

Prosecuting and Defending Rape: Perspectives From the Bar

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This article discusses the findings of a qualitative study (part of a larger study into rape and criminal justice) which involved in-depth interviews with a sample of ten highly experienced barristers who between them had prosecuted and defended in hundreds of rape trials. It is concerned with the barristers' perceptions of the problems involved in prosecuting rape and the strategies deployed in defending rape cases. The article discusses the ethics of advocacy in the context of rape trials and argues that within the adversarial system there are ethical limits which should be observed.

In the 1970s, considerable concern began to be expressed about the conduct of rape trials and the treatment of complainants in court.¹ This has continued unabated despite the legislative steps which have been taken in the last three decades in an attempt to improve the situation.² There has, in particular, been continuing criticism of the way barristers prosecute and defend in rape trials and the failure of judges sufficiently to control defence excesses.³ However, research into rape trials has not, for the most part, attempted to gauge the attitudes and practice of barristers from barristers themselves.⁴ This article

1 See, for example, *Report of the Advisory Group on the Law of Rape* (1975; Cmnd. 6352; chair, Mrs Justice Heilbron).

2 See Sexual Offences (Amendment) Act 1976, s. 2; Criminal Justice and Public Order Act 1994, s. 32.

3 See, for example, S. Lees, *Carnal Knowledge* (1996) 125–6.

4 Brown et al considered the attitudes of barristers to the use of sexual history evidence in Scottish rape trials. See B. Brown et al., *Sexual History and Sexual Character Evidence in Scottish Rape Trials* (Scottish Office Central Research Unit, 1992) 15–16. Five barristers and five judges were interviewed in Home Office, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (Home Office Study 196, 1999) see at 3.

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considers the findings of a study which looks at the modern rape trial from the perspective of a sample of barristers with considerable experience of defending and prosecuting in rape cases and assesses its implications for the improvement of rape trials.

The article will present the background to the research. It will explain the methods used and how data was analysed. It will examine the barristers' perceptions of the problems in prosecuting rape and in bringing home rape convictions and their approach to the task of defending alleged rapists. It will also consider the barristers' suggestions for improving rape trials. Finally, it will discuss the implications of the study findings.

BACKGROUND

Criticism of the decision of the House of Lords in *DPP v. Morgan*⁵ resulted in the setting up by the government of the Advisory Committee on the Law of Rape, chaired by Mrs Justice Heilbron.⁶ That committee's report, voicing concern about the conduct of rape trials, led to the passing of the Sexual Offences (Amendment) Act 1976 which, among other things, attempted to place some curbs on the use of evidence about the complainant's sexual past. Adler's research into the operation of this legislation queried its impact, showing that sexual history evidence remained a strong feature of rape trials.⁷ Subsequently a study published by the Scottish Office painted a devastating picture of rape trials in Scotland.⁸ It revealed the blatant mistreatment of victims by defence counsel and an acquiescent attitude on the part of prosecutors and judges. Twenty victims who had appeared in court were interviewed. The feeling of being on trial themselves was common amongst them.⁹ This study was instrumental in producing legislation to control the use of sexual history evidence in Scotland.¹⁰ But a subsequent study, which looked into the impact of the legislation, found that, whilst it had had some effect, its success had been limited.¹¹ The most recent empirical research on the rape trial in England and Wales was carried out by Sue Lees. She monitored all the rape trials at the Old Bailey over a four-month period in 1993 and additionally analysed thirty-one transcripts of rape trials. She also interviewed twenty-one women whose cases had gone to court.¹² This research indicated that women were still being systematically

5 [1976] A.C. 182.

6 *op. cit.*, n. 1.

7 Z. Adler, *Rape on Trial* (1987).

8 G. Chambers and A. Millar, *Prosecuting Sexual Assault* (Scottish Office Central Research Unit, 1986).

9 *id.*, p. 90.

10 Law Reform (Miscellaneous Provisions) Act 1986, s. 36.

11 Brown et al., *op. cit.*, n. 4, ch. 7.

12 Lees, *op. cit.*, n. 3, p. xxii.

humiliated in court and that victims were continuing to find the experience extremely distressing.

In 1998, in response to the Labour Party's manifesto undertaking 'that greater protection will be provided for victims in rape and sexual assault trials', the Home Office published a report,¹³ which was concerned with a range of issues relating to victims in the criminal justice process including the plight of complainants in rape trials. Many of its recommendations have been taken up in the Youth Justice and Criminal Evidence Act 1999 (YJCEA).

Most recently, growing unease about rape trials has been fuelled by the publication of a Home Office study¹⁴ that highlights the falling conviction rate in rape cases. Although there have been dramatic increases in the number of recorded rapes over the last decade, the rise in the number of convictions has by no means kept pace. Indeed, the conviction rate for rape (that is, the number of convictions as a percentage of the number of recorded offences) dropped from 24 per cent in 1985 to 10 per cent in 1993 to 9 per cent in 1994. In 1997 it remained at 9 per cent.¹⁵ This points to a persistent difficulty in obtaining rape convictions.

METHODS

Using qualitative methods, the study aimed to consider the views of a sample of barristers about the issues involved in rape prosecutions and their approach and practice when defending in rape cases. It was decided that the objectives of the study could be fulfilled by interviewing ten barristers in depth, choosing as far as possible those whose involvement in the field was extensive. This does not aim or claim to be a quantitatively representative sample, but it is sufficient to reveal a number of important issues about the business of prosecuting and defending rape.

Names of barristers who specialized in this area of work were provided by solicitors, Crown Prosecution Service (CPS) lawyers, and other interviewees. Most of the names supplied were those of well-established female barristers reflecting the fact that women now play a major role in prosecuting and defending in rape cases. All those approached were willing to be interviewed. With one exception, the barristers had chambers in the Temple but their work was not confined to London. Three were QCs, of whom one sat as a Recorder and was licensed to try rape cases. Four had been at the Bar for over twenty-five years, three for over twenty years, and the remaining three for eleven, twelve, and seventeen years respectively. BAR1's practice was confined almost exclusively to sexual offences. Most of the rest were

13 Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998).

14 Home Office, *op. cit.*, n. 4.

15 *id.*, p. 51.

regularly involved in rape cases; BAR8, for example, had prosecuted or defended in hundreds of rape cases. Three had been involved in rape cases on the defence side only.

The barristers, of whom two were male (BAR 6 and BAR10), were interviewed in depth by a female researcher.¹⁶ The interviews, which lasted approximately two hours, were tape-recorded and transcribed. All the barristers were asked, among other things, about the task of prosecuting rape, the practice and the strategies they employed when defending in rape cases, and their suggestions for improving the system.

Data analysis was effected by the collection of statements on particular themes. The responses of barristers to questions about their involvement in rape cases were analysed with a view to ascertaining their practice and approach and the problems perceived to arise. Attitudes towards victims and towards appearing in rape cases were also analysed.

PROSECUTING RAPE

The barristers in the study perceived the task of prosecuting rape as a difficult one in a number of different ways. They were questioned in depth about these perceived difficulties and asked for their opinion as to how they might be circumvented.

1. The examination-in-chief

Barristers described the difficulties involved in taking the witness through her evidence. Most were concerned about delays in bringing cases to trial and considered that this was a particular problem in rape cases. Rape victims often needed to forget what had happened to them in order to cope with their lives and expended much effort in seeking to do so. Where, after a year or so, they had managed to put the experience behind them, it was traumatic then to be forced to recall the event in court and they frequently had a reluctance to talk about it. Their minds sometimes went blank. Very often they had not spoken in any detail about the rape for months and it was frequently difficult for them to recall the sequence of events. The problem of describing intimate experiences in a very large, intimidating courtroom was also mentioned. BAR1 thought it was far easier 'in a nice cosy little court, say one of the courts at Lewes.'

2. Contact with complainant before the trial

Given the difficulties which they knew complainants had in giving their evidence in examination-in-chief, barristers were asked about the extent of

16 The interviews took place between the beginning of 1995 and the beginning of 1997 with most in 1996.

their contact with complainants immediately before the case began. Although the Bar's Code of Conduct now permits such contact,¹⁷ it was clear that few routinely introduced themselves to complainants before trial. Some did so occasionally and one never did.

BAR2 said that because of the change in the rules she now always got the CPS representative to introduce her to the complainant for a 'get to know you chat' and simply to say: 'Good luck, don't get nervous, listen to the questions and answer the questions you're asked.' She always made it clear that she could not discuss any aspect of the case. BAR5 similarly thought it was vital to introduce both herself and defence counsel and to remind the complainant that if she didn't understand a question she should say so.

Other barristers were even more cautious in their approach. BAR7 limited her conversation to 'Hello, I'm the person prosecuting'. She was afraid that saying much more could lead to accusations by the defence of partisanship or collusion. BAR9 said that she would only introduce herself if she had first obtained the agreement of defence counsel and if she were asked to do so because the complainant was particularly nervous.

Some barristers were keen to avoid any prior contact with the complainant. It was felt that there was not much that could be talked about so that the meetings were awkward and that there was always the danger of being drawn into a discussion of the evidence, which was strictly forbidden. There was a preference for establishing rapport in the courtroom. BAR8 was adamant that there was no point in any such meetings, which she dismissed as 'bonding sessions'. She understood that complainants might feel let down 'if they see us wafting past in what seems to them a rather distant and aloof way' but she felt that the answer to this was more education of complainants about the prosecutor's role which was not to represent them.

None of the barristers were in favour of any further relaxation of the Bar Code to enable greater contact with witnesses. It was pointed out by several that if the witness told the barrister something which she then contradicted in court, this could lead to serious problems including a forced withdrawal from the case or even being called upon to give evidence as to what the witness had said outside the courtroom. These views are opposed to those of the majority on the Royal Commission on Criminal Justice,¹⁸ which considered that prosecuting counsel should be able to discuss the case with the victim who might be fearful about giving evidence. Its report states:

Meetings between witnesses and counsel, if conducted with propriety, will help to improve the presentation of cases in court both by increasing the confidence of witnesses and by helping barristers in the presentation of the case.¹⁹

17 Provided that the barrister does not 'rehearse, practise or coach a witness in relation to his evidence or the way in which he should give it': see General Council of the Bar, *Code of Conduct for Barristers* (1990, as amended) para. 607.

18 *Report of the Royal Commission on Criminal Justice* (1993; Cm. 2263) para. 52.

19 *id.*, para 52.

But the examination-in chief was only one in a range of difficulties which the barristers felt they faced in prosecuting rape. Lack of supporting evidence and the quality of witnesses were regarded as further major problems. The complainant herself was seen in many instances as the prime impediment to a successful prosecution. Her appearance, her behaviour, her lifestyle were all viewed as obstacles.

3. Lack of supporting evidence

Save in stranger rape cases, it was felt to be extremely difficult to achieve a conviction where there was a lack of supporting evidence unless the complainant was 'amazingly good' in the witness box. Strong medical evidence of injury was regarded as particularly important but very often this was lacking. In the case of adult, mature women vaginal damage was unlikely and reddening could be said to be equally consistent with consensual sexual intercourse.

Delay in reporting the offence, which destroyed forensic evidence and prevented evidence of recent complaint, was regarded as a serious setback. The exclusion of expert evidence about such matters as rape trauma syndrome, which might explain the complainant's failure to report immediately, was also mentioned as a handicap to the prosecution. However, it was pointed out that the abolition of the requirement that the judge give the jury a corroboration warning²⁰ had been helpful where there was a dearth of supporting evidence.

4. Evidence of police surgeons

There was much criticism of the quality of medical evidence. Doctors' written statements were not always sufficiently detailed and although some doctors were regarded as excellent witnesses with precise recall of factual detail, many were not. Some were criticized as 'slapdash' or described as 'dreadful' in court. Many were said to change their mind in mid-stream and were simply unable to put across the evidence intelligibly. Some doctors assumed that penetration must have been digital when it could equally well have been penile, a critical matter in rape cases, and some failed to mention in evidence that lack of injuries did not signify that rape had not taken place. This was regarded as a serious omission. A further problem arose where doctors made it their business to delve into the victim's medical history since, as BAR6 put it: 'You would then have a lot of material for the defence'.

5. The character of the complainant

Complainants were viewed by some barristers in an uncomplimentary and negative light. It was felt, for example, that juries were very affected by the

20 Criminal Justice and Public Order Act 1994, s. 32.

appearance of witnesses. The barristers drew a distinction between women who gave the appearance of respectability and those who did not. The language used to describe the latter was, in some cases, sharply denigratory as if there was some sympathy for jury assessments based on such criteria. Several barristers mentioned the problem of complainants who came to court inappropriately dressed. BAR3 said:

I think it's just common sense that if a woman looks like a scrubber she's going to get less sympathy from a jury than someone who looks respectable.

BAR2 said: 'It would be useful if they could sit down without showing their knickers'.

The complainant's behaviour at the time of the event and her sexual character were also regarded as impediments to the prosecution. BAR3, who mainly prosecuted, nevertheless agreed with juries who took a dim view of the complainant's behaviour in some cases:

I mean the silly woman is prepared to be picked up by a stranger and go back for, quotes, coffee, you know, what does she expect? If a woman does that, can she really be surprised that a jury will say that she may have consented to sex? Again a hitch-hiker or somebody like that.

BAR 6 said that juries 'were not very good (at convicting) when somebody can be depicted as a slut'. He also saw the lifestyle of the complainant as a problem:

If you live in a squat or are a single mother it does have an impact on juries. I think that they think that you are more likely to have got what you deserved.

Thus some barristers had the perception that their own efforts were sabotaged by poor witnesses. In the case of medical witnesses there was clearly some justification for this.²¹ In the case of complainants however, there was no criticism of what Smart would describe as the 'phallocentric'²² assumptions on which the trial was based. Rather, women were seen by some barristers as their own worst enemies, or even to blame for their own fate and that of the prosecution.

6. Previous relationship with accused

There was some support for the view that it was very difficult to bring home convictions where there had been a previous sexual relationship with the

21 See, further, on this, J. Temkin, 'Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice' (1998) 61 *Modern Law Rev.* 821.

22 'Phallocentrism' is, in Smart's words, 'a term deployed to refer to a culture which is structured to meet the needs of the masculine imperative'. Her thesis is that the rape trial is a celebration of phallocentrism in which men's sexual urges and their fulfilment are presented as the natural order of things. The rape trial disqualifies women and women's sexuality and effectively disempowers them. It follows from her thesis that a low conviction rate in rape cases is only to be expected. See C. Smart, *Feminism and the Power of Law* (1989) 27, and ch. 2.

accused. Speaking again in support of juries who acquit in such circumstances, BAR3 said:

If somebody has been having a sexual relationship with somebody before, whether it's because juries feel the same way as I do, that it's really not a terrible offence . . .

7. Unsuitable cases prosecuted

Given the problems in prosecuting rape cases, barristers in the present study were asked for their views about whether too many rapes were in fact being prosecuted.²³ Opinion on this matter differed sharply. Some barristers were critical of the CPS for bringing too many cases.²⁴ It was felt to be unfair to complainants to bring them before the courts when the prosecution was unlikely to succeed. In date-rape cases or those where there was a previous relationship with the accused, it was thought that women should be given time to reflect before a prosecution was brought. The CPS was considered to be highly sensitive to criticism about the failure to prosecute rape cases and, it was suggested, pursued cases which 'on the 50 per cent rule ought to have foundered'. Such cases included those where the behaviour of the complainant was likely to prove significant. BAR3 felt that the CPS was too influenced by the views of victims. Her main objection was to prosecuting in cases where there had been a permanent relationship between victim and accused since she considered that in many such cases it was of no consequence whether the woman had been raped or not:

I feel very strongly about this. I feel very strongly that it's a great waste of public money to prosecute the ex-husband rape or the ex-boyfriend rape unless there is extreme violence involved or it's part of a sort of campaign of harassment. I have had to prosecute an awful lot of cases where people have still been sort of seeing each other after having a relationship, where he wants it and she doesn't and it happens. Well she says it was a rape and probably, yes, it really was. But frankly does it matter?

Thus criticism was levelled at the CPS for bringing 'unsuitable' cases. But the reasons for their lack of suitability were not questioned; neither was the

23 The CPS must decide whether prosecution is appropriate applying the evidential and public interest tests set out in the Code for Crown Prosecutors. Where there is a 'realistic prospect of conviction' it is highly unlikely that it would not be in the public interest to prosecute a rape case since rape meets all the factors in favour of prosecution set out in the Code, that is, it is a serious offence, likely to result in a significant sentence, where the victim is likely to be vulnerable, put in fear, and attacked. As part of the Home Office study (op. cit., n. 4, p. 25), discussions were held with CPS lawyers and caseworkers who maintained that they would not discontinue a rape case without very good reason. Nevertheless, over 25 per cent of the cases considered in the study had been discontinued.

24 This was the view of most of those interviewed in the Home Office study: id., p. 35.

way in which certain types of cases were treated in court so as to render convictions less likely.

Most barristers however were uncritical of the CPS. BAR6 who sat as a Recorder at the Old Bailey considered that, whereas in some areas of crime it was clear that the wrong cases were being brought, this was not the case for rape. Others conceded that more cases were coming through where corroboration was lacking but they were uncritical of this. Indeed several were highly supportive of this approach. BAR9, for example, said:

I think they (the CPS) are pretty good at sorting them out, you know, and I think that just because a jury doesn't agree with the strength of the evidence is something that we have to say that we can't help.

8. Choice of counsel

There was strong feeling amongst some of the barristers that in a growing number of cases inexperienced barristers were picked to prosecute rape cases. Barristers interviewed in the Home Office study were equally emphatic about the need for experienced barristers to prosecute in rape cases.²⁵ BAR6, the most senior of those interviewed in the present study, was the most vociferous. He considered that the low conviction rate in rape cases was directly attributable to the level and quality of the people prosecuting. Inexperienced barristers were especially ill-equipped to draw out the story from reluctant complainants in examination-in-chief. BAR2, whose experience with rape cases was exclusively in defence work, said that she found 'quite shockingly junior members of the Bar doing them'. Their lack of experience in defending cases made them less able to prosecute and she described them as an 'open target'.

There was agreement that cost cutting was the motivation for instructing less experienced people. It was suggested that rapes were being sent out to chambers as standard-fee cases. This meant that they were being paid at the same rate as a simple shoplifting case. This deterred some experienced barristers from taking the case whereas those who were inexperienced were happy to do so. BAR5 stated:

There is certainly a feeling amongst all of us that quite frankly we are being paid about half of what people who are defending are paid. It's very badly paid in fact.

Low fees could also explain the problem of returns in rape cases. Where experienced barristers were faced with a clash of cases, their clerks were likely to point them in the direction of the brief with the highest fee, which was unlikely to be the rape case. This would then be passed to a more junior member of chambers.²⁶ It was also pointed out that low fees meant poor

²⁵ *id.*, p. 36.

²⁶ A barrister interviewed in the Home Office study also expressed this view: *id.*, p. 36.

preparation, which was another reason why it was felt that conviction rates were being affected.

Several barristers were critical of the designated chambers system by which the CPS gives its work only to certain sets of chambers. This limited the choice of counsel. It was suggested that those in designated sets were briefed irrespective of their abilities. BAR2 drew the contrast with solicitors briefing defence counsel: 'You muck up once and you can forget it'. Barristers in designated chambers, however, were likely to continue to be briefed whatever their level of incompetence. It was rare for CPS lawyers to attend court: unqualified clerks were sent instead, so that competence levels only became known gradually.

9. Use of female barristers

Whilst male barristers both prosecute and defend rape cases, it is frequently female barristers who are the preferred choice. The reason for this was variously expressed to be that complainants would be more likely to be able to tell their story if questioned by a female barrister, that female barristers were more likely to be able to show some sensitivity and that it was more acceptable to have intimate questions put to a woman by a female barrister. BAR6 felt that the CPS had an obsession with the idea of appointing females to prosecute in rape cases and that since female barristers were concentrated in the early rungs of the profession this was a factor in the lack of experience and skill of those chosen to prosecute.

Interviews with CPS prosecutors²⁷ indicate that barristers were not wrong to discern a cost-cutting motivation in the choice of barrister to prosecute in some rape cases. Asked whether cost was a consideration in the appointment of counsel, one London crown prosecutor replied:

Of course it is. Of course it is. I mean you know I could say 'oh no, no, it's not'. But you know it's a balancing act. We're under resource constraints just like everybody else and we are limited to how much we can pay.

Whilst consideration of cost may influence the choice of counsel across the board in criminal cases, the effects of this may be felt particularly acutely in rape cases.

27 A sample of CPS prosecutors was interviewed as part of the larger study conducted by the author into the processing of rape cases.

DEFENDING RAPE

Most of the barristers interviewed had experience of both prosecuting and defending rape. They were asked about defence strategy in rape cases.

1. Use of female barristers

It is frequently part of defence strategy to appoint a female barrister to represent the defendant. Several barristers explained that female barristers lent respectability to the defendant's case. The message to the jury was that this woman was not frightened by the defendant and indeed believed him in preference to the complainant. As BAR2 put it:

A woman attacking another woman is seen by most defendants as much more of a statement than a man attacking a woman.

Not all barristers were convinced that juries were so gullible but some felt that this defence ploy was in fact fairly effective.

2. Harassment

Given current concerns about the way in which rape cases are defended, the barristers were asked whether they considered that complainants were still harassed in court by defence counsel. All denied that they personally practised harassment, which they understood in very narrow terms to mean overt bullying of the victim and making her cry. However, a few pointed the finger at other barristers. Male and particularly older male barristers were mentioned as culprits. BAR9 said:

I'm afraid it tends to be male barristers of advanced middle age. They can be very unpleasant. They've got certain views and it comes over loud and clear in the questions.

Again BAR6 stated: 'Harassment does still happen. Advocates have been too slow to adapt'.

The barristers seemed to think that there were far more effective means of defending than bullying the complainant. It seems that this tactic was mainly rejected because it was unproductive. As BAR 4 explained:

I mean the jury would practically lynch you if you tried that now. The climate has shifted. It's not acceptable.

Similarly BAR 6 said:

Harassment is very bad advocacy. It's thoroughly unproductive for a defendant. I don't believe advocates realise sometimes the impact they're making. I don't regard hectoring and harassment as a tactic or as a device I would use because it's simply counter-productive and you don't want to make a jury say 'This bastard is bullying her.' The moment you're bullying her, you've lost the jury.

Although they claimed not to practice harassment in the sense of overt bullying and intimidation of the complainant, it was clear that every tactic short of this would be deployed if necessary and that their approach to defending was robust to the point of ruthlessness. As BAR7 put it:

When I'm defending it's no holds barred in that anything that properly I can use to help secure my client's acquittal I will.

BAR4 said:

If you're asking do I take account of the sensitivity of the complainant, the blunt answer is no because it's not my brief.

The barristers made use of their knowledge of the difficulties of prosecuting in their approach to the task of defending. The research identified five distinct strategies:

(a) Assessing the complainant

Several barristers explained how they would adapt their approach to their assessment of the complainant, mindful always of the impact which their questioning would have on the jury. BAR4, for example, said:

You feel your way in a case always. There may be some cases in which you feel that your best tactic is to be extremely courteous with the woman and not lay into her, as your client wants you to do. There are some cases where, yes, I have laid into a woman where I feel it's justified. I wouldn't feel that because she was a woman alleging rape my hands were tied in any way.

BAR1 saw women in terms of different and denigratory stereotypes:

I tend to size up the complainant and decide whether the more aggressive approach is required or whether the softly, softly (approach). If you've got a sort of tarty woman then you're not going to get the softly-softly approach. I mean if you've got a tarty little number with a mini-skirt round her neck who's brassy and will give as good as she gets then you'll be firm with her but if you've got some little mouse then you'll treat her gently and sympathetically because you'll get more out of her.

(b) Trapping the complainant

BAR6 practised the art of trapping the complainant by lulling her into a false sense of security through establishing some sort of rapport:

I try and make the witness feel that I'm more on her side than she thinks when I'm not. I don't hector the witness because I get much more out of a witness if you can establish a common ground. If you get the witness to agree with the first five of your propositions then there is a psychological tendency to agree to the sixth even if she doesn't want to. I try and establish a wave length with a witness.

This technique was also used by BAR1:

They think they're having a nice, friendly chat with you and then, when they're not expecting it, you can jump in with something.

BAR2 did her best to keep the complainant calm because the jury would be less inclined to believe her if she were calm:

You ask her a number of questions to calm her down, neutral questions. If you keep her calm that's very good because the jury is less inclined to believe her. Nobody has ever related any major tragedy in a monotone.

BAR2 was also careful not to antagonize the complainant or upset her. She would leave challenging her veracity until the very end of her cross-examination because to do it beforehand would ensure 'they will cease trading with you.'

(c) Discrediting the complainant

This was the central strategy in the defence armoury.²⁸ BAR8, for example, explained that she would deal with the facts of the case but that was not what was important. The main thing was to undermine the victim in the eyes of the jury:

My tactics are to be agreeable, not to be aggressive, to be reasonable, to ask the sort of questions in the sort of way that a juror might wish to ask them. You'll put your chap's facts and obviously controvert her facts. They're less important than undermining her personality. It sounds sinister but that's what you're trying to do, make her sound and appear less credible. What you are trying to show the jury on your instructions is that the vulnerable and sympathetic personality which they see may, if you shed a skin or two, be different.

The strategy of discrediting the complainant involved several different tactics:

(i) *Maligning the victim's behaviour*

The barristers regarded the victim's behaviour at the time of the incident as a key factor in securing an acquittal. It would be dealt with at some length during cross-examination. As BAR1 explained:

I think that juries are very prejudiced and if a woman puts herself in a compromising position, I don't think juries are ready to convict.

Cross-examination would therefore dwell on the foolishness of the complainant's behaviour with the message that she had brought what happened upon herself and had only herself to blame. BAR4 explained how she would routinely proceed where there was a consent defence:

You would seek to explore the circumstances in which the two first met, whether or not they accord with common sense as I would suggest a woman would conduct herself in 1990s London and to explore her opportunities and

28 In the Home Office study, barristers considered that 'the defence has little choice but to seek to undermine the credibility of the complainant': op. cit., n. 4, p. 36.

her motivation for getting herself into a situation in which sexual activity could have taken place.

In relation to behaviour and consent BAR3 said:

I know that we're all terribly careful to be politically correct about this and say 'Well, surely women are allowed to go to people's houses and take lifts in strangers' cars without expecting to have to give them sex.' But, I mean, people being what they are, I think a jury is always going to say, 'She said she didn't consent, but I think that she might have done and obviously he thought she might have consented because of the way she behaved.' So the woman's behaviour at the time makes it difficult to get a conviction.

The 'foolish behaviour' theme was presented both in relation to consent and independently of it. The jury would be invited to think that the way the complainant behaved suggested that either she might have consented or that the defendant might have believed that she consented. Alternatively, although less explicitly, it is put to the jury that whatever happened on the occasion in question, it was at least in part the complainant's fault and that therefore the defendant does not deserve to be convicted and imprisoned for it. BAR5 explained that it was difficult for the prosecution to counteract this tactic:

There is a difficulty in properly presenting women with a right to decline sexual intercourse despite the fact that they may have been very drunk or have acted in a sexually explicit manner towards the man. It goes down to a number of attitudes which are ingrained in people. There plainly is a perception that women should act in a certain way.

Thus, the barristers set 'foolish' behaviour against behaviour which conformed to 'common sense'. Common sense was interpreted to mean behaviour that respected the primacy of men's sexual urges and which judiciously sought to avoid them. Women who failed to mind what they did and where they went were 'lacking in common sense' and hence to blame when men sought the natural gratification of these urges. In this way, barristers played to the 'phallogocentric'²⁹ instincts and understandings of jurors and deflected attention from the behaviour of the defendant himself. Some barristers themselves passed judgmental remarks about the behaviour of complainants. Most, however, made no claim to share the views of the juries they addressed, but were content to exploit them in the interests of the defence.

The lengths to which barristers would go in exploring the complainant's behaviour are illustrated by one case in which BAR6 was defence counsel. The complainant, who was Afro/Caribbean, had been lured into saying that she was not an exhibitionist. The defence then produced a video of her dancing in a club. BAR6 commented:

We had a video of her dancing in a club in a very flamboyant and suggestive Afro-Caribbean way. And you could see the jury, once I'd played the tape ...

29 Smart, *op. cit.*, n. 22.

In this case, the video did not show behaviour on the occasion in question. Indeed the complainant had jumped out of a first floor window to escape the defendant and had broken her ankle. The defendant was nevertheless acquitted.

Several barristers expressed the view that it was women jurors in particular who were judgmental about the behaviour of other women, a view echoed by barristers in the Home Office study.³⁰ It was not clear how they could ascertain this but the view that it was particularly advantageous for the defendant to have women on the jury was frequently expressed. BAR 9, for example, commented that female members of the jury of a certain age could be relied upon to take the view:

‘She should know better, she shouldn’t have gone back there for coffee. You shouldn’t have done that. You were asking for it.’ Everybody has a view about what your social behaviour should be.

Whilst the ‘foolish behaviour’ tactic might elicit a favourable response from female members of the jury, BAR5 conceded that the views of men on the jury could be more extreme: ‘Some men don’t believe that rape ever exists’. An appeal to the judgmental attitudes of female members of the jury might bring them alongside those male jurors who were ready to acquit in any case.

There was more than one way in which the complainant’s fate could be sealed by her behaviour. BAR8 explained that victims were often conscious of the way in which their behaviour could be presented to the jury in a detrimental light and would be less than candid about matters which they thought were trivial, for example, how many drinks they had had. This however was fatal. The defence would ensure that one lie was enough to destroy their credibility.

(ii) *Maligning the victim’s clothes*³¹

Barristers always asked complainants questions about their clothing. It was part of the same theme that they had brought what had happened upon themselves. BAR10 clearly believed that the way some women, particularly young women, dressed was the reason for what happened to them. He said:

This girl has gone into a bikers’ pub wearing a mini-skirt and a see-through shirt. That’s part of the story. I don’t think they (young girls) realise the effect of their appearance on men. Guys get turned on if they can see through the women’s clothes. Dress *is* significant.

However, questions were not confined to clothing on the occasion in question. In the case mentioned above, in which a video of the complainant dancing was shown, she was questioned about the clothing she was wearing

30 Home Office, op. cit., n. 4, p. 37.

31 For the use of this tactic in American rape trials, see A. Sterling, ‘Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women’s Clothing in Rape Trials’ [1995] 7 *Yale J. of Law and Feminism* 87.

at court. BAR7 who had prosecuted the case commented: 'The girl was basically just cross-examined because she had a mini skirt with a zip in it.'

(iii) *Maligning the complainant's sexual character*

In the Home Office study, the judges and barristers interviewed generally considered that sexual history evidence was often relevant.³² The barristers in the present study were asked about the relevance of sexual history evidence and the frequency with which they would, if defending, seek to have it introduced under section 2 of the Sexual Offences (Amendment) Act 1976. Most would frequently apply under section 2.³³ BAR6 invariably did so because, as he put it, if the complainant could be portrayed as a 'slut', this was highly likely to secure an acquittal.³⁴ But several barristers considered that such evidence was rarely relevant and would seldom make a section 2 application unless, for example, there was a similar fact type situation.

It was pointed out that the barrister had to have material from the defendant and instructions from him before an application could be made. These were frequently forthcoming. Indeed, there was often considerable pressure from the defendant to bring in this type of evidence. As BAR 5 commented: '[They] often want you to dig up every piece of smut there is about the complainant'. BAR2 said that she would resist this pressure where she considered that the judge would view the evidence as irrelevant. But BAR 5 said that she sympathized in some cases with the defendant's wishes:

To be honest there are lots of women who make complaints of rape who would sleep with the local donkey and the defendant says, 'Well, how can she possibly say I raped her when she goes with everybody in sight. I want that brought up'. To an extent, I suppose, they're entitled to have that done because a jury must consider that if she sleeps with nine out of ten men why is it that she wouldn't sleep with this one.

BAR3 considered that sexual history evidence was almost always relevant in consent cases:

I think it is relevant in almost every case where consent is the defence. That's my view. I think that a woman who has had sexual experience and, particularly varied and a lot of sexual experience, is frankly more likely to consent to a sexual experience with someone new than someone who hasn't.

Moreover, BAR3, who mainly prosecuted in rape cases, commented that she would 'quite often' not object when the defence applied under section 2.

32 Home Office, *op. cit.*, n. 4, p. 40.

33 Under this section application had to be made to the judge in the absence of the jury to allow evidence of past sexual history to be admitted.

34 The Scottish Office report noted that defence barristers who had been interviewed in the study 'freely admitted that they would do what they could to suggest that a woman was of "easy virtue" precisely because they believed that juries were swayed by it' (*op. cit.*, n. 4, p. 73).

These views do not accord with the purpose of section 2. As the Home Office report noted:

The legislation was intended to prevent the introduction of evidence that would lead the jury to believe that the victim was promiscuous and readily consented or that her evidence was less likely to be sound.³⁵

Whilst there were different views about the relevance of past sexual history and whilst there were differences in the frequency with which applications under section 2 would be made, there was complete unanimity of response on the question of judicial attitudes towards section 2. All the barristers felt that trial judges, particularly those who were newly appointed, took the matter very seriously and were very careful before allowing such evidence. However, despite the protestations about the rigorous judicial approach to section 2, none of the barristers seemed to have experienced much difficulty in making successful applications under it. Given the attitude of the Court of Appeal to sexual history evidence this is not surprising.³⁶ BAR6 who was himself licensed to try rape cases said:

A judge has to be indulgent if the defence can set up half a good reason why they need to go into the sexual history.

BAR4 stated:

My experience is that generally, if you present your arguments properly and you explain the proper basis for it, that judges in the main will rule in your favour.

(d) Exploiting inconsistency to suggest fabrication

It is standard defence practice in any criminal trial to try to point up inconsistencies in a witness's evidence. All the barristers would routinely do this. In rape cases such inconsistencies are highlighted to suggest that the complainant may have lied on the issue of consent. Comparisons were routinely made between what the complainant said by way of recent complaint and what she said subsequently to others when describing what had happened to her. If she did not say the same thing to all parties this would be pointed out as an inconsistency. Of course people's accounts of events do differ depending on the person to whom they are speaking. Complainants frequently mention matters to doctors which they might not mention to police officers. But differences, albeit trivial, would be presented by the defence as inconsistencies and as indicators of unreliability and lack of truthfulness.

BAR2 commented that complainants, presumably as a result of nervousness, were often in too much of a rush to answer questions in

³⁵ Home Office, *op. cit.*, n. 13, para. 9.62.

³⁶ See, for example, J. Temkin, 'Sexual History Evidence – the Ravishment of Section 2' [1993] *Criminal Law Rev.* 3.

cross-examination. This led them to make mistakes and allowed counsel to give them the opportunity to contradict themselves subsequently.

(e) Using and challenging medical evidence

Defence counsel found the doctors' medical notes very useful. BAR1 explained that they provide the defence with 'lots of leads' and are 'a mine of information'. Notes may disclose that the victim is vulnerable in some way, has a history of mental problems or even that she has made up stories in the past. It was common for the defence to employ an expert medical witness to challenge the medical evidence adduced by the prosecution. The prosecution would seek to deflect this by pointing out that the expert had not examined the complainant and that his theoretical knowledge was therefore less than useful.

IMPROVING THE SYSTEM

Given the difficulties both in prosecuting rape and in achieving convictions which the barristers had emphasized, it might have been thought that they would have been keen to put forward suggestions for improving the system. But they were mostly complacent about it. It was generally agreed that the system had improved immeasurably and that not a lot more needed to be done. The abolition of the requirement that a corroboration warning be given by the judge and intended changes to committal proceedings³⁷ were mentioned as major improvements. It was also thought that the preponderance of women now prosecuting and defending in rape cases had been an important factor in raising the tone in rape trials.

The barristers were keen to emphasize that if a grave allegation is made the complainant must be made to substantiate it as if this was an answer to suggestions for change. Indeed, several barristers appeared to be advocating less support for victims. They felt that victims were already far too molycoddled, particularly by Victim Support, and that this cossetting led them to have a false sense of optimism about pursuing the case when it would be in their interest not to do so.

However, some suggestions for improvements were made. These mostly concerned victim care before and during proceedings. There was much criticism of the system at the Old Bailey where rapes were floated. Victims were made to turn up to court and to wait, only to find that the case would not be heard that day. It was strongly felt that rapes should be given fixed dates and that they should be brought to trial far more quickly. There should be information packs for victims to explain court procedures and visits to the courtroom before the trial. Waiting areas should be improved and smaller rooms selected to try rape cases.

37 Under s. 47 of the Criminal Procedure and Investigations Act 1996, witnesses may not be called to give oral evidence in committal proceedings.

The barristers were asked specific questions to ascertain their views on television link, screens, legal representation for victims, and training for barristers.

1. Television link

There was unanimous and strong opposition to the suggestion that live television link³⁸ should be routinely available for adult witnesses in rape trials.³⁹ Several barristers considered that the use of television link contravened what they believed to be the basic principle that the accuser must be made to face the accused. Most considered that the prosecution task would be rendered more difficult if this were introduced for adults and that only the defence would be assisted by such a move. It was felt to be very difficult to establish rapport with the witness through a television screen and that the screen ‘neutralized’, ‘anaesthetized’, and ‘diminished’ the effect of the evidence. The complainant would become just another image on a television screen. As BAR9 explained:

It’s so difficult to bring home a rape case. You need evidence, you need spontaneity. It’s awful for women but once they get going they’re normally all right. OK they do burst into tears and it’s terrible for them but if you’re going to make an impact, then they do make it.

Barristers liked television link when they were defending cases. BAR8 spoke of one case that she had successfully defended in which the young complainant gave her evidence by the link. Since she was in another room rather than the courtroom, she was ‘lulled into a false sense of security by her surroundings’. She thought she was having a ‘nice chat’ when in fact her evidence was being discredited.

2. Screens

Some barristers were very enthusiastic about the use of screens⁴⁰ and regretted the decision in *R. v. Cooper and Schaub* that, in the case of adults, screens should be used only in exceptional cases.⁴¹ It was pointed out that some witnesses were too intimidated to give evidence without screens and

38 This method involves the witness giving her evidence from a separate room in the court building which is connected to the courtroom through closed circuit television. The witness will see on her screen only the barrister who is asking her questions.

39 The barristers, CPS lawyers, and judges interviewed in the Home Office study reacted similarly: *op. cit.*, n. 4, p. 41.

40 This involves placing the witness behind a screen so that she cannot see the defendant and usually, but not invariably, he cannot see her

41 [1994] *Criminal Law Rev.* 531. There was no mention of the later case of *R. v. Foster* [1995] *Criminal Law Rev.* 333 in which a differently constituted Court of Appeal could see no harm in the use of screens provided that a warning to the jury about adverse inferences was given.

that the sight of the defendant caused the minds of some to go blank. BAR7 said that some defendants had ‘an incredible psychological influence’ over complainants, even those who were not ‘fading violets’. It was felt that it was not necessary for the defendant to see the complainant’s facial reactions provided that advocates, judge and jury could do so.

But there were equally firm views against the use of screens save in exceptional cases. BAR3 considered that screens were unfair to the defendant in allowing the complainant to avoid facing him:

Imagine you’re an innocent man and the woman is being allowed to tell a pack of lies about you from behind a screen and you can’t even see her face.

Others believed that screens created prejudice against the defendant in the minds of the jury. It was also pointed out that some of the screens in use were propped up on a couple of chairs and were so ‘flimsy and ramshackle’ that they were in any case useless for the task.

3. Legal representation for victims

There was unanimous condemnation of the proposal that there should be separate legal representation for victims. This was thought to be contrary to the adversarial system and counterproductive for the victim who might then be seen by the jury as a contending party rather than as a victim of the crime.

4. Training

There was a mixed response to the suggestion that barristers should receive training about rape and matters such as rape trauma syndrome. Several were emphatically against any training. Barristers relied on their experience and this was sufficient. BAR4 who only did defence work felt that such training would be inappropriate for her. She felt that it was not her role to ‘wonder about the impact of cross-examination on the victim’. BAR3 said it was the barrister’s job to present the case and it was not her job to know about such matters as rape trauma syndrome unless this had some direct bearing on the evidence which could be used in court. However, several barristers were more receptive to the idea. BAR9 felt that it would be very helpful ‘to develop the degree of sensitivity that is required to bring out the account in examination-in-chief.’ BAR6, who had himself received training for his judicial duties, was the most enthusiastic although he added that training sessions he had attended which were designed to promote a better understanding of victims had proved most useful for him when he was defending in sexual assault cases.

Thus barristers largely placed their faith in their own skills and experience inside the courtroom to tackle the problems posed by the rape trial although they were concerned to reduce delays in bringing forward prosecutions. Change was mostly viewed with suspicion.

IMPLICATIONS OF THE STUDY FINDINGS

This study sheds light on some of the problems involved in prosecuting rape cases and the strategies and tactics employed in defending alleged rapists. The policy implications of these findings will now be considered.

1. Prosecuting rape

The barristers emphasized that a major difficulty in rape cases was persuading the complainant to tell her story in examination-in-chief. Delay in bringing cases to trial substantially exacerbated this problem. In child sexual abuse cases, a fast-track system has been in place for some time to try to ensure that cases come for trial as fast as possible. In Victoria, Australia, rape trials have to take place within six months of a defendant being charged.⁴² Such a system deserves careful consideration. The YJCEA will permit the use of video-recorded evidence.⁴³ Where such evidence is authorized, this will deal in part with the problem of delay since the complainant's fresh account of events, made when she first reported the offence, will be able to be used in the courtroom and she will not then be forced to recount them a long time afterwards. However, it is not to be supposed that such authorization will be routine in the case of adults.⁴⁴

Some of the barristers in the study favoured the use of screens whilst all were opposed to the routine use of television link. The YJCEA will permit the use of both.⁴⁵ This study suggests that the use of television link will not be encouraged by prosecuting barristers whereas defence barristers are unlikely to resist it. Some of the concerns expressed by the barristers about the impact on the jury of these measures should be assuaged by section 32 which requires the judge to give such warning as is considered to be necessary to ensure that their use does not prejudice the accused.

The barristers stressed the importance of experienced barristers being appointed to prosecute in rape cases. It would be easy to dismiss their comments as self-serving observations from senior counsel whose work is being undercut by junior members of the Bar. However, the sheer difficulty of obtaining convictions in rape cases does lend credence to this point of view. There is something to be said for a rule to this effect as there is for judges who try rape cases. The Home Office study recommends that in rape cases the pay of prosecuting barristers should be broadly similar to that of defence lawyers.⁴⁶

42 Rape Offences (Proceedings) Act 1976.

43 Youth Justice and Criminal Evidence Act 1999, s. 27.

44 Section 27 does not permit the use of video-recorded evidence where this would not be 'in the interests of justice'.

45 ss. 23 and 24. It will also permit the complainant in certain circumstances to give her evidence in private although neither the accused nor his legal representative may be excluded from the courtroom: see s. 25.

46 Home Office, *op. cit.*, n. 4, p. xv.

If implemented this would be likely to encourage more senior barristers to prosecute.

It is clear however that the measures so far discussed are not all that is required. Over the years in this country and elsewhere in the common law world, the prosecution of rape cases has been sharply criticized. It has been said that prosecutions are conducted faithlessly, that prosecutors have remained passive in the face of aggressive defence tactics and have failed to take sufficient steps to counteract them.⁴⁷ This study suggests that the barristers, who were mostly women, mainly had an unchallenging attitude towards the construction of rape in the courtroom and that some shared the prejudiced assumptions that have for so long disfigured rape trials. They were deeply traditional in their approach to prosecuting.

The Home Office Report wisely recognized the need for training about 'vulnerable witness issues'⁴⁸ for all those, including barristers, whose involvement in the criminal justice system brings them into contact with such witnesses. Some of the barristers in this study were opposed to training largely because they could not see the relevance of it for the tasks they had to perform. But there is clearly much to be said for training to encourage the active prosecution of rape cases.⁴⁹ The report makes no attempt to specify the precise content of the training it recommends. The Scottish Office report mentioned the possibility of training prosecutors to take a more assertive line on defence attempts to introduce sexual history evidence.⁵⁰ This and more is required. Training is needed to impress upon counsel the importance of making proper contact with the complainant before the trial so that she is reassured and provided with general advice about giving evidence in court. Training is needed which challenges misogynistic attitudes and stereotypical assumptions about male and female sexuality so that prosecutors are able with conviction to counter the tactics used by defence counsel. They should be able to point out the fallacies and prejudice inherent in defence argument, to expose the misleading statements, to explain that apparent inconsistency in the complainant's testimony may be entirely understandable, that 'understatements' about alcohol consumption do not mean that she is lying about the rape. That the prosecution should take these steps is not only important from the point of view of ensuring more convictions. It is also important that victims are not allowed to be systematically trashed in court. It is suggested that none of this would be inconsistent with the prosecutor's role as representative of the state rather than the victim.

47 See, for example, L. Clark and D. Lewis, *Rape: The Price of Coercive Sexuality* (1977) 47; Chambers and Millar, *op. cit.*, n. 8, p. 89; Lees, *op. cit.*, n. 3, pp. 253–4.

48 Home Office, *op. cit.*, n. 13, para. 12.15.

49 In 1999, Leeds Metropolitan University, in conjunction with the CPS, launched, on a limited basis, a new voluntary programme to train prosecutors for rape cases in the light of concerns about poor conviction rates.

50 Brown et al., *op. cit.*, n. 4, p. 75.

2. *Defending rape: ethical issues*

The study illustrates the strategies and tactics used by a sample of barristers in rape cases. It is suggested that these raise ethical issues. The ethics of advocacy has been the subject of relatively little academic analysis in this country. The profession itself has not promoted a great deal of discussion in this area, and training for advocates has, until fairly recently, failed to include any component in which ethical matters were debated. The Bar's Code of Conduct sets out the duties of advocates and, for most barristers, it is this which provides the only ethical guidance. There remain, as Blake and Ashworth have pointed out, areas of discretion for barristers as to how they behave in court, which the broad outlines of the code of conduct fail to address.⁵¹

Rock has noted the formulaic character of defending in criminal cases. He observes:

Defence and prosecution counsel do not devise utterly new forensic methods for every trial in the Crown Court . . . They rely on standard stories, stories in which they may actually have little trust themselves.⁵²

Rape cases, it seems, are no exception. The study suggests and other research confirms that certain tactics are routinely employed⁵³ and certain stories routinely told. It may be that constraints of time and money operate to encourage a system in which events are reconstructed into a limited range of stories (for example, victim as foolish young woman, 'tart', or exponent of 'alternative' lifestyle, who either consented or who has only herself to blame for what happened to her) rather than fresh approaches being taken. But it is these tactics and stories which require ethical consideration. The barristers interviewed did not appear to question the ethics of their approach. Thus, for example, for BAR6 there was no ethical quandary in seeking routinely to depict women as 'sluts' so that juries would conclude that they were undeserving of the law's protection or, in showing a video of a black woman dancing, to invoke racist stereotypes to the same effect. This apparent lack of concern with ethical issues might have occurred because barristers routinely employed the formulae without thinking about them and/or because they simply assumed that it was their duty to do their utmost for their client and that this was the extent of their ethical duty.

51 M. Blake and A. Ashworth, 'Some Ethical Issues in Prosecuting and Defending Criminal Cases' [1998] *Criminal Law Rev.* 16, at 18.

52 P. Rock, *The Social World of an English Crown Court* (1993) 83. As Luban has observed, 'the typical defender is not paid enough to engage in individualised advocacy': see D. Luban, 'Are Criminal Defenders Different?' [1993] 91 *Michigan Law Rev.* 1729, at 1763.

53 See, for example, Chambers and Millar, *op. cit.*, n. 8, ch. 6.

In a criminal trial, the defendant is pitched against the state. He stands to lose his liberty and perhaps his reputation, his family, and his friends. Imprisonment is likely to involve considerable hardship, which might also include subjection to violence and sexual assault. In these circumstances, it is incumbent upon the advocate to do his utmost to see that the client's defence is presented as strongly as possible. Under the rule of law, a person has to be proved guilty of the offence with which he is charged. He must be proved, in exact accordance with the rules of evidence and procedure, to come within the four corners of that offence and proof must be beyond reasonable doubt. By the very nature of the rule of law, advocates are daily placed in situations in which they are defending to the hilt persons whom they know are, at the very least, a menace and often a positive danger to the community. In so doing, they are, paradoxically, defending the interests of the community by upholding the rule of law. It is understandable therefore that advocates grow weary of laymen who question the morality of defending alleged child abusers, murderers, and rapists. The cab-rank principle is there to ensure that available barristers who practice in criminal law take on cases when they are asked to do so. In this way no stigma attaches to advocates for the people they defend and all clients can have access to representation.⁵⁴ Lawyers who refuse to defend men charged with rape act in defiance of this principle, the Bar's Code of Conduct,⁵⁵ and the rule of law itself.

Given that all defendants are entitled to the best defence available, of what should this consist? The Code states:

A practising barrister must promote and protect fearlessly and by all proper and lawful means his lay clients' best interests and do so without regard to his own interests or to any consequences to himself or to any other person.⁵⁶

The Code does not define 'proper means' but there can be no dispute that the advocate should 'point out every doubt that can reasonably be raised about the prosecution's evidence'.⁵⁷ The prosecution evidence must be tested to the full 'challenging each witness in so far as that witness's evidence either differs from what counsel has been told by the client or appears to be weak, muddled or otherwise open to question'.⁵⁸ Counsel must ensure that only admissible evidence is used against his client. It is also entirely proper for the advocate to take technical points that do not relate to the merits of the

54 For further discussion, see D. Pannick, *Advocates* (1992) ch. 5.

55 See General Council of the Bar, *op. cit.*, n. 17, para. 501.

56 *id.*, para. 203.

57 Luban, *op. cit.*, n. 52, p. 1759.

58 Blake and Ashworth, *op. cit.*, n. 51, p. 17.

dispute such as reliance on limitation periods⁵⁹ or abuse of process or argument about the meaning of the wording of the statute.⁶⁰

But it is well established that there are limits to what is appropriate for a barrister to do in defence of his client. The Code states:

A practising barrister has an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved.⁶¹

This provision makes clear that ultimately the defence barrister has a duty to the court which transcends his duty to his client. According to Lord Morris, every advocate is an *amicus curiae*⁶² and Lord Pearce concluded that the advocate should pursue his client's interests only so far 'as public considerations allow'.⁶³

Moreover, the advocate is not simply bound to defend the case in the manner the client expects. Counsel must follow the client's instructions about the facts and must consult him before deciding not to call alibi witnesses but is otherwise free to conduct the case as s/he thinks is proper and in the client's best interests.⁶⁴ Lord Esher noted that an advocate is not 'bound to degrade himself for the purpose of winning his client's case'.⁶⁵ The Court of Appeal will not challenge the advocate's decision as to how the case is best run unless there has been 'flagrantly incompetent advocacy'.⁶⁶ Pannick avers that 'when counselling the client a lawyer can and should express his opinions fully and frankly about all aspects of the case, legal and ethical'.⁶⁷

More specifically, the following limits to defence practice, which have been suggested by commentators or set out in the Bar Code, have particular significance for rape cases:

(a) Misleading tactics

The Code states that a barrister 'must not deceive or knowingly or recklessly mislead the court'.⁶⁸ Pannick adds that it is not the function of the advocate to assist his client to mislead the court.⁶⁹ Luban would also reject the use of statements that are literally true but highly misleading.⁷⁰ Discussion of what

59 See Pannick, op. cit., n. 54, p. 114.

60 Monroe Freedman also points out that 'effective trial advocacy requires that the attorney's every word, action and attitude be consistent with the conclusion that his client is innocent': see 'Professional Responsibility of the Criminal Defence Lawyer: The Three Hardest Questions' [1966] 64 *Michigan Law Rev.* 1469, at 1471.

61 General Council of the Bar, op. cit., n. 17, para. 202.

62 *Rondel v. Worsley* [1969] 1 A.C. 191, at 247.

63 id., p. 274. See Pannick, op. cit., n. 54, ch. 4.

64 See Blake and Ashworth, op. cit., n. 51, p. 26.

65 In *Re G. Mayor Cooke* (1889) 5 T.L.R. 407, at 408.

66 *R. v. Ensor* [1989] 1 W.L.R. 497, 502.

67 Pannick, op. cit., n. 54, p. 92.

68 General Council of the Bar, op. cit., n. 17, para. 202.

69 See discussion by Pannick, op. cit., n. 54, pp. 107–12.

70 Luban, op. cit., n. 52, p. 1762.

might fairly be claimed to be misleading has normally assumed a narrow focus. Apart from the obvious example of tendering evidence which is known to be false, it has concentrated on deliberate attempts to mislead the court about particular facts relevant to the case by failing to disclose material facts.⁷¹

But a court and particularly a jury may be seriously misled in other ways as well. It is suggested that some of the tactics used in rape trials as part of the strategy of discrediting the complainant do involve some attempt to mislead the court. First, the tactic of maligning the complainant's behaviour is calculated to mislead because it relies on the 'sealed world of the courtroom',⁷² to 'filter out some of the surrounding reality',⁷³ and to provide a skewed impression of existing cultural and social mores. Rock's observations about Crown Court trials seem to apply with particular force to rape cases:

There remained an ineluctable and pervasive sense that the world of trials was not quite firmly anchored, that barristers worked professionally to beguile their audience, that things could sometimes be other than they seemed and that on occasion social reality itself was in suspense.⁷⁴

In rape trials, codes of behaviour, which have lost their force, are presented as taken-for-granted norms so that women, who will frequently fall foul of them, are condemned. Today women work, play, drink, and travel with men who are not their partners and visit their homes. Failing to note this or to suggest otherwise is to misrepresent the circumstances of everyday living and consequently to allocate blame where none is due.

The tactic of maligning the complainant's clothes similarly gives a skewed impression of clothing norms so that what may be regulation attire at, say, a teenagers' disco is portrayed as outlandish and unusually inviting. The clothing of the complainant is silently and disapprovingly juxtaposed to that of the lawyers, particularly female lawyers, in the courtroom, whose bodies are chastely concealed in long robes. Barristers become figures of virtue, complainants figures of vice. Therein lies a deception for it is the robes which are outlandish and the dress of the complainant which is commonplace.

The use of sexual history evidence misrepresents the relaxed sexual mores of our time in which it is common for women as well as men to have, in the course of a lifetime, a number of sexual partners and in which sexual relations before marriage are almost universally approved.⁷⁵ A sexual code is assumed to which a majority no longer adheres.⁷⁶

71 See, for example, *Meek v. Fleming* [1961] 2 Q.B. 366; *Abraham v. Abraham and Harding* (1919) 12 O.L.T. 672, discussed by Pannick, op. cit., n. 54, p. 111.

72 P. Rock, *The Social World of an English Crown Court* (1993) 34.

73 H. Young, 'An Indictment of Justice' *Guardian*, 1 February 1992, quoted in Rock, id.

74 Rock, id., p. 94.

75 See A.M. Johnson, J. Wadsworth, K. Wellings, J. Field, and S. Bradshaw, *Sexual Attitudes and Lifestyles* (1994) 236.

76 A suggestion by the defence that the complainant has a motive to lie where there is no evidence of this would also be a way of misleading the court by setting up a false trail. For a contrary view, see Luban, op. cit., n. 52, p. 1760.

(b) Cross-examination of victims which fails to promote the accurate resolution of any relevant issue in the case.

George Wright calls into question what he describes as the abuse of trial witnesses on cross-examination. His principle example of this is a 'humiliating or degrading cross-examination of the victim where the attorney knows that the effects of that cross-examination are unlikely to significantly promote the accurate resolution of any relevant issue in the case.'⁷⁷ He suggests that for 'moral reasons' the institutionally permitted conduct of the advocate should change and that advocates are morally blameworthy for participating in such abusive conduct.⁷⁸ The specific moral rights of witnesses must count against abusive or misleading cross-examinations and the duties dictated by an adversary system. Blake and Ashworth also consider that advocates should look more to the impact of their cross-examination on victims since it can be profoundly disturbing.⁷⁹

Cross-examination based on maligning the complainant's behaviour, clothing or sexual past does not promote the accurate resolution of any relevant issue in the case. The issue in a rape case will be almost invariably, whether or not the complainant consented to sexual intercourse with the defendant. Whether or not she behaved 'foolishly', wore a short skirt or had previous lovers does not shed light on whether she consented to sexual intercourse with him. Cross-examination on some of these matters may however be profoundly humiliating and distressing for her. If the defence contention is that the defendant believed that the complainant was consenting because of her behaviour, clothing or past sexual conduct then the defence should make it clear that it is on that basis that cross-examination is taking place.⁸⁰ However, there is much to be said for overruling the decision in *DPP v. Morgan* which permits such arguments, as has been done elsewhere.⁸¹

(c) Dirty tricks

Luban would draw the line at what he calls 'dirty tricks'.⁸² These would include what he describes as 'digging up the dirt on the prosecutor'.⁸³ As examples of this he mentions obtaining adjournments in the hope that key

77 R.G. Wright, 'Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character' (1994-5) 83 *Kentucky Law J.* 801, at 802.

78 *id.*, pp. 820-1.

79 Blake and Ashworth, *op. cit.*, n. 51, p. 30.

80 Since such a defence may be thought to run counter to a defence of consent, the advocate is unlikely to wish to do this.

81 See New Zealand Crimes Amendment Act (No.3) 1985, s. 2. The Morgan rule does not apply in any of the code states of Australia.

82 Luban, *op. cit.*, n. 52, p. 1761.

83 *id.*

witnesses would either forget or die, the use of private investigators to scrutinize the private life of rape complainants or appealing to a jury's racism.⁸⁴ He feels that lawyers using dirty tricks in cases where the crime 'has had real victims . . . deserve moral censure'.⁸⁵ Tactics that involve dredging up the victim's past behaviour, lifestyle or sexual habits can often be an exercise in digging the dirt on the complainant. Together with impugning her clothing, they are also sexist because they rely on a world view which excludes and disqualifies women's sexuality and women's interests and suggests that women who behave or dress in certain ways should be beyond the scope of the law's protection. The Code states:

A practising barrister must not, in relation to any other person . . . on grounds of race, ethnic origin, sex, sexual orientation, marital status, disability, religion . . . treat the person for any purposes less favourably than he would treat other such persons.⁸⁶

The precise scope of this prohibition is unclear but it would appear to place a ban on defending and prosecuting cases in a way which relies upon sexist or racist assumptions or stereotypes.

If the conduct of rape trials is to change, it will not be sufficient, as is often proposed, to exhort the judges to rein in barristers, or to pass further and better legislation controlling the types of questions that can be asked.⁸⁷ It is to be regretted that the Home Office report glossed over the ethical issues involved in defending rape cases. It recommended that 'the Lord Chief Justice be invited to consider issuing a Practice Direction giving guidance to barristers and judges on the need to disallow unnecessarily aggressive and/or inappropriate cross-examination.'⁸⁸ It made no attempt however to discuss what amounts to an inappropriate cross-examination. Unless careful consideration is given to the ethical issues involved, a practice direction is unlikely to be helpful. For so long as barristers feel that it is in accordance with their duties to their client to employ any strategy which might be effective in producing an acquittal, there is unlikely to be much of an improvement.

The Code does place limits on barristers' behaviour and these limits could be said to be of direct application to the type of defences used in rape cases. However the Code does not speak sufficiently clearly and unequivocally to challenge practice which is long established and considered, by barristers at least, to be justifiable. Moreover, as Blake and Ashworth point out, codes can be neutralized when they conflict with a strong culture.⁸⁹ Where the

84 *id.*

85 *id.*, p. 1765. A further example of dirty tricks could be said to be the asking of questions which are bound to be ruled as inadmissible in order to plant an impression on the court, compare Blake and Ashworth, *op. cit.*, n. 51, p. 30.

86 General Council of the Bar, *op. cit.*, n. 17, para. 204.

87 See, below, under the heading '3. *Sexual history evidence*'.

88 Home Office, *op. cit.*, n. 13, para. 8.53.

89 Blake and Ashworth, *op. cit.*, n. 51, p. 32.

limits lie and where the interests of the state should take precedence over those of the client is what may in practice be difficult for the barrister to determine in any given situation. Whilst the Code offers a framework, its provisions need to be fleshed out. Specific provisions dealing with sexual assault cases are ideally required. Training for barristers which looks at the ethics of advocacy in this context is also essential.

3. *Sexual history evidence*

The study illustrates that sexual history evidence was regarded by most of the barristers as an important defence tool. They were also confident that if they framed their argument carefully they would be able to convince the judge to permit it. The Home Office report was satisfied that there was ‘overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose’.⁹⁰ It wisely recommended that ‘the law should be amended to set out clearly when evidence on a complainant’s previous sexual history may be admitted in evidence’.⁹¹ The YJCEA seeks to implement this proposal with a more structured approach than that which presently applies.⁹² It will prohibit the use of sexual history evidence in all cases save those which are specifically designated. There are four exceptions to the general rule of prohibition. Judges will be able to admit sexual history evidence where consent is not the issue, as where the defence argues mistaken belief in consent; where the evidence relates to sexual behaviour which is alleged to have taken place ‘at or about the same time as the subject matter of the charge’; in similar fact style situations; and to contradict sexual history evidence adduced by the prosecution. There must be concern that the exceptional categories have been drawn too broadly and should permit the defence ample scope to come within one or other of them. Certainly, unless the Morgan rule is reversed so that a belief in consent is required to be reasonable as well as honest, it would seem that the legislation would frequently permit sexual history to be introduced. This study indicates that the defence will make use of every opportunity which the law provides to ensure that sexual history evidence is admitted. Indeed, since the legislation sets out particular categories in which such evidence will be permitted, a barrister will be obliged to consider whether his client’s case can be said to fall within any one of them and may be encouraged to look for ways to show that it does.

⁹⁰ Home Office, *op. cit.*, n. 13, para. 9.64.

⁹¹ *id.*, para. 9.72.

⁹² Youth and Criminal Evidence Act, ss. 41–3. For criticism of these provisions and of the Home Office for relying *inter alia* on the findings of the present study to justify the need for them, see A. Geddes, ‘The Exclusion of Evidence Relating to a Complainant’s Sexual Behaviour in Sexual Offence Trials’ (1999) 149 *New Law J.* 1084.

CONCLUSION

In its report, the Home Office put forward proposals for alleviating the plight of victims in rape trials.⁹³ Many of these have been implemented in the Youth and Criminal Evidence Act 1999. The report did not, however, attempt to grapple with the prejudiced assumptions which bedevil the rape trial, neither did it seek to challenge the ethics of advocacy in rape cases. Research of the type that has been undertaken here does not lend itself to sweeping statements and conclusions but it does suggest that, without further examination of the practice of advocacy in rape trials and without training which fundamentally challenges existing attitudes of both female and male barristers, it is unlikely that the experience of vulnerable witnesses in rape trials will be substantially improved.

93 Home Office, *op. cit.*, n. 13, ch. 9.