The use and abuse of psychiatric evidence in rape trials

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Abstract This article examines how psychiatric evidence can be misused in rape trials and argues in favour of more stringent limits on cross-examination to protect rape complainants from improper attacks on their credibility.

Keywords Cross-examination; Mental illness; Witnesses; Sexual assault

Criminal Evidence and Procedure

Commentators discussing the cross-examination of rape complainants have tended to focus on sexual history evidence and, to a lesser extent, the use of character evidence more generally. The defence use of psychiatric evidence to discredit rape testimony has, in contrast, received scant attention to date even though it has been observed that defence lawyers commonly seek access to complainants' medical records for this purpose. This is perhaps unsurprising when one considers the limited attention paid generally to the use of psychiatric evidence to impugn witness credibility in criminal proceedings. Few academic commentators have addressed the subject and in England and Wales, at least, there is a paucity of decided cases. In this article I set out to bridge this gap in the literature by first examining how psychiatric evidence can be misused in rape trials. I begin by drawing attention to the historical association of rape complaints with female psychopathology and the underpinning belief that women falsely accuse men of rape because they are psychologically disturbed or unable to distinguish between rape and consensual sexual intercourse. This enduring association provides a clear incentive for defence lawyers to question complainants about their mental health in the context of a rape prosecution. The difficulty from an evidentiary perspective is that such questioning may have little, if any, logical bearing on a complainant's credibility but may simply reflect popular prejudices about mental illness and the untrustworthiness of women in relation to sexual matters. Having outlined these concerns, the second part of the analysis considers how rape complainants (and other witnesses) may be better protected in court, turning attention specifically to the United States and the evidentiary principles that criminal courts in some states have developed and applied to the use of psychiatric evidence to impeach witness credibility. Drawing inspiration from practice in these jurisdictions, I offer some thoughts on how a more principled approach toward the use of psychiatric evidence might be instituted in England and Wales.

False accusations and women's 'madness'

The association between allegations of rape and female psychopathology can be traced to early 20th century medical jurisprudence. This period saw the emergence of psychoanalysis and, as Edwards has detailed, in-
terpretations of female sexuality that were presented as both innately masochistic and related to the sub-conscious mind, manifesting in sexual fantasies of sexual domination, violation and rape. Both strands of psychoanalytic theory were quickly assimilated within medical discourse and commentary on rape but were notably taken a step further in the notion that women could not be trusted to differentiate between their sub-conscious sexual desires and reality. According to Kanin, fear of false allegations reached new heights at this time as prominent medical figures warned of women's proclivity to sexual delusion and the tendency of 'neurotic individuals' to convert 'fantasies into actual beliefs and memory falsifications'.

This medical position was subsequently endorsed by legal scholars across common law jurisdictions and cited as further evidence of the need for evidentiary rules that allowed for the rigorous testing of rape complaints and the careful scrutiny of women themselves. Writing in 1949, for example, Machttinger argued in favour of the admission of expert psychiatric opinion in sexual offence cases on the grounds that such evidence was necessary to explain the 'abnormal instincts' of the 'female sexual pervert' and to protect innocent men from unfounded accusations:

'The fact that many of these charges stem from a psychopathic mind, makes it essential that the rules of evidence permit complete investigation into the truth of the charges. The most useful kind of evidence in a sexual case is the opinions of psychiatrists, social workers and probation officers as to the moral and mental traits of the prosecutrix.'

Other writers, most notably the influential American jurist John Henry Wigmore, called upon the criminal courts to order the fully fledged psychiatric evaluation of the credibility of rape complainants as a preconditions to prosecution. The American Bar Association ultimately adopted the same line, declaring that 'the complainant in a sex offense should always be examined by competent experts to ascertain whether she suffers from some mental or moral delusions or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases'. These entreaties were never strictly followed in practice but trial judges in the United States do significantly retain the discretion in some states to order the compulsory psychiatric examination of a rape complainant where corroborative evidence is lacking or limited and an examination is deemed 'a necessity'. Continued support for this 'gross invasion of complainants' privacy' centres on the 'possibility that a believable complaining witness, who suffers from an emotional condition inducing her belief that she has been subjected to a sexual offense, may charge some male with that offense'.

In England and Wales, Wigmore's cautionary warning became a mainstay of legal texts. The 'peculiar dangers of sexual charges' were, for instance, cited by Glanville Williams writing in support of the corroboration warning in rape trials in the 1960s. Experience had shown, he declared, 'that the complainant's evidence [in sexual cases] may be warped by psychological processes which are not evident to the eye of common sense'.

Eschewing court-ordered psychiatric examination, Williams suggested that rape complainants could be required to take a liedetector test as a precautionary measure against false complaints. Heydon's Evidence: Cases and Materials, published a decade later, featured a similarly couched warning:

false accusations may proceed from all kinds of psychological neuroses and delusions. ... The danger here is that it is very difficult to detect when some bizarre motive of this kind is operating, and the supposed victim may have so high a social standing or so innocentseeming an exterior as to disarm suspicion and attract sympathy. The current improvement in the status of women is said to lessen the chance of such fantasy, but this is doubtful.

The open expression of such views may be less common today but the association between false complaints and female psychopathology nevertheless provides a potent backdrop to modern-day rape trials. When a defence lawyer questions a rape complainant about her psychiatric history in court it is typically with the aim of undermining her credibility in the eyes of jurors. This tactic is likely to prove effective precisely because it invokes the gender-stereotyped image of a mentally unstable accuser. Defence lawyers are also able to tap into common prejudices about mental illness. In England and Wales, population surveys indicate that people have a poor understanding of mental health issues generally and, moreover, that many hold negative, stereotypic views about the capabilities of those diagnosed with a psychiatric condition. This is supported by studies demonstrating the extent of discrimination and stigma faced by people with a history of mental illness in their daily lives, whilst the pejorative language commonly used in association with mental illness--'psycho', 'nuts', 'loony', 'headcase'--provides further evidence, as Hinshaw notes, that prejudice and ignorance remain widespread. Psychiatric evidence is therefore likely to prove highly prejudicial in the con-
text of rape proceedings but may have little real connection with a complainant's credibility, as the following section sets out to illustrate.

Identifying (mis)uses of psychiatric evidence in rape cases

In most rape cases the accused argues that the complainant consented. The thrust of the defence position is thus that the complainant is lying and a range of possible motivations may be advanced on the accused's behalf, including revenge, spite, greed, and regret. As an alternative or complementary strategy the defence may seek to portray the complainant as a fantasist or a disturbed individual whose allegation is the product of an unbalanced mind and, on this basis, question her about her mental health in court. The problem with this line of defence is that it is predicated on an unsupported assumption that women who have received psychiatric treatment are predisposed to make false allegations of rape, either wittingly or unwittingly, or are otherwise lacking in credibility. Certain mental illnesses may disclose a tendency to confuse fantasy and fact. However, it is simply erroneous to suggest that mental illness per se impairs a person's ability to differentiate between the two. The same may be said with regard to deliberate deception which is associated (not uncontroversially) with particular psychiatric diagnoses. The mere fact that a complainant has received psychiatric treatment does not support an inference that she is an unreliable witness. Defence lawyers may nevertheless quiz complainants about their mental health in the hope that the merest hint of psychological aberration will be sufficient to discredit their accounts.

A Dispatches documentary report broadcast by Channel 4 Television provides examples of the types of questions put to rape complainants during cross-examination, drawing from actual trial reconstructions involving cases where the defendant claimed consent and was ultimately acquitted. In one featured case the complainant described how she was pinned down and raped in her home by a male work colleague. During cross-examination defence counsel made pointed reference to the complainant's mental health:

[Defence]: And I think it is right to say, is it not, that you suffered from depression for a number of years?
[Complainant]: Yes.

[Defence]: Certainly since 1992, and perhaps earlier? Sufficiently down in 1992 to take an overdose?
[Complainant]: Yes.

The complainant had experienced post-natal depression and the defence evidently hoped to impugn her credibility by bringing this information to the attention of the jury. The relevance of this questioning is not readily apparent. Depression is a common disorder that presents with loss of interest or pleasure, feelings of guilt or low self-worth, disturbed sleep or appetite, low energy, and poor concentration. As Englert and colleagues note, mood disorders would not typically cause a complainant to have difficulty remembering events or relating testimony in a truthful way. Severe depression, which is far less common, can be associated with psychotic symptoms, including hallucinations and delusions, but these can be controlled through appropriate treatment. In the instant case, evidence of the complainant's depression appears to have been adduced simply as an attempt to cast her as 'emotionally unstable', as if this in itself could supply a satisfactory motive for fabrication. Significantly, the trial judge appeared to adhere to this same view, referring directly to the complainant's mental health in his summing-up where he noted that it had caused her, on her own admission, to have 'mood swings'.

In another case a complainant described a vicious attack by a neighbour whom she claimed raped her, punched her repeatedly in the face, bit her breasts and urinated over her. In court, the complainant recounted how she had run into the street covered in blood and urine, prompting passers-by to call the police. The defence responded by quizzing her about her troubled childhood and specifically about her referral to a psychiatrist at the age of 11 after she had cut her arms with a razor. During cross-examination defence counsel asked her whether she remembered harming herself and about her 'motive' for doing so:

[Defence]: Right. Have you ever--it might sound a funny question I just don't know--have you ever hurt yourself for attention?
[Complainant]: Not for attention, no.
[Defence]: You have hurt yourself, injured yourself, a lot of times in the past, haven't you?

[Complainant]: Yes.

This strategy constitutes a highly cynical attempt to supply jurors with an 'explanation' as to why a woman would not only fabricate an allegation of rape but would also subject herself to a demeaning and violent sexual encounter. The complainant's behaviour is portrayed as exploitative when, in reality, those who engage in deliberate self-harm typically do so in private, going to considerable lengths to conceal the activity and are often unaware of the effect that their self-harming has on others. Individuals self-harm not as a means of manipulation but as a way of coping with acute stress and other strong emotions. No explicit claims are advanced regarding the complainant's credibility, yet through crude innuendo and insinuation the complainant's mental stability and, by extension, her reliability are called into question by the defence. Commenting on such tactics, forensic psychiatrist Gillian Mezey has criticised the use of histories of depression, self-harm and suicide attempts to undermine rape testimony. In adducing such evidence defence lawyers are, she warns, simply feeding into 'the common prejudices and myths about people with mental illness--the fact that they are unreliable, unstable, incredible and liable to make false claims'.

The issue of timing is also significant in these cases as both complainants were asked about episodes that occurred some years previously, seemingly on the assumption that a psychiatric diagnosis has an automatic bearing on witness credibility whenever it was made. This taps into a common but nevertheless erroneous view of mental illness as inevitably unremitting and chronic--the assumption that once someone is mentally ill, that person is always mentally ill. In truth, mental illnesses, like physical illnesses, vary enormously in range, severity of symptoms and duration. Individuals are often able to manage their condition successfully and many people return to full health. Psychiatric evidence is thus unlikely to be relevant when an illness preceded the events or testimony in question or indeed where symptoms are controlled by appropriate pharmacological or alternative treatment.

Further misguided uses of psychiatric evidence in rape cases are reported in the international literature, including accounts of defence lawyers using the trauma of childhood sexual abuse or a previous rape to cast doubt on complainants' credibility. Where a complainant has been diagnosed with Post Traumatic Stress Disorder ('PTSD'), for example, defence lawyers have proposed, quite outlandishly, that flashbacks to a prior sexual assault could have caused 'confusion' between consensual sexual intercourse and rape on the occasion in question. PTSD is a term used to describe a range of psychological symptoms individuals may experience following a traumatic event which is outside the parameters of normal human experience. Recognised symptoms include nightmares, avoidance behaviour, emotional numbing, hypervigilance and flashbacks which are neither hallucinations nor delusions. As Wilkinson-Ryan observes:

There is an important distinction to be made between intrusion symptoms and actual delusions. ... a person who 're-experiences' a previous traumatic event with these kinds of intrusions [flashbacks] is aware of their pathological nature. ... On the other hand, a person suffering from a psychotic delusion lacks insight into the nature of the problem--in other words, she believes what she sees or hears to be 'real'.

Wilkinson-Ryan suggests that this questioning strategy is also an attempt to introduce evidence of a previous rape, on the tactical assumption that a jury is unlikely to believe that a woman could be raped twice. In reality, there is substantial evidence indicating that women with a history of childhood sexual abuse and/or adult sexual assault are at increased risk of sexual victimisation. These same women are potentially easy targets for defence lawyers as sexual abuse and rape can lead, inter alia, to depression, PTSD, self-destructive behaviour, eating disorders and suicidal ideation. Those who experience the ordeal of repeat victimisation are thus at heightened risk of being labelled 'mentally unstable' and consequently forensically incredible.

The foregoing analysis has illustrated how psychiatric evidence can be misused in rape cases by making explicit the assumptions underlying lines of questioning by defence advocates. It has been suggested that the tactics employed by the defence to discredit complainants betray a stereotyped and flawed understanding of both mental illness and the link between mental ill-health and witness credibility. These misconceptions have serious implications for the fair administration of justice in rape cases. When irrelevant psychiatric evidence is adduced jurors are invited to draw unwarranted adverse inferences regarding a rape complainant's credibility. As jurors are likely to attach exaggerated significance to psychiatric evidence this is likely to have an irrational, distorting influence on juror decision-making to the prejudice of the individual complainant and the fact-finding process.
Erroneous verdicts are not the only potential negative consequence to flow from the improper use of psychiatric evidence during cross-examination. There is the additional danger that victims of rape with a psychiatric history will be deterred from coming forward and reporting offences by the prospect of having to answer questions relating to their mental health in court and being discredited on this basis.\textsuperscript{27} Indeed, critics in the United States maintain that defence lawyers seek disclosure of medical records in sexual assault cases in a deliberate bid to intimidate complainants and discourage prosecutions.\textsuperscript{28} They are often successful. An expectation that psychiatric evidence will ultimately be used to discredit rape testimony may also influence decision-making at the investigative stage of proceedings. Police officers and CPS lawyers are called upon to make credibility assessments and this will inevitably involve an element of 'second-guessing' the anticipated impact of likely defence strategies on juror decision-making.\textsuperscript{29} Knowledge that a complainant's credibility may be challenged, albeit unfairly, on the grounds of mental health will weigh in the balance when individual officers and prosecutors decide whether to discontinue a case or proceed to trial.

Finally, if a case reaches court there is the personal cost to complainants who may endure an intrusive and humiliating cross-examination where their psychiatric history is not only made public (perhaps for the first time) but is used to damning effect against them. For victims of rape, the experience of testifying can be traumatic and is commonly characterised as a 'revictimisation' or 'second assault'.\textsuperscript{30} The admission of the complainant's psychiatric history can only compound the stress of giving evidence, increasing the risk of further traumatisation.

Having highlighted concerns surrounding the introduction of psychiatric evidence in rape cases, the following sections explore how complainants might be better protected from improper attacks against their credibility.

**Preventing improper cross-examination**

In England and Wales, trial judges have the power to restrain unnecessary, protracted cross-examination and questioning that relates to matters so remote as to have negligible impact on the credibility of witnesses.\textsuperscript{31} There is little guidance to be derived from decided cases as to the proper bounds of questioning relating to a witness's mental health, however; as mentioned above, there are few pertinent cases. In the relatively recent case of \textit{R v Tine} the Court of Appeal upheld a trial judge's decision to disallow questioning on the grounds that the defence had insufficient material to justify an exploration of the psychiatric history of a burglary victim.\textsuperscript{32} The complainant was being treated for depression but this in itself did not provide a sufficient basis for cross-examination, the court ruled, adding that:

Sometimes psychiatric evidence will be irrelevant to credibility; sometimes it may be very relevant. However, this court would certainly agree that cross-examination of a witness about his or her psychiatric history should not be permitted unless there is some basis for doing so. Plainly if it is permitted, it must be sensitively carried out and carefully controlled.\textsuperscript{33}

The Court of Appeal notably offered no guidance on the issue of relevance nor did the court draw attention to the potential prejudicial effect attached to psychiatric evidence and how this might be appropriately addressed when determining whether cross-examination should or should not be permitted. This sums up the present position in England and Wales where trial judges are left to determine the propriety of cross-examination about a witness's mental health without basic principles to structure or steer their reasoning. They must rely instead on logic, common sense and experience. Whilst this may be unproblematic in many contexts, mental illness, as this analysis has sought to show, is an area of inquiry where experience, common sense and logic may be infected by stereotype and myth.\textsuperscript{34} To compound matters further, trial judges are constrained to intervening \textit{during} cross-examination. With limited knowledge of counsel's instructions trial judges may find it difficult to know when to intercede and may err on the side of allowing cross-examination for fear of compromising the appearance of judicial impartiality and providing grounds for an appeal in the event of a conviction.\textsuperscript{35} Even if a trial judge responds promptly and informs a witness that he or she need not answer a question regarding his or her mental health, the 'damage' may already have been inflicted. Simply raising the issue of a witness's psychiatric history may be sufficient to plant doubts in the minds of jurors and cause a witness public distress and embarrassment.\textsuperscript{36}

In the United States, the extent of cross-examination and the admissibility of psychiatric evidence similarly rest in the discretion of the trial judge. The courts in some states, however, have acknowledged the potential
A comparative perspective

In the United States there is general acceptance that a defendant has the right to challenge a witness's credibility with competent and relevant psychiatric evidence. The basic position was set out in United States v Partin:

[t]he jury should, within reason, be informed of all matters affecting a witness’s credibility to aid in their determination of the truth ... It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he suffered an impairment of sight or hearing. It goes to the ability to comprehend, know and relate the truth.\(^{37}\)

However, the extent of a defendant's right to impeach a witness's credibility during cross-examination on the grounds of mental health has been subject to further elucidation and refinement in some states. Rather than leave the question of relevance to the broad interpretation of trial judges, the appellate courts have developed clear governing principles to guide trial judges in the exercise of their discretion. For example, in State v Stewart the Utah Court of Appeals held that a party seeking to adduce psychiatric evidence for the purposes of impeachment must lay a two-part foundation of relevance.\(^{38}\) First, the party must show that a witness's mental condition is such that it affects his or her ability accurately to perceive, recall, and relate events. Secondly, the party must show that the relevant mental disorder existed either at the time of the event regarding which the witness has been called to testify or at the time testimony is given.\(^{39}\) Merely asserting that a witness suffers from a mental disorder would not meet the relevance requirement, the court stated, on the basis that mental disorders do not necessarily affect a person's credibility as a witness. A party must offer evidence demonstrating the relevance of psychiatric evidence if cross-examination is to be permitted:

As with heart disease or flu, mental illness or partial blindness, any physical disability suffered by a potential witness may or may not have an impact on the witness's ability to perceive, recall and relate events. Proof of the impact of any illness, or its treatment, on a witness's ability to perceive, recall, relate events in question is important to the search for truth in the courtroom. The suggestion that mental illness, as a category, somehow should be accepted by the court as evidence of diminished credibility, without further evidence of actual diminished ability related in time to the events in question, is simply unsupportable.

The defendant in this case was charged with aggravated robbery. At trial, a prosecution witness testified that he had talked with the defendant the day before the alleged robbery and the defendant had asked him for assistance in committing the offence. The defence, in turn, sought to attack the witness's credibility by asking him about his mental health. To support this attack the defence cited examples of the witness's mental health history which included hospitalisation on two occasions some 10 years previously, use of anti-psychotic drugs, the witness's decision to discontinue treatment a year before the alleged robbery took place, the witness's commission of an offence six weeks after the robbery, to which the witness pleaded 'not guilty by reason of insanity', and suicide attempts. In upholding the trial judge's refusal to permit the cross-examination, the appeal court ruled that these details supported the assertion that the witness suffered from mental disorders but they did not support the argument that the witness could not accurately perceive, recall, and relate events. Accordingly, the defence had failed to demonstrate through appropriate evidence how the witness's mental health history was relevant to his testimony in this case and cross-examination was rightly disallowed.

A similar approach was adopted by the District of Columbia Court of Appeals in Velasquez v United States.\(^{40}\) In this case the defence had sought to cross-examine a complainant of sexual abuse about a period of hospitalisation three years after the date of the alleged offence. The defence relied on the complainant's medical notes which showed that she had suffered a psychotic episode at this time and had professed some delusional beliefs. The notes also revealed that the complainant had been prescribed medication but her treatment had ceased by the time of the trial. The appeal court held that cross-examination had been properly
disallowed as the defence had failed to show that the complainant had a mental illness that would have af-
tected her credibility at the time of trial or her perception of events at the time of the alleged assault. The 
complainant's medical notes did not show that the psychotic delusional episode was relevant to her credibility 
and, whilst it was open to the defence to proffer expert opinion evidence to demonstrate such a connection, 
the court observed that no offer of expert opinion had been made in this case.

The principle that a party should offer evidence to demonstrate the relevance of mental illness to a witness's 
credibility has received approval in other states. In *Huber v Commonwealth* the defendant, who was charged 
with burglary, sought to challenge the credibility of a prosecution witness by cross-examining her about prior 
treatment for manic depression. The Supreme Court of Kentucky ruled that cross-examination had been 
properly disallowed as the defence had failed to produce any evidence to show how the illness affected the 
woman's reliability. In *Commonwealth v Perrault* the Appeals Court of Massachusetts similarly held that 
cross-examination had been properly disallowed where the only evidence adduced by the defence was evi-
dence that a prosecution witness had been committed to a mental hospital. The mere fact of hospitalisation 
was insufficient to compel the admission of psychiatric evidence, the appeal court ruled. The same line was 
taken in *People v Helton* where the Appellate Court of Illinois held, in a prosecution for rape, that the trial 
court did not err in refusing to allow the defendant, on cross-examination, to elicit the facts that the com-
plainant had been hospitalised on five occasions and administered lithium for severe depression two years 
prior to the assault. The defendant had not met his burden of showing relevance, the court held, as he had 
failed to show that the complainant was still taking medication and had not demonstrated how the medication 
or the complainant's depression affected her credibility.

Appellate courts in the United States have not merely insisted that parties lay a sufficient foundation of rele-
vance when seeking to adduce psychiatric evidence. In a number of cases the courts have additionally made 
clar that trial judges may legitimately disallow cross-examination even where relevance is established if 
they are satisfied that the probative value of psychiatric evidence is substantially outweighed by its potential 
prejudicial effect. Moreover, the appellate courts have identified specific sources of possible prejudice. In 
*Velásquez v United States*, for example, the District of Columbia Court of Appeals observed that there was 
'a significant degree of prejudice in the way that a lay person might view mental health history' while in 
*United States v Lopez* the US Court of Appeals for the Fourth Circuit discussed the risk of prejudice in terms 
of the impact on individual witnesses. 'One's psychiatric history is an area of great personal privacy and 
should only be invaded in cross-examination when required in the interests of justice', the court opined, add-
ing that it would be manifestly unfair and unnecessarily demeaning of the witness to allow cross-examination 
where psychiatric evidence was of minimal probative value. Trial judges are thus given clear authority to pro-
hibit cross-examination that does little to impair credibility but invades a witness's right to privacy and, in 
the assessment of the court, threatens to have an irrational influence on juror decision-making.

It is important to note that these cases are not reflective of practice across jurisdictions in the United States. 
According to Wilkinson-Ryan, a majority of states have in fact failed to set out clear guidelines for the admis-
sibility of evidence of a witness’s mental health. Focusing on rape prosecutions, she argues that this has re-
sulted in many states being 'overly permissive in admitting evidence of the accuser's psychiatric make-up 
and history'. The protection of rape complainants from baseless defence speculation will ultimately be de-
pendent, she concludes, on all states developing a coherent, principled approach to the admissibility of psy-
chiatric evidence.

**Lessons for England and Wales**

The conclusion reached by Wilkinson-Ryan could be extended to England and Wales. In the absence of a 
clear framework governing the admissibility of psychiatric evidence in criminal proceedings rape complain-
ants and other witnesses are likely to face continued gratuitous attacks against their credibility during 
cross-examination. The practices and procedures already operating in some US states, meanwhile, suggest 
a way of protecting witnesses from improper questioning while preserving the right of the defendant to chal-
lenge contrary evidence.

In accordance with this approach, it is submitted that cross-examination intended to impugn credibility should 
be allowed only if it is shown that a witness's capacity or disposition to provide reliable evidence is negatively
affected by a mental illness or disorder. Advocates seeking to aduce psychiatric evidence should bear the burden of laying a foundation of relevance and, for the reasons articulated by the US appellate courts cited in the last section, should have to do more than show that a witness has been diagnosed with a specific psychiatric condition or has received psychiatric treatment before cross-examination is allowed, regardless of the severity of the witness's current or past mental health problems. To discharge this burden, advocates should have to go a step further and show how a witness's credibility is impaired and how this impairment then relates to the facts of the instant case, relying on a witness's medical records (where these have been disclosed) or, if medical records fail to support a link, by resorting to expert witness opinion. In practical terms, this means that advocates in England and Wales would have to seek the leave of the court in all criminal cases before introducing evidence of a witness's mental health in order to discredit his or her testimony.46

A leave requirement would give trial judges the opportunity to assess the relevance of psychiatric evidence in advance of trial. The benefits of the evidence in terms of materiality, weight, and reliability would then have to be weighed, in accordance with established common law principles, against any costs associated with its receipt. Cross-examination would be appropriately disallowed where the probative value of psychiatric evidence was deemed insufficient having regard to its potential prejudicial effect. There are significant negative costs attached to psychiatric evidence, as already indicated, including a real danger that jurors will accord it exaggerated significance and dismiss a witness's testimony unduly, influenced by the many stereotyped assumptions that research suggests continue to surround mental illness. Added to this, there is the potential invasion of a witness's right to privacy and attendant risk of causing witnesses, who may already be traumatised, unnecessary humiliation and distress or of deterring other witnesses from engaging with the criminal justice system at all. Whether trial judges should be directed to consider these specific factors under the terms of a leave requirement might be debated, but a principled approach demands that they be accorded due weight when the question of admissibility is decided. On this issue it is worth noting the Divisional Court's recent recognition of the privacy interest in psychiatric records in R (on the application of TB) v Stafford Crown Court, where the court stipulated that appropriate procedures be put in place to enable witnesses to contest applications for the disclosure of such records as a means of protecting their privacy rights.49 This is a welcome development that will hopefully result in closer judicial scrutiny of disclosure applications and finally put paid to defence 'fishing expeditions' in sexual offence cases.50 It nevertheless stands in stark contrast to current trial arrangements where advocates are free to introduce psychiatric evidence without any advance consideration being given to the interests of witnesses or their Article 8 rights.51

It is not suggested that the interests of witnesses should be protected at the expense of a defendant's ability to present a full and vigorous defence. The right to challenge opposing witnesses is fundamental to providing a fair trial to an accused and must be robustly protected. Exclusion of relevant psychiatric evidence does not necessarily infringe this right however. As the Law Commission of England and Wales noted in its 2001 report on the use of bad character evidence, there is 'no explicit right in the Convention to adduce whatever evidence the defence wishes to adduce'.52 The exclusion of relevant evidence does not in itself render a trial unfair, the report added, '[i]t depends how relevant the excluded evidence is to the crucial issues in the case'.53 Where psychiatric evidence has little bearing on a witness's credibility its consequent exclusion would accordingly be compatible with Article 6(3)(d).

When cross-examination is permitted, it is essential, as the Court of Appeal stated in R v Tine, that it is 'carefully controlled'.54 Under the evidentiary regime outlined here, advocates would have to specify the evidence they wished to aduce when applying for leave and it would be for trial judges to ensure that advocates did not stray beyond these negotiated parameters during the actual questioning of witnesses.

Limitations of a leave requirement

A leave requirement would provide trial judges with a clearer foundation for preventing unwarranted attacks on the credibility of rape complainants and other witnesses. Experience has nevertheless shown the potential limitations of evidentiary innovation in effecting change in the absence of institutional support. One need only reflect upon the unhappy history of s. 2 of the Sexual Offences (Amendment) Act 1976 to see that the success (or abject failure) of statutory intervention rests heavily on the attitudes and behaviour of legal professionals involved in its implementation.55 In this specific context, significant change is unlikely to be brought
about unless reform is supported by educative initiatives. There is no reason to suppose that lawyers and judges do not harbour the same discriminatory beliefs about mental illness that research suggests are pervasive in the wider population. This view is supported by the mental health charity Mind which has recently called for compulsory mental health awareness training for all criminal justice personnel. This recommendation warrants support but it would be naïve to surmise that the problem is solely or primarily one of inadequate understanding. Improper cross-examination is bound up in a conception of adversarial advocacy that sees advocates ‘attitudinally and ethically committed to winning the contest rather than some other goal, such as discovery of truth or fairness to the opposing side’. The recognised ineffectiveness of the Code of Conduct of the Bar as a constraint on irrelevant or otherwise inappropriate questioning can be explained on this basis. If this situation is to change, the scope of advocates’ ethical duties must be broadened well beyond its current narrow confines. This is a task for the Bar Council in communicating clear limits for ethical trial advocacy and a responsibility to be met by those charged with providing legal education and training.

Prosecutors also have an important and more immediate role to play. Although traditionally criticised for their failure to adopt a sufficiently robust approach towards the shoddy, unfair treatment of prosecution witnesses, prosecutors are now specifically pledged to protect complainants from improper or irrelevant attacks on their character in court. Psychiatric evidence is not character evidence but its improper use in criminal trials may be no less humiliating for witnesses and no less prejudicial in its impact on juror decision-making. It is therefore suggested that the terms of the Prosecutors’ Pledge could usefully be amended to include a specific undertaking to protect complainants and other prosecution witnesses from improper or irrelevant attacks on their credibility through the use of psychiatric evidence, an undertaking that should be supported by appropriate training. These measures combined would reduce the chances of a leave requirement being circumvented or ignored.

Another potential limitation of the approach outlined here stems from its focus on psychiatric evidence adduced to impeach credibility. In practice, the distinction between evidence going to credibility and evidence going to the issue in a criminal case can often become blurred. Psychiatric evidence adduced for some purpose other than credibility impeachment may, moreover, carry similar dangers in terms of the risk of prejudice to individual witnesses and the fact-finding process. Ultimately, it may therefore prove necessary to extend judicial scrutiny to the use and abuse of psychiatric evidence in cross-examination more generally.

Ensuring the reliability of expert evidence

It has been argued that advocates should have to offer evidence to establish a relationship between a witness’s mental health and his or her credibility prior to adducing psychiatric evidence and that this may be provided in the shape of expert witness opinion. Detailed consideration of the regulation of expert evidence is beyond the scope of this analysis but the reliability of experts’ claims will clearly have to be carefully scrutinised if expert testimony is to operate as an effective check against improper cross-examination. If psychiatric evidence is introduced on the authority of invalid expert witness opinion a leave requirement will have little practical value. The same may be said in respect of expert witness testimony proffered for use at trial which should obviously only be admitted where psychiatrists and psychologists have an empirically sound basis for challenging a witness's credibility.

The importance of judicial training on mental health issues has already been stressed but there is an equal need for effective self-regulation on the part of the professional bodies representing psychiatrists, psychologists and other forensic practitioners. The Royal College of Psychiatrists has already taken a notable lead in this direction by issuing guidance to psychiatrists who act in legal proceedings and making significant recommendations related to professional training. This guidance states, for example, that those presenting themselves as experts should undergo an induction into expert witness work. Although the document is intended to cover all areas of psychiatric practice, certain sections have particular relevance for expertise relating to witness credibility. Psychiatrists are, for instance, cautioned against taking instructions that go beyond psychiatric expertise ‘by providing opinions as to whether an individual is telling the truth’, setting a clear boundary of professional competence. As a principle of best practice, psychiatrists are additionally advised to prepare reports only on people with whom they have professional involvement and directed that they must explain the limitations of their sources of information if requested to provide a ‘paper’ report.

These are welcome pronouncements but it would be helpful if professional bodies would go further still in
identifying the limitations of psychiatric and psychological expertise as it relates to witness credibility and in setting out clear principles for experts to follow when giving an opinion on such matters in criminal proceedings.

Conclusion

This article has highlighted specific concerns surrounding the employment of psychiatric evidence in rape cases, but it is hoped that it may prompt wider discussion of the credibility barriers facing rape complainants with a history of mental ill-health. The vulnerability of women with mental illness to sexual victimisation is well documented but the same cannot currently be said of their treatment within the criminal justice system. Little is known, for example, about rates of reporting or police and prosecutorial responses when a complaint is made. Studies conducted in other common law jurisdictions suggest, unsurprisingly, that complainants struggle to gain credibility, with cases typically falling out of the criminal process at an early stage. In England and Wales, researchers have expressed concern about the position of rape complainants with a mental illness but the picture that emerges is far from complete, indicating an urgent need for further research.

Viewed in broader perspective, there is a need for a more fundamental review of the criminal justice system's response to victims of crime with mental illness. A recent survey of over 300 people with mental health problems, conducted by the charity Mind, found that a majority of respondents had been victimised in the preceding two years, while a sizeable number faced ongoing bullying and harassment within the community. Many respondents were reluctant to report offences: 30 per cent elect to tell no one. They feared that involvement in the criminal process would expose them to further discrimination and vulnerability whilst those who sought legal redress were often dissatisfied with the response they received, 60 per cent believing that their complaint had not been taken seriously, in part, because of their psychiatric history. It is clearly unacceptable that those vulnerable to criminal victimisation should be deterred from seeking justice or should face unequal treatment by the police, CPS or the courts on the basis of their mental health. The government has pledged to challenge the stigma and discrimination that surrounds mental illness and to improve the lives of people with mental health problems by reducing or eliminating barriers to employment and wider social participation. Ensuring that victims with mental illness have confidence in the criminal justice system and are treated with sensitivity, dignity and respect at each stage of the investigation, prosecution and trial process must form an integral part of this strategy.

1 In England and Wales, Sedley LJ commented on this practice more than a decade ago. Re H (L) [1997] 1 Cr App R 176. More recently, a Home Office study that tracked rape cases over a three-month period in 2003 found that third party disclosure applications were made in nearly one quarter of cases and medical records accounted for 22 per cent of applications. L. Kelly, J. Temkin and S. Griffiths, Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials (Home Office: London, 2006) 25. Mental health charities and victim organisations have additionally voiced concerns over this development. Victim Support, Women, Rape and the Criminal Justice System (Victim Support: London, 1996); M. Pedlar, S. Baker, C. Williams and S. George, Silenced Witnesses (Mind: London, 2000).

2 Critical commentary to date has centred on the evidentiary use of counselling records made post-assault and issues surrounding the admissibility of evidence relating to a complainant's mental health pre-assault have been largely overlooked. See, e.g., S. Bronitt and B. McSherry, 'The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the "Rape Shield"?" (1997) 8 Criminal Law Forum 259.


7 As cited in Wigmore, above n. 6.


10 G. Williams, ‘Corroboration—Sexual Cases’ [1962] *Crim LR* 662, 663.


14 Hinshaw, above n. 12 at xi.


16 ‘Still Getting Away with Rape’ *Dispatches* documentary broadcast on Channel 4 Television on 16 March 2000.

17 It is estimated that at least one person in five will suffer from a depressive illness at some point in their life. World Health Organization <http://www.who.int/en/>, accessed 31 October 2008.


20 See above n. 16.

21 Hinshaw, above n. 12; Thornicroft, above n. 12.

22 This may of course give rise to a secondary inquiry as to the effect, if any, of prescribed medication on a witness’s perception and recall ability.

Ibid. at 1396. Englert et al. also note that someone suffering from PTSD is not necessarily more likely to imagine false memories, above n. 18 at 2.


Respondents to a survey conducted by Mind claimed there was reluctance on the part of victims with a history of mental illness to report criminal offences and attributed this, in large part, to victims’ fears that an allegation would not be believed: M. Pedlar, S. Baker, C. Williams and S. George, Silenced Witnesses (Mind: London, 2000).

See T. Lininger, ‘Bearing the Cross’ (2005) 74 Fordham Law Review 1353, 1373; J. Toobin, ‘The consent defence: rape laws may have changed but questions about the accuser are often the same’ The New Yorker, 1 September 2003.


Ibid.


493 F2d 750 (5th Cir. 1974). For a list of further cases, see J. Purver, ‘Cross-examination of Witness as to His Mental States or Condition to Impeach Competency or Credibility’, 44 American Law Reports 3d 1203 (1972 & Supplement).


Ibid. See also United States v Jimenez 256 F3d 330 at 343 (5th Cir. 2001).
40 US 801 A2d 72 (DC, 2002). See also State v Judge 758 So2d 313 (La.Ct.App.3d Cir. 2000).

41 711 SW2d 490 (1986, Ky).


44 US 801 A2d 72 (DC, 2002).

45 611 F2d 44, 45 (4th Cir. 1979).

46 Rule 403 of the Federal Rules of Evidence is said to provide courts with the power to do just this. Rule 403 states: 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence'.

47 Above n. 23 at 1375.

48 This is not the first time the possibility of a leave requirement has been mooted. In 1999, Lord Dholakia proposed amendments during the passage of what became the Youth Justice and Criminal Evidence Act 1999 designed, in sum, to prevent the introduction of evidence relating to mental disorder in sexual assault cases 'unless it is related directly to events at the time'. The amendments garnered some support but were subsequently withdrawn amidst concern that evidence pertinent to the determination of an accused's guilt could be excluded where it related to a complainant's mental state at the time of trial rather than at the time of the alleged assault. HL Deb, 8 February 1999, col. 40.

49 [2006] EWHC 1645, [2007] 1 All ER 102, citing R v Finland (1997) 25 EHRR 371. Following the decision the Criminal Procedure Rules 2005 were amended and now provide in Part 28 that the person to whom the evidence relates must be served notice of an application and given an opportunity to make representations unless the court otherwise directs.


51 Article 8 of the European Convention on Human Rights provides that: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’.


54 [2006] EWCA Crim 1788.


56 Mind, Another Assault (Mind: London, 2007).

The code stipulates, *inter alia*, that counsel may not 'make a statement or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person'. General Council of the Bar of England and Wales, *Code of Conduct of the Bar of England and Wales* (Bar Council: London, 2005) Part VII, para. 708(g).


*R v Funderburk* [1990] 1 WLR 587.


Royal College of Psychiatrists, above at 8.

Ibid. Echoing guidance already contained in the Criminal Procedure Rules, the document further provides that psychiatrists 'must act with honesty, impartiality and respect for justice, regardless of the party who instructs them'. See Criminal Procedure Rules 2005, r. 33.2(1) and additional guidance issued by the Court of Appeal in *R v Bowman* [2006] EWCA Crim 417, [2006] 2 Cr App R 3; *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5; and *R v B* [2006] EWCA Crim 417, [2006] 2 Cr App R 3.


