EXPERT EVIDENCE TO COUNTERACT JURY MISCONCEPTIONS ABOUT CONSENT IN SEXUAL ASSAULT CASES: FAILURES AND LESSONS LEARNED

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This century has seen dramatic changes in the way in which sexual offences, particularly against children, are prosecuted in Australia, Canada, New Zealand, the United Kingdom and the United States of America. These jurisdictions have acknowledged the potential of myths and misconceptions about how a victim will behave, both during and after a sexual assault, to exert an undue influence on jurors. Expert evidence to educate jurors about common rape myths that apply to issues of consent has been used to redress this issue. However, such expert evidence poses significant challenges for the lawyers and experts. This article explores the effectiveness of educative expert evidence through analysis of an illustrative contemporary Australian child sexual assault case where the authors interviewed some of the jurors and other trial participants about their perceptions of the expert evidence. Practical suggestions to improve educative expert evidence are identified and explained.

I INTRODUCTION[1]

When Saxon Mullins was 18 years old, she went into the city to go nightclubbing with her girlfriends. By 4am, she was drunk and met Luke Lazarus on the dark dance floor. Luke posed as the owner of the Kings Cross nightclub and offered to take her to the VIP room. Instead he took her by the hand, led her out to a dark alley behind the club and took her virginity, by penetrating her anally. Saxon explained that 'the few things he said to me before we went outside were just nice, calm, normal things and then all of a sudden, after I tried to leave, it was, "Put your fucking hands on the wall", it wasn't, "No, please, stay with me"'.[2] Saxon did not fight Luke off or try to run away and she did not tell him to stop.

Saxon went to the police the next day. Luke was charged with rape and convicted by a jury. He won a retrial on appeal. The second trial was heard by a judge sitting

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1 Warning for readers; this article contains descriptions of sexual assaults.

2 'I Am That Girl', *Four Corners* (Australian Broadcasting Corporation, 2018) 0:11:37–0:11:52 <http://www.abc.net.au/4corners/i-am-that-girl/9736126>. We acknowledge that the complainant did not choose to have her private experience of sexual assault scrutinised/publicised for legal or academic purposes, and hope her story is instrumental in improving justice for others.

alone. Judge Tupman acquitted the defendant, essentially on the basis that Luke had reasonable grounds to believe Saxon was consenting.[3] As the trial judge said: 'As I have found she did not say "stop" or "no". She did not take any physical action to move away from the intercourse'.[4] Judge Tupman asserted that notions of 'contemporary morality' informed her as to how a victim is expected to convey her non-consent. The prosecution did not lead any expert evidence about common (mis)conceptions about consent in sexual assault. While the trial judge concluded that 'the complainant in her own mind, did not consent to the anal sexual intercourse that occurred' she was persuaded by the fact that 'the complainant did nothing physical to prevent the sexual intercourse from continuing'.[5] In this regard, Judge Tupman's reasons for decision disclosed that the judge relied upon erroneous but common sexual assault myths that genuine victims of sexual assault will say 'stop' or 'no' and will attempt to escape or fight back.[6] Myths reflect views about how the world works, and what typical behaviour is. These views are unsupported by or contradicted by empirical research on that topic.

It is unusual for a trial judge alone to render a verdict in a sexual assault trial in Australia, as such trials are usually heard by juries who are not required to disclose their reasoning.[7] The judgment in *R v Lazarus* ('*Lazarus*') highlighted that the law in New South Wales ('NSW') permits judges, juries and defendants to rely on rape myths, even when those false beliefs are acknowledged by the community to be outdated and morally wrong.[8] Community outrage in response to the judge's reasoning reflected a contrary view, more in line with research on sexual assault myths.[9]

In response to the community reaction to the *Lazarus* judgment, the NSW Law Reform Commission was asked to review and report on consent and knowledge of consent in relation to sexual assault offences.[10] At least three of the written submissions

3 Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* Cases' (2019) 31(1) *Current Issues in Criminal Justice* 24, 31.

4 *R v Lazarus* (District Court of New South Wales, Judge Tupman, 4 May 2017) 73.

5 Ibid 37, 70.

6 Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296 ('Persistent Narratives of Force and Resistance'); Donald A Dripps, 'Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent' (1992) 92(7) *Columbia Law Review* 1780; Julia Quilter, 'From Raptus to Rape: A History of the "Requirements" of Resistance and Injury' (2015) 2 *Law & History* 89; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 46.

7 In New South Wales, either the accused or the prosecution may seek a trial by judge alone in the interests of justice. If the accused wishes to avoid a jury trial the prosecution must consent or a 'trial by judge order' may be sought under s 132 of the *Criminal Procedure Act 1986* (NSW). The court may refuse the application on grounds that a factual issue requires the application of objective community standards: see *Criminal Procedure Act 1986* (NSW) s 132.

8 See, eg, Clementine Ford, 'Why the Acquittal of Luke Lazarus Goes to the Heart of Rape Culture in Australia', *Sydney Morning Herald* (online, 27 July 2017) <https://www.smh.com.au/lifestyle/why-the-acquittal-of-luke-lazarus-goes-to-the-heart-of-rape-culture-in-australia-20170727-gxjvvp.html>; Candace Sutton, 'Lazarus: "She Wanted to Be There"', *The Chronicle* (online, 17 May 2018) <https://www.thechronicle.com.au/news/luke-lazarus-says-woman-he-was-acquitted-of-raping/3417722/>.

9 The Attorney-General of NSW initiated the review into consent in relation to sexual offences immediately following the media and community reaction to a current affairs *television* program which featured the story of Saxon Mullins: see above n 1; Louise Milligan and Lucy Carter, 'NSW Attorney-General Calls for Review of Sexual Consent Laws Following Four Corners Program', *ABC News* (online, 8 May 2018) <https://www.abc.net.au/news/2018-05-08/nsw-attorney-general-calls-for-review-of-sexual-consent-laws/9734988>.

10 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Terms of Reference, 3 May 2018). <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/TOR.aspx>.

received in response to the reference expressed concern that jurors, like the trial judge in the *Lazarus* trial, rely on their own misunderstandings of rape, in determining whether a complainant was consenting and/or whether the accused believed that the complainant was consenting.[11] For example, one academic pointed out that there is 'no legislative restriction that prevents rape myths … from being taken into account by fact finders'.[12] Rape and Domestic Violence Services Australia ('RDVSA') observed that juries 'remain free to conclude that a complainant's style of dress, consumption of alcohol, flirtatious behaviour or lack of resistance constituted "reasonable grounds" for a belief in consent'.[13] The RDVSA recommended that if the jury remains as the fact finder in sexual assault trials 'reforms should be implemented to overcome the influence of rape myths and victim-blaming attitudes on juror decision-making. This may include improved processes in relation to jury selection, expert evidence and/or judicial direction.'[14]

Extensive research over the last 40 years has identified numerous false assumptions commonly made by citizens in relation to sexual offending.[15] Opinion surveys and experimental jury simulation studies have documented errors in community and juror knowledge and expectations about child sexual assault evidence.[16] The latter have demonstrated how endorsement of those myths impacts the assessment of the credibility of complainants and trial outcomes.[17] There is genuine concern that rape myths too often

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The review is considering sexual assault research and expert opinion, as well as community views, and developments in law, policy and practice in Australia and internationally.

11 Rachael Burgin, Submission No 72 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (29 June 2018) <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO72.pdf> ('Submission No 72'); Arlie Loughnan et al, Submission No 65 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (28 June 2018) 8–9 <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO65.pdf>; Rape & Domestic Violence Services Australia, Submission No 88 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (29 June 2018) 33–35 [9.3]–[9.9] <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO88.pdf>.

12 Rape & Domestic Violence Services Australia (n 10) 12 [6.6] quoting Annie Cossins, 'Submission to New South Wales Law Reform Commission Review of Consent in Relation to Sexual Offences' (Draft Submission, 2018).

13 Rape & Domestic Violence Services Australia (n 10) 12 [6.6].

14 Ibid 43 recommendation 16.

15 See, eg, Susan A Basow and Alexandra Minieri, '"You Owe Me": Effects of Date Cost, Who Pays, Participant Gender, and Rape Myth Beliefs on Perceptions of Rape' (2011) 26(3) *Journal of Interpersonal Violence* 479; Martha R Burt, 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217; Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2005); Kimberly A Lonsway and Louise F Fitzgerald, 'Rape Myths in Review' (1994) 18(2) *Psychology of Women Quarterly* 133; Anastasia Powell et al, 'Meanings of "Sex" and "Consent"' (2013) 22(2) *Griffith Law Review* 456; Eliana Suarez and Tahany M Gadalla, 'Stop Blaming the Victim: A Meta-Analysis on Rape Myths' (2010) 25(11) *Journal of Interpersonal Violence* 2010.

16 Jane Goodman-Delahunty, Natalie Martschuk and Annie Cossins, 'What Australian Jurors Know and Do Not Know about Evidence of Child Sexual Abuse' (2017) 41(2) *Criminal Law Journal* 86, 88 ('What Australian Jurors Know and Do Not Know').

17 See Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202 ('Reacting to Rape'); Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22(2) *Canadian Journal of Women and the Law* 397; Emily Finch and Vanessa E Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45(1) *British Journal of Criminology* 25; Anne-Marie Wall and Regina A Schuller, 'Sexual Assault and Defendant/Victim Intoxication: Jurors' Perceptions of Guilt' (2000) 30(2) *Journal of Applied Social Psychology* 253; Jane Goodman-Delahunty, Natalie Martschuk and Annie Cossins, 'Validation of the Child Sexual Abuse

influence jury decision-making, as they did the trial judge in *Lazarus*.[18] In addition, contemporary research has shown that common cues of sexual consent are intermingled with rape myths in cases of acquaintance rape.[19] Sexual scripts or schema are cognitive models that guide and are used to evaluate social and sexual interactions.[20] Deliberating jurors may rely on sexual scripts to resolve perceived ambiguity about consent in sexual assault trials.

Whether or not real jurors are unduly influenced by common myths and misconceptions about sexual assault when performing their fact-finding role is unknown. This is because jury secrecy rules prohibit researchers from observing and accessing real jurors to test this issue in a comprehensive empirical way. However, the fact that Judge Tupman in her exercise of her fact-finding role relied upon sexual assault myths and misconceptions, suggests that legal professionals and fact finders in many sexual assault cases, including jurors, are susceptible to the same misconceptions. The authors conducted a multi-jury, multi-jurisdictional study in which they were given rare access to interview legal professionals and actual jurors about their perceptions of expert evidence presented in a sample of 55 Australian criminal jury trials. The reactions of these professionals and juries to the use of expert evidence intended to counteract these myths and misconceptions gives us some modest, but unique, insights into the issue.

Legal authorities in Australia,[21] Canada,[22] New Zealand,[23] the United Kingdom[24] and the United States of America[25] accept that sexual assault myths and misconceptions have a potential to exert an undue influence on triers of fact when deliberating about a sexual assault case. To avoid this undesirable influence, courts rely on traditional processes to educate juries so that they can better assess the evidence in a sexual assault trial on a sound factual basis. The two primary mechanisms to counteract the undue influence of sexual assault myths are expert evidence and judicial directions.[26] Over the last decade,

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Knowledge Questionnaire' (2017) 23(4) *Psychology, Crime and Law* 391 ('Validation of the Child Sexual Abuse Knowledge Questionnaire').

18 Burgin, 'Submission No 72' (n 10); Olivia Smith and Tina Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social and Legal Studies* 441; Powell et al (n 14); Ellison and Munro, 'Reacting to Rape' (n 16); Lucinda Vandervort, 'Sexual Consent as Voluntary Agreement: Tales of "Seduction" or Questions of Law?' (2013) 16(1) *New Criminal Law Review* 143.

19 Shannon M Stuart, Blake M McKimmie and Barbara M Masser, 'Rape Perpetrators on Trial: The Effect of Sexual Assault-Related Schemas on Attributions of Blame' (2019) 34(2) *Journal of Interpersonal Violence* 310, 328–9.

20 William Simon and John H Gagnon, 'Sexual Scripts: Permanence and Change' (1986) 15(2) *Archives of Sexual Behavior* 97; 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(3) *Social and Legal Studies* 291 ('Of "Normal Sex" and "Real Rape"'); Burgin, 'Persistent Narratives of Force and Resistance' (n 5).

21 For example, the Victorian judiciary have developed jury directions that specifically enable them to address this concern with jurors: *Jury Directions Act 2015* (Vic) ss 51–3.

22 For example, see obiter dicta in *R v Seaboyer* [1991] 2 SCR 577, 647–65 (L'Heureux-Dubé J) and *R v Ewanchuk* [1999] 1 SCR 330, 369–70 (L'Heureux-Dubé J).

23 *Kohai v R* [2015] 1 NZLR 833, 840–1 (Arnold J for the Court); *DH v R* [2015] 1 NZLR 625, 636–7 (O'Regan J for the Court).

24 Judicial Studies Board of England and Wales, *Crown Court Bench Book: Directing the Jury* (2010) 353 [4]; Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims: Justice for Victims of Rape* (Consultation Paper, March 2006) 40–1.

25 Twenty-five American states have admitted educative evidence about rape trauma syndrome, and four more have admitted as evidence general information about the effects of rape on a victim: Arthur H Garrison, 'Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials' (2000) 23 *American Journal of Trial Advocacy* 591, 629.

26 In NSW, guidelines for judicial direction are outlined in Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2007) [5-1566]. Other jurisdictions allow or recommend jury directions through other

counterintuitive expert evidence has been permitted to educate the jury as to how complainants vary in their behaviour both during and following a sexual assault.[27] Legal practitioners and academics have noted that this provision remains underused, despite the widely acknowledged need for this type of educative intervention.[28] This article focuses on the effectiveness of this type of educative expert evidence.

We contend that when rape myths play a role in jury decision-making, expert evidence needs to be carefully prepared and presented if it is going to have the desired effect of assisting the jurors to understand the impact that rape myths might have on their decision-making. In support of this contention, we have discussed the current literature on this topic in the context of observations we have made after surveying and interviewing real jurors from a recent child sexual assault trial, in which the defendant claimed the sexual contact was consensual.[29] This 2012 trial involved counterintuitive expert evidence from two expert witnesses that was intended to redress common child sexual assault misconceptions. The expert evidence was deemed a failure by the trial judge, prosecutor and defence counsel who were all interviewed following the trial. Reasons for the failure are instructive and are the topic of this article.

This article is presented in seven parts. Following this Introduction, an overview of the case study is presented in Part II. The perceptions of the expert evidence of five of the actual jurors sitting on that trial are documented in Part III. Next, Part IV focuses on the jurors' perceptions of the expert evidence that specifically addressed the issues of consent and rape myths, and analyses how effective the counterintuitive expert evidence was in addressing those misconceptions. The perceptions of the same expert evidence by the lawyers and judge are summarised in Part V. Part VI records the two experts' views of their respective experiences in that trial. We chose this case from a larger study of 55 Australian criminal jury trials because this was the only case that featured an expert offering counterintuitive evidence to the jury. Suggestions for improving the effectiveness of such expert evidence are identified and explained in the conclusion, Part VII.

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legislation: see, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 72; *Criminal Code Act 1983* (NT) s 192A; *Evidence Act 1929* (SA) s 34N; *Jury Directions Act 2015* (Vic) ss 46–7. See further Jane Goodman-Delahunty, Anne Cossins and Kate O'Brien, 'A Comparison of Expert Evidence and Judicial Directions to Counter Misconceptions in Child Sexual Abuse Trials' (2011) 44(2) *Australian and New Zealand Journal of Criminology* 196 ('Comparison of Expert Evidence and Judicial Directions'); Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?' (2016) 39(2) *University of New South Wales Law Journal* 750; Marc A Klippenstine and Regina Schuller, 'Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim over Time' (2012) 18(1) *Psychology, Crime and Law* 79. See also Law Commission, *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) 196 [12.2]–[12.4].

27 Expert evidence is enabled in NSW, for example, by the *Evidence Act 1995* (NSW) s 177 and in Victoria by the *Criminal Procedure Act 2009* (Vic) s 388 and the *Evidence Act 2008* (Vic) s 79. See also Anne Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15(1) *Psychiatry, Psychology and Law* 153, 163–5 ('Children, Sexual Abuse and Suggestibility'); Fred Seymour et al, 'Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand' (2014) 21(4) *Psychiatry, Psychology and Law* 511; Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) 119 [6.65].

28 Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26(1) *Current Issues in Criminal Justice* 55, 68; Eunro Lee et al, 'Special Measures in Child Sexual Abuse Trials: Criminal Justice Practitioners' Experiences and Views' (2018) 18(2) *Queensland University of Technology Law Review* 2; *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report Parts VII–X and Appendices* (Final Report, 2017) 154.

29 The authors de-identified and simplified the facts to preserve the anonymity of the parties. All jurors and experts interviewed are described as men and all lawyers and lay witnesses as women, regardless of their true gender.

II CASE STUDY

The adolescent complainant and the much older defendant were acquaintances; the defendant was the father of one of the complainant's friends. As the complainant[30] was leaving her friend's house, the defendant offered to drive her to see another friend. She alleged that in the car, he forced her to perform oral sex on him and digitally raped her. Initially, she fought hard to resist his sexual advances. He pulled her hair and caused her to vomit. She cracked the windscreen in the struggle, and drew blood from her attacker. He was a physically large man. She eventually submitted to the assault as she was unable to escape or resist his aggression. The defendant asserted that the complainant flirted and came onto him. He claimed they had wild, rough sex in the car for two hours. The complainant's behaviour was integral to the defence contention that the sexual contact was consensual.

When the complainant arrived home, she was laughing and crying hysterically. She immediately confided in a friend and then her mother, who took her to hospital within a few hours of the incident. At the hospital, a doctor attended to her and conducted a forensic examination. The complainant became teary during the sensitive times of the history taking. She submitted to an external examination but declined an internal examination. The complainant showed the doctor where the bruises, bloodstains and vomit were on her body and clothes and explained that they were caused by her struggle with the defendant. The forensic doctor observed two bruises on the complainant's body. Swabs of the clothes were taken. The clothes were given to the police but results of the swabs and forensic testing were not presented at trial.

The defendant was charged with three counts of rape, indecent assault and detention for the purpose of sexual penetration. The trial proceeded before a senior judge. Both the prosecutor and defence counsel were experienced advocates. Five witnesses gave evidence for the prosecution. The complainant's evidence was given remotely (she appeared on a screen in the courtroom). Next, the two people in whom the complainant confided immediately after the incident gave their evidence. This was followed by video-linked evidence of the forensic doctor who attended the complainant at the hospital. The doctor's evidence in relation to the reported injuries was as follows:

Prosecutor:	How did she appear to you, when she arrived at the – at your surgery?
Doctor:	Um, she appeared tired. She had smudged make-up around her eyes and her cheeks and she – but despite the tiredness, she – I did note that she was able to provide a um, a clear history – an articulate history. She became a bit – she became teary during the sensitive times of the – of the history taking um, and she used her friend in the room for support … she showed me some light coloured stains over her left and right thigh areas on her pants.
Prosecutor:	What if anything did she say about those stains?
Doctor:	She told me that those were vomit stains.
Prosecutor:	Can you tell us please what markings you observed, if any, on her body?
Doctor:	Yes, I observed – I documented three markings. The first one was a four centimetre by one centimetre grey-brown elongated bruise over the side of her right abdomen. She said that this was a result of the struggle, but she couldn't recall the exact mechanism. The second

30 The complainant was under 18 years of age at the time of the assault. Her precise age is undisclosed to safeguard her identity.

> marking was a two centimetre by .5 of a centimetre vertical linear abrasion, with overlying scab over the centre of her right shin. She told me that this was a shaving accident, not – unrelated to this incident. Um, the third marking was a two centimetre by 1.5 centimetre oval shaped red mark on the right shin, just below injury No.2 and she said that this was the result of a struggle with the defendant during the alleged assault, but could not recall the exact mechanism.
>
> Prosecutor: What opinion, if any, are you able to express in relation to those injuries which the complainant attributed to the struggle?
>
> Doctor: Um, the injuries are non-specific. I can't – they may have occurred as a result of blunt force trauma during this – this – the – during dragging or kicking or part of the alleged assault, but they may have also occurred from other mechanisms.

The forensic doctor noted that there may or may not be evidence of trauma or injury because of the elastic nature of the vaginal tissues.

During cross-examination, defence counsel suggested to the doctor that it would have been highly relevant to have asked the complainant questions such as how many fingers the defendant used when he digitally penetrated her.

> Doctor: Ah, I think it – in the circumstances – in the context of the examination in a late – it was very um – in the early hours of the morning, it – I think that I – I asked – I tried to get a detailed history but I didn't actually push the small details because I know that – I often know that the story will be given to someone else.
>
> Defence counsel: … What I'm putting to you Doctor is it's really not a small detail …
>
> Doctor: Sorry, yes I agree, I agree, I shouldn't have said small, I meant, sorry, more detailed questions I should say.

During examination-in-chief, the forensic doctor reported that the complainant refused to consent to an internal examination. In re-examination, the doctor was asked to explain why he did not encourage the victim to undergo a genital examination:

> Doctor: Because um, for many reasons, firstly the ultimate – ultimately it's always a patient's choice whether or not they wish to go ahead with it. Secondly, I didn't feel that it was – I didn't feel that it was such a – sorry, a critical aspect of the assessment.
>
> Prosecutor: Let me just ask you why you didn't feel it was such a critical aspect of the assessment?
>
> Doctor: Because whether or not I find injuries does not mean that there was or wasn't a sexual assault that took place, so finding an injury is useful but sometimes is non-specific. Not finding an injury is – doesn't mean that there wasn't an assault and so to me …

A senior psychiatrist was the last witness for the prosecution. The psychiatrist had never met the complainant but was called to educate the jury about common misconceptions about how victims of a sexual assault might behave after the assault. His evidence only addressed two common myths – the fact that victims commonly laugh and cry hysterically post-sexual assault and that victims can resist internal medical examinations as they do not want to be violated again. The defence barrister chose not to cross-examine the psychiatrist.

The defendant did not give evidence. The defence case theory was explained by his barrister:

> I think the critical issues were … was she flirting with him or was he flirting with her? Did she ask him (which would be unusual) to drive her, as opposed to did he ask her to come with him for the drive? There was a scratch on his face and there was a broken car windscreen, which, at face value, would be more consistent with it, perhaps, being non-

> consensual. But we were arguing that that was consistent with her energetic involvement and instigation of sexual behaviour.

The trial took seven days and the jury deliberated for two hours. The jury acquitted the defendant of all charges.

Immediately following the verdict, jurors were invited to complete a written post-trial questionnaire and to participate in an anonymous interview about their perceptions of the expert witnesses. The jurors' perceptions discussed below are drawn from both their written and oral responses.[31]

III JURORS' GENERAL PERCEPTIONS OF THE EXPERT EVIDENCE

Of the eleven jurors that deliberated to a verdict, five completed a survey (45% response rate). The respondents were comprised of two men and three women ranging in age from 27 to 76 years old. Four of those jurors provided more detailed and nuanced perceptions in one on one interviews conducted as soon as possible after the verdict. During the interviews, jurors often spoke in the plural (ie 'our opinion') which suggests that the jury was not divided in their perceptions of the evidence. The short deliberation time of two hours before the unanimous 'not guilty' verdict for all five charges supports this impression.

A Jurors' Perceptions of the Forensic Medical Doctor

Four of the jurors rated the forensic doctor as a reasonably good witness, in terms of credibility and clarity of expression. However, the jurors perceived this expert as inexperienced and poorly prepared for the court appearance. When Juror 4 was asked how the witness handled cross-examination, this juror said: 'Not terribly well. He was clearly under a bit of pressure and … I think his records were a little inadequate. He referred to his records a lot as if he hadn't possibly done the homework on the case before he was interviewed'.

All five jurors thought the forensic doctor was inexperienced in terms of conducting a forensic medical examination of the complainant. As Juror 3 explained, 'he hadn't had a whole lot of experience so, "expert" is probably not a good word'.

When looking for overt signs of consent, the jurors emphasised the absence of forensic and medical evidence to corroborate the complainant's version of events. The jurors identified two issues that the forensic doctor inadequately addressed as part of his forensic duties. First, the doctor failed to fully inform the complainant of the repercussions of her decision not to have an internal examination. Juror 2 thought that the forensic doctor 'should have taken more thorough notes on the night when he had seen the victim' and 'he should have made it clear to the victim that it is very hard to prove a rape in court if the victim does not allow a full examination'. Juror 1 said: 'He testified about the examination. He had a form that he followed but the victim wasn't prepared to have a full examination and we all, the jurors, thought later that he should have pushed harder for it'.

31 In analysing this case, we also relied on transcripts of interviews of prosecution and defence counsel, the presiding judge, the examining medical officer and the psychiatrist who gave expert evidence. Part of the trial transcript was available to the research team. The first author attended and observed the trial.

Second, the doctor failed to gather evidence which was perceived by the jury as relevant to whether or not the sexual relations were consensual. Juror 4 was highly critical of the lack of thorough investigation by the forensic doctor: 'Swabs and photos of hands and other significant bodily areas and clothes should have been taken … More thorough questions and answers should have been taken down by the doctor'. Juror 3 observed, 'You know they, they could have swung it either way. Those things, if she had have had [sic] the skin under the nails, the swabs of the palms where she supposedly vomited and there was blood in it. Um, her clothes, you know, if she had you know, blood and vomit on her clothes, none of this was … she said she had marks on her pants but yep, okay then, what were the marks? Was it mud, was it blood, was it vomit?' Juror 1 was dissatisfied with this evidence because the expert did not explain the injuries adequately and was 'not prepared to make a definitive answer as to likelihood of force (or not) being applied' by the defendant.

It was evident to the jurors that this witness was not adequately prepared and had not come to terms with the importance of his evidence to the prosecution case. As Juror 4 said, 'he didn't give us the impression that he understood the serious nature of what had occurred'. Juror 5 agreed with Juror 4: 'He did not seem to understand his importance to the … future case as a possible witness … he seemed unable to explain why the claimant would not consent to examination'.

B Jurors' Perceptions of the Psychiatrist

All jurors found the psychiatrist highly credible and trustworthy. This expert performed extremely well in court. However, whilst two of the five jurors found this evidence helpful as it 'gave additional insight into how different persons react to traumatic situations' (Juror 2), the other three jurors did not perceive that this expert evidence assisted them in their task. Juror 3 thought that the psychiatrist's presentation was beyond criticism, but he perceived that it 'didn't really change any thoughts as to the case'. Juror 4 found the evidence from the psychiatrist annoying: 'He went around the mulberry bush in a way, and he didn't draw any conclusions … He talked about hysteria and privacy and not wanting to be touched, and he talked about how some people will tell everybody, and some people won't tell a soul. So he went across the whole gamut of possibilities'. This juror was annoyed that this expert gave evidence about matters that were not relevant to the facts of the particular case. For example, this complainant reported the crime immediately whereas the expert addressed the jury about the fact that it is common for victims of rape to delay reporting of the crime. 'The expert testimony was actually a total waste of time' according to Juror 3 who explained:

> What did we learn? Nothing. Because, what he said, that she should have been doing, she didn't do. So does that make her guilty or not guilty? Or does that make her lying or telling the truth? … The other [issue] was giving [evidence as to] what her state of mind could have been after a rape. He never spoke to this person, so he didn't [know] … So to us it was, it wasn't really relevant. We would have been better off having someone who'd actually spoken to her. You know, knew what her demeanour was at the time, but it was just a generalisation of what you could expect a victim to be like after an attack.

All the jurors recorded their disappointment that this expert had not spoken directly to the complainant in order to provide more to the jury than general statements. In prior jury simulation research, an intervention in the form of a clinical psychological expert witness who met with the complainant was more effective in reducing jurors' misconceptions than the same evidence provided by an expert described as a research

psychologist who did not meet with complainant, even though the evidence given by both was identical.[32]

The jurors wanted the expert to confine himself to explaining rape misconceptions relevant to the facts of the case at hand and not, as he did, give them a general education about rape misconceptions.

IV JUROR PERCEPTIONS OF THE EXPERT EVIDENCE ADDRESSING CONSENT AND RAPE MYTHS

Research has shown that jurors expect that a sexual assault complainant will demonstrate overt signs of non-consent in verbal and non-verbal ways, such as saying 'no', and resisting use of force by the defendant.[33] The defence in the case study relied upon these and several other common sexual consent myths to establish that the prosecution failed to prove beyond reasonable doubt that there was no consent: (1) a flirtatious adolescent girl is likely to initiate sex; (2) a failure of the complainant to flee or fight back against the defendant; (3) an absence of physical injury; (4) an absence of victim distress following the incident; (5) a refusal to co-operate with the investigating authorities; (6) an adolescent girl will fabricate a rape to cover up an unwanted pregnancy; and (7) an absence of forensic and medical evidence to corroborate the complainant's version of events.

Next, we explain these seven 'consent' myths and then review jurors' discussions of each when deliberating about the evidence in the case.

A The 'Lolita' Myth: A Flirtatious Adolescent Girl Is Likely to Initiate Sex

A United Kingdom community poll in 2005 found that a third of people believed that a flirtatious woman is partially responsible for being raped.[34] A common misconception exists that women who flirt are giving their consent to a later sexual act by the recipient of the flirting.[35] Findings from an Australian survey on 'Community Attitudes towards Violence against Women' reported that only two in five agreed that 'rape results from men not being able to control their sexual urges'.[36] Women are thought to be indicating that they want sex by what they wear, if it happens to arouse

32 Jane Goodman-Delahunty, Natalie Martschuk and Anne Cossins, 'Programmatic Pretest–Posttest Research to Reduce Jury Bias in Child Sexual Abuse Cases' (2016) 6(2) *Oñati Socio-Legal Series* 283, 305 ('Programmatic Pretest'); *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (n 27) 155 quoting Martine Powell et al, 'An Evaluation of How Evidence Is Elicited from Complainants of Child Sexual Abuse' (Research Report, Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) 272–3.

33 Burgin, 'Persistent Narratives of Force and Resistance' (n 5) 301–4; Annie Cossins, 'Expert Witness Evidence in Sexual Assault Trials: Questions, Answers and Law Reform in Australia and England' (2013) 17(1) *International Journal of Evidence and Proof* 74, 76 ('Expert Witness Evidence in Sexual Assault Trials').

34 Amnesty International UK, 'UK: New Poll Finds a Third of People Believe Women Who Flirt Partially Responsible for Being Raped' (Press Release, 21 November 2005) <https://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being>.

35 See, eg, a 2017 UK survey of 4000 revealed that one–third of men polled thought that if a woman had flirted on a date but not explicitly consented to sex it generally would not count as rape, compared with 21% of women: Shane Croucher, 'It's Not Rape if She Flirted on a Date, a Third of British Men Believe', *Newsweek* (online, 12 June 2018) <https://www.newsweek.com/rape-sexual-assault-raped-date-rape-definition-yougov-survey-1246605>.

36 VicHealth, *Australians' Attitudes towards Violence against Women: Findings from the 2013 National Community Survey (NCAS)* (Report No P-MW-146, September 2014) 12–13, 53, 84, 88.

the male defendant.[37] In these consent narratives, no-one is more seductive than an adolescent girl. The notion of a sexually precocious adolescent girl was the subject of an acclaimed book 'Lolita' published in 1955.[38] The narrator of that novel is a university professor who becomes sexually involved with his 12-year-old step-daughter. The narrator asserts to the reader that it was Lolita who forced herself upon him. Half a century later, an adolescent complainant's sexually flirtatious behaviour or dress is still inappropriately relied upon in court cases to support the narrative of consent, by portraying the complainant as a nymph who initiated sexual acts, which were too hard for the vulnerable older man to refuse.[39] In the interim, psychological research on child sex offenders has shown that one common offender cognitive distortion is to project that children are sexual beings who have the capacity to make informed decisions about sexual behaviour and who enjoy and initiate sexual connections.[40] A manifestation of this distortion is blame attributed to the victim for the sexual offending, eg, because 'she was trying to arouse me by walking in front of me with skimpy clothes on'.

Although from the outset, the defence candidly promoted the notion that the complainant flirted with the defendant and initiated consensual sex, as shown in the excerpt above from the defence opening statement, this version of the complainant's behaviour did not feature explicitly in the five jurors' responses. The myth may nonetheless have had an implicit or unconscious effect on their view of the complainant and reasoning about the facts.[41] Ultimately, the jury determined that the prosecution had failed to prove the case against the defendant beyond reasonable doubt. In coming to this conclusion, perhaps it was unnecessary for the jury to deliberate about the defence case based on this myth. In order to cover all possibilities, jurors should be cautioned not to base their decisions on this myth, where relevant.

B The Myth that Rape Victims 'Fight Back' and Try to Escape

Community attitudes suggests that jurors expect that complainants will flee, escape or fight back against a violent attack.[42] In reality, rape victims sometimes 'freeze' and do not always flee, escape or fight back.[43] Male adult perpetrators are usually larger in

37 Jane Goodman-Delahunty and Kelly Graham, 'The Influence of Victim Intoxication and Victim Attire on Police Responses to Sexual Assault' (2011) 8(1) *Journal of Investigative Psychology and Offender Profiling* 22.

38 Vladimir Nabokov, *Lolita* (Vintage International, 1st ed, 1989).

39 Antonia Abbey et al, 'The Effect of Clothing and Dyad Sex Composition on Perceptions of Sexual Intent: Do Women and Men Evaluate These Cues Differently?' (1987) 17(2) *Journal of Applied Social Psychology* 108; Rachael Burgin, 'Communicating Consent: Narratives of Sexual Consent in Victorian Rape Trials' (PhD Thesis, Monash University, 2019) ch 5; *M Gigi Durham, The Lolita Effect: The Media Sexualization of Young Girls and What We Can Do about It* (The Overlook Press, 2008); Ellison and Munro, 'Reacting to Rape' (n 16); Jane E Workman and Elizabeth W Freeburg, 'An Examination of Date Rape, Victim Dress, and Perceiver Variables within the Context of Attribution Theory' (1999) 41(3–4) *Sex Roles* 261.

40 Vincent Marziano et al, 'Identification of Five Fundamental Implicit Theories Underlying Cognitive Distortions in Child Abusers: A Preliminary Study' (2006) 12(1) *Psychology, Crime and Law* 97, 98, citing Tony Ward and Thomas Keenan, 'Child Molesters' Implicit Theories' (1999) 14(8) *Journal of Interpersonal Violence* 821, 827.

41 See, eg, Mark Andrew Nolan and Jane Goodman-Delahunty, *Legal Psychology in Australia* (Lawbook Co, 1st ed, 2015) 310–11, 346.

42 See, eg, Andy SJ Ong and Colleen A Ward, 'The Effects of Sex and Power Schemas, Attitudes toward Women, and Victim Resistance on Rape Attributions' (1999) 29(2) *Journal of Applied Social Psychology* 362; Beverly A Kopper, 'Gender, Gender Identity, Rape Myth Acceptance, and Time of Initial Resistance on the Perception of Acquaintance Rape Blame and Avoidability' (1996) 34(1–2) *Sex Roles* 81.

43 See, eg, Christine A Gidycz, Amy Van Wynsberghe and Katie M Edwards, 'Prediction of Women's Utilization of Resistance Strategies in a Sexual Assault Situation: A Prospective Study' (2008) 23(5) *Journal of Interpersonal Violence* 571. See also Australian Institute of Family Studies, *Challenging Misconceptions about*

size than their child victim, so it is reasonable for victims to fear for their physical safety. Further, victims submit to the assault, often due to the power dynamic that exists based on their existing relationship with the perpetrator. Younger victims are likely to be groomed to cooperate rather than fight off an adult offender.[44] Unlike the judge in *Lazarus*, jurors should be advised never to consider a failure to take physical action to move away, escape or fight back as indicative of consent, supporting a defendant's claim that he reasonably believed the sexual acts were mutually consensual.

The impact of the 'fight back' myth on the jury in this case is difficult to ascertain because, for about 45 minutes, this complainant did fight back. The jurors perceived that her physical resistance was important as they were all critical of the investigating authorities for failing to collect and present the hard evidence that was available that would have confirmed what actually happened. Despite rare evidence of a protracted physical struggle, one juror nonetheless expressed some concern about the failure of the complainant to escape the attacker at a later point of the ordeal. Juror 5 told us: 'And it's also the fact that the girl did have opportunity to leave. I'm not saying that that's not – you know, you can still consider someone to be detained even in that situation, psychologically, but it was just all of it was plausible, but it wasn't, yeah, "that definitely happened"'. The tenor of this response is that the juror was disinclined to accept the expert evidence on this point, as it did not accord with his world view of how rape complainants should behave. This was the sole juror who entertained this rape myth notwithstanding acknowledgment of the expert evidence on the issue. The myth that a complainant has an obligation to attempt to escape did not feature explicitly in the other four jurors' responses.

C The Myth that Rape Victims Suffer Physical Injuries from the Force Imposed on Them During the Attack

Based on common stereotypes about violent stranger rape,[45] many people falsely expect rape victims to sustain physical injuries even when the complainant is acquainted with the perpetrator.[46] Given that male adult perpetrators are usually larger in size than a child victim, the false assumption that some people make is that child victims will be physically injured from resisting the force imposed during the assault. In reality, most perpetrators are acquainted with their victims and do not need to use violence as they can coerce their victims to submit in other ways due to the power dynamic based on their existing relationship. Younger victims are likely to cooperate rather than fight off an adult offender and thus do not sustain injuries.[47] Furthermore, physiologically, the genital area is extremely resistant to injury,[48] so rape victims are unlikely to experience

Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners (Report, 2017) 7 ('*Challenging Misconceptions about Sexual Offending*').

44 Samantha Craven, Sarah Brown and Elizabeth Gilchrist, 'Sexual Grooming of Children: Review of Literature and Theoretical Considerations' (2006) 12(3) *Journal of Sexual Aggression* 287, 290, 295.

45 Kenneth V Lanning, *Child Molesters: A Behavioral Analysis* (National Center for Missing and Exploited Children, 5th ed, 2010).

46 See, eg, an archival study of 189 child sexual assault jury trials conducted in Los Angeles County showed that juries were nine times more likely to convict when the defendant was charged with using force: Stacia N Stolzenberg and Thomas D Lyon, 'Evidence Summarized in Attorneys' Closing Arguments Predicts Acquittals in Criminal Trials of Child Sexual Abuse' (2014) 19(2) *Child Maltreatment* 119.

47 Australian Institute of Family Studies, *Challenging Misconceptions about Sexual Offending* (n 42) 6.

48 See also Marilyn Sawyer Sommers, 'Defining Patterns of Genital Injury from Sexual Assault' (2007) 8(3) *Trauma, Violence and Abuse* 270.

physical injury during an offence even if they resist the assault. For example, in a United Kingdom study of 400 cases of rape reported to the central police force, 79% of victims were not visibly injured.[49] In a recent Australian study, most non-empanelled jurors were unaware that a medical examination rarely reveals physical evidence of child sexual assault.[50] Juries should be advised that presumptions regarding the credibility of child rape victims based on a lack of visible physical injury to the victim are unsupported myths.[51]

In the case study, the forensic doctor's personal observations and contemporaneous records of the complainant's external physical injuries should have strongly corroborated the complainant's version of events and addressed the jurors' expectations. However, they did not. Rather, the factual record developed at trial through the doctor's medical evidence about the two bruises on the complainant's body failed to establish the significance of these injuries and was mooted. Rather than say that the injuries observed were consistent with the complainant's description of how she obtained those bruises, the doctor described the injuries as 'non-specific'; and said they 'may have occurred as a result of blunt force trauma during … the alleged assault, but they may also have occurred from other mechanisms'. The prosecutor failed to clarify medical terminology used by the forensic doctor, such as what was meant by 'blunt force trauma' or 'other mechanisms'.

The evidence from the forensic doctor left the impression with the jury that these reported injuries were inconsequential and/or unreliable. By portraying the marks on the complainant's body as 'non-specific', rather than 'consistent with the complainant's version of events as provided to him' their evidential weight was minimised. The use of vague language and medical jargon from the expert and the failure of the prosecutor to extract more detail from the expert, led the jurors to discount the visible injuries observed by the expert. As Juror 5 said: 'There was apparently bruising on the girl. There were no photographs of any sort of bruising or anything like that'. Juror 4 inaccurately recollected:

> Well, we don't know whether she had been injured or not. And that created the reasonable doubt. You know she didn't say that she was injured, and she didn't tell the doctor that she was injured, from memory. And yet, possibly she should have been. I mean, there was no semen collection or, that we knew of, anything like that. There was no collection of vomit from her clothing. There were no pictures of her. Perhaps the doctor should have taken some photos.

All jurors criticised the forensic doctor for failing to photograph the external injuries. Juror 2 said '*Physical* evidence is what was needed – ie, photos of injuries, results of swabs'.

Research has established a juror preference for DNA and other forms of physical evidence.[52] Jurors want to see photographic evidence and are reluctant to accept the alternative of an oral description from a doctor who observed the bruising firsthand. This is common sense. Cameras are readily available. A photograph can present a full description in a few seconds compared to a verbal description, which would take thousands of words and never be as accurate.

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49 Genevieve F Waterhouse, Ali Reynolds and Vincent Egan, 'Myths and Legends: The Reality of Rape Offences Reported to a UK Police Force' (2016) 8(1) *European Journal of Psychology Applied to Legal Context* 1, 6.

50 Goodman-Delahunty, Martschuk and Cossins, 'What Australian Jurors Know and Do Not Know' (n 15) 96.

51 Australian Institute of Family Studies, *Challenging Misconceptions about Sexual Offending* (n 42) 6.

52 John M Pearson et al, 'Modelling the Effects of Crime Type and Evidence on Judgments about Guilt' (2018) 2(11) *Nature Human Behaviour* 856. See below Part IV(G).

The forensic doctor took samples of the substances that the complainant said were blood and vomit. However, results of those tests were not presented at trial. As Juror 3 complained: 'But we can't understand why we had no evidence of the hand swab. She was supposed to have vomited blood, or there was [his] blood in the vomit. The hands were swabbed, but we weren't told the results of the swabs'.

Similarly, there was no evidence that the police searched the car for the complainant's hair that had been pulled by the defendant. Why the prosecution did not present these results, or, alternatively, an explanation for their absence,[53] is unknown. In the case study, the absence of this physical evidence caused significant damage to the prosecution case. The jury asked for results of the swab tests and several other similar questions about physical evidence that they perceived was missing. For example, Juror 5 explained:

> Well, it was very frustrating for the jury, I have to say. There were so many factors, so many questions we had which were not put up as evidence … We're meant to picture what went – what happened and we can't tell … We can't tell – we have to just imagine this stick figure, particularly when we're talking about confined spaces where windows were smashed and how a struggle may have occurred. That was very annoying … we asked all the questions we wanted to ask after all the evidence was given and unfortunately we were told we have been given the evidence and that is not evidence that is to be given.

The diligent jurors felt that in piecing together what had happened, they were forced to imagine a 'stick figure re-enactment', due to the lack of detail provided. The jurors were unequivocal that the failure of the prosecution to present all the physical evidence that should have been available was a significant factor in their decision-making. The jury felt uncomfortable about putting someone in 'jail for 20 years' (Juror 5) based upon what they perceived was a substandard investigation. They did not necessarily take the failure to present all the available evidence as a sign that there was no rape, but determined that in the absence of the physical evidence, the case was not proven beyond reasonable doubt. As Juror 4 explained:

> He'd done his work poorly. But because there was [sic] so many gaps in it, it just created a lot more doubt. Reasonable doubt. We were pretty sure something had happened, but just what had happened and whether it should have happened was another matter.

D The Myth that Genuine Rape Victims Are Tearful

A common misconception is that genuine child rape victims are visibly distressed when they report the abuse and when giving their evidence in court.[54] Jury simulation research consistently shows that the complainant is rated less credible and the

53 'Negative evidence' may be introduced at trial when the prosecution infers that the jury will view the absence of physical evidence as meaningful: see Simon A Cole and Rachel Dioso-Villa, 'Should Judges Worry about the "CSI Effect"?' 47(1–2) *Court Review* 20, 22.

54 Goodman-Delahunty, Martschuk and Cossins, 'What Australian Jurors Know and Do Not Know' (n 15) 100; Ellen Margrethe Wessel et al, 'Disclosure of Child Sexual Abuse: Expressed Emotions and Credibility Judgments of a Child Mock Victim' (2016) 22(4) *Psychology, Crime and Law* 331; Karl Ask and Sara Landström, 'Why Emotions Matter: Expectancy Violation and Affective Response Mediate the Emotional Victim Effect' (2010) 34(5) *Law and Human Behavior* 392; Geir Kaufmann et al, 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility' (2003) 17(1) *Applied Cognitive Psychology* 21; Judith E Krulewitz, 'Reactions to Rape Victims: Effects of Rape Circumstances, Victim's Emotional Response, and Sex of Helper' (1982) 29(6) *Journal of Counseling Psychology* 645; Regina A Schuller et al, 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes' (2010) 13(4) *New Criminal Law Review* 759.

perpetrator less guilty when the complainant gives her evidence in a neutral manner compared with a tearful and emotional delivery.[55] One related stereotypical expectation of child witnesses in sexual assault trials is that they cry when relaying what happened.[56] In a recent Norwegian simulated jury trial, a female child was interviewed by police in relation to physical abuse by her stepfather. The child delivered the interview with one of four emotional expressions – neutral, sad, angry, or positive. A total of 465 laypersons watched the videos and rated the credibility of the child complainant. The child with the 'sad' expression was rated highest in credibility.[57] One study found that the least credible complainant is one who is emotionally inconsistent; sometimes tearful/upset and at other times calm/controlled.[58] If child rape complainants are not visibly upset and distressed when they disclose the abuse and when giving evidence at trial, they are likely to be perceived as less credible by jurors.

Contrary to these common assumptions, research consistently shows that individuals act in many varied ways in response to the trauma of experiencing and reporting a sexual assault. The same variations in behaviour are evident when a victim is giving evidence about the sexual assault in legal proceedings.[59] Studies show that children tend not to be visibly emotional when they report sexual assault to the authorities.[60] Some children 'mask emotional expressions and [develop] strategies to hide feelings in situations related to the abuse, or to detach from the emotional and physical pain of events'.[61] For example, when giving evidence, abused children may speak without much expression, with 'an emotionally flattened' demeanour.[62] Juries should be advised about erroneous presumptions regarding the credibility of child rape victims based on their level of visible distress at the time of the report and subsequent trial.

The jurors in the case study remembered that the psychiatrist had explained that it was common behaviour for a victim to be hysterically laughing and crying following a sexual assault. This was how the complainant in this case reacted, so the expert's evidence was relevant to these case facts. Juror 5 said that the expert explained:

> the reactions of how people may act after being through this particular situation, and it can be actually quite surprising that you're not necessarily in a crying state. You can be in a bit of a crazy state, where you can laugh, you can joke, and then you can cry. You

55 See, eg, Guri Bollingmo et al, 'The Effect of Biased and Non-Biased Information on Judgments of Witness Credibility' (2009) 15(1) *Psychology, Crime and Law* 61; Pamela C Regan and Sheri J Baker, 'The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases' (1998) 13(2) *Journal of Family Violence* 187.

56 Ellen Wessel, Svein Magnussen and Annika Maria Desiree Melinder, 'Expressed Emotions and Perceived Credibility of Child Mock Victims Disclosing Physical Abuse' (2013) 27(5) *Applied Cognitive Psychology* 611, 611.

57 Annika Melinder et al, 'The Emotional Child Witness Effect Survives Presentation Mode' (2016) 34(1) *Behavioral Sciences and the Law* 113, 120.

58 Klippenstine and Schuller (n 25) 89.

59 Melinder et al (n 56) 114; Gail S Goodman et al, 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims' (1992) 57(5) *Monographs of the Society for Research in Child Development* 1.

60 Paola Castelli and Gail S Goodman, 'Children's Perceived Emotional Behavior at Disclosure and Prosecutors' Evaluations' (2014) 38(9) *Child Abuse and Neglect* 1521; Liat Sayfan et al, 'Children's Expressed Emotions When Disclosing Maltreatment' (2008) 32(11) *Child Abuse and Neglect* 1026.

61 Melinder et al (n 56) 114–15; Pamela M Cole, Margaret K Michel and Laureen O'Donnell Teti, 'The Development of Emotion Regulation and Dysregulation: A Clinical Perspective' (1994) 59(2–3) *Monographs of the Society for Research in Child Development* 73.

62 Melinder et al (n 56) 115.

> can be all over the place, which was good, because that highlighted what all the other witnesses indicated how she was after the act. So, yeah, that was quite good.

While Juror 4 thought that the psychiatric evidence 'confirmed what the rest of us were thinking and put it into scientific or understandable terms that we could express', Juror 5 believed that the expert's evidence addressing the sometimes hysterical behaviour of victims effectively corrected some jurors' misconceptions. Prior to this evidence, some of the jurors did 'mention about why would a girl be laughing or carrying on in this way after being raped? But after his evidence a lot of people just accepted that, yeah'. This rape myth explanation appears to have been well addressed by the expert and useful to one or more jurors.

Typically, trial judges provide a generic jury direction explaining that ordinarily a witness can't give opinion in evidence but there is an exception for people with particular scientific expertise. The jury is told that, just because a witness is an expert, the jury does not have to accept the evidence. In child sexual assault cases, trial judges have discretion to provide further directions pertaining to counterintuitive expert evidence and its impact upon the credibility of child witnesses.

Section 108C of the *Evidence Act 1995* (Cth)[63] specifies that counterintuitive expert evidence is permitted in child sexual assault cases even if it relates to the credibility of the child as a witness.[64] However, the Victorian and New South Wales courts have recommended that it may be appropriate in some cases to complement such counterintuitive expert evidence with a further judicial direction. For example, the NSW Criminal Trial Courts Bench Book states that where such counterintuitive expert witness evidence might invite the jury to improperly reason that 'abuse of children elicits certain behavioural responses; the complainant exhibited some or all of those behaviours; [and] therefore the complainant is likely to be telling the truth about having been … abused', it may be appropriate to direct the jury not to reason in this way.[65]

Whilst the trial judge in our case study had discretion to deliver additional directions pursuant to section 108C, the trial judge chose not to do so, believing it to be unnecessary, as the psychiatric evidence was simple and unchallenged by the defence.

Since this study was completed, recent additions to the NSW Bench Book and the Victorian Criminal Charge Book included further model directions that bear on the credibility of the complainant.[66] Those directions have not yet been empirically tested.

E The Myth that Child Victims Who Do Not Cooperate with Authorities Are Probably Hiding Something and Therefore Are Unreliable

Victims of sexual assault can be reticent about disclosing a sexual assault because they fear the perpetrator; fear that they will not be believed or may believe that they are to blame.[67] Child victims may fear that 'either their experiences would be trivialized or

63 This section of the Commonwealth Act is mirrored in legislation in New South Wales, Victoria and Tasmania.

64 This section was considered by the Victorian Court of Appeal in *MA v R* (2013) 40 VR 564. The court held that general opinion evidence concerning how a child may react to sexual abuse was admissible.

65 See further Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2015) pt 1 ch 6; Judicial Commission of New South Wales (n 25) 355–8 [2-1100]–[2-1110]; Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005) [9.157].

66 For the most recent update in the area (July 2017) see Judicial Commission of New South Wales (n 25) 23–5 [1-135]–[1-140] ; Judicial College of Victoria, *Victorian Criminal Charge Book* (2018) ch 4.2 <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#67420.htm>.

67 Australian Institute of Family Studies, *Challenging Misconceptions about Sexual Offending* (n 42) 4.

things would get out of control if they talked about their experiences'.[68] In the study conducted by Jensen et al, 'these concerns became an impetus for not talking'.[69] Some child victims, immediately following a rape, experience trauma. If a victim reports the crime immediately, they may, in their traumatised state, resist a post-assault medical examination on the basis that they have been violated and do not want to expose themselves to further humiliation. Jurors should be advised that negative presumptions regarding the credibility of rape victims based on their lack of complete cooperation during the investigation, are controverted by research and are unwarranted.

At trial, both the forensic doctor and psychiatrist gave evidence addressing why a child victim might wish to avoid being internally examined immediately following a violent assault. The forensic doctor also described how he addressed this issue in the hospital on the night of the attack. The jurors, judge and prosecutor agreed that the forensic doctor failed to adequately explain to the complainant the ramifications of her decision to refuse an internal examination.

Juror 4 was not left with

> the impression that he really tried to get this girl to understand why she needed to be examined … I mean the girl didn't want to be examined, and [the psychiatrist] said perhaps she wouldn't want to be examined, but if we'd known a bit more – if the girl had said, "Well, I'm hurt and I don't want to be hurt. I'm hurting, and all the rest of it, and I don't want to be hurt more", that might have held up a bit more, but no one went down that track. I mean, if the girl had been injured, and she'd told the doctor she was very upset and very sore and she was injured and she didn't really want to be touched again, that would have held a lot more water.

The jurors did note that 'the other expert witness [the psychiatrist] did explain also that when someone is raped and for them to go through the entire procedure of a full examination can be to the person like they're being molested all over again'. However, the psychiatrist's evidence on this point, provided at the end of the prosecution case, had little traction with the jurors. Whilst the psychiatrist had explained that this was a common reaction of rape victims, the jurors' focus remained firmly on the forensic doctor's failure to adequately inform the victim about the importance of a full body examination when reporting such crimes. As Juror 5 explained:

> The doctor should have insisted to have a full examination because, as one of the experts said, only about 33% or something of women who are allegedly raped actually have enough strength to actually come forward. And it's very disappointing that someone who has come forward hasn't been put through the entire process. Otherwise it's pointless for her to go through the trauma in the first place.

F The Myth that Rapes Are Often Fabricated by Adolescent Females to Solve Other Problems, Such as an Unwanted Pregnancy

Statistics on the rate of false rape allegations vary, in part because consensus on definitions of false allegations is lacking and because no representative survey on prevalence exists.[70] It is difficult to assess the prevalence of false rape allegations because, for example, the authorities that collate court data will only become aware of a victim's lie if they are found out. Jury verdicts do not have to specify when they find

68 Tine K Jensen et al, 'Reporting Possible Sexual Abuse: A Qualitative Study on Children's Perspectives and the Context for Disclosure' (2005) 29(12) *Child Abuse and Neglect* 1395, 1408.

69 Ibid 1408–9.

70 Ros Burnett, 'Reducing the Incidence and Harms of Wrongful Allegations of Abuse' in Ros Burnett (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford University Press, 2016) 282, 284–5.

the defendant not guilty due to the lies of a victim. Despite such limitations, one recent meta-analysis of seven Western jurisdiction studies suggests that, on average, 95% of rape allegations were true, while a review of several methodologically rigorous studies yielded estimates ranging from 2–8%.[71] Even taking into account the fact that a portion of lying victims are never identified, it is still likely that the vast majority of rape allegations are true. Research studies also confirm that children are unlikely to provide false accounts of events, unless questioned in a highly coercive and leading manner.[72] In contradiction to the research, it is a common misconception that child rape complainant evidence is unreliable.[73] A further common misperception in relation to teenage girls is that they will falsely accuse a man to avoid trouble because of an unwanted pregnancy.[74] Juries should be advised to avoid presumptions regarding ulterior motives of children who report sexual assault.

This rape myth was not addressed by the psychiatrist in the case study. However, the facts of the case and the defence case theory suggested that the prosecution should have anticipated that some jurors might labour under this myth. All the surveyed jurors were uncomfortable with the absence of forensic and medical evidence to corroborate the complainant's version of events. When such information is missing, as is most typical, research suggests that jurors may be tempted to gap-fill.[75]

The inadequacy of the explanation as to why the complainant would decline an internal examination led one juror to search for explanations as to why the complainant would not comply. Juror 4 speculated about the complainant's motives and suggested that she might be hiding a pregnancy.[76] Juror 4 did not completely accept the psychiatrist's explanation as to why a complainant would resist an internal examination: 'I supposed it added up to some degree. Her need for privacy, or was she hiding something? Was she hiding a pregnancy or – that was in my mind – or, you know, just what was she up to? What was her motive? Did she have a motive?' This juror conjectured about the possible motive of the complainant in making a false accusation of rape: 'We wondered whether she was pregnant and she didn't want to be examined. Perhaps she was pregnant … And I was thinking later, whether she actually wanted to put in some maintenance money against the accused? I don't know what her motive was there'. By using the word 'we', Juror 4 suggested that all the jury members were

71 Claire E Ferguson and John M Malouff, 'Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates' (2016) 45(5) *Archives of Sexual Behavior* 1185, 1189. See also Melanie Heenan and Suellen Murray, 'Study of Reported Rapes in Victoria 2000–2003' (Summary Research Report, Office of Women's Policy, Department for Victorian Communities, 2006) 5; David Lisak et al, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(12) *Violence Against Women* 1318; Kimberly Lonsway, Joanne Archambault and David Lisak, 'False Reports: Moving beyond the Issue to Successfully Investigate and Prosecute Non-stranger Sexual Assault' (2009) 43(1) *Prosecutor* 1, 2–4.

72 Cossins, 'Children, Sexual Abuse and Suggestibility' (n 26); Martine B Powell and Pamela C Snow, 'Guide to Questioning Children During the Free-Narrative Phase of an Investigative Interview' (2007) 42(1) *Australian Psychologist* 57.

73 Australian Institute of Family Studies, *Challenging Misconceptions about Sexual Offending* (n 42) 18. Rachel Zajac et al, 'Misconceptions about Childhood Sexual Abuse and Child Witnesses: Implications for Psychological Experts in the Courtroom' (2013) 21(5) *Memory* 608.

74 Sandra Newman, 'What Kind of Person Makes False Rape Accusations?', *Quartz* (online, 11 May 2017) <https://qz.com/980766/the-truth-about-false-rape-accusations/>.

75 Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 88–9.

76 See above Part IV(E).

thinking the same things as he. However, the other four jurors did not explicitly mention this topic in their interview responses.[77]

G The Myth that an Absence of Forensic and Medical Evidence Indicates that the Rape Report Is False

The law provides that a complainant's evidence, on its own, is adequate to support a finding of no consent. However, this myth asserts that a rape victim's oral evidence is not enough on its own to establish the absence of consent. As was explained in Part IV(C) above, medical examinations rarely reveal physical evidence of a child's sexual assault.[78] Research highlights that jury eligible citizens are more confident to convict when there is some type of physical evidence providing scientific or medical corroboration of the complainant's version of events.[79]

Rapid scientific and medical advances, such as DNA evidence have increased jurors' expectations of the availability and infallibility of medical and scientific evidence.[80] The perceived need in some juries for 'hard or scientific' evidence to support the victim's version of events has been referred to as the 'tech effect' or 'CSI effect'.[81] In CSI-type TV shows, scientific experts solve crimes in less than an hour. Empirical evidence on the impact of CSI viewing on verdicts by mock jurors has been mixed, in part because definitions of the purported effect have not been uniform and in part because of wide variations in the type and reliability of research methods applied.[82] As many as six different definitions or types of CSI effects have been distinguished.[83] The two most relevant to the present case study are the biasing impact of (a) general jury expectations of forensic evidence in criminal cases, leading them to give it more weight than it deserves; and (b) jury reactions when the results of forensic evidence sampling are not explained or presented at trial. Regarding the latter, recent research has distinguished (i) negative evidence (failure of forensic tests to yield support for a hypothesis about what transpired) from (ii) missing evidence (failure to conduct a relevant forensic test or to present test outcomes) and (iii) contextualising expert evidence (introduced by the prosecution to account for negative or missing evidence).[84]

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77 However, Juror 5 acknowledged that the psychiatric evidence as to the 'distressed victim' myth was more than confirmatory: see above Part IV(D).

78 Goodman-Delahunty, Martschuk and Cossins, 'What Australian Jurors Know and Do Not Know' (n 15) 96.

79 Pearson et al (n 51); Cossins, 'Expert Witness Evidence in Sexual Assault Trials' (n 30) 75.

80 Donald E Shelton, 'Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality about the "CSI Effect" Myth' (2010) 27(1) *Thomas M Cooley Law Review* 1, 11, 23. See also Suzanne Blackwell and Fred Seymour, 'Prediction of Jury Verdicts in Child Sexual Assault Trials' (2014) 21(4) *Psychiatry, Psychology and Law* 567.

81 Cole and Dioso-Villa (n 52) 22. See also Ian Freckelton et al, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 1st ed, 2016) 123–31; Jane Goodman-Delahunty and David Tait, 'CSI Effects on Jury Reasoning and Verdicts' in David Tait and Jane Goodman-Delahunty (eds), *Juries, Science and Popular Culture in the Age of Terror: The Case of the Sydney Bomber* (Palgrave Macmillan, 2017) 217.

82 Jason M Chin and Larysa Workewych, 'The CSI Effect' (2016) *Oxford Handbooks Online* 1; Jane Goodman-Delahunty and Hielkje Verbrugge, 'Reality, Fantasy and the Truth about CSI Effects' (2010) 32(4) *InPsych* 18.

83 Cole and Dioso-Villa (n 52) 22; Goodman-Delahunty and Tait (n 80) 222.

84 William C Thompson et al, 'Evaluating Negative Forensic Evidence: When Do Jurors Treat Absence of Evidence as Evidence of Absence?' (2017) 14(3) *Journal of Empirical Legal Studies* 569, 570.

Forensic science evidence biases have been documented in empirical studies conducted in Australia,[85] the United Kingdom[86] and North America.[87] A common finding is that participants hold wide-ranging views on the accuracy of different types of forensic techniques, some of which were overstated while others were understated.[88] Commonly-held beliefs about the infallibility of some forensic scientific evidence correspond more closely with outdated beliefs about the reliability of traditional forensic sciences than with more recent scientific studies which highlight several forms of forensic scientific evidence that are less reliable.[89]

Experimental research using the Forensic Evidence Evaluation Bias Scale distinguished two divergent types of attitudes held by mock-jurors about forensic scientific evidence. The first is a pro-prosecution series of beliefs in the infallibility and conclusiveness of forensic science.[90] This can manifest in overweighting forensic evidence and unwarranted convictions. The second is a pro-defence series of expectations that forensic scientific evidence is unreliable and weak. In the absence of forensic scientific evidence that meets high standards of reliability, the latter can manifest in unwillingness to convict.

Further support for the first type of bias towards forensic scientific evidence came from a recent United States study in which prospective jurors gave 'much greater weight to forensic science evidence than to other types of evidence' such as eyewitness evidence.[91] The same behaviour was observed in the lawyers and law students who participated in that study. The authors observed that the study participants relied on their prior beliefs about the reliability of each forensic method and this 'confidence in the reliability of forensic methods may have been reinforced by popular media, as in the "CSI effect"'.[92] A recent Australian study was able to link the CSI effect to the persuasive force of providing forensic science evidence in a visual format as opposed to the traditional oral delivery of such evidence.[93] The authors concluded that 'most trials will include some jurors who hold … elevated expectations and attitudes about forensic scientific evidence, and once on a jury, they may give undue weight to [this]

85 Goodman-Delahunty and Tait (n 80) 230.

86 Lisa L Smith and Ray Bull, 'Identifying and Measuring Juror Pre-trial Bias for Forensic Evidence: Development and Validation of the Forensic Evidence Evaluation Bias Scale' (2012) 18(9) *Psychology, Crime and Law* 797; Lisa L Smith and Ray Bull, 'Validation of the Factor Structure and Predictive Validity of the Forensic Evidence Evaluation Bias Scale for Robbery and Sexual Assault Trial Scenarios' (2014) 20(5) *Psychology, Crime and Law* 450.

87 NJ Schweitzer and Michael J Saks, 'The CSI Effect: Popular Fiction about Forensic Science Affects the Public's Expectations about Real Forensic Science' (2007) 47(3) *Jurimetrics* 357; Young S Kim, Gregg Barak and Donald E Shelton, 'Examining the "CSI-Effect" in the Cases of Circumstantial Evidence and Eyewitness Testimony: Multivariate and Path Analyses' (2009) 37(5) *Journal of Criminal Justice* 452.

88 Gianni Ribeiro, Jason M Tangen and Blake M McKimmie, 'Beliefs about Error Rates and Human Judgment in Forensic Science' (2019) 297 *Forensic Science International* 138, 145; Jane Goodman-Delahunty and Lindsay Hewson, 'Improving Jury Understanding and Use of DNA Evidence' (Technical and Background Paper No 37, Australian Institute of Criminology, 2010) 65.

89 Pearson et al (n 51) 862. See also Gary Edmond, 'What Lawyers Should Know about the Forensic "Sciences"' (2015) 36(1) *Adelaide Law Review* 33; Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (Report No 325, 21 March 2011); Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (Report No 228091, August 2009) 42–4; President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Report, September 2016) 65.

90 See also Goodman-Delahunty and Tait (n 80) 221–3.

91 Pearson et al (n 51) 862.

92 Ibid.

93 Goodman-Delahunty and Tait (n 80).

forensic scientific evidence admitted by the prosecution, and be more prone to convict'.[94]

Support for the second type of bias against forensic scientific evidence emerged in another Australian study in which 21 actual jurors were interviewed in the aftermath of two trials of the same defendant; the focus of the interviews was DNA evidence. The findings of this study support the existence of a 'tech effect'. Some of the jurors had high hopes of the conclusive nature of DNA evidence but these expectations were unmet. Those jurors could not contemplate a guilty verdict in the circumstances.[95] They speculated about aspects of the DNA evidence, such as the scientific expert notes which were referred to but not provided to them.[96] This observation about the jurors speculating about information not provided to them is in keeping with general juror misgivings about being deprived of information that they believe they need to undertake their job effectively. When such information is missing, research suggests that jurors may be tempted to gap-fill.[97] Defence lawyers exploit the perceived gap to their advantage using the absence of hard evidence as a reason for the jury to acquit.[98]

In the present case study, the lack of 'hard' evidence was by far the most important factor in the minds of the five jurors in reaching a verdict of 'not guilty' for all five charges. As Juror 2 explained, the prosecution could have made their job easier 'if they had submitted more evidence (physical). It is very hard when most of the case is one person's word against another'.

The jurors' responses emphasise their desire and preference for hard evidence. This case study reflects that this myth was important in shaping the verdict. Although it is unlikely that an adolescent girl would willingly participate in sex so rough as to make her vomit and draw blood from the defendant's penis, the prosecution case would have been rendered more plausible to the jury if the complainant's vomit and blood had been detected on her hands and pants. Had the jury been provided the photo of the injuries and the results of the swabs of the vomit and the blood on the complainant's pants, the verdict may have been different. As Juror 3 suggested:

> You know they, they could have swung it either way. Those things, if she had have had the skin under the nails, the swabs of the palms where she supposedly vomited, and there was blood in it. Um, her clothes, you know, if she had, you know, blood and vomit on her clothes. None of this was … She said she had marks on her pants, but, yep, okay then what were the marks? Was it mud? Was it blood? Was it vomit?

There may have been a very good reason why such 'hard evidence' was not presented to the jury. However, the prosecutor did not provide any contextualising evidence in the form of expert witness testimony explaining its absence. Juror complaints over the lack of evidence is a theme that has emerged in numerous other studies.[99] When evidence is unavailable, jurors want to understand why. Research has shown that members of the public acknowledge the fallibility of forensic science when

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94 Ibid 231.

95 Rhonda Wheate, 'The Importance of DNA Evidence to Juries in Criminal Trials' (2010) 14(2) *International Journal of Evidence and Proof* 129, 144–5.

96 Rhonda Marie Wheate, 'Jury Comprehension and Use of Forensic Science' (PhD Thesis, University of New South Wales, 2007) 382–3.

97 Horan, *Juries in the 21st Century* (n 74).

98 Jane Goodman-Delahunty and David Tait, 'DNA and the Changing Face of Justice' (2006) 38(2) *Australian Journal of Forensic Sciences* 97, 98.

99 See, eg, Warren Young, Neil Cameron and Yvette Tinsley, 'Juries in Criminal Trials, Part Two: A Summary of the Research Findings' (Preliminary Paper No 37, New Zealand Law Commission, November 1999) vol 2, 23; Jacqueline Horan, *The Civil Jury System: An Empirical Study* (PhD Thesis, University of Melbourne, 2004) 195.

asked about it.[100] Once juries appreciate the reason for the lack of evidence, it is more likely that they will confine their decision-making to the available evidence.

Based on how annoyed the jury was with the inadequate investigation of this immediate complaint, it is possible that if the complainant had not shown the forensic doctor her bruises, vomit and blood stains, this jury might have found the defendant guilty. As Juror 2 explained, the forensic doctor's evidence did more harm than good to the prosecution case: 'It helped the defence more so. His evidence raised more questions, eg, why did we not see/hear about the swabs etc taken? Left the case open to much more doubt'.

V LAWYERS' AND JUDGES' PERCEPTIONS OF THE EXPERT EVIDENCE

The judge and both barristers in the case, rated the prosecution case as strong because there were few inconsistencies in the evidence. Unlike many sexual assault cases, the circumstances and behaviour of the complainant did not require the prosecutor to dispel awkward facts of a delayed report to friends and family members, the absence of physical injuries, and non-disclosure to authorities. As the prosecutor explained:

> It was immediate complaint. She was distressed, she was crying. Immediately she went to the doctor. She told her friends immediately that she had been raped. The relationship between her and the accused man was such that one would think it unlikely that she would have 'come on' to him. He was her friend's father.

A Lawyers' and Judges' Perceptions of the Forensic Doctor

All the lawyers in this trial agreed with the jurors that the forensic doctor 'wasn't very experienced'. The judge was highly critical of the manner in which this doctor conducted his medical examination. The judge agreed with the jurors that the forensic doctor failed to pay attention to identifying evidence of blood, vomit and hair pulling. As the judge explained: '[t]here was some staining on her pants which I don't think the doctor paid enough attention to'. The complainant described how the defendant had a hold of her head and was pushing her up and down. The judge noted that 'it would have been good to check her hair, which [the forensic doctor] hadn't done'.

The judge was highly critical of the failure of the forensic doctor to present evidence that the judge thought was important:

> This girl had described quite a violent attack upon her. I mean, she left this out. It was in her statement that she had been wrestling with this man for about 45 minutes before he made threats, saying, you know, 'I'll completely fuck you over' [before she] submitted to performing oral sex. The complainant had said that because she had a piercing in her tongue, she had somehow put a cut onto the accused man's penis, there was blood everywhere. She said she had vomited when the man ejaculated in her mouth …

The judge was also critical of the forensic doctor's failure to properly explain why a complainant would not want to be internally examined after a violent attack:

> The complainant also refused to have a genital examination and [the forensic doctor] didn't properly explain why … the defence counsel kept putting this stupid proposition about 'the greater the force, the more likely there is of some sign of injury in the vagina' and [the forensic doctor] kept saying 'you know the vagina's very stretchy and ra, ra' and really it would have been much better if [the forensic doctor] said 'look the force would

100 Ribeiro, Tangen and McKimmie (n 87).

> have to be very great indeed and … I was not going to cause this girl even more [distress]. She presented as an extremely upset witness. She had described a fairly harrowing incident' … The defence got a bit of mileage out of [the forensic doctor] actually …

A recurring theme in the judge's interview was that the prosecution 'needs to be far more understanding of jury's expectancies. And when they're not getting them, it then acts as a negative':

> I think there is a real CSI effect on juries which is a real problem … It's well recognised that juries think that forensic expertise/scientific expertise is far more developed than it in fact is. And I think that's something that prosecutors absolutely have to explain to them because, you know, defence counsel can exploit that …

Similarly, the prosecutor expressed her frustration with the forensic doctor's evidence:

> [The expert failed to address] the reasons why a complainant did not consent and why consent is important in the particular circumstances of people who have been raped, just to assist the jury to understand the reasons why a person may not consent, and what the role of consent is in medical treatment. I think that [the forensic doctor] took that a little bit for granted, and [the forensic doctor] just said 'Oh well, she didn't consent and patient consent is important' but didn't … I couldn't extract it out of [the forensic doctor] as to why.

The defence barrister had no difficulty with the forensic doctor's evidence and recognised that the evidence was to the defence advantage: 'I think the jury clearly understood this girl wasn't prepared to allow herself to be examined and it worked for the defence'. The defence barrister did suggest that: '[i]f forensic medical officers are aware of an inconsistency from the history they took, and their findings, not that they should cross-examine, but they should perhaps ask a few more questions in an attempt to clarify'. This observation implied that the defence barrister recognised the failure of the forensic doctor to conduct a thorough examination. The defence barrister also acknowledged the importance of the lack of available medical evidence as key to the success of the defence. The defence barrister's cross-examination of the forensic doctor focused on the lack of evidence as to the internal and external injuries, with the intention of capitalising on the common sense conclusion that there will be injuries from an attack in the confines of a car.

B Lawyers' and Judges' Perceptions of the Psychiatrist

All the legal professionals agreed that the psychiatrist was a good witness: 'Extraordinarily knowledgeable. He is also a very loquacious witness. He will talk on and on and on and on and … if you're going to call him as a witness, he needs to be firmly directed to his particular area. But, he's excellent at explaining' (Judge).

The description by the prosecutor confirmed that this expert was not firmly directed to the particulars of the case at hand. The prosecutor explained that the written report from the psychiatrist had not addressed what she had asked. The report addressed only two rape myths – why a victim might refuse a genital examination and the fact that a victim might be unevenly waveringly emotional following an assault. The prosecutor was obliged to restrict her examination of this expert to what was contained in the report. The prosecutor had planned to address other relevant child sexual assault myths as part of her re-examination of the expert. However, the plan backfired because defence counsel took the prosecution by surprise by opting not to cross-examine this witness.

Trial rules provide that if there is no cross-examination, a prosecutor cannot re-examine the witness.[101]

The prosecutor described the psychiatrist as a charismatic and benevolent witness and thought that the '[d]efence were very clever in not cross-examining him because it gave [me] very little opportunity to really present the entirety of [my] evidence'. It is rare that an expert will not be cross-examined. This strategy was perceived by everyone involved in the trial as a clever tactic, confirmed by the 'not guilty' verdict. The judge concluded that because of the way the trial was run, the psychiatric evidence in this trial became 'strangely irrelevant. However, I'd had him in another criminal trial where his evidence was extremely relevant and extremely important'.

The prosecutor should have approached the preparation of this case with greater caution; a further report from the educative expert that addressed not just two, but all the myths that were relevant to the case, should have been obtained before the trial began. This would have avoided the risk that there would be no cross-examination of the educative expert (and therefore no opportunity to re-examine the witness).

The judge was also of the opinion that the prosecution did not adequately anticipate and address the unrealistic expectations of jurors for hard evidence:

> Jurors have an unrealistic expectation in sexual assault trials that there will be hard evidence to back up the complainant's verbal account – I think when you come to medical evidence in sexual cases there is also an expectation however in juries that, you know, there'll be this and this and this evidence – you know, there'll be bruises everywhere there'll be a ripped and torn vagina, … and that she'll be hardly able to walk. And so I think that's a real problem, and I think that needs to be attended to … They're told that [the evidence is] neutral, but they can actually take it further and say 'Well, that's a sign it didn't happen'…

The defence barrister disagreed with the legislation enabling expert witnesses to give evidence to counter community misconceptions and disputed the empirical foundations for this evidence and policy:[102]

> It's meant to be an expertise based on specialised knowledge that's not in the province of the lay person. I think issues of delay and inconsistent behaviour are matters that people deal with every day in their lives. And I don't think the studies back it up in an empirical fashion at all, what a number of these alleged experts say.

Like the judge in *Lazarus*, this barrister labours under the common sexual assault misconceptions relating to delayed complaints and inconsistent behaviour of a victim post-assault.[103] This barrister's inaccurate perspective is not an isolated viewpoint but is common among members of the defence bar. For instance, the aberrant and contrary views of defence counsel emerged prominently in an anonymous online survey of views of criminal justice sector professionals about numerous special measures adopted legislatively to assist vulnerable child complainants in giving their best evidence, including the use of counterintuitive expert evidence.[104]

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101 Section 39 of Australia's *Uniform Evidence Law*. Australian *Uniform Evidence Law* has been enacted in *Evidence Act 1995* (Cth) which applies in the Federal Court and in courts in the Australian Capital Territory; *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

102 Lee et al (n 27) 11, 18. Goodman-Delahunty, Martschuk and Cossins also noted that trial strategies used by defence counsel exploited jury uncertainty and prevalent jury misconceptions about child sexual assault evidence by reinforcing inaccurate stereotypes: Goodman-Delahunty, Martschuk and Cossins, 'What Australian Jurors Know and Do Not Know' (n 15).

103 A large body of empirically sound studies support the existence of these misconceptions: see, eg, research about inconsistent behaviour cited under Parts IV(B), (D) and (E) above.

104 Lee et al (n 27) 20.

VI AFTERTHOUGHTS FROM THE EXPERTS

The tenor of responses from the forensic medical doctor during the post-trial interview suggests that the doctor did not appreciate the ramifications of his inadequate explanation to the jury of the exchange he had with the complainant at the time she presented to the emergency department of the hospital. The doctor did reflect: 'I think the judge felt that the prosecution didn't get enough out of me; that it actually wouldn't have made any difference whether or not I examined her [the complainant]'. The forensic doctor told us that he spoke to the prosecutor for a few minutes on the phone prior to giving evidence via video link. During those few minutes they focused on the logistics of giving evidence via video link and not on the nature of the evidence to be elicited. The forensic doctor did not display an appreciation for his role of dispelling two of the rape myths. The forensic doctor was taken by surprise when his evidence went on for over an hour, and that there was such an emphasis on hypothetical questions that addressed the rape myths:

> The significance of the girl not being examined, you know, refusing to be examined and whether that's significant or not significant to the case, and the injuries, like there was a lot of kind of … 'What extent of injuries would you expect …', and it was a little bit hypothetical, you know, 'What would you expect with this amount of force and this amount of … for this period of time?'

The forensic doctor made no reference in the interview to the failure to take photographs of the injuries or what happened to the swabs he took at the time and submitted for analysis.

The psychiatrist expert, who was called specifically to address the relevant rape myths, was overseas until just before he attended court. The prosecutor had about three minutes to talk to the expert before he gave his evidence. This expert has given evidence in jurisdictions overseas and noted that in Australia there is 'a lot less time spent discussing with counsel – either prosecution or defence – the nature and limitations of one's evidence, and what questions it would be unwise or particularly important to put to me'.

The psychiatrist explained that, in this case, he provided very limited, generic evidence. The expert did not meet the victim or interview the defendant. He chose to give general advice about the probable behaviour of children who have been sexually assaulted. Whilst the jurors were disappointed that the psychiatrist did not provide more case specific evidence (because he had not seen the complainant) the psychiatrist believes that generic evidence is preferable than case specific evidence. The psychiatrist was concerned that experts can too easily:

> become a proxy for the accused or a proxy for the prosecution. And that in fact providing the jury or occasionally the judge with the background knowledge to enable them to make their own opinions based on the evidence is a much more, for me, sympathetic role and easier role than one in which one is inevitably drawn into discussions of very specific elements of the case.

This characterisation of the role of the expert, whilst consistent with what the criminal justice system asks of expert, sits in contrast to what the jurors in this trial expected and wanted.

The psychiatrist conceded that perhaps all his explanations were not ideal: 'I may not have explained it as well as I should have done in this case. I can't remember … Perhaps I didn't because the defence got up, didn't it'.

VII CONCLUSIONS

As the psychiatrist in the case study acknowledged, in the last 25 years, there has been a 'dramatic change in both the legislation, the consequences, and the energy with which sexual offences, particularly against children are prosecuted. [This] has totally changed the way in which our courts operate with regard to sexual offences against children.'

Dramatic changes, such as the use of expert evidence to educate jurors about common rape myths that apply to issues of consent in child sexual assault trials, have posed significant challenges for the lawyers and experts. These challenges have resulted in underuse and also unsuccessful use of legislative reforms allowing this type of expert evidence.[105] The case study analysed in this article is an example of the unsuccessful use of this type of evidence. It places a spotlight on some specific areas where the current procedures could be more effectively used.

The highly experienced judge and both barristers in the case study perceived that this prosecution was strong, due to the immediate reporting of the crime. However, the prosecution did not yield a conviction. Prima facie, the strength of this prosecution suggests that the jurors fell prey to several rape myths in finding the defendant not guilty. However, the survey responses and interviews of five of the jurors reveal that the rape myths relating to consent were not identified as the major reason for their verdict. The key factor for them being dissatisfied with the prosecution's case was the prosecution's failure to provide them with the 'hard evidence' that was available. The experienced defence barrister capitalised on this failure.

In the case study, expert evidence to combat common rape myths was mostly ineffective. Whilst there is evidence that it worked well to combat the 'tearful victim' myth (Myth D), the positive impact on the other relevant myths was not evident from the juror's feedback. The jurors perceived that the forensic doctor provided an inadequate explanation as to why a complainant would resist an internal examination. The psychiatrist's evidence on this rape myth was probably delivered too late to impact juror opinions. Those opinions were firmly focused on the fact that the forensic doctor failed to explain, to the complainant, the importance of agreeing to an internal examination. The jurors concluded that this deprived them of evidence that they needed to be satisfied of the crime beyond reasonable doubt.

The psychiatrist expert gave general evidence about rape myths. In doing so, he included some myths that were not relevant to the facts of the case at hand. The jurors perceived this evidence as a waste of their time. By failing to contextualise the relevant rape myths, this expert also neglected to explain to the jury two relevant rape myths; the *Lolita* myth (Myth A) and the myth that adolescent girls are prone to lying (Myth F). One juror was clearly relying upon Myth F when speculating about the complainant's motives for bringing a false complaint. Like the other four jurors, the

105 Views of judges and lawyers on expert evidence of this nature were canvassed in a recent online survey administered in three Australian states. Responses confirmed that their opinions of the success of this measure in cases of child sexual assault were mixed. While all except defence counsel supported such expert evidence, they rated its effectiveness, when used, as limited: Lee et al (n 27). Goodman-Delahunty, Martschuk and Cossins also noted that trial strategies used by defence counsel exploited jury uncertainty and prevalent jury misconceptions about child sexual assault evidence by reinforcing inaccurate stereotypes: Goodman-Delahunty, Martschuk and Cossins, 'What Australian Jurors Know and Do Not Know' (n 15). See also Powell et al (n 31) 196–231.

fifth juror also focused on the failure of the authorities to properly investigate the complaint. The perceived lack of evidence encouraged this juror to speculate.

The jurors did partly align themselves with Myth G; they were uncomfortable convicting purely on 'one person's word against the other'. The jurors did not perceive that the immediate report of the assault to a friend, the mother and then the doctor was enough to satisfy the charge beyond reasonable doubt in the absence of corroborating evidence that should have been available to them. The jurors' perceived need for forensic evidence aligns with other recent research that asserts that jury eligible citizens are more confident to convict when there is some type of physical evidence providing scientific or medical corroboration of the complainant's version of events.[106]

The jurors did not say that that absence of forensic and medical evidence suggested that the complainant made a false report. Their reasoning focused on the fact that there was corroborating forensic evidence available (swab tests etc) that they were not provided with. No explanation was given to the jury as to why the corroborating evidence was not available. In the absence of the corroborating forensic evidence or a viable explanation as to why this evidence was not available, these jurors did not perceive that the high standard of proof was met by the prosecution. With the exception of Juror 4, the jurors did not suggest that the complainant made a false report.

The experts did not adequately explain the rape myths that were salient to this case. At the heart of this problem was a failure of the prosecution to adequately prepare the experts for trial. The prosecutor in this trial spent only a few minutes with each expert prior to their attendance at the trial. The interviews with the experts revealed that neither of them had an adequate appreciation of their forensic role for this particular trial. The judge noted that she had heard the psychiatrist give adequate evidence before. This suggests that his poor performance in this trial was due to the lack of adequate preparation by the prosecutor.

The importance of adequate preparation for trial was also echoed in the results of the broader project of 55 trials. Preparation of expert witnesses in pre-trial conferences was generally inadequate. In some instances this was the product of lack of industry, in others it seemed reflective of usual practice. The authors concluded that 'if counsel calling an expert witness is not adequately apprised of the subtleties or shades of grey in an expert's opinions … problems will emerge at trial'.[107]

Five lessons on how to adequately prepare and present evidence to educate juries and counteract rape myths emerged from jurors' reactions to the evidence.

A Prepare the Counterintuitive Evidence Adequately

The prosecutor had only a very brief conference beforehand with the psychiatrist, which is likely to have contributed to poor tactical decisions by the prosecution. The prosecutor should have asked the expert for a further written report addressing rape myths that the expert failed to address in the first report. The tactic of leaving this information for re-examination backfired, leaving jurors to speculate about the complainant's behaviour. For example, the psychiatrist failed to address the rape myth about ulterior motives of adolescent girls in complaining (Myth E). One of the jurors hypothesised about the complainant's ulterior motives.

106 See above Part IV(G).
107 Freckelton et al (n 80) 195.

The judge noted that this expert needed firm direction. This expert received all the relevant written documents before he prepared his report. One way to firm up directions to this expert is to provide the expert with the recording of the complainant's police interview. Such recordings are likely to elucidate what rape myths are relevant to the facts in issue.

Another benefit to the psychiatrist of viewing the recorded police interview is that it may redress some of the jurors' views that an expert who has not met the complainant is less persuasive than experts who did. For an expert to give relevant evidence about empirical research findings on rape myths, it is not necessary to meet the complainant. However, prosecutors should be ready to address the eventuality that evidence from experts who have never met the complainant is likely to be undervalued by some jurors.[108] An expert who has reviewed a prerecorded police interview of the complainant might be less vulnerable to this juror criticism.

Another way to improve the current rape complaints system is to offer complainants the opportunity to meet with a mental health care professional with expertise in sexual assault as soon as possible after the reporting. This would not only promote adequate mental health care to a person likely to be experiencing trauma, but addresses jurors' concerns that the psychiatric expert never met the complainant.

B Present the Counterintuitive Evidence in a Timely Manner

The timing of the evidence may have mooted the impact of the psychiatrist's evidence. As the last witness for the prosecution, his evidence was, perhaps, 'too little too late'. Studies have shown the benefits for juries of providing information to establish a framework to evaluate evidence *before* the evidence is presented.[109] For example, Goodman-Delahunty, Cossins and O'Brien found that a judicial direction provided before a child complainant gives evidence was a more effective educational intervention than the same judicial direction provided after.[110] Moreover, presentation of the specialised information before the evidence of the child complainant significantly enhanced the credibility of the complainant in comparison with the same information provided after the child complainant gave evidence.[111] Together these findings indicated that these interventions, when presented early in the trial, assisted jurors in evaluating the evidence of the complainant by serving 'as a powerful organizing theme for interpreting new information presented subsequently'.[112]

Our case study analysis is consistent with findings of these prior studies. The prosecutor in the case study did not anticipate that the jury would require expert

108 Goodman-Delahunty, Martschuk and Cossins, 'Programmatic Pretest' (n 31).

109 Nancy Brekke and Eugene Borgida, 'Expert Psychological Testimony in Rape Trials: A Social-Analysis' (1988) 55(3) *Journal of Personality and Social Psychology* 372; Neil P Cohen, 'The Timing of Jury Instructions' (2000) 67(3) *Tennessee Law Review* 681; Rachel K Cush and Jane Goodman Delahunty, 'The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence' (2006) 13(1) *Psychiatry, Psychology and Law* 110; Vicki L Smith, 'Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making' (1991) 76(2) *Journal of Applied Psychology* 220.

110 Jane Goodman-Delahunty, Anne Cossins and Kate O'Brien, 'Enhancing the Credibility of Complainants in Child Sexual Assault Trials: The Effect of Expert Evidence and Judicial Directions' (2010) 28(6) *Behavioral Sciences and the Law* 769 ('Enhancing the Credibility of Complainants in CSA Trials'); Goodman-Delahunty, Cossins and O'Brien, 'Comparison of Expert Evidence and Judicial Directions' (n 25).

111 Goodman-Delahunty, Cossins and O'Brien, 'Comparison of Expert Evidence and Judicial Directions' (n 25) 212.

112 Goodman-Delahunty, Cossins and O'Brien, 'Enhancing the Credibility of Complainants in CSA Trials' (n 109) 780. See also Cossins 'Expert Witness Evidence in Sexual Assault Trials' (n 32) 94.

evidence about several rape myths potentially at play, but called the expert psychiatrist at the end of the case, as an afterthought. Our analysis suggests that calling the expert evidence as to rape myths at the end of the prosecution case rendered much of the expert's evidence ineffective.

Ideally, such expert evidence should be delivered early, before the relevant evidence. For example, in the case study, the psychiatrist's evidence should have been heard before the complainant and forensic doctor's evidence. This would ensure that the jury heard the forensic doctor's evidence in the knowledge that it was normal for an adolescent girl to resist an internal investigation immediately after enduring a violent assault. The jurors' negative reaction to the forensic doctor's failure to persuade the complainant to consent to an internal examination may have been ameliorated by counterintuitive expert evidence presented before the factual evidence pertinent to the myth.

C Prepare the Forensic Medical Evidence Adequately

All forensic doctors who receive the complainant's first report, need to be adequately prepared for their courtroom performance. Ideally, this means meeting with the forensic doctor. During that meeting the prosecutor needs to explain to the witness the scope and importance of their evidence. For example, in the case study, the prosecutor should have explained the doctor's role was to educate jurors in relation to two sexual assault misconceptions that were relevant to his examination of the complainant.

Failure by the prosecutor in the case study to meet and prepare the forensic doctor led this witness to operate under the false assumption that his evidence was of little import in the case. The forensic doctor was taken by surprise when his evidence went on for over an hour. Juror 4 offered the forensic doctor some salient words of advice; **'**I think probably the witnesses if they know they are going to be cross-examined, they need to review the case a bit in their own minds and with their notes'.

The results of the broader study also suggest that the need for adequate pre-trial preparation is more imperative when the expert is either lacking in courtroom experience (like the forensic doctor) or highly experienced in giving evidence (like the psychiatrist). Results from the broader study showed that experts with a moderate level of experience in the courtroom were best received by jurors.[113]

D Assume Jurors Want Hard Evidence

Whilst some of the jurors acknowledged that injuries may not be seen in a vagina post-rape, they nevertheless wanted assurance of a thorough investigation of the complaint. All five jurors expected visual illustrative exhibits to accompany the physician's oral evidence. They commented on the failure of the doctor to take photos of the marks that the complainant showed him. All five jurors noted the failure of the prosecution to present the results of forensic tests on the swabs taken from the complainant by the forensic doctor on the night of the alleged attack.

These findings highlight that prosecutors should always prepare their case on the assumption that some jurors expect hard evidence. When that hard evidence is available

113 Chapter 8 of the broader study results reported that experts who were not used to giving expert testimony were perceived more negatively by the jurors. The more that the expert had appeared in court, the greater the disagreement in jurors' ratings of the credibility of that expert: Freckelton et al (n 80) 182–3.

but not presented, jurors are less likely to accept that the case was proven 'beyond reasonable doubt'. Jurors will punish investigating authorities for conducting an unsatisfactory investigation. The defence effectively exploited the perceived gaps in the prosecution case, using the absence of hard evidence as a reason for the jury to conclude that the case had not been made out. As the judge advised:

> juries are expecting bloodied and torn vaginas. There needs to be far more explanation about the fact that, you know, this rarely happens. You do not see this a lot … There needs to be far more of that sort of explanation as to why a neutral finding is not a negative finding. There needs to be far more understanding of juries expecting things. And when they're not getting them, it then acts as a negative.

When hard evidence is unavailable, the prosecutor needs to explain why it is not available in order to address the expectations of jurors. Jurors are diligent and educated and are likely to accept a reasoned explanation.[114]

Similarly, it should be assumed that some jurors will expect that an expert psychiatrist will interview the complainant before coming to court (as discussed in Part VII(A) above). In order to ensure that this does not create a barrier to the prosecution case, a prosecutor should always, in these circumstances, anticipate this juror expectation and address it by explaining why an educative expert does not need to interview the complainant before providing their evidence. This explanation should address the following factors; that:

- interviewing the complainant does not make them more authoritative when they explain research findings;
- the educative expert cannot comment on the credibility of the complainant as that is the task of the jury; and
- interviewing the complainant might further traumatise the complainant as she would have to deal with yet another stranger in the legal process.

E Conduct a Thorough Examination on the Night of the Complaint

Forensic doctors who are likely to be called upon as a first point of contact in a rape report must be trained to appreciate the importance of their examination for any criminal charges that might be laid in relation to the complaint. The firsthand experience of the forensic doctor with the complainant immediately following the alleged rape was perceived by the jurors as crucial. Yet the forensic doctor 'didn't feel that it was such a – sorry, a critical aspect of the assessment'. No forensic doctor should assume (as the forensic doctor in the case study did) that the complainant's story will be taken more extensively later by someone else.

Whilst medically, an internal examination may not be critical to the care of the patient, the jurors in the case study were not satisfied that the forensic doctor had fully informed the complainant of her options; specifically, how her decision might impact upon a potential criminal trial in future. Speedy acceptance by the forensic doctor of the initial reluctance of the complainant to be internally examined was considered by at least three of the jurors to be unsatisfactory. As Juror 2 explained: 'He should have made it clear to the victim that it is very hard to prove a rape in court if the victim does not allow a full examination'.

114 This observation is consistent with the results of the broader study from which this trial came. Analysis of 115 juror interviews and almost 300 surveys suggested that the jurors 'engaged in in-depth central processing of the content of the expert evidence and were engaged by their task': Freckelton et al (n 80) 196.

The authors gained the impression that if the forensic doctor had conducted a full examination that yielded no evidence of trauma, the jury would have been more satisfied that the assault took place. The failure of the forensic doctor to fully inform the complainant of the repercussions of her choice not to have an internal examination led jurors to rate this doctor as incompetent for not treating the allegation with the seriousness that it deserved. The forensic doctor explained that 'I didn't actually push the small details'. However, the jurors told us that they wanted the small details. The jurors were not prepared to send someone to jail unless they had enough evidence to picture what actually happened. As Juror 5 explained 'we just went back in the jury room and said, what, are we supposed to picture, a stick figure? This is quite – you know, this is serious. Someone could go to gaol for 20 years and we just wanted to know'.