RESPONDING TO

misconceptions *about* sexual offending

EXAMPLE DIRECTIONS FOR JUDGES AND LAWYERS

Te Kura Kaiwhakawā
Institute of JUDICIAL STUDIES

COPYRIGHT

DISCLAIMER

We advise you that:

1. Te Kura Kaiwhakawa | The Institute of Judicial Studies (Te Kura) may change, delete, add to, or otherwise amend the material contained in this resource without notice.
2. Te Kura does not warrant or represent that the resource (or any material incorporated into the resource by reference) is free of errors or omissions or suitable for any other purpose.
3. The resource does not constitute legal advice. Changes to the law and other matters covered in the resource after the date of publication may impact on the accuracy and reliability of the information.
4. Te Kura, its employees, consultants, and agents, do not accept liability of any kind, to any person or entity that chooses to rely upon the material contained in this resource.
5. All links and references to other websites, organisations or materials are provided for convenience only. Te Kura is not responsible for and does not endorse the content of any other website linked or referenced to.

Important information

Te Kura Kaiwhakawā published the example sexual violence evidential directions in August 2023 to provide guidance for judges and lawyers as the first cases came to court that were required to take s 126A of the Evidence Act 2006 into account. Since their publication, legal professional organisations have raised some concerns about the example directions. Te Kura Kaiwhakawā is now working with the profession to address these concerns. Judges and lawyers referring to the directions will want to bear this in mind. Any changes to example directions as a result of the engagement will be notified to the profession and the judiciary by Te Kura Kaiwhakawā.

As the explanation below says, the directions are a guide only—judges are encouraged to discuss any directions they propose to give with counsel within the context and circumstances of each trial, on a case-by-case basis.

Introduction

Sexual offending is an area that is commonly misunderstood by people without training or education in the area. Research has shown that jurors may believe myths and misconceptions about sexual offending, and that this can affect how they consider the evidence in sexual cases.

This document (the "misconceptions material") brings together current research about sexual offending to identify what should be considered a misconception, and to provide evidence-based information about the behaviour and responses of victims and offenders.

The misconceptions material contains example directions that judges can tailor to use in a sexual case to address any misconceptions about sexual offending that are relevant to that case. The purpose of giving a direction is to reduce the risk that jurors will engage in improper reasoning.

If there is an issue raised on the facts and evidence, it will be for the judge to decide the nature of any direction that may be required. The examples directions are provided as *a guide only* and the wording will need to be adapted to the circumstances of the particular case.

The misconceptions material has been prepared to assist judges with these directions. It is provided publicly at the recommendation of the Law Commission to help prosecution and defence lawyers prepare for sexual violence hearings.

Senior representatives from the defence bar, representatives from the judiciary, and academic subject-matter experts have been consulted on the misconceptions material.

Although considerable care has been taken in the preparation of the misconceptions material, the content should not be regarded as a substitute for the actual text of the legislation or case law.

Te Kura Kaiwhakawā wishes to produce materials that are helpful to judges, as such we welcome any feedback about the content or form of the misconceptions material.

Contact:
Manager, Judicial Resources
Te Kura Kaiwhakawā
Email: TeKura@justice.govt.nz

Contents

1. Responding to misconceptions: The law reform response

In *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) the Law Commission stated (at [6.12]):

> The field of sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual violence.

Recommendation 28 of that Report was that:

> Judges who sit on sexual violence cases should have access to detailed and up-to-date guidance on the instances in which guiding judicial directions to the jury may be appropriate in sexual violence cases and examples of how those directions should be framed.

The Supreme Court in *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 confirmed the legitimacy of using judicial directions, section 9 statements, and/or expert evidence to counter fact finders' erroneous beliefs or assumptions in sexual cases (at [110]).

Section 126A of the Evidence Act 2006 was introduced in response to Recommendations 21 and 22 in *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), and came into force on 21 December 2022. The Law Commission stated the rationale for the recommendations (at [12.1]):

> Research has shown that jurors may believe myths and misconceptions about sexual and family violence, which can affect how they consider the evidence in sexual and family violence cases. For example, a juror might reason that a complainant must have consented to a sexual act because she did not fight off the defendant or suffer physical injuries, or a juror might think that incidents of family violence could not have been serious because the complainant did not leave the relationship. Potential misconceptions about sexual and family violence need to be addressed during the trial process to reduce the risk that jurors will engage in improper reasoning.

In 1999, in the commentary to the proposed *Evidence Code* (NZLC R55, Volume 2), the Law Commission also explained the purpose and use of information (or evidence) addressing misconceptions, with a particular focus on child complainants in sexual cases (at [C110] and [C111]):

> The purpose of such evidence is not diagnostic. Rather, the purpose of the evidence is educative: to impart specialised knowledge the jury may not otherwise have, in order to help the jury understand the evidence of and about the complainant, and therefore be better able to evaluate it.
>
> Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively … The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance.

1.1 The international context

Jury directions to counter potential juror reliance on misconceptions in sexual cases are used in comparable jurisdictions. Examples include: Chapter 20 of the *Crown Court Compendium* (England & Wales); sections 288DA and 288DB of the Criminal Procedure Act (Scotland) 1995; Part 5 of the Jury Directions Act 2015 (Victoria); sections 292 – 294AA of the Criminal Procedure Act 1986 (NSW); sections 34M and 34N of the Evidence Act 1992 (South Australia); sections 36BD, 36BE and 39F of the Evidence Act 1906 (Western Australia); sections 80A and 80B of the Evidence (Miscellaneous Provisions) Act 1991 (ACT); section 192A of the Criminal Code Act 1983 (Northern Territory) and, Canadian Judicial Council - National Judicial Institute *Model Jury Instructions: Offence 271 Sexual Assault*.

2. Timing and delivery of directions; judge-alone trials

Social science research concludes that if a juror has a misconception, they will have it from the start of the trial and will consider the evidence through this "schema". When jurors have already considered evidence through one lens, it is very difficult for them to reassess that evidence fully and fairly through a different lens: known as the "perseverance effect". Studies indicate that judicial directions on particular issues are more effective given during the trial (for example, before a particular witness testifies) than during the summing up.

Stephan Lewandowsky and others suggest that:

> [O]nly three factors have been identified that can increase the effectiveness of retractions [of misinformation]: (a) warnings at the time of the initial exposure to misinformation, (b) repetition of the retraction, and (c) corrections that tell an alternative story that fills the coherence gap otherwise left by the retraction.

The *Crown Court Compendium* (England & Wales, June 2022) encourages the use of directions at a point or points in the trial when they are of most use to the jury (at 1.2), including in opening remarks or before a witness or complainant gives evidence – such as the direction on avoiding assumptions (at 20.5). See also *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.43] and [12.103] and the Victorian Law Reform Commission's *Improving the Justice System Response to Sexual Offending: Report* (2021) at [20.54]:

> We agree with research that suggests that hearing a jury direction early in the trial would mean jurors have an informed position in their minds before they hear the complainant's evidence and before they form any opinions based on misconceptions.
>
> We recommend that jury directions should be given before or during the evidence, and that judges should be able to repeat them at any time in the trial. This can be done if counsel requests, or if the judge considers that there is evidence in the trial that requires the direction to be given. A similar model to the timing of the current direction on delay or lack of reporting could be adopted.

It is recommended the general direction on avoiding assumptions be given as part of the judge's opening remarks to the jury. There may be occasions in which it is helpful to give early directions about particular misconceptions, just in the way, for example, some directions are given *during* trial. Everything turns on the circumstances.

Norbert Schwarz, Eryn Newman and William Leach have concluded:

> The available research indicates that information is more likely to stick the more easily it can be processed and the more familiar it feels. Accordingly, the overarching goal for any communication strategy is to increase the fluency and familiarity of correct information and to decrease the fluency and familiarity of misinformation.

The Ministry of Justice, in advice to the Select Committee, noted the submissions which supported that misconception directions be provided in writing but rejected adding a specific reference to this practice in the section, saying (*Departmental Report* (2020) at [311]):

> [W]e understand judges can and do provide directions in writing, and at different points throughout the trial, as appropriate in the circumstances of the case. We are not convinced that legislative amendment reaffirming the current position is necessary. Adding specific reference to existing discretions may also inadvertently imply a different approach to other judicial directions under the Evidence Act.

The Law Commission in *The Second Review of the Evidence Act 2006* noted that it may "assist jurors to be able to refer to written copies of the directions" (at [12.104]).

2.1 Directing the jury even if expert evidence or a section 9 statement is offered

Section 126A(3) was revised during the Select Committee stage. The subsection had originally provided: "No direction is necessary or desirable if the misconception has already been addressed adequately by evidence (for example, evidence admitted by agreement under section 9(1)) …". In the *Departmental Report for the Justice Committee*, it was stated (at [317], emphasis added):

> [W]e agree that a direction is different in nature to evidence presented by parties, and that there may be cases in which a judicial direction is desirable even if such evidence has been presented. *We therefore recommend removing reference to evidence and section 9 statements from section 126A(3)*. We note judges' decisions about whether to give a direction are still likely to consider the risks of overemphasis, to both the defence and the prosecution cases.

2.2 Use of self-directions in judge-alone sexual cases

In *Keats v R* [2022] NZCA 149 at [25], the Court of Appeal stated:

> It is now generally accepted that juries can be instructed about counter-intuitive principles without calling an expert witness on that topic. It is axiomatic that, if juries can be properly directed on counter-intuitive principles, then there is even less need for evidence on those principles when the trial is being conducted by a judge sitting without a jury.

Judges sitting alone as fact-finders in cases involving allegations of sexual offending should consider which aspects of the following material should form part of any self-directions. See further the definition of "sexual case" in section 4 of the Evidence Act 2006.

2.3 Obligations on prosecutors

Paragraph 13.7 of the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* requires prosecutors to consider, before the summing up, whether to suggest to the Judge any directions under s 126A. If expert evidence has been given in a trial to address misconceptions,

prosecutors must be careful, especially when closing to the jury, not to use that evidence in a diagnostic way.[1]

REFERENCES:

- Lara F Hudspith and others "Forty Years of Rape Myth Acceptance Interventions: A Systematic Review of What Works in Naturalistic Institutional Settings and How this can be Applied to Educational Guidance for Jurors" (2023) 24 Trauma, Violence and Abuse 981
- Norbert Schwarz, Eryn Newman and William Leach "Making the truth stick & the myths fade: Lessons from cognitive psychology" (2016) 2 Behavioral Science & Policy 85
- Stephan Lewandowsky and others "Misinformation and Its Correction: Continued Influence and Successful Debiasing" (2012) 13 Psychological Science in the Public Interest 106
- James Chalmers and Fiona Leverick *Methods of Conveying Information to Jurors: An Evidence Review* (Scottish Government, Social Research, 2018)
- Blake M McKimmie and others "The impact of schemas on decision-making in cases involving allegations of sexual violence" (2020) 32 Current Issues in Criminal Justice 420
- Lewis Ross "The curious case of the jury-shaped hole: A plea for real jury research" (2023) 27 International Journal of Evidence & Proof 107
- Harrison D H Lee and others "Guided by the rape schema: the influence of event order on how jurors evaluate the victim's testimony in cases of rape" (2023) 29 Psychology, Crime & Law 25
- NSW Law Reform Commission *Jury Directions* (R136, 2012)

[1] If a prosecutor does so, the Judge should correct the position in the summing up.

3. General direction on avoiding reliance on misconceptions about sexual offending

Along with any particular directions, in most cases involving alleged sexual offending it will be good practice to caution juries generally against relying on any misconceptions they may hold about sexual offending, including what is a typical offender and what is a typical victim.

The English Court of Appeal in *Miller v R* [2010] EWCA Crim 1578 said:

> Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

The *Crown Court Compendium* (June 2022) at 20-4 contains some guidance on the kind of approach warranted in cases involving allegations of sexual offending (at [11]):

> There is a possibility that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both the prosecution and the defence. Inappropriate comments in counsel's final speech can usually be dealt with by a suitable direction. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.

This type of generalised warning, against "applying stereotypical images" or "approaching the evidence with any preconceived assumptions", is also used in Canada and in Victoria. Such a direction is encouraged even if a section 9 statement or expert evidence is offered to address particular misconceptions (see *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [48]) and should ideally form part of the judge's introductory remarks to the jury but should also be repeated.

False assumptions and misconceptions need to be replaced by accurate understandings about the attributes and behaviours of complainants and defendants. Further, as stated by the Law Commission in *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.104], care must be taken not to reinforce a misconception – instead, focus on providing, and repeating, statements that are accurate and based on research. General instructions should be joined with specific directions that concretely illustrate the point in question.

3.1 Instructions to apply "common sense" should be avoided

In *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) the Law Commission stated (at [6.12] and [6.16]):

> … Although the jury is intended to apply combined common sense and life experience to ascertain the facts in a criminal case, one might suggest this function is inhibited when applied to an area of human conduct that is frequently subject to misconceptions and misunderstandings…
>
> [T]he idea that "common sense" and experience can be applied to the facts of a specific form of criminal offending which, because of its distinctive features, is at risk of illegitimate reasoning and incorrect decision-making when handled by people who have no prior expertise in the area.

The authors of *Rape Myths as Barriers to Fair Trial Process* (Canterbury University Press, 2020) stated (at 391):

> [W]e consider that the direction to jurors to use their "common sense" is particularly problematic in the context of rape trials — especially when it is now known that jurors may well believe highly contestable claims about victim behaviour on the grounds that they are oft-repeated and commonly-held. Given the acceptance of the helpfulness of "counter-intuitive" directions offered to provide an alternative explanation to that which might be "intuitive" or based on "common sense", it seems problematic for the jury to concurrently be told to rely on their own world view. It is difficult to know what juries would make of counter-intuitive directions given alongside such an instruction.

It is therefore considered best practice to avoid directing jurors to use their common sense, or knowledge of human nature, or knowledge of the world. This is because complainants, due to the brain's natural reactions to trauma, may act in ways in which people might consider the opposite of common sense or counter to general knowledge (see further commentary on a complainant's lack of physical resistance at para 4.6). Jurors should be instructed to bring their own knowledge about human behaviour to the decision-making process, instead of encouraging them to apply "common sense" (see also *Crump v R* [2020] NZCA 287 at [37]).

3.2 General directions about avoiding misconceptions and false assumptions

3.2.1 Example direction: Involving a charge or charges of rape

I earlier mentioned you must decide this case according to the evidence, and only the evidence. What I said then applies to misconceptions or false assumptions about sexual offending that may incorrectly be presented as true or common sense. If you did allow a false assumption or misconception to influence your decision you would not be deciding the case in accordance with the evidence.

Research shows that widely held assumptions about how frequently sexual offending occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual offending. It is therefore important for you to know that there is no such thing as a "typical" rape; a "typical" rapist; or a "typical" person who is raped. The offence of rape can be committed in a variety of circumstances. It can happen when the people involved know each other, are

related, or are in a relationship with one another. Rape is not less serious just because the people involved have any such relationship.

There is also no "typical" response to rape. We know from research that victims of sexual offending react to the trauma in different ways, including in ways they might not be able to control. The ways they react might not be what you would expect; or what you think you would do in this situation.

I add the obvious: this direction says nothing about the defendant's guilt or innocence. As I have explained, the defendant must be presumed innocent unless the Crown establishes guilt beyond reasonable doubt.

3.2.2 Example direction: Using a generic reference to sexual offending

I earlier mentioned you must decide this case according to the evidence, and only the evidence. What I said then applies to misconceptions or false assumptions about sexual offending that may incorrectly be presented as true or common sense. If you did allow a false assumption or misconception to influence your decision you would not be deciding the case in accordance with the evidence.

Research shows that widely held assumptions about how frequently sexual offending occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual offending. It is therefore important for you to know that there is no such thing as "typical" sexual offending; a "typical" sexual offender; or a "typical" victim of sexual offending. Non-consensual sexual activity can be committed in a variety of circumstances. It can happen when the people involved know each other, are related, or are in a relationship with one another. Sexual offending is not less serious just because the people involved have any such relationship.

There is also no "typical" response to sexual offending. We know from research that victims of sexual offending react to the trauma in different ways, including in ways they might not be able to control. The ways they react might not be what you would expect; or what you think you would do in this situation.

I add the obvious: these directions say nothing about the defendant's guilt or innocence. As I have explained, the defendant must be presumed innocent unless the Crown establishes guilt beyond reasonable doubt.

4. Particular misconceptions about sexual offending

Research challenging misconceptions about sexual offending, grouped in response to the elements of section 126A of the Evidence Act 2006, is outlined in the following discussion. Not every aspect of this material is accompanied by a sample direction. Judges are encouraged to refer to it when considering whether to give a direction in cases where misconceptions are relied on in a party's case.

The Law Commission considered the research on myths and misconceptions in the context of sexual offending and identified the following categories of contestable beliefs and incorrect assumptions (*The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.58], edited for consistency and meaning):

- **FALSE ASSUMPTION** women provoke or are responsible for sexual assault, for example by wearing revealing clothing, drinking alcohol, flirting with the defendant, or inviting the defendant into their home.
- **FALSE ASSUMPTION** only certain people are victims of sexual offending. For example, it is not true that only women can be sexually assaulted, sex workers cannot be raped, people with disabilities are rarely victims of sexual assault and only young attractive people are victims.
- **FALSE BELIEFS** about who can be the perpetrator of sexual offending include the belief that "real rape" is committed by strangers and women cannot be sexually assaulted by their partner or this is a less serious crime.
- **FALSE BELIEFS** are also attempted to be relied on in relation to fabrication of allegations and believability of complainants. For example, it is not true that false rape allegations are common, that there should be other witnesses of the incident or physical evidence and that the complainant's recollection should be clear, coherent, detailed, specific and should not contain any inconsistencies or omissions.
- **FALSE BELIEFS** include beliefs that seek to minimise or excuse perpetrator behaviour. For example, the incorrect assumption that rape results from men being unable to control their need for sex.
- **FALSE ASSUMPTIONS** about the necessity of physical force and/or physical resistance during a sexual assault includes the incorrect belief that an offender will typically use physical force or a weapon, a "real rape" victim will resist and fight off the offender, and a "real rape victim" will sustain physical injuries at the time of the offence.
- **FALSE ASSUMPTIONS** about how a "real rape" victim will respond to sexual assault include the belief that a "real rape" victim would report the offending immediately, refuse to associate with the offender and react with visible distress and hysteria.
- **FALSE BELIEFS** about complainant sexual behaviour and consent includes the belief that a complainant is less credible or more responsible if they have previously engaged in

consensual sex with the defendant and that physiological responses during sexual activity must mean the person consented.

Some of the above myths and misconceptions discussed by the Law Commission may be sufficiently addressed by the general direction to avoid reliance on assumptions. However, further information to replace the particular misconception with statements of fact (and repeat such facts based on research) may be of value for the jury to have, depending on the individual case.

The relevant legislation is contained in sections 126A and 127 of the Evidence Act 2006.

> **126A Judicial directions about misconceptions arising in sexual cases**
>
> (1) In a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary or desirable to address any relevant misconception relating to sexual cases.
>
> (2) Misconceptions relating to sexual cases (all or any of which the Judge may consider relevant in the case) include, but are not limited to, misconceptions—
>
> (a) about the prevalence or features of false complaints in sexual cases:
>
> (b) that a victim or an offender in a sexual case has, or does not have, particular stereotypical characteristics:
>
> (c) that sexual offending is committed only by strangers, or is less serious when committed by a family member (including, but not limited to, a spouse, civil union partner, or de facto partner) or by an acquaintance:
>
> (d) that sexual offending always involves force or the infliction of physical injuries:
>
> (e) that, in a sexual case, a complainant is less credible or more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant—
>
> (i) dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs:
>
> (ii) being in a relationship with a defendant, including a sexual relationship:
>
> (iii) maintaining contact with a defendant, or showing a lack of visible distress, after the alleged offending.
>
> (3) This section does not limit or affect—
>
> (a) section 127 (delayed complaints or failure to complain in sexual cases):
>
> (b) any regulations made under section 201(m) (warning or informing jury about very young children's evidence).

127 Delayed complaints or failure to complain in sexual cases

(1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.

(2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

4.1 Meaning of time taken to report (see sections 127 and 126A(3)(a) of the Evidence Act 2006)

Research shows that the time taken by young children to report alleged sexual offending will not be perceived by jurors to affect the likelihood of a truthful or false complaint (although the time taken may affect reliability due to the passage of time). However, potential jurors are less likely to expect delayed disclosure from teenagers and adults.

Attrition research in New Zealand, and all comparative jurisdictions, shows that 85 percent or more of those who have experienced sexual offending do not report to the police. Failure to report or delay in reporting can occur for many reasons, including:

- Confusion, guilt or shock;
- Fear of the offender and the consequences of reporting the rape (including engaging with the criminal justice system and on their social and family network);
- Fear of not being believed;
- Blaming themselves for what has occurred;
- Not immediately recognising they have been sexually assaulted.

Recent New Zealand research shows that a frequent aspect of the cross-examination of adult complainants in rape cases is the time taken to report *to the police*, even though there may have been an immediate complaint made to a friend or family member.

Failure to disclose sexual offending when seeking a protection order on the basis of physical or psychological harm is also used to challenge the credibility of the complainant, even though research shows that sexual offending is usually the last type of family harm to be disclosed.

A delay in disclosure does not necessarily mean the complaint is untrue. However, this does not mean that there is no impact on the reliability of recall. A careful balance is needed about the directions given under both sections 122 and 127.

Direction of assistance even if reasons for delay were given

The Supreme Court in *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 stated that "the mere fact that a complainant gives a reason for the delay does not displace the usefulness of the direction": at [48].

4.1.1 Example direction: Time of reporting

You will recall the complainant did not tell anyone [or did not tell a particular person] about the alleged offending until [...]

There may be many reasons why a complainant of a sexual offence might not immediately make a complaint, whether to family, friends or others. There can also be understandable reasons why someone does not involve the Police straight away, including a fear of the process that may follow and the impact it may have

on their relationships, including with the defendant. Research shows that victims of sexual offences react in different ways. Some complain close in time to the alleged offending. Others do not. This can be because of shame, shock, confusion or fear of getting into trouble, not being believed, causing problems for other people, or because of a fear about the process that may follow. Importantly, there is no such thing as a "typical" response. Different people react to situations in different ways. A complaint made some time after the alleged offending does not necessarily mean the complaint was untrue, just as an early complaint does not necessarily mean it was true.

On this issue, the Crown says …. The defence, however, says ….

If you think that the complainant in this case took time to either make a complaint or to involve the Police, examine the evidence that you heard in this case about why that is, and take into account what I have just told you.

REFERENCES

- Deidre Brown, Samantha J Andrews and Michael E Lamb "Children's disclosures, memory, and testimony about maltreatment: Beliefs of jury-eligible New Zealanders" (forthcoming)
- *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019)
- *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [113]
- Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (Commonwealth of Australia, 2017)
- Julia Quilter, Luke McNamara and Melissa Porter "The most persistent rape myth? A qualitative study of 'delay' in complaint in Victorian rape trials" (2023) 35 Current Issues in Criminal Justice 4
- Rebecca L Heron, Maarten Eisma and Kevin Browne "Why Do Female Domestic Violence Victims Remain in or Leave Abusive Relationships? A Qualitative Study" (2022) 31 Journal of Aggression, Maltreatment & Trauma 677
- Elizabeth N Wright and others "Help-Seeking and Barriers to Care in Intimate Partner Sexual Violence: A Systematic Review" (2022) Trauma, Violence, & Abuse 1510
- Quincy C Miller, Alissa Anderson Call and Kamala London "Mock Jurors' Perceptions of Child Sexual Abuse Cases: Investigating the Role of Delayed Disclosure and Relationship to the Perpetrator" (2022) 37 Journal of Interpersonal Violence NP23374

4.2 Sexual offences are not only committed by those who are strangers to the complainant; Sexual offending is not less serious or less traumatic when committed by acquaintances, intimate partners or family members; Assessments of credibility and consent should not be based solely on the existence of a relationship between the defendant and the complainant (see section 126A(2)(c) and (2)(e)(ii) of the Evidence Act 2006)

In *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019), 74 percent of cases involved alleged offenders who were known to the victim. However, compared to strangers, defendants in intimate partner sexual offending cases were less likely to be convicted (30 percent as compared to 51 percent) as were those defendants known to the complainant in a more general sense (34 percent): at 3–4 and 58.

Social science research shows that judgements concerning the culpability of the defendant differ depending on the relationship between the defendant and the complainant. When the complainant and the defendant were said to be in an intimate relationship at the time of the alleged sexual offending, mock juror researchers noted that there were more specific assumptions relied on, including about the ability of the complainant to effectively manage and resist unwanted sex. In one study, 71 percent of jurors indicated that the parties' previous relationship was an important or highly important factor influencing their verdicts.

The Law Commission stated in *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.78] (emphasis added):

> We consider it would be desirable to develop a direction which refers to the fact that sexual offending can, and often does, take place between people who know each other. The direction might also caution jurors about making generalisations about the incident based on whether the defendant was a stranger to the complainant (*such as reasoning that they would have been able to escape if the defendant was known to them*).

See also the general direction about avoiding assumptions and misconceptions.

4.2.1 Example direction: Complainant knew defendant

In this case, as in many others, the complainant and defendant knew each other before the commission of the alleged offence. There is no such thing as "typical" sexual offending; a "typical" offender; or a "typical" victim of sexual offending. Sexual offences can be committed in a wide variety of circumstances. Sexual acts can occur without consent between all sorts of people. It can happen when the people involved are strangers. It can happen when the people involved know each other well, or when those involved know each other, but not well. It is important when assessing the evidence and considering the competing submissions you do

not start from the viewpoint of any incorrect assumptions. Non-consensual sexual activity can happen between people who know each other.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

4.2.2 Example direction: Complainant was in a relationship with the defendant

In this case, as in others, the complainant and defendant were in a relationship before the commission of the alleged offence. There is no such thing as "typical" sexual offending; a "typical" offender; or a "typical" victim of sexual offending. Offences involving sexual acts can be committed in a wide variety of circumstances. Sexual acts can occur without consent between all sorts of people. It can happen when the people involved are strangers. It can happen when the people involved know each other well, including when those involved were in a relationship. It is important when assessing the evidence and considering the competing submissions you do not start from the viewpoint of any incorrect assumptions. Non-consensual sexual activity can happen between people who were in a relationship.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

REFERENCES

- Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 International Journal of Evidence & Proof 299
- Patrick Tidmarsh and Gemma Hamilton *Misconceptions of sexual crimes against adult victims: Barriers to justice* (Trends & Issues 611, Australian Institute of Criminology, 2020)
- Louise Ellison "Credibility in context: Jury education and intimate partner rape" (2019) 23 International Journal of Evidence & Proof 263
- Laura Tarzia and Kelsey Hegarty " 'He'd Tell Me I was Frigid and Ugly and Force me to Have Sex with Him Anyway': Women's Experiences of Co-Occurring Sexual Violence and Psychological Abuse in Heterosexual Relationships" (2023) 38 Journal of Interpersonal Violence 1299
- Anastasia Powell and others "Meanings of 'Sex' and 'Consent': The Persistence of Rape Myths in Victorian Rape Law" (2013) 22 Griffith Law Review 456
- *Biddle v R* [2021] NZCA 57 at [51]
- *S (CA420/2019) v R* [2020] NZCA 321 at [54]

4.3 Complainant's clothing choices as contributing to the alleged offending (impact on consent and credibility – see section 126A(2)(e)(i) of the Evidence Act 2006)

The Law Commission considered the risk that jurors may "reason that a complainant who dressed or acted in a certain way must have wanted sexual activity", or "focus on whether they think the complainant is 'to blame' [due to how they were dressed] rather than focusing on the question of consent", should be addressed by directions (*The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.63]). Research shows that judgements about consent are influenced by the complainant's clothing at the time of the alleged offending.

Evidence of what the complainant was wearing, either at the time of the alleged offending or at other times (including in social media posts), offered for the purpose of suggesting the complainant was wanting to have sex, or to provide the defendant with reasonable grounds to believe she consented, should usually be treated as irrelevant and inadmissible. If such material emerges unrestricted in evidence, it should be addressed by jury directions.

Note the following extract from the *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1* (Department of Justice, 2019) at 88–89:

> Concern has been raised about the admissibility of a woman's clothing as evidence of consent — I pause to observe at this stage that there is no doubt that the clothing a complainant is wearing has no relevance whatsoever to whether she consented or not. That is one of the rape myths that needs to be robustly dispelled.

Exhibitions have presented the range of clothing victims/survivors of sexual assault were wearing at the time of the alleged offence, in order to challenge beliefs that particular clothing choices make people more susceptible to (by contributing to) sexual offending: https://www.boredpanda.com/what-were-you-wearing-sexual-assault-art-exhibition/?utm_source=google&utm_medium=organic&utm_campaign=organic

4.3.1 Example direction: Forensic use of complainant's clothing

[***Note:*** *Section 126A(2)(e)(i) refers to a misconception: that a complainant is less credible, more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant "dressing provocatively". A related direction is usually given when: (a) a submission is made or implied that the complainant's clothing suggested she was promiscuous or (b) there is a risk of the jury employing this misconception, or one like it, because of the complainant's clothing. As with all other directions, the wording of this direction depends on the circumstances.*]

You heard evidence about what the complainant was wearing before the commission of the alleged offence(s). [Cite evidence and the purpose of admission.]

> You must not make any assumptions about the complainant's willingness to engage in sexual activity [or the reasonableness of the defendant's belief in consent] based on the type of clothing worn at that time. That someone dresses in what could be considered as revealing clothing says nothing about whether they wanted to have sex. The complainant's clothing therefore says nothing about whether she consented to sexual activity with the defendant. Thinking of this nature has no place in this trial. You must put all such thinking aside.

REFERENCES

- Kirsty Osborn and others "Juror Decision Making in Acquaintance and Marital Rape: The Influence of Clothing, Alcohol, and Pre-existing Stereotypical Attitudes" (2021) 36 Journal of Interpersonal Violence NP2675
- Kim Johnson and others "Young Adults' Inferences Surrounding an Alleged Sexual Assault" (2016) 34 Clothing & Textiles Research Journal 127
- Jane Goodman-Delahunty and K Graham "The influence of victim intoxication and victim attire on police responses to sexual assault" (2011) 8 Journal of Investigative Psychology and Offender Profiling 22

4.4 Evidence of the complainant flirting with the defendant (see section 126A(2)(e)(i) of the Evidence Act 2006)

Research with mock jurors found that amongst the behaviours that jurors highlighted as indirectly communicating a complainant's willingness to engage in sexual activity were offering/accepting a lift; inviting the defendant into her home; remaining in the defendant's company for a prolonged period; paying/receiving compliments; drinking alcohol; sharing a goodnight kiss; and using sexual innuendo.

The Law Commission stated that research demonstrates that some jurors may believe that "the defendant is less culpable (or the complainant is responsible) if the complainant 'led them on', for example by flirting, dancing, kissing them or inviting them in". The Commission identified the risk that this might "cause [jurors] to focus on whether they think the complainant is 'to blame' rather than focusing on the question of consent": *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.62] – [12.63].

It is important to note that jurors may not necessarily consider that a woman is "to blame" if she flirts with the defendant – they may think that flirting is indicative of consent. Therefore, any direction should be given in accordance with the final wording of section 126A(2)(e) which problematises a connection between flirting and credibility, consent, or belief in consent.

The Commission recommended a direction to remind the jury of the need to decide whether the complainant consented to the sexual activity complained of *at the time of that activity*, and that some forms of previous conduct do not mean (of themselves) that consent was given.

4.4.1 Example direction: Behaviour of the complainant shortly before the alleged offending

[***Note:*** *Section 126A(2)(e)(i) refers to a misconception: that a complainant is less credible, more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant "acting flirtatiously".*]

It is common ground the alleged offending occurred at the complainant's home, after she invited the defendant to return there with her. It is also common ground the complainant and the defendant kissed shortly before the commission of the alleged sexual offences, and, in the same period, that the complainant engaged in behaviours that could be seen as flirting.

The Crown says …. The defence says ….

Just because the complainant asked the defendant to return home, that there was consensual kissing, and apparently flirting, does not necessarily mean the complainant consented to anything that occurred after, [nor that it was reasonable for the defendant to believe that the complainant was consenting]. A person who

engages in sexual activity is entitled to choose how far that activity goes and to have their position respected by the other person and upheld by the law.

REFERENCES

- Natalie Taylor *Juror biases and attitudes in sexual assault cases* (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, No 344, 2007)
- Louise Ellison and Vanessa E Munro "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" (2009) 18 Social and Legal Studies 291
- Blake M McKimmie, Barbara M Masser and Renata Bongiorno "What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant are Perceived" (2014) 29 Journal of Interpersonal Violence 2273
- Megan Hermolle, Samantha J Andrews and Ching-Yu S Huang "Rape Stereotype Acceptance in the General Population of England and Wales" (2022) 37 Journal of Interpersonal Violence NP23131

4.5 Evidence of the complainant drinking alcohol or taking drugs (see section 126A(2)(e)(i) of the Evidence Act 2006)

The Law Commission suggested "a judicial direction could be developed to counter impermissible reasoning about the victim's use of alcohol or drugs. For example, a juror reasoning that a victim must have wanted sex because she had a drink with the defendant, or reasoning that the defendant should not be held responsible in a sexual case because the complainant 'got herself into the situation' by choosing to drink alcohol": *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.72].

This recommendation is related to the Commission's concern about illegitimate reasoning about the complainant's clothing or the meaning made of the complainant inviting the defendant to their home. The concern identified by the Commission is that choosing to drink or take drugs should not be viewed by jurors as meaning the complainant was responsible for the alleged offending, nor that the complainant's choice to drink, or become intoxicated, indicates they consented to sex.

Note the response of Sir John Gillen to the reliance on such an inference in the *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1* (Department of Justice, 2019) at 14:

> [V]ictims who drink alcohol or use drugs are asking to be raped, a concept so exquisitely vacuous that those who cling to it ought to hang their heads in shame.

Research with both focus groups and mock juries demonstrates that when the victim (in a scripted scenario) had voluntarily ingested either alcohol or recreational drugs, participants were of the view that she ought to bear some responsibility for the subsequent sexual activity – however this did not always result in excusing the defendant. For some participants, this was sufficient to absolve the defendant of all liability. When both complainant and defendant were described as being equally intoxicated, there was a reduced willingness to label the depiction of non-consensual sex as rape. Social science researchers note that the contestable way intoxication and responsibility impacts on verdict choice is most visible in cases involving cisgender[2] women and girls – due to historical ideals of femininity and traditional heterosexual normative scripts.

4.5.1 Example direction: Relevance of voluntary intoxication before the alleged offending

[***Note:*** *Section 126A(2)(e)(i) refers to a misconception: that a complainant is less credible, more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant "drinking alcohol".*]

[2] Cisgender / Cis is a term used to describe a person whose gender aligns with their sex assigned at birth.

> The complainant and the defendant were socialising and drinking before the commission of the alleged offence(s). You must not assume the complainant consented to sexual activity with the defendant [nor did the defendant have reasonable grounds to believe she was consenting] just because she was socialising and drinking with the defendant before the commission of the alleged offence(s). It is not uncommon for people to socialise, and when doing so, to drink to the point of intoxication. Alcohol use is part of the evidence but do not assume that drinking alcohol of itself indicates an interest in having sex.
>
> Similarly, you must not think that because the complainant was drinking, she was therefore "asking for trouble." Thinking of this nature has no place in this trial. You must put all such thinking aside.

REFERENCES

- Emily Finch and Vanessa E Munro "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants" (2005) 45 British Journal of Criminology 25
- Geoffrey Hunt and others '"Blurring the Line": Intoxication, Gender, Consent, and Sexual Encounters Among Young People" (2022) 49 Contemporary Drug Problems 84
- Faye T Nitschke "Intoxicated But Not Incapacitated: Are There Effective Methods to Assist Juries in Interpreting Evidence of Voluntary Complainant Intoxication in Cases of Rape?" (2021) 36 Journal of Interpersonal Violence 4335
- Emily Finch and Vanessa E Munro "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials involving Intoxicants" (2007) 16 Social & Legal Studies 591
- Clare Gunby, Anna Carline and Caryl Beynon "Regretting it After? Focus Group Perspectives on Alcohol Consumption, Non-consensual Sex and False Allegations of Rape" (2012) 22 Social & Legal Studies 87

4.6 The complainant's lack of physical resistance; lack of injuries; physiological responses; absence of threats or force by the defendant (see section 126A(2)(d) of the Evidence Act 2006)

The Law Commission listed in *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.79] (edited for consistency and meaning), a number of myths about the use of force during sexual offending and about the victim's resulting injuries, such as:

- **MYTH**: an offender will typically use physical force against their victim and/or use a weapon;
- **MYTH**: a victim of "real rape" will resist and fight off the offender; and
- **MYTH**: a rape victim will usually sustain physical injuries at the time of the offence.

The Commission cited local and overseas research demonstrating that in many cases sexual offenders do not use physical force during an offence and that victims may be more likely to freeze than fight off the offender.

A 2017 Swedish study of 298 women who had visited an emergency clinic within a month of an alleged sexual assault found seven out of 10 of these women experienced "tonic immobility". This was described as an involuntary, temporary state of motor inhibition in response to situations involving intense fear (e.g., "freezing").

Other research shows that a lack of physical resistance is normal and often out of the victim's conscious control, due to the brain's natural responses to life threatening situations.

Despite research showing that a victim may have a range of responses – including freezing, fleeing, fighting, or trying to befriend the alleged offender in order to prevent the harm – work with mock jurors demonstrates that many believe that a rape victim would fight back, especially if they knew the defendant. In the context of an acquaintance rape, (mock) jurors were typically committed to the idea that a woman would do her utmost to avoid an assault by issuing strong verbal protests and fighting back. This view was formed on the unproven assumption that rape by a known assailant would provoke less fear. As a result, jurors believe that a "real victim" would receive injuries, with many research participants expecting there would be evidence of injury.

Absence of (genital) injury

Mock jurors considered that if a victim "froze" (which was more likely to be accepted in the case of stranger rape), then there would be injury, including to their genitals. Observing their deliberations, researchers Louise Ellison and Vanessa E Munro noted that there were often "strong, but unfounded, convictions that vaginal tissues are easily torn, that pelvic muscles can be rigidified at will and that intercourse without trauma only occurs where a woman is aroused, which, in the jurors' minds, was wholly inconsistent with rape" ((2009) at 207).

It is commonly believed that any non-consenting sexual contact will result in injury to the genital area, which a medical examiner will be able to see. It is in fact normal and common for non-consensual sexual contact, including penetration, to occur without causing injury.

Researchers have therefore suggested that expert medical evidence or judicial directions should include information in support of the fact that rapes can occur without vaginal trauma, together with some explanations as to why this might be (e.g., the resilience of the vaginal tissues). The genital tissues are stretchy in nature and have lubrication (in a similar way to the presence of saliva in the mouth).

Because the skin and genital tissues are stretchy, the majority of people seen after an alleged non-consenting sexual contact have a normal genital examination. The likelihood and extent of genital injury that might occur following sexual contact, including penetration (consenting or non-consenting), is affected by many factors. These factors include the age of the person, their general health, what medications they are on, the degree of force involved, the presence of skin disease, infection and inflammation and the nature of the penetrating object (e.g., penis, finger, or another object), amongst other things. Injuries can occur in both consenting and nonconsenting sexual contact. Whether or not the sexual contact was consensual is not a determining factor.

During sexual contact (both consenting and non-consenting), if genital injuries occur they are usually minor, for example small bruises, small splits or grazes. Such injuries heal quickly, often within hours or days, due to the excellent blood supply to the area. This means that a time delay between the alleged event and the medical examination will affect the likelihood of seeing injuries.

It is not possible for a person to "actively resist" penetration of the vagina or anus, by genital muscle contraction.

Physiological responses

The Law Commission included in their report reference to the myth that "physiological responses during sexual activity must mean the person consented": *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.58].

The human sexual response is complex and dynamic, involving multiple cognitive, emotional and physiological processes which are not fully understood and which are difficult to study. Even non-consensual sexual stimulation can sometimes lead to increased blood flow in the pelvic organs (women) and, more commonly, in the penis (men). This is part of a physiological "reflex action", and does not indicate enjoyment, pleasure or consent.

When these physiological responses occur, they can be confusing for victims of sexual assault, who may feel that "their body has let them down" and this may result in decreased disclosure to social supports, clinicians and police. There can be "arousal non-concordance", a physiological response to sexual stimulation without the contact being wanted or liked, but there is a risk that jurors may believe that the presence of arousal and orgasm implies consent.

However, sexual arousal, including erection, ejaculation and orgasm, can occur when someone is sexually assaulted and such arousal does not mean that the contact was consensual. The admission of information about sexual arousal at trial should be carefully managed, and assessed for relevance, for this reason.

4.6.1 Example direction: Lack of resistance

In this case the complainant did not protest or offer physical resistance to, or during, the alleged offending. The law on this topic is clear: a person does not consent to sexual activity merely because they did not protest or offer physical resistance. Research and experience tell us that people can respond very differently to sexual offending. Some protest and physically resist. Others, however, do not. Some people "freeze" and are unable to move or struggle due to the brain's natural responses to real or perceived life-threatening situations. Some try to avoid the sexual offending, or further injury or harm by trying to befriend the alleged offender, or by deliberately choosing not to resist or call out. Importantly, there is no "typical" reaction to a sexual offence. You must not reason as if there were. As I explained earlier, "consent" means a true consent, freely given by a person who is in a position to make a rational decision.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

The Crown says the complainant did not consent .... The defence says the complainant did consent because ....

In assessing this point, consider the evidence, what the Crown and defence have said about the issue, and what I have told you about the range of ways people may react.

4.6.2 Example direction: Lack of genital injury

Research tells us [and MEDSAC doctors will usually say as part of their evidence] that it is common for non-consensual sexual contact, including penetrative sexual activity, to occur without injuries. You may be under the false impression that sexual offending necessarily causes injuries. This is not so. Rape and other forms of sexual offending often occur without leaving any injury to the genitalia because the female genital area is stretchy in nature.

Lack of genital injury does not mean the offending did not occur. Similarly the absence of genital injury says nothing about whether a complainant did or did not consent.

[***Note**: In some factual circumstances the defence might legitimately raise the absence of injury where the type of allegation against the defendant suggests that injury would be highly likely*.]

REFERENCES

- James Chalmers, Fiona Leverick and Vanessa E Munro "The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials" (2021) 48 Journal of Law and Society 266
- Anna Möller and others "Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression" (2017) 96 Acta Obstetricia et Gynecologica Scandinavica 932
- Jeannie Oliphant and others "A retrospective observational study of genital findings in adult women presenting to a New Zealand Adult Sexual Abuse Assessment and Treatment Service following an allegation of recent sexual assault" (2022) 86 Journal of Forensic and Legal Medicine 102301
- Nina Burrowes *Responding to the challenge of rape myths in court: A guide for prosecutors* (nbresearch, London, 2013)
- Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019)
- Tracy Ann Tyler "The Limbic Model of Systemic Trauma" (2012) 26 Journal of Social Work Practice 125
- Roy Jerome Levin and Willy TM van Berlo "Sexual arousal and orgasm in subjects who experience forced or non-consensual sexual stimulation – A review" (2004) 11 Journal of Clinical Forensic Medicine 82
- Cathy Lincoln "Genital Injury: Is It Significant? A Review of the Literature" (2001) 41 Medicine, Science and the Law 206
- *Tuhura v R* [2010] NZCA 246 at [25] ff (expert evidence on absence of injury)
- *Toru v R* [2020] NZCA 541 at [97] (expert evidence on sexual arousal during an assault)

4.7 Demeanour / distress of the complainant (see section 126A(2)(e)(iii) of the Evidence Act 2006)

Psychological literature has drawn attention to the different emotional styles displayed by complainants when communicating their experiences (including (but not limited to) being composed, direct, outwardly distraught and/or crying, anxious, focused, distracted, numb, flippant, scared). These emotional reactions can be present from immediately after the alleged offending and continue until, and beyond, the point at which the complainant (whether an adult or a child) gives evidence.

Personality and individual coping strategies are commonly said to explain these differing reactions, as well as the complex, often conflicting emotions victims typically experience after an assault. It has also been demonstrated that different styles of self-presentation in court may be a product of complainants seeking to manage their emotions. To perform the witness role, some people will understandably engage in deliberate strategies that enable them to stay in command of their feelings, sometimes by emotionally detaching from their experience of sexual offending.

Research with mock jurors suggests that the degree of distress exhibited by a complainant when giving evidence did not impact on deliberations in a consistent way. For some jurors, the complainant's visible distress was a sign that she was recounting the details of an experienced traumatic event. However, the value of observing demeanour was more sceptically appraised by others who appeared concerned that witnesses, who had a vested interest in the outcome of the trial, may manage both their emotions and their overall appearance as a means of eliciting sympathy and/or bolstering their credibility.

Other research has found that people expect that sexual offence victims will respond consistently over time and so those who show varying responses at different times are viewed as less credible. In reality, victims' emotions may well change during different stages of the criminal justice system (for many reasons, including therapeutic assistance or different coping mechanisms). The nature of responses from people the complainant has told about the offending may also impact on how the complainant talks about the events at later stages.

While the Law Commission did not specifically recommend the development and use of a direction on the forensic significance of distress, it referred to the assumption that a "real victim" would react "with visible distress and hysteria": *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.58].

The *Crown Court Compendium* (June, 2022) at 20.8, and section 52(4)(a) of the Jury Directions Act 2015 (Victoria) address this issue, and further juror education on this point was recommended by Cheryl Thomas. Local jury research by Claire Baylis suggests that some "jurors had fixed expectations of how 'normal' rape victims would respond, including that they would not be angry, and that they would not display different levels of emotion when testifying in court [as compared to] when interviewed by police."

4.7.1 Example direction: Display of emotion or absence of emotion in connection with the complaint

The complainant was crying uncontrollably when she told …. Or, X said the complainant was calm and showed little or no emotion when she said the defendant had raped [sexually assaulted] her.

When you assess this evidence, remember that there is no single or "typical" reaction displayed by a person who has experienced sexual offending. Some complainants appear distressed when they complain of the offence. Others do not. The ways they react might not be what you would expect; or what you think you would do in this situation. I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

The Crown says …. The defence says ….

In assessing this point, consider the evidence, what the Crown and defence have said about the issue, and what I have just told you.

4.7.2 Example direction: Display of emotion or absence of emotion when making a VRI/EVI or giving evidence

The complainant cried when she gave evidence. Or, the complainant was calm and showed little or no emotion when she gave evidence.

The Crown says …. The defence says ….

Research and experience tell us that the way in which a complainant gives evidence is not a good measure of whether the person is telling the truth or not. Sometimes when people have to recount events of this kind, they show obvious signs of emotion and distress. Others in the same situation might display no obvious sign of emotion or may present as composed, direct, focused, distracted, numb, scared or something else. The presence or absence of emotion or distress or anger when giving evidence does not provide a reliable indication of whether the person is telling the truth or not.

I must warn you that simply observing the complainant and watching their behaviour as they give evidence is not by itself a good way to assess whether their evidence is true or false. For example, a complainant may not appear confident, or may hesitate, fidget or look away when giving evidence. That doesn't necessarily mean that their evidence is untruthful.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

REFERENCES

- Louise Ellison and Vanessa E Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49 British Journal of Criminology 202
- Kathryn Rowsell and Melissa F Colloff "Are sad children more believable? A systematic review of the relationship between emotional demeanour of child victims and juror credibility judgements" (2022) 28 Psychology, Crime & Law 943
- Cheryl Thomas "The 21st century jury: contempt, bias and the impact of jury service" [2020] Criminal Law Review 987
- Camas Ussery "The Myth of the 'Ideal Victim': Combatting Misconceptions of Expected Demeanour in Sexual Assault Survivors" (2022) 27 Appeal: Review of Current Law and Law Reform 3
- Claire Baylis "Sexual Violence Legislation Bill – Submission to the Select Committee for Justice" (2020)
- Jacqueline Horan and Jane Goodman-Delahunty "Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned" (2020) 43 UNSW Law Journal 707
- Amelia Mindthoff, Deborah Goldfarb and Kelly Alison Behre "How Social Science Can Help Us Understand Why Family Courts May Discount Women's Testimony in Intimate Partner Violence Cases" (2019) 53 Family Law Quarterly 243
- James Chalmers, Fiona Leverick and Vanessa E Munro "Handle with care: Jury deliberation and demeanour-based assessments of witness credibility" (2022) 26 International Journal of Evidence & Proof 381

4.8 Forensic meaning of inconsistencies

The Law Commission identified a misconception concerning omissions and inconsistencies in its *Issues Paper* (NZLC IP42, 2018) at [11.19]: that inconsistencies in evidence represent evidence of fabrication since truthful people remember all the details. In *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.58] the Law Commission listed the following misconception as one that could helpfully be addressed by a direction: that the complainant's recollection should be clear, coherent, detailed, specific and should not contain any inconsistencies or omissions. Local jury research by Claire Baylis suggests that "some jurors laboured under [the misconception] that real victims would remember all the specific details of offending".

While inconsistencies between accounts form the basis of credibility challenges in many contexts, not all inconsistencies should be treated as forensically significant. Psychological research on memory suggests that inconsistencies are a normal measure of human memory and a poor measure of the reliability of the core of the allegation.

When events are stressful or cause heightened emotions (positive or negative) people may remember that the events happened. However, how well the details of such events are remembered, and why, is still being researched and is a point of difference between memory experts. What is generally agreed is that "high levels of arousal lead to the prioritising of certain information": see *P (CA470/2017) v R* [2020] NZCA 304 at [22] and [32]. Current understandings of how memory works indicate that it is unrealistic to expect victims of sexual assault to recall all aspects of their experiences with detailed accuracy from start to finish. While inconsistencies, lack of detail, errors, and omissions in the complainant's account over time or in court are raised to undermine their credibility, the current view of human memory considers all of these to be typical features of a normal memory.

Researchers recommend that if jurors are encouraged to use consistency as a measure of credibility, this should be related to individual statements made either pre-trial or at trial (as inconsistency is diagnostic of error but only at the level of individual statements, not in relation to all of a person's evidence).

4.8.1 Example direction: Inconsistencies in the complainant's evidence

The complainant accepted in cross-examination that her evidence was in some ways different from what she said to the Police. The complainant said this was because …

On this aspect, the Crown says …. The defence says ….

You may take these inconsistencies into account when determining if the complainant's evidence on these matters is truthful and accurate. You may also take into account the complainant's explanation for the inconsistencies, and their

apparent significance or otherwise when determining if these aspects of the complainant's evidence is truthful and accurate.

It is important to remember that just because a complainant or witness is inconsistent on a particular topic, it does not necessarily mean that person is generally untruthful or inaccurate. Inconsistencies can happen even when someone is telling the truth. You should be careful not to assume a complainant should have a clear and detailed account of the alleged event, and that if she does not, her evidence is untrue. We know from research that this is a misconception. The stress and trauma, such as the type alleged to have occurred to the complainant, can affect a person's account of events. Some people may go over an event afterwards in their minds many times and their memory may become clearer or can develop over time. But other people may try to avoid thinking about an event at all, and they may then find it hard to recall the event accurately. Your assessment of this factor will be influenced by your conclusions as to the facts of this case. You must form a view of what happened in this case based on all the evidence you have heard.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

4.8.2 Example direction: The complainant's evidence more generally

Be careful not to assume a complainant should have a clear and detailed account of the alleged event, and that if she does not, her evidence is untrue. We know from research that this is a misconception. The stress and trauma, such as the type alleged to have occurred to the complainant, can affect a person's account of events. Some people may go over an event afterwards in their minds many times and their memory may become clearer or can develop over time. But other people may try to avoid thinking about an event at all, and they may then find it hard to recall the event accurately. Your assessment of this factor will be influenced by your conclusions as to the facts of this case. You must form a view of what happened in this case based on all the evidence you have heard.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

REFERENCES

- Katrin Hohl and Elisabeth A Stanko "Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales" (2015) 12 European Journal of Criminology 324
- Anne Sophie Pichler and others "Inconsistencies in complainant's accounts of child sexual abuse arising in their cross-examination" (2021) 27 Psychology, Crime & Law 341
- Jane Goodman-Delahunty, Natalie Martschutz and Mark Nolan "Memory Science in the *Pell* Appeals: Impossibility, Timing, Inconsistencies" (2020) 44 Criminal Law Journal 232
- Katrin Hohl and Martin A Conway "Memory as evidence: How normal features of victim memory lead to the attrition of rape complaints" (2017) 17 Criminology and Criminal Justice 248
- J Douglas Bremner "Traumatic stress: effects on the brain" (2006) 8 Dialogues in Clinical Neuroscience 445
- Research Board *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (British Psychological Society, 2010) at 2 and 25

4.9 Complainant maintains on-going contact with the defendant after the alleged offending (see section 126A(2)(e)(iii) of the Evidence Act 2006)

Misconceptions concerning the behaviour of a child towards an alleged abuser have been the subject of approved expert evidence and section 9 statements for some time (see, for example, *G (CA738/2018) v R* [2020] NZCA 375 at [46]). The Law Commission stated this misconception may also have an impact in cases of alleged sexual offending against adults, though in this context the offering of expert evidence is rare. In *Keats v R* [2022] NZCA 149 the Court of Appeal agreed that the judge sitting alone was entitled to self-direct on three "well-established matters" of counter-intuitive evidence, including the meaning of the adult rape complainant having continued contact with the defendant.

People may believe that a victim would discontinue a relationship with the offender and end all contact. However, offenders often build a relationship with a victim involving a combination of trust, power, and fear – making it difficult for a victim to immediately stop seeing or interacting with the offender (due to worry about the consequences – especially for a relationship where there has been physical violence and the heightened risk of lethal violence following separation). They may also still love the defendant and worry about the effect of separation on their economic and social wellbeing, and that of their children. Complainants may well go on to have regular consensual sex with the defendant after the alleged rape.

"Grooming" (including normalising the sexual conduct and encouraging the complainant to not see it as wrong, nor tell anyone) can occur within adult relationships and is not a tactic used only with children.

Victims may also feel unable to immediately stop interacting with the offender (including on social media), especially while they are still coming to terms with what has happened. When the offender is in their social network or wider circle of friends, it may be too difficult to avoid contact with them without disclosing the offending which they may not be ready to do, or do not wish it to be widely known. They may also maintain contact as a way of understanding what happened and as a way of taking control or attempting to normalise the assault.

4.9.1 Example direction: Ongoing contact after the alleged offending

It was argued ongoing contact between the complainant and the defendant following the alleged offending means no offending happened, or it is more likely it did not happen because of that contact.

If this is something you consider when determining if the charge is proved, please know that research shows there is no "typical" response to rape [or sexual offending]. People react in many different ways to a sexual act to which they did not consent. Research tells us some victims maintain contact with someone who has raped or offended against them, including continuing a relationship with them

and having consensual sex on later occasions. This may happen for good reasons, including fear or concern about the consequences of not maintaining contact or discomfort at having to explain the lack of contact to others. The ways they react might not be what you would expect; or what you think you would do in this situation. Ongoing contact, [including later consensual sex] does not of itself mean the alleged offending did not occur.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

REFERENCES

- Patrick Tidmarsh and Gemma Hamilton *Misconceptions of sexual crimes against adult victims: Barriers to justice* (Trends & Issues 611, Australian Institute of Criminology, 2020) at 8-9
- Denise Wilson and others *E Tū Wāhine, E Tū Whānau: Wāhine Māori keeping safe in unsafe*
- *relationships* (Taupua Waiora Māori Research Centre, Auckland, 2019)
- Lisa Dufraimont "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44 Queen's Law Journal 316
- Georgia M Winters, Elizabeth L Jeglic and Leah E Kaylor "Validation of the Sexual Grooming Model" (2020) 29 Journal of Child Sexual Abuse 858
- Grant Sinnamon "The Psychology of Adult Sexual Grooming: Sinnamon's Seven-Stage Model of Adult Sexual Grooming" in Wayne Petherick and Grant Sinnamon (eds) *The Psychology of Criminal and Antisocial Behavior Victim and Offender Perspectives* (Elsevier, Academic Press, 2017) 459

4.10 Prevalence of false complaints (see section 126A(2)(a) of the Evidence Act 2006)

Researchers observed that during mock jury deliberations there were frequent and sustained references to the perception that false rape allegations were common. In a focus group study, the topic of false allegations was spontaneously raised by participants in all groups without direction from the investigator, arguably demonstrating the widespread nature of the issue. Interestingly, this occurred despite many of the same participants rejecting the claim that false rape allegations are common when asked in the abstract.

The misconception that false complaints are common in rape cases is also held by a significant percentage of potential New Zealand jurors. In the 2017 *Gender Attitudes Survey*, 29 percent of respondents agreed that "false rape accusations are common". A further 26 percent were "neutral" on the statement, with another 18 percent responding that they did not know – meaning only 26 percent of all respondents disagreed with the statement. Local jury research by Claire Baylis suggests that the "most basic misconception that appears to hold traction amongst jurors is that women routinely lie about rape and that there is therefore a preponderance of false allegations before the courts."

However, research over time has established a low level of false reporting. In a large study in 2005, 216 complaints were classified as false (8 percent of all the reported cases – but reduced to 3 percent when formulated based on a probable or possible false complaint). In this English study, only six of these complaints led to an arrest, and in only two cases were charges laid. This supports the findings of global attrition studies that most false complaints are identified early in the investigative process, often due to an admission by the complainant (Liz Kelly, Jo Lovett and Linda Regan *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study 293, London, 2005) at 47—50).

The 3 percent figure was replicated by another study reported in Mandy Burton "How different are 'false' allegations of rape from false complaints of GBH?" [2013] Criminal Law Review 203.

Liz Kelly also noted (see also Sandra Newman, below) that:

> [A]lthough false allegations do exist, they are rarely of the kind that dominates popular discourse: in the majority there is no named offender but rather a vague allegation with respect to a stranger.

In the New Zealand Ministry of Justice's report *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (2019) the "no crime" categorisation decreased during the time of the research from 17 percent to 2 percent, which is more consistent with overseas attrition studies and is related to how disposition is recorded: at 3. In a 2019 New Zealand study of 110 police files from 2015 (involving complaints of alleged sexual violation), researchers reported that 9 percent of cases were classified by police as K3 (no offence or false complaint), however none of these cases proceeded to a prosecution: at 34.

No study establishes that mental health conditions such as anxiety, depression or bipolar disorder are associated with false reports of rape. Despite this, some commentators point out

that mere consultation with a mental health professional can be treated in court as indicative of complainant unreliability.

It is argued that part of the disconnect between beliefs about the extent of false reports and the actual numbers is based on how falsity is "counted". Those working in the criminal justice system may view the existence of inconsistencies and errors relating to aspects of an account as amounting to a false report (and are classified as "no offence"), as opposed to limiting that label to complaints that are untrue in their entirety.

4.10.1 Example direction: Prevalence of false complaints of rape/sexual offending

[***Note:*** *Usually only given when a submission is made about the regularity of false complaints and/or the claim that false complaints are easy to make*]

Defence counsel said false complaints are easy to make, common, and hard to disprove. You must ignore this submission. It is unsupported by evidence and is contrary to research and experience. In short, put this submission out of your mind.

REFERENCES

- Clare Gunby, Anna Carline and Caryl Beynon "Regretting it After? Focus Group Perspectives on Alcohol Consumption, Non-consensual Sex and False Allegations of Rape" (2012) 22 Social & Legal Studies 87
- Laura Hunt and Ray Bull (2012) "Differentiating Genuine and False Rape Allegations: A Model to Aid Rape Investigations" (2012) 19 Psychiatry, Psychology and Law 682
- Sandra Newman "The truth about false rape allegations" Quartz (2017) https://qz.com/980766/the-truth-aboutfalse-rape-accusations/
- William O'Donohue, Caroline Cummings and Brendan Willis "The Frequency of False Allegations of Child Sexual Abuse: A Critical Review" (2018) 27 Journal of Child Sexual Abuse 459—475
- Cassia Spohn, Clair White and Katharine Tellis "Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports" (2014) 48 Law & Society Review 161
- Candida L Saunders "The Truth, the Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape" (2012) 52 British Journal of Criminology 1152
- Jan Jordan and Elaine Mossman *Police Sexual Violence File Analysis Report* (Institute of Criminology, VUW, 2019)
- Liz Kelly "The (in)credible words of women: False allegations in European rape research" (2010) 16 Violence Against Women 1345

4.11 The assertion that allegations of sexual offending are easy to make (see section 126A(2)(a) of the Evidence Act 2006)

It is not uncommon for the claim to be made in closing argument (based on the dictum of Lord Hale in 1680) that rape is an allegation easy to make but hard to disprove.

Both these claims are contentious. The second appears to place a burden of disproving the prosecution case on the defendant and to that extent is incorrect – see the concern expressed on appeal by the appellant in *O'Donnell v R* [2010] NZCA 352 that trial counsel had misstated the position when closing: at [28]. The Judge in that case noted the submission and reminded the jury that the Crown has the obligation to prove the charge: at [30].

The submission that an allegation of sexual offending is easy to make is contrary to decades of social-science research, and was the rationale for the historical approach to corroboration.

Researchers in the 1983 *Rape Study*, among others, found that rape is not a charge to be made easily and that a complaint to the police is usually made at considerable personal cost to the complainant. However, they also reported that over half of the men present at a *Rape Symposium* (the majority working in the criminal justice system) agreed or strongly agreed with Hale's dictum. The authors noted: "It is disturbing that these beliefs should persist despite the fact that … they run directly counter to the available statistics on rape".

In the words of Gerry Orchard:

> There is no warrant for the apparent presumption that the evidence of every complainant is unreliable and … the making and maintaining of such a complaint requires fortitude, rather than being easy to make.

In *R v Pere* CA155/97 6 October 1997 the Court of Appeal approved of the trial Judge's response to the closing argument, noting that "a firm response … is not to be condemned when it results from a submission which, as in this case, is of little assistance to the jury and could be seen as an attempt to deflect them from their true task". The basis of the appeal was that the summing-up was unfair and unbalanced. One of the aspects in issue was the following:

> [Defence counsel] made the submission which was common in the past (but I must confess I haven't heard for years) that the allegation of rape is so easy to make and so difficult to disprove. You were here. You heard and saw [the complainant]. You can determine how easy it was for her to come and tell this story in the courtroom in front of a group of strangers. I suggest to you that the submission is an unhelpful and ignorant comment from a period of rampant male chauvinism which I had thought we had at last grown beyond.

Recent jury trial research shows continued use of this type of submission in adult rape cases between 2010 and 2018 (17/40 cases).

4.11.1 Example direction: Rape is an allegation that is easy to make but hard to disprove

Defence counsel said complaints of rape or sexual offending are easy to make and hard to disprove. You must ignore this submission. It is unsupported by evidence and is contrary to research and experience.

The process of complaining to Police, and talking about such events, is something you can readily understand is not easy. Please put this submission out of your mind.

REFERENCES

- Rosemary Barrington "The Rape Law Reform Process in New Zealand" (1984) 8 Criminal Law Journal 3017 at 318
- Gerald Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 New Zealand Universities Law Review 97 at 112
- Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process* (Canterbury University Press, 2020) Chapter 9

5. Misconceptions about particular groups of complainants (section 126A(2)(b) of the Evidence Act 2006)

5.1 Child complainants (including adults who were children when the alleged sexual abuse occurred)

While the Law Commission in *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) focussed on the misconceptions held about adult complainants in sexual cases, they commented on misconceptions in relation to child sexual abuse (at [12.98]):

> [F]or the sake of completeness, we note the literature shows jurors may also hold a number of misconceptions in such cases. These misconceptions include: children are easily manipulated into giving false reports of sexual abuse, children often lie about being sexually abused, child sexual assault can be detected by a medical examination, real child victims would report sexual abuse immediately to an adult and if a child continues to associate with the defendant, the offending didn't happen.

False allegations of sexual abuse made by children

The research supports two general conclusions: (a) the vast majority of allegations are true but (b) false allegations do occur at some non-negligible rates (research suggests between 2 percent and 5 percent of reported allegations). Also note that "false negatives" (when a child says something did not happen when it did) are considerably more common.

Research over time shows that children cannot be easily manipulated into making false complaints. By the age of four years, most children "are surprisingly resistant to abuse suggestions" and that it is difficult to make children give false reports of abuse so that "highly suggestive interrogation practices are necessary to elicit such false reports". A 2005 review of 17 studies concluded that "when children who have been abused are questioned in formal settings, they will usually tell, obviating the need for suggestive questioning techniques". Even when children did agree with misinformation in a 2002 study, the accuracy of their responses decreased after one week and again after one month so that the influence of misinformation decreased with time.

However, some research suggests that "false" memories (of events other than sexual abuse) can be created as the result of suggestive practices. The role for experts is to inform the courts about the effects of any suggestive techniques used to recover the memory, how memory may have been influenced, and the need for caution when considering the credibility of that memory. Research also shows that the perceived credibility of child complainants decreases once a child is over 10 years of age.

See *R v M (CA419/2020)* [2021] NZCA 663 at [26] about the admissibility of expert evidence on infantile amnesia.

Continued contact with the defendant

It is not uncommon for a child to continue having contact with someone who has abused them sexually. Due to their age or relationship, some children may not have a choice about continued contact with the offender. If the offender has used threats or intimidation during the sexual abuse, which has prevented the child from reporting the sexual abuse to others, the child may also continue to have contact with the offender to avoid the sexual abuse becoming known to others.

Although many children manifest overt signs of distress or fear towards their abuser and may show trauma-specific symptoms following sexual abuse (both in the short-term and into adulthood), many other children do not react in this way or show any such signs. A substantial group of victims of child sexual abuse (approximately one third) do not show any clear signs at the time of initial clinical assessment.

Some children will be focussed on strategies for surviving the abuse, given they see limited opportunities to avoid it, which may well require on-going contact with the offender. Part of what has been termed the "sexual grooming model" includes "post-abuse maintenance" by the offender to ensure lack of reporting, and further normalising of the sexual behaviour.

Recent New Zealand-based research shows that 73 percent of potential jurors indicated slight or more disagreement with the statement: "Children who have ongoing relationships with their alleged abuser are unlikely to have actually been abused". This may indicate that most people no longer subscribe to this misconception. However, disagreement in the abstract does not mean a person will not rely on a misconception during a decision-making process, indicating an on-going need to provide constructive and specific guidance. Whether a direction is necessary on this point may also depend on whether and how such evidence is used in the trial. See also *S (CA361/2010) v R* [2013] NZCA 179 at [31]: "It is now well established that a young victim of sexual abuse will often maintain an outwardly loving relationship with the perpetrator of the abuse."

Time taken to complain: Occurrence and meaning

It is estimated that childhood sexual abuse impacts on 12 percent of children globally. Research has established that many children who have been sexually abused will delay their disclosure until adulthood, if they disclose at all. This is because of the adverse impact that reporting abuse can have for the child and their families (especially when committed by an intrafamilial perpetrator). Difficulties disclosing can be due to the barriers that youth face in reporting abuse, including fear, lack of support or understanding of abuse, shame, embarrassment, threats or a desire to protect other family members. Certain details of this offence may be particularly hard for children to reveal, such as naming the offenders or describing the severity of the abuse.

Research suggests the likelihood of disclosure is impacted by both characteristics of children (i.e., age), as well as abuse characteristics (i.e., relation to perpetrator, severity and frequency of abuse, context and situational factors). Age has been identified as a significant predictor of disclosure – younger children are less likely to disclose than older children. Children who are

abused by a family member are less likely to disclose and more likely to delay disclosure than those abused by someone outside the family.

Cultural factors may also inhibit reporting of sexual abuse for many children. This may relate to the status of children in comparison to adults in a particular culture as well as to whether talking about sexual matters is acceptable in a culture or specific family system.

Sexual offending against children is not always experienced as painful or unpleasant. Some children and adolescents may even enjoy aspects of the interaction that occurred as part of the sexual offending. This is in the context that they may also find the offending aversive and distressing. It is not uncommon for the child to experience both pleasure and pain/distress at the same time.

This sense of "enjoyment" may result in the child or adolescent feeling as if they are agreeing to the behaviour and that they are, therefore, equally guilty or to blame. The process by which the offender gains and maintains the child's compliance and silence frequently places the child in the role of a co-conspirator, feeling guilty and acting to conceal their own sexual victimisation. They may believe that they should have done something to prevent the sexual abuse. The feelings of guilt and shame and self-disgust may be a significant barrier to reporting the sexual offending to trusted adults.

Recent research suggests that potential jurors expect delay in disclosure from younger children but less so from older children and teenagers. As research shows that disclosure is developmentally sensitive, the beliefs of potential jurors reflect this pattern. Case law suggests there is general agreement that delay does not affect the likelihood of a truthful or false complaint (*DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [113]) – however, the length of time taken to report may well have an impact on accuracy and reliability because of normal memory processes (see also section 122 of the Evidence Act 2006).

Retracting or changing the nature of a complaint

Disclosure is a process. Minimal, partial, and hesitant disclosures may occur, as well as recantations as children experience misgivings or confront the consequences of their disclosures (viewed as being a "sizeable minority").

Research suggests that who the disclosure is made to, and in what context, impacts on the level of detail disclosed (with questioning in a formal setting by trained interviewers likely to gather the most detailed information). Incremental reporting may result in less accurate information, again because of the operation of memory. However, the process of disclosure (different or further pieces of information over time) does not mean, of itself, that the offending did not occur.

Research on the frequency and meaning of retraction is currently insufficient to provide the basis of a direction as to its forensic value (i.e., whether a jury should give weight to or ignore as unhelpful a retraction when determining what originally happened).

The absence of genital or other injury

Data shows that physical evidence of child sexual abuse, as with adults, is the exception (see further commentary on a complainant's lack of injuries at para 4.6). In a sample of 2,384 children referred for suspected child sexual abuse, only 4 percent had abnormal medical examinations, and the rate of abnormal medical findings was still only 5.5 percent for children with a history of severe abuse such as anal or vaginal penetration. See also *S(CA361/2010) v R* [2013] NZCA 179 at [71]: "[A]s is now well established in the literature, most physical examinations of older girls and young women said to have been engaged in sexual activity are unremarkable in the sense that they can neither confirm nor rule out sexual abuse."

Proximity of others during the alleged offending

See *H (CA7242/2020) v R* [2021] NZCA 139 at [58]—[60].

Offending against boys

Boys are also victims of sexual abuse, although girls experience childhood sexual abuse at higher rates in some settings. Research from 2015 suggests that boys are more commonly victims in institutional settings and with strangers, as compared to girls. International sexual abuse rates in research studies for males under the age of 16 range from one in six to one in 10.

The fact that boys are more often sexually abused by males than females can raise associated fears of being labelled as too feminine or homosexual, which may also prevent them from reporting the offending. They may also, as a result of their sexual victimisation, be confused about their sexuality. Research shows that underreporting is a significant issue for boys and men.

The negative health, social and psychological effects of sexual abuse are similar for boys and girls – there is no evidence to suggest that boys are less harmed or less traumatised by sexual abuse.

5.1.1 Example direction: General direction in relation to children

Sexually abused children can behave in lots of different ways. Children do not necessarily cry out; seek help; resist; or attempt to escape the offender or the associated environment. Some children who have been sexually abused behave in ways that may not make sense to you – such as having ongoing contact with the offender. Sometimes children can have ongoing contact with an offender even where there is no ongoing family connection due to complex grooming dynamics. Of course, behaviours of this type are not evidence of sexual abuse either and their presence in this case says nothing about whether the alleged offending occurred.

Sexual abuse of a child does not often result in physical injury that can be detected by a medical examination. Absence of physical injury is not evidence that the sexual abuse did not occur.

I am explaining these points so you think about them in your deliberations. I am not expressing any opinion about the evidence, or what your verdict should be.

REFERENCES

- Heather R Hlavka "Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization" (2017) 20 Men and Masculinities 482
- Carmit Katz "Beyond fight, flight, and freeze: Towards a new conceptualization of peritraumatic responses to child sexual abuse based on retrospective accounts of adult survivors" (2021) 112 Child Abuse & Neglect 104905
- Cassidy RD Wallis and Michael D Woodworth "Child sexual abuse: An examination of individual and abuse characteristics that may impact delays of disclosure" (2020) 107 Child Abuse & Neglect 104604
- Ashmyra Voogt and others "The impact of extra-legal factors on perceived credibility of child victims of sexual assault" (2020) 26 Psychology, Crime & Law 823

- Anne Cossins, Jane Goodman-Delahunty and Kate O'Brien, "Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System" (2009) 16 Psychiatry, Psychology and Law 435
- Rachel Zajac and others "Misconceptions about childhood sexual abuse and child witnesses: Implications for psychological experts in the courtroom" (2013) 21 Memory 608
- Rita Shackel "Understanding Children's Medium for Disclosing Sexual Abuse: A Tool for Overcoming Potential Misconceptions in the Courtroom" (2009) 16 Psychiatry, Psychology and Law 379
- Valentine Josenhans and others "Gender, rights and responsibilities: The need for a global analysis of the sexual exploitation of boys" (2020) 110 Child Abuse & Neglect 104291
- Jane Goodman-Delahunty, Natalie Martschuk and Annie Cossins "What Australian Jurors Know and Do Not Know about Evidence of Child Sexual Abuse" (2017) 41 Criminal Law Journal 86
- Elizabeth Gruenfeld, Danny G Willis and Scott D Easton "'A Very Steep Climb': Therapists' Perspectives on Barriers to Disclosure of Child Sexual Abuse Experiences for Men" (2017) 26 Journal of Child Sexual Abuse 731
- Georgia M Winters, Elizabeth L Jeglic and Leah E Kaylor "Validation of the Sexual Grooming Model" (2020) 29 Journal of Child Sexual Abuse 858
- Gonca Celik and others "Recantation of Sexual Abuse Disclosure Among Child Victims: Accommodation Syndrome" (2018) 27 Journal of Child Sexual Abuse 612
- Suzanne St George, Emily Denne and Stacia N Stolzenbergh "Blaming Children: How Rape Myths Manifest in Defense Attorneys' Questions to Children Testifying About Child Sexual Abuse" (2022) 37 Journal of Interpersonal Violence NP16623
- William O'Donohue, Caroline Cummings and Brendan Willis "The Frequency of False Allegations of Child Sexual Abuse: A Critical Review" (2018) 27 Journal of Child Sexual Abuse 459

[**Note**: *For general material on the reliability of child witnesses see section 125 of the Evidence Act 2006 and regulation 59 of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023. While aspects of the above information refer to aspects of memory, for a summary of the research about the memory of children see:* New Zealand Law Commission Total Recall? The Reliability of Witness Testimony *(NZLC MP13, 1999) chapters 4 and 5; Jane Goodman-Delahunty, Mark A Nolan and Evianne L van Gijn-Grosvenor* Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence *(Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2017) Appendix 10; and Suzanne Blackwell, Fred Seymour and Sarah Mandeno* Expert Evidence About Memory in New Zealand Sexual Violence Trials and Appellate Courts 2010 to 2020 *(2020) pages 125—126*.]

5.2 Adult male complainants

Myths and misconceptions about the rape (used in the list below to include unwanted genital or anal penetration of or by another person) or sexual violation of adult men include:

- **MYTH**: Men cannot be raped [or sexually violated].
- **MYTH**: The extent of a man's resistance should be a major factor in determining if he was raped.
- **MYTH**: Any healthy man can successfully resist a rapist of any gender if he really wants to.
- **MYTH**: Most men who are raped are somewhat to blame for not fighting off the offender.
- **MYTH**: If a man obtained an erection while being raped it probably means that he started to enjoy it.
- **MYTH**: Many men claim rape if they have consented to homosexual relations but have changed their minds afterwards.
- **MYTH**: Male rape is usually committed by homosexuals.
- **MYTH**: Male rape is more serious when the victim is heterosexual than when the victim is homosexual.
- **MYTH**: Homosexual men who are raped probably consented because homosexuals are promiscuous.
- **MYTH**: Men can cope with adversity and so would not be affected by being a victim.

All these misconceptions have been refuted by social-science research. However, as with research focussing on rape myth acceptance about adult female complainants, male rape myth acceptance is a strong predictor of victim blaming (indicating less responsibility allocated to the alleged offender).

Rates of offending against adult men; reasons for delayed reporting

Recent New Zealand research shows that at least 12 percent of males have experienced some form of sexual abuse (Ministry of Justice *New Zealand Crime and Victims Survey: Key findings Cycle 2 (October 2018 – September 2019) Descriptive statistics* at 73). However, male victims of sexual abuse may face social and cultural barriers to disclosing sexual abuse, believing that it is unacceptable for men to experience victimisation. They may well be of the view that it would be shaming and stigmatising to discuss these experiences.

The barriers that impact on the low reporting rates for sexual offending against males (such as a person's self-belief that men cannot be victims) have been shown to influence juror decisions about blame and responsibility. Male victims also contend with many of the same issues that female victims report, including the concern that they will be, at least partly, blamed for being raped.

Barriers to men telling others and seeking help are various, including not knowing where to get help and fear of how they will be perceived. Accounts of male rape victims have demonstrated that expectations about men's masculinity discourages men from reporting sexual attacks because of fear that they will be labelled effeminate and essentially weak. This

may be linked with a self-perception that they should have been able to successfully resist the attack.

Impact of sexual abuse on adult men

The impact of sexual abuse on boys and men is multi-faceted and can cause severe trauma. Well-documented longer-term impacts of sexual abuse include post-traumatic stress, drug and alcohol misuse, psychological/mental health distress, employment and relationship breakdown, as well as self-harm/suicide.

Males who have been offended against by females

See also the information on female defendants.

Research suggests that people incorrectly assume that male survivors of sexual offending have encouraged or initiated the sex acts, to have derived more pleasure from them, and to have experienced less stress.

Males who have been offended against by males

Adult males who have been sexually abused may fear that they will be feminised and seen as homosexual and so will be reluctant to report immediately.

Research shows that in intimate partner sexual offending, the typical sexual partner (the complainant) of a man (whether a homosexual man or a heterosexual or bisexual woman) tends to be blamed more for their victimisation – being perceived to have behaved in a way that caused the rape.

REFERENCES

- Sophie Hindes and Bianca Fileborn "Reporting on sexual violence 'inside the closet': Masculinity, homosexuality and #MeToo" (2021) 17 Crime, Media, Culture: An International Journal
- Maria Ioannou, Laura Hammond and Laura Machin "Male-on-male sexual assault: Victim, offender and offence characteristics" (2017) 14 Journal of Investigative Psychology and Offender Profiling 189
- Ruth Graham "Male Rape and the Careful Construction of the Male Victim" (2006) 15 Social and Legal Studies 187
- Jayne Walker, John Archer and Michelle Davies "Effects of Rape on Men: A Descriptive Analysis" (2005) 34 Archives of Sexual Behaviour 69
- Jessica A Turchik and Katie M Edwards "Myths About Male Rape: A Literature Review" (2012) 13 Psychology of Men & Masculinities 211
- Aliraza Javaid *Male Rape, Masculinities, and Sexualities: Understanding, Policing, and Overcoming Male Sexual Victimisation* (Palgrave Macmillan, London, 2018)
- Rebecca R Reed and others "Higher Rates of Unacknowledged Rape Among Men: The Role of Rape Myth Acceptance" (2020) 21 Psychology of Men & Masculinities 162
- Kirsty Duncanson *Community beliefs and misconceptions about male sexual assault* (ACSSA Resource Sheet, 2013)
- Marissa V Moore and Cindy Miller-Perrin "Exploring the Effects of Perpetrator, Victim, and Participant Gender on Perceptions Related to Sexual Assault" (2022) 31 Journal of Aggression, Maltreatment & Trauma 1129
- Scott M Walfield "'Men Cannot Be Raped': Correlates of Male Rape Myth Acceptance" (2021) 36 Journal of Interpersonal Violence 6391
- Orna Alyagon-Darr and Ruthy Lowenstein Lazar "Toward a Socio-Legal Theory of Male Rape" (2023) Journal of Criminal Law & Criminology (forthcoming)

5.3 Complainants from LGBTQIA+[3] ("Rainbow") communities

Research within Rainbow communities in comparable jurisdictions has consistently pointed to the significant levels of sexual offending experienced by members of those communities. In New Zealand, the latest Crime and Victims Survey found lesbian, gay and bisexual adults were more than twice as likely as straight people to experience sexual offending during their lifetime. Bisexual women reported the highest rates of sexual offending of all sexualities.

Rates of reporting to police are very low for people from Rainbow communities. Reasons given include being unable to find appropriate support as most services focus on men's violence towards women. Gay and bisexual men and trans people have historically been unlikely to believe services will support them at all (although the changing nature of the provision of support, including online private providers may be impacting on current understandings). There is also significant historical wariness of the police and the criminal law for many in Rainbow communities, as well as concerns about safety, discrimination, misgendering, deadnaming and "outing", which may occur during any engagement with the criminal justice system.

Trans women have had their claims of sexual assault ignored or discounted by police (based on a view that their conduct has been fraudulent – "pretending" to be women – and that they are not viewed as credible complainants). Some members of Rainbow communities may be reluctant to report sexual offending because they fear it may feed false stereotypes that sexual or gender diversity is a problem or an illness or that it is "caused" by sexual abuse.

For the very few complainants from Rainbow communities who do engage with the criminal justice system, it is important that their choices as to name and honorific, and how their gender and sexuality is described, are respected and complied with.

It is also important to understand that sexual assault may cause additional distress or impact for trans or intersex people if they experience dysphoria related to their bodily diversity or are assaulted in ways that are targeted at their diversity. For example, any act that is incongruent with the gender identity of a trans person is likely to increase traumatic impact. Despite wider societal beliefs about the particular sexual conduct of people in Rainbow communities, some may never want particular forms of penetrative sex and being forced to do so will be especially distressing and harmful.

Other additional trauma may be caused by mocking of an intersex person's body, non-consensual removal of chest binding for a trans man, or any form of sexual assault accompanied by verbal abuse of a person's sex characteristics, gender identity or expression, or sexual orientation.

[3] LGBTQIA+ – A common abbreviation for Lesbian, Gay, Bisexual, Pansexual, Transgender, Takataapui, Genderqueer, Queer, Intersexed, Agender, Asexual, and Ally community. Queer is an umbrella term that embraces a matrix of sexual preferences, orientations, and habits of the not-exclusively-heterosexual-and-monogamous majority, however given it can sometimes be used pejoratively it is not a term embraced by all members of Rainbow communities.

Sexual offending towards people in Rainbow communities may also occur in contexts where people are being punished for breaking sexuality or gender norms and the motive of the perpetrator is to "correct", change or suppress a person's sexuality, gender identity or gender expression. For example, unwanted vaginal penetration by a man may be forced onto lesbian and bisexual women or trans men (sometimes referred to as "corrective rape") – which may also be a result of the offender's desire to bolster their own masculine identity or sense of dominance. Understanding the significance of specific acts of sexual harm will be important for juror decision-making, including paying attention to accompanying verbal abuse or slurs directed at identity (e.g., the use of terms such as "faggot", "tranny" or "shemale").

A key issue for many people in Rainbow communities is over-sexualisation and stereotypes of gay men, bisexual people and trans women as promiscuous, predatory and available for sex at any time with anyone. For trans women, who are over-represented as sex workers, this is compounded by the minimising of sexual assaults against sex workers alongside high rates of offending against sex workers. Over-sexualisation means sexual offending may be seen as less traumatising and serious for complainants from Rainbow communities, or even make it difficult for lack of consent to be recognised at all. In addition, the objectification of diverse sex characteristics can increase both the incidence and impact of sexual assault on intersex people (born with innate variations of sex characteristics) or trans people whose bodies have been modified through the use of gender-affirming hormones or surgeries.

Jurors may also be reluctant to accept the possibility of serious sexual offending occurring in a relationship between women.

Depending on the arguments made at trial, a direction that responds to reliance on misconceptions about the dynamics of intimate relationships within Rainbow communities may be advisable. The following guidance from the Crown Prosecution Service (England and Wales) may be helpful, especially for understanding how issues of power and control may manifest within relationships, but also for issues arising for trans complainants or defendants:

https://www.cps.gov.uk/legal-guidance/same-sex-sexual-violence-and-sexual-violence-involving-trans-complainant-or

REFERENCES

- Jaimie Veale and others Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand (Transgender Health Research Lab, University of Waikato, Hamilton, 2019)
- Sandra Dickson Building Rainbow Communities Free of Partner and Sexual Violence (2016) http://www.kahukura.co.nz/wp-content/uploads/2017/07/Building-Rainbow-Communities-Free-of-Partner-and-Sexual-Violence-2016.pdf
- Elisabeth McDonald, Jack Byrne and Sandra Dickson "The Significance of Naming Harm for Trans Women: Defining Rape in Aotearoa New Zealand" in Evan Hazenberg and Miriam Meyerhoff (eds) Representing Trans: Linguistic, legal and everyday perspectives (VUP, Wellington, 2017) 104
- Marla E Eisenberg and others "Sexual Assault, Sexual Orientation, and Reporting Among College Students" (2021) 36 Journal of Interpersonal Violence 62
- Brian Dodge and others "Attitudes toward Bisexual Men and Women among a Nationally Representative Probability Sample of Adults in the United States" (2016) 11 (10) PLoS ONE e0164430
- Shaez Mortimer, Anastasia Powell and Larissa Sandy " 'Typical scripts' and their silences: exploring myths about sexual violence and LGBTQ people from the perspectives of support workers" (2019) 31 Current Issues in Criminal Justice 333
- Sarah Doan-Minh "*Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence*" (2019) 30 Hastings Women's Law Journal 167
- Nicholas C Borgogna, Emma C Lathan and Stephen L Aita "Sexual and Gender Minority Victimization: Base Rates of Assault in College Students Across Sexual and Gender Identities" (2023) 38 Journal of Interpersonal Violence 5613

5.4 Complainants who are sex workers

Research suggests that attrition in cases concerning sex workers is high. In a 2020 Los Angeles study the overwhelming majority of detectives stated that problematic victim behaviours (e.g., risk-taking and sex work) influence the processing of a sexual assault allegation.

In New Zealand research of police files, which involved 110 cases of allegations of sexual offending (over a three-month period in 2015), nine were made by sex workers. Eight were investigated but none resulted in a prosecution. In the 2020 rape trial research (40 cases from 2010—2018 where the issue at trial was consent) one case involved a complainant who was a sex worker (the defendant was acquitted).

Rates of sexual offending against sex workers remain high globally – with alleged offenders being both clients and co-workers or employers. In a recent Canadian study of 367 sex workers (post-reform of the industry), 131 (37 percent) reported they had been raped or were victims of sexual offending. While in jurisdictions like New Zealand, where sex work has been decriminalised and there may be consequently less reluctance to report sexual offending, distrust of the police remains an issue and initiatives were put in place in 2018 to ensure fair handling of complaints.

A common myth is that a sexual assault is not as traumatic for a sex worker because it is assumed that their usual experience is of having sex that is "not really wanted anyway" (because it is paid for by one person rather than sex that is mutually desired).

Although financial pressure is the most common reason given for people, especially women, entering the commercial sex industry, other intersecting vulnerabilities and socio-economic factors mean that sex workers may well have criminal convictions or a past involving drug use. Information about their past behaviour must be subject to the same admissibility rules as for all complainants (such as s 37 of the Evidence Act 2006 about evidence of veracity).

Sections 44, 44AA and 88 of the Evidence Act 2006 operate as controls on the admission of evidence that the complainant is, or was at the relevant time, a sex worker. If the alleged offending occurred outside of their employment, careful consideration should be given about the relevance of their occupation or sexual experience, especially if offered for the purpose of challenging the complainant's credibility.

Given attrition studies suggest that sex workers are viewed as less credible or reliable as a group, likely because of on-going social stigma, there may be a risk that jurors will draw negative inferences from hearing about the complainant's occupation status or sexual experience. Admission of such evidence should ideally be accompanied by an appropriate limited use direction.

REFERENCES

- Eryn Nicole O'Neal and Brittany E Hayes "'A Rape Is a Rape, Regardless of What the Victim Was Doing at the Time': Detective Views on How 'Problematic' Victims Affect Sexual Assault Case Processing" (2020) 45 Criminal Justice Review 26
- Bronwyn McBride and others "Underreporting of Violence to Police among Women Sex Workers in Canada" (2020) 22 Health and Human Rights Journal 257
- Lynzi Armstrong "From law enforcement to protection? Interactions between sex workers and police in a decriminalized street-based sex industry" (2017) 57 British Journal of Criminology 570
- Reuben Balfour and Jessica Allen *A Review of the Literature on Sex Workers and Social Exclusion* (UCL Institute of Health Equity, London, 2014)

5.5 Complainants who have experienced repeated sexual offending

Re-victimisation is a feature of crime generally, but sexual offending and intimate partner violence have the highest re-victimisation rates of any crimes.

Research suggests that two out of three individuals who are sexually victimised will be re-victimised. Individual risk factors include a history of child sexual abuse, impaired risk perception, emotional dysregulation, cumulative past abuse, family conflict and distress. The occurrence of childhood sexual abuse and its severity are the best documented and researched predictors of sexual re-victimisation.

There are risks that jurors may incorrectly consider that re-victimisation (especially in similar contexts or with the perpetrator using a similar modus) is highly unlikely and therefore the complainant's version of events is not credible. Arguments for the admission of previous sexual offending against the complainant (in reliance on s 44 of the Evidence Act 2006) may also be based on this misconception and should be carefully considered if offered to challenge the complainant's credibility.

REFERENCES

- Janet Fanslow and others "Adverse childhood experiences in New Zealand and subsequent victimization in adulthood: Findings from a population-based study" (2021) 117 Child Abuse and Neglect 105067
- Mary Stathopoulos *Sexual revictimisation: Individual, interpersonal and contextual factors* (ACSSA Research Summary, 2014)
- Ministry of Women's Affairs *Lightning Does Strike Twice: preventing sexual revictimisation* (Wellington, 2012)
- Ángel Castro and others "Childhood Sexual Abuse, Sexual Behavior, and Revictimization in Adolescence and Youth: A Mini Review" (2019) 10 Frontiers in Psychology (online)
- Catherine C Classen and others "Sexual Revictimization: A Review of the Empirical Literature" (2005) 6 Trauma, Violence & Abuse 103
- Arielle AJ Scoglio and others "Systematic Review of Risk and Protective Factors for Revictimization After Child Sexual Abuse" (2021) 22 Trauma, Violence, & Abuse 41
- Hannah E Walker and others "The Prevalence of Sexual Revictimization: A Meta-analytic review" (2019) 20 Trauma, Violence, & Abuse 67
- *R v Pou* [2021] NZHC 385 at [47]
- *Noble v R* [2020] NZCA 422 at [23]

6. Misconceptions about particular defendants (see section 126A(2)(b) of the Evidence Act 2006)

6.1 Female defendants

Sexual offending encompasses a wide range of unwanted behaviours. Research shows that a small proportion of sexual offenders are/identify as women.

It is possible for women to commit sexual offences, even including offences that require penile penetration. Sexual arousal may happen for a variety of reasons and is not an indication that the sexual contact was consensual (see the commentary on injury/physiological response).

While significantly less common than cases of men committing child sexual abuse, women may also sexually abuse children, including their own biological children. In some cases, a woman may also be a victim of sexual or physical offending and acting under pressure from her male partner to be a participant in the offending. While there is a lack of research due to the numbers involved, the dynamics that lead to offending by women against children are likely to be different than those that lead to offending by men. In particular, the gendered context in which sexual offending has historically occurred means that the drivers and reinforcement of offending are very different for women.

REFERENCES

- April Loxton and Andrew Groves "Adult male victims of female-perpetrated sexual violence: Australian media responses, myths and flipped expectations" (2022) 28 International Review of Victimology 191
- Nicola Gavey *Just sex? The cultural scaffolding of rape* (2ed, Routledge, London and New York)
- Nicola L Fisher and Afroditi Pina "An Overview of the Literature on Female-Perpetrated Adult Male Sexual Victimization" (2013) 18 Aggression and Violent Behavior 54
- Theresa Gannon and others "Women men Who Sexually Offend Display Three Main Offense Styles: A Re-examination of the Descriptive Model of Female Sexual Offending" (2014) 26 Sexual Abuse: A Journal of Research and Treatment 207
- Georgina Hammock and others "The Effect of Gender of Perpetrator and Victim on Perceptions of Psychological and Physical Intimate Partner Aggression" (2017) 32 Journal of Family Violence 1133
- Olivia Banton and Keon West "Gendered Perceptions of Sexual Abuse: Investigating the Effect of Offender, Victim and Observer Gender on the Perceived Seriousness of Child Sexual Abuse" (2020) 29 Child Sexual Abuse 247

6.2 Defendant identifies as homosexual/lesbian/queer or trans/non-binary

There is no evidence linking sexual offending to a person's sexual orientation, gender identity or expression or their sex characteristics. It is known that most sexual offending is committed by men, and that most of this group identify as cisgender[4] and heterosexual.

However, there may be a risk that a defendant who identifies as in a sexual or gender minority or as intersex or non-binary will be viewed by jurors as more likely to sexually offend because of harmful stereotypes about people in Rainbow communities. These include false assumptions that people in Rainbow communities are promiscuous, predatory or available for sex at any time with anyone.

REFERENCES

- Lisa DeMarni Cromer and Rachel E Goldsmith "Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences" (2010) 19 Journal of Child Sexual Abuse 618

[4] Cisgender / Cis is a term used to describe a person whose gender aligns with their sex assigned at birth.

6.3 Male defendant identifies as heterosexual, but alleged victims are male

Sexual offenders can be male or female, heterosexual, homosexual, bisexual, asexual, in a relationship or single, and of any ethnicity or socioeconomic status. A person may offend against children of any gender and also against adults of any gender.

For example, researchers have found evidence of crossover sexual offences in a sample of non-incarcerated adult males. Almost one quarter of those who were convicted of sexually offending against female children also admitted sexually offending against male children, and almost two thirds of those convicted of sexual offences against male children also admitted to sexually offending against female children. Similar findings of crossover sexual offences were reported in other studies using guaranteed subject anonymity.

Other researchers found that almost two thirds of their sample of incarcerated sexual offence offenders who were known to offend against only male children also admitted molesting female children. They also found that almost two thirds of inmates known to victimise child relations also admitted victimising non-relation children. The results of these studies (including one undertaken in South Australia) suggest there is an opportunistic and malleable nature to sex offending against children.

Within a prison environment, men who identify as heterosexual will commit sexual offending against other men but may not do so outside of prison.

REFERENCES

- Holly Kleban and others "An Exploration of Crossover Sexual Offending" (2012) 25 Sexual Abuse: A Journal of Research and Treatment 427
- Sophie Hindes and Bianca Fileborn "Reporting on sexual violence 'inside the closet': Masculinity, homosexuality and #MeToo" (2021) 17 Crime, Media, Culture: An International Journal 163
- Daphne J Sim and Michael Proeve "Crossover and stability of victim type in child molesters" (2010) 15 Legal and Criminological Psychology 401
- Skye Stephens and others "Examining the role of opportunity in the offense behaviour of victim age polymorphic sex offenders" (2017) 52 Journal of Criminal Justice 41
- Dominque A Simons, *Adult Sex Offender Typologies* (Sex Offender Management Assessment and Planning Initiative Research Brief, U.S. Department of Justice, 2015)
- *Goundar v R* [2020] NZCA 517 at [22]
- *Jenkins v R* [2020] NZCA 672 at [15]

6.4 Male defendant was the victim of sexual abuse as a child

A common misconception is that male survivors of sexual abuse will go on to commit sexual abuse as adults. For criticism of the prosecutor's use (unsupported by any expert evidence) of the fact that the defendant had been sexually abused as a child, see *KN (CA120/13) v R* [2014] NZCA 233.

While many offenders have histories of abuse and neglect, they are not significantly more likely than other groups to commit sexual offending. The *sexually abused → sexual abuser* hypothesis remains a controversial area of research characterised by conflicting research findings, in part because any relationship is found almost entirely among males but not females. Child sexual abuse may have an association with the onset of subsequent sexual offending, but not necessarily persistent sexual offending.

Experts agree that the link between child sexual abuse and the tendency to sexually abuse children as an adult is not clear. This is due in particular to the widely different methodologies used in the various studies. In 2015, the authors of a study concluded that "[t]he widespread belief that sexually abused children are uniquely at risk to become sex offenders [is] not supported by prospective empirical evidence".

REFERENCES

- M Glasser and others "Cycle of child sexual abuse: Links between being a victim and becoming a perpetrator" (2001) 179 British Journal of Psychiatry 482
- Chelsea Leach, Anna Stewart and Stephen Smallbone "Testing the sexually abused-sexual abuser hypothesis: A prospective longitudinal birth cohort study" (2016) 51 Child Abuse & Neglect 144
- Sue Carswell, Elaine Donovan and Hector Kaiwai *What is known about effective recovery services for men who have been sexually abused? An evidence review* (Ministry of Social Development, Wellington, 2019)
- Cathy Windom and Christina Massey "A Prospective Examination of Whether Childhood Sexual Abuse Predicts Subsequent Sexual Offending" (2015) 169 JAMA Pediatrics (online)
- Antonia Quadara and others *Conceptualising the prevention of child sexual abuse: Final report* (Research Report No. 33, Australian Institute of Family Studies, Melbourne, 2015)

6.5 The defendant is "not a rapist": they are in an established sexual relationship or are not that type of person

Historically it has been claimed that rape is not about sex, but about power and control. In some situations (especially when the defendant and the complainant know each other), sexual desire may also be a part of the motivation. However, research also suggests that some people who offend against particular children are not motivated by sexual desire *or* power but by opportunity and other situational factors.

Subsequent research has identified many different factors that motivate and enable sexual assault (by men against women). These include developmental factors and family history; individual-level characteristics, such as personality and attitudes/thoughts; and environmental factors, such as peer influences and alcohol consumption. No single identified factor alone, however, has been found to be highly predictive of someone committing a sexual offence. Instead, it is likely that a combination of factors influences the probability of committing a sexual offence, and these factors interact in different combinations for different people. Importantly, research has identified that offenders make deliberate choices and enact "situationally targeted" strategies to secure sexual interaction with the victim/survivor (such as isolating, use of intoxicants).

Sexual offenders are not all of one type or from the same background or social or economic status. Many are in a settled intimate relationship with another person at the time of the offence. For example, in the research resulting in the 2020 book *Rape Myths as Barriers to Fair Trial Process*, defendants were convicted of rape in 15/40 cases. In those 15 cases, at least eight defendants were in an intimate relationship with another woman at the time of the offending (this information was not known for all of the 15 defendants). Being in a sexual relationship with another person is therefore not of itself predictive of a defendant's lack of motive or willingness to commit sexual offences against another person.

Yvette Tinsley, Clair Baylis and Warren Young have also observed:

> [I]n eight cases, some of the jurors also drew on stereotypical assumptions about the characteristics of "real rapists"… Jurors discussed whether the characteristics of the defendant himself matched their preconceptions, including expectations that rapists are predators who offend more than once, are violent, are evil, and are not from respectable backgrounds.

6.5.1 Example direction: Defendant is in an established sexual relationship

It is not disputed that C was raped. What is disputed is whether it was D who raped C; and the evidence that identifies D as the person responsible for the rape is challenged. In evidence you heard from D, and also from D's partner, that they have a mutually fulfilling sex life. D claims they had no need to have sex with a stranger and had much to lose by doing so.

You may consider this evidence in determining whether the charge has been proved. However, it is important you understand there is no such thing as a "typical" rape—or rapist – and that people who do rape do so for many different reasons. Rape can be committed by men from all walks of life, including those in an apparently happy relationship with a person other than the victim. While you may consider this evidence, be careful not to assume a man who commits rape has a particular profile, reasons for committing rape or an associated set of personal circumstances. There is no such thing as a "typical" rape or rapist.

REFERENCES

- Sarah Michal Greathouse A Review of the Literature on Sexual Assault Perpetration Characteristics and Behaviour (Rand Corporation, 2015)
- Yvette Tinsley, Claire Baylis and Warren Young "'I Think She's Learned Her Lesson': Juror Use of Cultural Misconceptions in Sexual Violence Trials" (2021) 52 VUWLR 463
- Hayley Clark and Antonia Quadara Insights into sexual assault perpetration: Giving voice to victim/survivors' knowledge (Research Report 18, Australian Institute of Family Studies, Melbourne, 2010) at 7
- World Health Organisation Guidelines for medico-legal care for victims of sexual violence (Geneva, 2003) Chapter 2
- Richard Wortley and Stephen Smallbone "Applying Situational Principles to Sexual Offenses against Children" (2006) 19 Crime Prevention Studies 7

Te Kura Kaiwhakawā
Institute of JUDICIAL STUDIES