feature (sought in just over a quarter of the 47 applications). This included a wide range of questioning and evidence concerning: the complainer’s use of alcohol or drugs; her (alleged) mental instability or depression; her (alleged) dishonesty (as evidence by previous arrests; working whilst claiming unemployment benefit; attempting or committing benefit fraud; the making of fraudulent claims to the Criminal Injury Compensation Board; lying about her age or marital status). Character evidence also includes the complainer’s (alleged) propensity for untruthfulness and making up stories, including past allegations of sexual assault. The nature of
Evidence or questioning sought to show a motive for false allegation included: revenge, jealousy or malice against the accused; as a means of obtaining financial compensation; in order to obtain a more lucrative divorce settlement; to gain custody of children; to gain sympathy; to become the ‘centre of attention’; to ‘conceal the true nature of her relationship’ with accused and; in order to avoid being found out (having consensual sex) by parents, husbands or boyfriends. Having to endure such questioning is not only very distressing and difficult, but can trigger feelings of anger:

Just basically because I self-harm . . . ., they actually used that against me, like you self-harm and stuff like that and I was like well what’s that actually got to do with this court room today? I’m not here because I self-harm, I’m here because something bad happened to me. I was really, really angry about that (C 4).

Several applications sought to base questions on the contents of the complainant’s medical report, derived from the routine medical examination undertaken following a report to the police. The status of the medical report, and the opportunist use of information taken from that report as a means of cross-examination, and its implications for the dignity and privacy of the complainant was highlighted in earlier Scottish research (Brown et al., 1992, 1993). Information from the medical report, such as the complainant’s contraceptive and gynaecological history, absence of hymen, and information regarding a history of depression or substance abuse continue to be used in contemporary trials to suggest that the complainant is not a credible witness and suggest that she is likely to consent.

Applications also typically sought to question the complainant on sexual history with someone other than the accused (this was the case in a fifth of applications). This includes questions about the number of past sexual partners; the complainant’s alleged ‘sexual proclivities’ and engagement in certain sexual practices (such as using sexual aids, exotic condoms etc.); questioning to establish whether or not she was a virgin (this was especially in relation to teenage complainers); questioning about her contraceptive and/or gynaecological history and questioning about involvement in prostitution. It also includes attempts to question the complainant on her sexual relations or ‘sexually interested’ behaviour with someone else on or around the same occasion as the alleged offence.

A similar proportion of applications sought to introduce evidence about the complainant’s past history with the accused. This was mostly evidence about their past sexual relations, but in a small number of applications it concerned past non-sexual behaviour, such as arguments, ‘falling-out’ and ‘bad’ feeling, either in the past or around the time of the alleged offence. Evidence or questioning sought about the complainant’s sexual behaviour with the accused on or around the same occasion of the alleged offence included: her apparent willingness to go somewhere with him (e.g. back to his home; getting into a taxi with him; accompanying him to a party); giving him her telephone number or home address; showing ‘sexual interest’ in him (by, for example, dancing with him in a ‘provocative’ or ‘suggestive’ manner; by ‘sensual posturing’, through ‘sexually explicit’ remarks; by kissing or cuddling him; by ‘pointing to and/or revealing her breasts in his company’; and by unzipping his trouser flies). Having to answer such questions renders Ann Robertson’s reaction to
questioning about aspects of her sexual life all the more understandable. Distress experienced by complainers during cross-examination when this kind of questioning was introduced related as much to difficulty in understanding the questions which were put to them, as to their sense of embarrassment in answering questions of a sexual nature:

... the questions they were asking me were quite, I thought, were quite dramatic the way they were treating me in that court room. It was disgusting and dreadful. I had actually to use some words of a sexual nature that quite embarrassed me in front of all those people in that courtroom and I was quite nervous as it was and I was awful shaky, so that didn’t help me any more, that didn’t help me. It was horrible. (C4)

Questioning sought about the behaviour of the complainer after the offence included: showing no visible signs of distress; her refusal/unwillingness to report the matter to the police or undergo a medical examination; maintaining contact with the accused (e.g. continuing to live in same house as him despite having her own home; allowing the accused to look after their children; giving him gifts and/or writing to him); and evidence that she tried to withdraw the allegation. In a small number of cases, almost all involving younger complainers, this also included questioning about the complainer’s sexual behaviour after the incident(s) in the charge (e.g. her alleged masturbation; ‘sexual touching’ of boys; looking at older men).

As previously stated, written applications are required to detail the key issues in the trial to which the evidence or questioning sought is to be considered relevant. Typically these issues are identified by the applicant as one or more of the following: the issue of consent; the issue of the complainer’s character, including her general lifestyle; her credibility and/or reliability as a witness; her predisposition towards sexual behaviour at the time of the offence; as an alternative explanation for physical or other evidence; her mental state as an alternative explanation for any distress; motive for making a false allegation.

Weighing up relevance?

A notable difference between the 1995 Act and the 2002 Act is that under the latter the court has to determine the relevance of the proposed evidence of questioning in deciding whether or not to allow the evidence. In doing so, the court has to consider a broad test – the proper administration of justice – and to do so must weigh the comparative benefit to the accused in having such evidence against any impact it might have on the dignity and privacy of the complainer. The legislation sets up an explicit balancing exercise for the admissibility of evidence, where the court is required to take an evaluative approach. A key question therefore is whether the 2002 legislation has indeed led to a closer assessment of the relevance of the evidence sought. However, the research found that the terms of applications are often agreed by the defence and prosecution in advance of the court’s deliberations, and this prior agreement is a factor in the court’s decision. So, whilst the written nature and required format of applications render them much more transparent than applications under the 1995 Act, prior agreement between the parties typically
means that there is relatively little discussion of any aspect of an applications at the hearing at which they are decided. The position taken by the prosecution is a key determining factor of whether or not an application is allowed by the court. By and large, the prosecution tend not to oppose defence applications, and hence the court typically endorses the application without airing the relevance of the evidence.

The research revealed that there was a shared presumption of relevance by the prosecution, defence and judge concerning sexual history evidence, particularly where there was a past history between the complainer and accused. All judges said that they would allow applications to establish a past sexual relationship between a complainer and an accused, accepting that this would normally be relevant background context that the jury would need to be able to understand the events. As one put it, ‘in order to explain the reality or context of the whole transaction you have to go into some history. It would be ridiculous to keep that from the jury.’

Another influential factor in undermining the anticipated rebalancing of the probative value of weakly relevant evidence against respect for the dignity and privacy of a complainer is the relative ease with which a case for relevance can be constructed. This can be attested to by the high incidence of successful applications.

Although it was the intention of the reformers that complainers would be given some advance notification that an application had been made, the research found that this rarely occurred. Indeed, as one woman interviewed said:

And, I just had absolutely no idea what was going to happen when I got there, and I think that, I had no idea, no doubt he was prepped by his people saying you know, act this way, look this way, you know this sort of thing, and I didn’t have any of that. I just had to turn up, I didn’t know what his defence was, I didn’t know anything, and I just, to walk into something and not entirely be sure how to react, how to even speak, I just could have done with more. Just, you know, just somebody to tell me a little bit about the best way to be, or the questions that might be asked, and the best way to answer them. (C1)

The prosecution are wary of the possibility of being seen to ‘coach’ complainers in advance of trial, and so whilst they may re-interview a complainer to get her position concerning any emergent events or issues raised in a defence application, this does not necessarily involve informing her that such an application has been made, or of the detail of the lines of questioning which the defence seek to admit. Nevertheless, it was believed by judges and defence interviewed that complainers are indeed informed by the prosecution. The practice of the prosecution in this area is, however, changing following the recommendations of a review of the investigation and prosecution of sexual offences (COPFS, 2006), so that the complainer will be informed where an application has been made and the outcome of the court’s consideration of the application.

**Unintended consequences**

The research findings in relation to both the volume and the level of detail concerning the questioning sought in applications runs contrary to both the intentions of
the legislation, and the expectations of the reformers. The 2002 Act has clearly not gone in the direction intended; it has resulted in neither a decrease in the use of sexual history and character evidence overall, nor a tighter focus on the type of questioning that is allowed. Rather, it has resulted in the introduction of much more sexual history and character evidence than under the 1995 Act. The proportion of trials with applications to introduce prohibited evidence have increased markedly, questioning on sexual history and character is now sought by both the prosecution and the defence, the numbers of multiple applications have doubled and the ‘belt and braces’ approach adopted by the defence means that the questioning or evidence sought in written applications is now far more detailed and extensive than that sought in verbal applications made during the trial under the 1995 Act.

Paradoxically, the requirement of making a written application goes some way to facilitate the introduction of a wider range of evidence and a greater level of detail of questioning than occurred previously. Submission of an application is now a routine aspect of defence case preparation. The requirement that the application be made in advance and in writing has combined with other changes in procedure, including a greater emphasis on early preparation of cases; more extensive and earlier disclosure by the prosecution of material and evidence that may be pertinent to the decision of whether or not to lodge an application; and the effect of influential appeal court decisions on cases which have involved applications to heighten early consideration of the possibility of an application. Crucially, it is widely understood by legal practitioners that applications to introduce prohibited evidence are extremely likely to be successful. Questioning about sexual history and character in order to contest consent and challenge the credibility of the complainer have long been characteristic features of sexual offence trials; the routine submission of applications is ensuring that these features will endure.

The outcome of various strands of legal practice has had the unfortunate and unintended consequence of undermining the intention of the legislators. Lawyers are not just ‘interpreting’ the law but are implementing it through legal practice in ways that ‘fit’ with legal constructions and understandings of fairness, and this is at odds with the legislative intent. As a result, the 2002 Act has had an unanticipated and perverse outcome, increasing the presence of sexual history and character evidence rather than limiting it. This is sobering indeed. There have been long-standing concerns amongst feminist academics and activists about the nature and effectiveness of the state response to violence against women, and this research highlights the obstacles to effective law reform in this contentious and complex area.

Improved conditions for women in the witness box?

In recent years, we have seen a raft of reforms to policy, procedure, evidence, statute and successive sets of agency guidelines in relation to sexual crimes in Scotland. But there remain significant challenges posed by the levels of underreporting, the dismal fact that Scotland has one of Europe’s lowest conviction rates for rape, and the prevalence of unenlightened social attitudes about sexual assault and those who experience it (ICM, 2005; TNS System Three, 2007). Women who allege sexual
assault continue to be seen by many as unreliable and lacking credibility, prone to making false allegation of sexual assault, and ultimately regarded as culpable for their sexual victimisation (ICM, 2005; Kelly et al., 2006; TNS System Three, 2007; Temkin, 2002). Legislative change can not on its own lead to improvements in this regard, and indeed may contribute to the problem. Sexual crimes still occur with relative impunity and this fact has to be acknowledged. Along with the widening of legal debate and the strengthening of the legal framework, we need, perhaps even more so, a sustained challenge to the culture of permissiveness towards violence against which lies beneath public attitudes to rape in Scotland. In particular, we need to confront the basis and the prevalence of widely held views that rape and sexual assault can be excused or explained away by reference to a particular lifestyle, character or sexual history, and that women are responsible for being raped.

References


Justice 2 Committee (2001b) Stage 2 Report on the Sexual Offences (Procedure and Evidence) (Scotland) Bill.


Michele Burman is Professor of Criminology at the University of Glasgow, where she is also Convenor of the International Centre for Gender and Women’s Studies (ICGWS). Address: University of Glasgow – Sociology, Anthropology and Applied Social Science, Florentine House, 53 Hillhead Street, Glasgow G12 8QF, United Kingdom. Email: m.burman@lbss.gla.ac.uk