

Tool kit for addressing consent and associated myths for prosecuting advocates in rape trials

1. The purpose of this tool kit is to support reviewing lawyers in effectively preparing papers for prosecuting advocates. The focus is on consent, as allegations of rape cases often involve the word of the complainant (C) against that of the defendant (D). Investigators and prosecutors need to consider issues of consent in rape cases when applying the two stages of the Code for Crown Prosecutors' Full Code test: (i) the evidential stage; followed by (ii) the public interest stage. Charging decisions will be made in line with the Director of Public Prosecutions' Guidance on Charging. Prosecutors must also take into account what becomes known of the defence case.

The art of the Advocate will be to challenge assumptions about consent and the associated victim blaming myths/stereotypes, by weaving a narrative of the case, contrary to that of the defence, which highlights the defendant's (D) behaviour and motives. This Toolkit has been drawn up as part of the *National Rape Action Plan* to improve the investigation, prosecution and presentation of rape cases and is informed by a number of authorities that include relevant CPS Legal Guidance. Prosecutors need to read this in the context of the Rape Legal Guidance, to consider other needs such as special measures or bad character applications. Prosecutors may also find it useful to read the report [*'Responding to the Challenge of Rape Myths in Court. A Guide for Prosecutors.'*](#) 2013, by Dr Nina Burrowes, a research psychologist specialising in the psychology of rape and sexual offences (see note from author; issues re juries in section 2; section 3.2 and section 4.2 re defendants).

2. This toolkit provides a chart which is linked to more detailed information and examples which will assist advocates in their preparation and presentation of arguments and speeches in court relating to consent and related myths.

3. Case Theory

This toolkit is designed to help Advocates:

- balance the focus of the case on D's behaviour, motives and reasons to assist in rebutting any assertion that C consented or D had a reasonable belief in consent, as well as assess the complainant's evidence.
- set out a case theory which demonstrates how the defendant made choices as to how he/she would commit the offence in a way which he may have hoped would prevent or limit him/her from being caught or punished.
- address the myths arising in the case under consideration.

Victims of rape are often selected and targeted by offenders because of ease of access and opportunity - current partner, family, friend, someone who is vulnerable through mental health/ learning/physical disabilities, someone who sells sex, someone who is isolated or in an institution, has poor communication skills, is young, in a current or past relationship with the offender, or is compromised through drink/drugs. This list is not exhaustive. Victims may be chosen for grooming because

of their vulnerabilities. The offender may hope that these vulnerabilities will limit belief in the complainant by authority and a court.

Vulnerable victims are targeted by offenders for a whole range of reasons, including the belief by offenders that:

- the complainants are more likely to succumb to pressure or intimidation on them to “comply” with the offender’s sexual advances.
- in some cases [e.g. younger victims] they are less likely to have “home support” where the suspected abuse will be noticed or acted on.
- they are less likely to report the abuse in the first place due to their vulnerabilities.
- if they do report, they are less likely to follow it through to giving evidence.
- they will not be believed by those to whom they report it, the CPS when deciding if to charge and, ultimately, the jury.
- overall the likelihood of detection and prosecution is low.

The targeting of a victim and how it has been carried out needs to be placed before the Jury at the outset of the case in support of the complainant, (link to [Assessing the credibility of the overall allegation by understanding the offender tactics and behaviour](#)).

The Advocate needs to appreciate that D or his defence may deploy a narrative that will present the behaviour of C in a negative way. This approach may reflect victim-blaming myths and assumptions held by professionals, the general public and therefore by potential jurors. This may include views ranging from believing consent was provided at the time and C has since changed her mind and is therefore lying; C is to blame for putting him/herself in a vulnerable situation or those who believe that rape must always be violent. When preparing the case theory the prosecuting advocate must incorporate the evidence to counter effect and address all potential views - for example highlighting the distinction between consensual sexual relations and rape; shifting the focus from complainant to defendant; explaining any targeting of the complainant or explaining the trauma irrespective of the use of violence.

Some defendants may reframe events, even to themselves, to claim they were spontaneous and consensual and others may claim the complainant ‘knew the rules’, ‘they were equal’ (despite any inequalities) or and they ‘both got carried away’.

Additionally, consideration should be given to the language used in presenting the case, ensuring that it clearly reflects the alleged rape, associated abuse and any violence and does not put it across as ‘sexual relations.’ Common language associated with consensual sex must be avoided. Language is needed that conveys – ‘it was not sex, it was rape and consent was not given’.

This toolkit is a summary of ways to address issues of consent and associated myths. It is linked to examples which include possible lines for Advocates to use in court and case studies.

Matters to be addressed by the Prosecuting Advocate

The issue of the complainant's consent as to penetration and the issue of the defendant's reasonable belief in that complainant's consent must be addressed in the Opening and Closing speech and in the evidence through examination-in-chief of the complainant and the Crown's witnesses and cross examination of the defendant and defence witnesses.

Judicial directions on assumptions

In some cases judicial directions in Rape/Sexual Offence trials are now given by the trial judge before the evidence is called [either before or, more usually, after the Opening]. Advocates should ask the judge to consider delivering their directions to the jury at the beginning of hearing evidence not at the end (link to [Bench Book](#)). In particular there are suggested directions as to how the jury should approach the evidence in the case "without being hampered by any unwarranted assumptions". These may assist with challenging potential stereotypical mind-sets within the parameters set by the Court of Appeal.

When 'summing up' the Judge will direct the jury as to:

- the elements of the offence of rape.
- the legal definition of consent (S74 Sexual Offences Act 2003)
- the approach to take when deciding whether the Crown has proved that at the time of the penetration the defendant did not reasonably believe the complainant was consenting to that penetration.

Consent¹

Consent is defined by section 74 Sexual Offences Act 2003. A complainant consents to vaginal, oral or anal penetration *only* if s/he **agrees by choice** to that penetration and has the **freedom** and **capacity** to make *that* choice. Agreement is a state of mind and does not need to be verbalised. (There is no requirement that lack of consent should be communicated or demonstrated to the defendant: Malone [1998] 2 Cr App R 447; Hysa [2007] EWCA Crim 2056 at §31).

In examining the complainant and cross-examining the defendant, it must be established what **steps, if any, the defendant took to obtain the complainant's consent** which will assist the Crown to prove that at the time of the penetration the defendant **did not have a reasonable belief that the complainant was consenting**.

Context

It is necessary to focus on whether D had selected or targeted C; issues about D's access to C or D's opportunistic behaviour or choice of location; any exploitation of friendship/family connections or use of drink or drugs. Context is all important to the consideration of freedom and capacity to choose. Focus on C's state of mind in the context of all relevant circumstances - these will include the age, maturity and understanding of C; whether s/he knew or understood the position they were in and what they

¹ See legal guidance for summary of meaning of consent under SO Act 1956, if needed.

were being asked to do; the history of the relationship between C and D; any earlier provision by D of any gifts, alcohol or drugs; any promises by D of a more secure or exciting way of life; insincere compliments and/or kindness shown by D; any other evidence of exploitation or grooming of C so that s/he may not understand the full significance of what they are doing.

[Examples of recent cases where context was important: *R v C* [2012] EWCA Crim 2034; *R v Robinson* [2011] EWCA Crim 916; *R v PK and TK* [2008] EWCA Crim 434].

Conditional consent:

Consent to penetration may also be conditional:

- D not using a condom when told to do so (*Assange v Swedish Prosecution Authority* [2011] EWHC 2849);
- D ejaculating when agreement was on the basis that he would not do so (*R on the application of F v DPP* [2013] EWHC 945 Admin
- Deception as to gender: *Justine McNally v R* [2013] EWCA Crim 1051 (link to [Rape legal guidance](#)).

Rebuttable presumptions about consent

Section 75 Sexual Offences Act 2003, creates *rebuttable* evidential presumptions about consent and the defendant's reasonable belief in consent. These arise: where D has used violence towards C; caused C to fear violence will be used against someone else; C was unlawfully detained at the time; asleep; unconscious; at the time of the penetration and due to a physical disability C was unable to communicate whether he/she consented; any person gave to C or caused her to take, without her consent, a substance causing stupefaction or overpowering at the time of the penetration (outlined in [Appendix A: S75 SOA 2003](#)).

Conclusive presumptions about consent

Section 76 Sexual Offences Act 2003, creates *conclusive* evidential presumptions about consent and the defendant's reasonable belief in consent. These arise twofold

1. When D intentionally deceives C as to nature or purpose of the act;
2. When D intentionally induces C to consent to penetration by impersonating a person known personally to C. (outlined in [Appendix B: S76 SOA 2003](#))

Note: deceptions must be directed to the nature and purpose of the "relevant act" i.e. the penetration itself – therefore will have limited use save, for example, when penetration is achieved under the pretence of it being a medical procedure or a defendant pretends to be the complainant's partner.

Language to present the case

It was not 'sex' or 'sexual intercourse' - it was 'rape.' Use appropriate language to present the case. Do not create the impression the incident was a cold sexual experience between consenting adults where one was less inclined than the other.

	Case Opening	Evidence	Closing speech
<p>Capacity:</p> <ul style="list-style-type: none"> Complainant under the influence of alcohol/drugs (link to Appendix C: Precedents) or is incapacitated through medical condition and did not have capacity to consent. <p>OR</p> <p>Complainant under the influence of alcohol/drugs or medical condition but DID have capacity to consent.</p>	<p>If either scenario is asserted, it should be opened to the jury.</p> <p>Highlight any evidence that indicates C lacked capacity to consent to intercourse because s/he was so affected by consumption of alcohol/drugs/illness.</p> <p>Was C asleep or unconscious (see below)?</p> <p>C was affected by drink/drugs or illness but retained the capacity to consent: Highlight any evidence supporting this contention. C may have been drifting in an out of consciousness or sleep but still had the capacity to choose. This is a matter for the jury.</p>	<p>For both scenarios ensure these matters are fully addressed in examination in chief and with any witnesses who saw the complainant in this vulnerable state.</p> <p>Ask questions such as “How did C present? How was C affected?” In cross examination put to the defendant, as appropriate, that he/she appreciated the condition of the complainant and targeted her/him.</p> <p>Put specifics – e.g. complainant was incoherent/ staggering/ vomiting/asleep or unconscious etc.</p> <p>Ask the defendant specific questions, e.g. Why he/she pursued someone in this condition? Why did he/she ply C with alcohol or</p>	<p>In closing submissions the advocate should highlight to the jury the evidence that: supports any deliberate targeting of the complainant in her/his vulnerable state.</p> <p>Indicate if the approach to C and the rape was planned</p> <p>OR</p> <p>Outline if D exploited the situation or did not care about consent.</p> <p>Pose reasons by way of submissions as to why D may have done this. Phrases such as ‘you may think’ can be used to preface common sense conclusions which may</p>

<ul style="list-style-type: none"> Learning disabilities/ Physical disability. Asleep Unconscious 	<p>If there is evidence relating specifically to the complainant this evidence should be referred to in the opening. (See S30-34 SOA 2003). Expert evidence, if used, should be mentioned but not in great detail. It is helpful to flag up complainant's disabilities before the evidence is called. It should also assist with presenting the case theory.</p> <p>See s75 SOA 2003</p>	<p>drugs?</p> <p>Either scenario: Put to D that C was vulnerable – and ask why D pursued someone so obviously affected?</p> <p>Depending on the severity of the difficulty the complainant should be asked to explain these disabilities – when and how they arise and how the difficulty may present and affect behaviour. The expert, if used, will be called. Ensure other witnesses also deal with the complainant's presentation/limitations. Put to the defendant that he/she has targeted the complainant for these reasons.</p>	<p>undermine rape myths e.g. he selected her/him because their recollection would be poor/they may not complain for fear of disbelief/they were ashamed. (link to Examples of closing speeches on capacity and alcohol, including rebuttable presumptions; and Case Study on capacity and alcohol)</p> <p>In closing submissions, the complainant's limitations should be referred to underline lack of capacity. Any cynical targeting by the defendant should be explored e.g. has he/she befriended the complainant to take advantage.</p>
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<ul style="list-style-type: none"> • Mental Health 	<p>If expert evidence supports incapacity through mental health difficulties the prosecution may indict s30-34 SOA 2003</p>	<p>The Advocate should present this evidence through an expert witness. Witnesses can elaborate from the lay-person's perspective.</p>	
<p><u>Freedom to choose:</u></p> <ul style="list-style-type: none"> • Domestic abuse • Fear of abuser; Abuse within the family; Abuse in work scenarios; Abuser in position of authority. 	<p>If there has been a history of domestic abuse within the relationship there may need to be a Bad Character argument (propensity or Important Explanatory Evidence) and whether this forms part of the opening address will be determined by the timing of the B/C application.</p> <p>These are all matters which should be asserted as part of the prosecution opening as matters which impact on consent and agreement by choice.</p>	<p>If B/C has been admitted by the Judge or by agreement then the complainant/witnesses will need to be asked about it in chief. The history of domestic abuse and other probative events should be put to the defendant. Questions about previous abuse may support any argument which suggests coercion or submission (vitiating consent)</p> <p>The evidence should be put. The relationships within the family/home/work will need to be explored with the complainant and any supporting witnesses. The defendant should be cross examined about any unequal status in the relationships, any obvious abuse of</p>	<p>In closing submissions it may be useful to address the jury in the following way 'you may think that with the history you have heard it was a courageous act to overcome the trauma and make the complaint; even more so to place this painful personal history before you' etc.</p> <p>Submissions should include assertions that rape is an offence of control and power. Specific examples from the evidence should be used to support these assertions. Any perceived shortfalls in the complainants account can be placed in the</p>

<ul style="list-style-type: none"> • C intentionally induced by D to consent as D impersonates a person known personally to V. 	<p>(Link to S76)</p>	<p>position and power.</p>	<p>context of fear borne from imbalanced status and abuse of relationship/ power</p>
<p><u>Steps taken by the defendant to obtain the complainant's consent:</u></p> <p>(link to Case study from The Crown Court Bench Book)</p>	<p>This should be referred to in the opening. The advocate should be cautious, as the witness (unless by ABE) may not repeat the account verbatim from their statement. If the defendant has indicated in interview the steps that he/she took, these will need to be included in the opening but with a commentary as to their credibility/ veracity/ adequacy.</p>	<p>This evidence should be explored in chief with the complainant. It is unlikely that witnesses can assist save for circumstances where the complainant is seen to resist unwanted advances. If it is alleged that the defendant took no or insufficient steps to secure consent this must be put to the defendant/ defence witnesses in cross examination.</p>	<p>This is pivotal in the context of a rape allegation and must be referred to in a closing address.</p>
<p>The Crown asserts the complainant did not have <i>capacity</i> to consent or if she did she did not consent - D asserts a</p>	<p>If the defendant, under the influence of alcohol/drugs or otherwise, is asserting reasonable belief in consent it must</p>	<p>The advocate must put, unequivocally, why this is disputed and explore in cross examination the validity of the</p>	<p>This must be addressed in the closing speech.</p>

<p><u>reasonable belief in consent</u> – Complainant and D were both under the influence of alcohol/drugs at the time of the penetration</p> <p>(link to Case study from Bench Book)</p>	<p>form part of the opening. The Advocate should explain briefly why it is not accepted that D had a reasonable belief in consent.</p> <p>The Case study deals with the complex situation where both C and D were under the influence of alcohol/drugs, the Crown would need to assert C did not have capacity to consent (or if she did, she did not consent) but D says he/she had a reasonable belief in consent.</p>	<p>defendant's assertion. Does it stand up to close scrutiny?</p>	
<p><u>Psychological evidence:</u></p>	<p>Only admissible if specific and not generic. The judge will have to determine whether it is relevant to an issue in the case and thus admissible. This should be a preliminary matter, possibly determined at PCMH/PTR.</p>	<p>Expert evidence can be called in chief or rebuttal (link to Appendix D: Expert evidence in psychological matters).</p> <p>If expert evidence is not possible consider exploring the reasons for the behaviour of the complainant (link to Appendix E: When no expert evidence in psychological matters)</p>	<p>Include in closing speech. This evidence may have been presented to explain the complainants behaviour post incident/ problems with recollection etc. or to rebut a defence assertion, for example that no attack has occurred. (link to Appendix F: Example of using expert evidence in closing speech)</p>

<p><u>Behaviour of complainant</u> <u>Trauma</u> <u>Clothing:</u></p>	<p>Unlikely to include in case opening, unless it has been specifically addressed in her/his ABE interview or witness statement. Even if this has been addressed exercise caution because s/he has not yet been cross examined and s/he may undermine anything suggested by the advocate.</p>	<p>These are matters which the defence will seek to explore in cross examination to suggest the complainant is at fault. The advocate should put these to the defendant as potential reasons for targeting the complainant.</p>	<p>A closing speech is the ideal time to address rape myths: e.g. 'if the defendant has deliberately targeted and isolated the complainant based upon behaviour/ clothing etc. - there were many other people dressed or behaving in this without being attacked – the defendant has weighed up the potential for resistance/ reporting and credibility'. Make the point that people react differently to trauma – they can be frozen by fear or submit, both of which negates injury. The complainant may try to suppress the memory of the attack itself or aspects of it etc.</p> <p>It may be helpful to have regard to the Bench Book which provides guidance on directions including how the jury should approach the evidence in the case “without</p>
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			being hampered by any unwarranted assumptions” (link to Bench Book p 353-376). (link to Different types of victim resistance); (Myth busting in court - link to Rape legal guidance Chapter 21)
<u>Late reporting</u> <u>Shame/</u> <u>Humiliation</u> <u>Lies/</u> <u>inconsistencies:</u>	Unlikely to include in case opening, unless it has been specifically addressed in her/his ABE interview or witness statement. Even if this has been addressed exercise caution because s/he has not yet been cross examined and s/he may undermine anything suggested by the advocate.	The complainant may be asked questions by the defence relating to these issues in cross examination. The prosecutor should deal with this in re-examination and should formulate questions which will provide material for a closing speech and ensure a direction in the summing up. Do not rely upon myths and stereotypes to challenge a defendant’s evidence. If accusing D of having a selective memory ensure there are no medical issues in his background that support his selection of memory.	The prosecutor must not stray into giving evidence but can ask the jury to use their common sense to assess, based on the evidence, why there may be lies or inconsistencies – shame, fear of repercussions, distress, quashing the trauma of the incident. There may be many reasons for late reporting – e.g. protection of others, mature reflection, inability to cope with the aftermath of report/ investigation/ trial, (link to Appendix G: Examples of late reporting, shame, inconsistencies)

		Put inconsistencies to D that appear when comparing his Evidence-in-Chief and suspect interview or either of these items and his Defence Case Statement.	
<u>Working in the sex industry:</u>	The jury should be told that the nature of the complainant's occupation does not preclude rape. The contractual nature of the sexual transaction between a prostitute and client must be contrasted with sexual intercourse without consent – rape.	In cross examination it could be put directly to the defendant that he/she has deliberately chosen to rape a sex worker on the premise that the complainant may be less inclined to report/ may not be believed/ possibly have a criminal record (if adduced) which may reduce credibility.	The previous matters adduced in evidence and opening should be reinforced in the closing speech.
<u>Alleged financial motivation:</u>	Unless this is suggested in interview/defence statement, any evidence relating to CICA or to request for compensation on the advice of a counsellor, should form part of the unused material. If it has been alleged that there is a financial motive for the allegation then the evidence should be served and referred to in	Evidence should be adduced from the counsellor confirming advice given to the complainant. The complainant should be asked in chief/re-examination about any application to CICA. If the allegation is made during the defence evidence an application should be made to bring rebuttal evidence.	Refer to in closing speech. Explain that financial compensation is a right accorded to all victims of crime including sexual violence. There are easier crimes to fabricate, such as theft of mobile phone, if the victim was only after money.

	opening. It should not be served routinely as evidence as it will often be irrelevant to the issues in the case.		
<u>Non-recent cases of rape, including adult survivors of child abuse²:</u>	In evidence given by an adult survivor about sustaining abuse as a child, the complainant may regress and behave or speak as a child – this will need explaining to the jury. The Judge will give a Doodey direction dealing with delay.	Explain myths about delayed reporting or financial gain (Myth busting in court - link to Rape legal guidance Chapter 21)	Deal with the myths relating to late reporting or financial gain in Closing if they have been raised by the defence when cross-examining the complainant.

Hindsight Bias

The Advocate needs to be conscious of the ‘hindsight bias’ which works on the erroneous premise that the complainant had the same awareness of the events that may unfold as the jury has. In submissions the Advocate should encourage the jury to see the reasonableness of the complainant’s behaviour. The complainant may have made choices believing that they were adequate to ensure their safety, e.g. being in friendly company, going home with an acquaintance rather than a stranger. The complainant did not foresee that the friend or acquaintance had identified them as a potential victim or that the home they were going to was the chosen location for the assault. Only the rapist was aware of these careful selections. Reinforce, as appropriate, any culpable behaviour of the defendant.

² See legal guidance for definition of consent in SO Act 1956.

Appendices

Appendix A

Section 75 of the Sexual Offences Act 2003

Section 75 of the Sexual Offences Act 2003 creates rebuttable presumptions relating to consent and reasonable belief in consent. These presumptions are:

Where the offender has used violence at the time of the relevant offence or immediately before it began towards the complainant causing the complainant to fear that immediate violence would be used against him;

Where the offender was, at the time of the relevant offence or immediately before it began, causing the complainant to fear that immediate violence would be used against another person;

The complainant was, and the offender was not, unlawfully detained at the time;

The complainant was asleep or otherwise unconscious at the time of the relevant act;

Because of the complainant's physical disability the complainant would not have been able at the time of the relevant offence to communicate whether the complainant consented;

Any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

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Appendix B

Section 76 of the Sexual Offences Act 2003

Section 76 of the Sexual Offences Act 2003 creates conclusive presumptions which feature less frequently. They arise in the following situations:

When the defendant intentionally deceived the complainant as the nature or purpose of the relevant act;

When the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Note: Deception must be directed to the nature and purpose of the “relevant act” i.e. The penetration itself – therefore this section will have limited use save, for example, when penetration is achieved under the pretence of it being a medical procedure or a defendant pretends to be the complainant’s partner.

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DRUGS AND ALCOHOL

Voluntary intoxication of complainant

The state of drunkenness of the complainant is relevant in the following ways:

- (1) Alcohol or drugs may have a disinhibiting effect upon the complainant;
- (2) The complainant may be so drunk that his/her capacity to consent is removed, or he/she in fact exercises no choice whether to agree or not.

Only a person who has the capacity to make a choice, and agrees by choice freely made, consents to sexual activity. If the issue of capacity arises the judge must deal with in directions when summing up. The judge will take note of the guideline case on capacity, R v Bree [2007] 2 Cr App R 13, [2007] EWCA Crim 804; R v H [2007] EWCA Crim 2056; Coates [2008] 1 Cr App R 3, [2007] EWCA Crim 1471.

At §34 of Bree, the President said:

“In our judgment, the proper construction of section 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant’s state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.”

From the Legal Guidance:

In cases similar to Bree, prosecutors should carefully consider whether the complainant has the capacity to consent, and ensure that the instructed advocate presents the Crown’s case on this basis and, if necessary, reminds the trial judge of the need to assist the jury with the meaning of capacity.

Prosecutors and investigators should consider whether supporting evidence is available to demonstrate that the complainant was so intoxicated that he/she had lost their capacity to consent. For example, evidence from friends, taxi drivers and forensic physicians describing the complainant’s intoxicated state may support the prosecution case. In addition, it may be possible to obtain expert evidence in respect of the effects of alcohol/drugs and the effects if they are taken together.

Consideration should be given to obtaining an expert's back calculation or the opinion of an expert in human pharmacology in relation to the complainant's level of alcohol/ drugs at the time of the incident. " Such a report is important as the victim's inebriated state is part of the reason why the defendant targeted her/him. Obtaining this evidence allows forceful cross examination of the defendant on his/her choice of a person so inebriated and makes the point to the jury that a reasonable person is more likely to have chosen someone not in such an inebriated state and therefore the defendant must have targeted the victim.

Where the question of *capacity* arises on the evidence it must be left to the jury to decide. It is NOT a matter of law for a judge to decide.

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EXPERT EVIDENCE IN PSYCHOLOGICAL MATTERS

Expert medical or other evidence as to the cogency of evidence is not admissible in a criminal trial if the facts in issue would be within the jury's experience, Browning [1995] Criminal Law Review Pg 227. Likewise, expert evidence is generally inadmissible if called to deal with the functioning or deterioration of memory or general human behaviour.

However, there may be cases where this expert evidence relating to psychological matters has been sought and for reasons that are case specific a reasonable argument can be made for its admission but the Advocate should be careful not to open up unnecessary areas of Appeal.

EXPERT EVIDENCE OF PSYCHOLOGICAL INJURY

Evidence that the complainant suffered psychological injury is admissible in exactly the same way as any doctor might give evidence of physical injury consistent with a particular allegation made by a complainant, **R v Adam Eden [2011] EWCA Crim 1690**.

If evidence is adduced before the jury that the complainant has psychological injury a suitable suggested **Opening** paragraph, if appropriate to the case, is as follows:

“The complainant was examined by a doctor who will tell you that at the time of the examination he/she was found to be suffering from a psychological injury known as (name it) which is consistent with some long repeated events or a significant emotional event. Those repeated events or that emotional event, says the Crown, is the sustained child abuse or rape suffered by the complainant at the hands of the defendant.”

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Appendix E

NO EXPERT EVIDENCE

No expert evidence and the prosecutor has to persuade the jury that the conduct, memory and actions of v during and after the sexual violence is consistent with the impact of trauma:

In the absence of expert evidence to prove this assertion is correct, the prosecutor has to rely **ONLY** upon the evidence in the case which includes:

- The complainant says her conduct, memory and actions during and after the sexual violence, however incoherent, unusual or “not as one would react” are as a result of that sexual violence.
- A witness says the complainant was not reacting as she usually does after the event thus making it clear something had happened she didn’t like. (Use facts to say she was not “regretting” consensual sex).
- Drawing common sense conclusions (inferences) from the facts.

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Appendix F

EXPERT EVIDENCE OF PSYCHOLOGICAL INJURY IN CLOSING SPEECH

In the **Closing Speech** the Crown could say (amended to fit with the evidence of the expert):

“The evidence of the psychologist proves that the complainant is suffering from a psychological injury known as (set it out). What the expert does not say and cannot say is that the complainant’s account of rape/sexual abuse is true. That is for you to decide, not the expert. The expert does not even say that the symptoms are necessarily related to a history of child sex abuse/rape (as appropriate), merely that the symptoms are consistent with some long term repeated events. That’s all s/he says.

The complainant says the only serious and significant event in her/his life that has caused this injury is the rape/child abuse (as appropriate) that s/he suffered OR the complainant says this condition came on after the rape/sexual abuse. In deciding where the truth lays in this case, this is evidence that will assist you.

The Crown says the complainant’s psychological injury was thus caused by the sexual offending by the defendant against the complainant as this is the only common sense conclusion that can be drawn on the evidence as a whole. But for the complainant being raped/abused s/he would not have suffered from the psychological injury you have heard about as it came on after the sexual abuse/rape s/he describes and there has been no other event in her life that could have caused it.”

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Appendix G

LATE REPORTING

The Advocate should make it clear to the jury why the report was late and what caused the report to be finally made. It may need to be stated that a late complaint does not mean it is a false complaint.

Emphasis must be placed on the reasons e.g. protection of others, mature reflection, inability to cope with the aftermath of report/Investigation/trial, whether this was due to fear of the abuser, abuse within the family, abuse at work, the abuser was in a position of authority, some people neither like to tell others about what has happened to them nor allow people to find out about what had happened to them or any other reason.

INCONSISTENCIES, LIES AND LOSS OF MEMORY BY COMPLAINANT

The court experience is obviously difficult for the complainant in having to relive the traumatic experience before strangers so the advocate may need to outline a request for an allowance for this when considering her/his demeanour and any inconsistencies in their account. Reliving an event may cause stress, panic and emotion.

In cases where the complainant may have relayed different information to the police or to friends, consider reasons for doing so. C may have altered parts of their account to avoid shame, humiliation or consequences of their actions, e.g. denying taking drugs because of fear of prosecution. This does not mean the actual main events to which C referred were necessarily false. Also note that trauma – physical, sexual or emotional - can affect memory, creating inconsistency and it is the inconsistency which may indicate the authenticity of the trauma.

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