A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems

by

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Submitted in accordance with the requirements for the degree of Full-time PhD

University of Leeds
Faculty of Law

July 1997

The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

Abstract

Recent research has confirmed that giving evidence in criminal proceedings is often a degrading and gruelling ordeal for complainants in rape cases. This study seeks to establish the extent to which the secondary victimisation of rape complainants in court is an inevitable consequence of the adversarial trial process. It explores the conflict between the needs and interests of rape complainants and the basic assumptions of the adversarial fact-finding process and concludes that the adversarial system creates intractable problems for vulnerable complainants. This study questions whether our commitment to the adversarial process can and should continue given its onerous implications for victims of crime.

This study examines rape trials in the Netherlands, a country with an inquisitorial trial process. It identifies the fundamental differences between Dutch and English trial procedures and explores their significance for complainants in rape cases. This study seeks to establish whether inquisitorial style proceedings hold significant advantages for vulnerable complainants.

Acknowledgments

This research was funded by an Anne Spencer Scholarship. Anne Spencer was a graduate of the Faculty of Law at the University of Leeds in 1974. At the time of her death from sudden illness in 1990, she was a Reader in Education Management at the Further Education Staff College and an academic editor and author in the field of gender issues with reference to the professions. Anne's parents established a fund in her memory, providing a scholarship for a research student.

I would like to thank the Dutch practitioners who participated in this research for their cooperation. I also want to thank Professor John Bell, my supervisor, Yaman Akdeniz and my parents for their constant support and encouragement.

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Introduction

> "I would like to know why you are raped again, again, again and again, because that's what they did to me. They allowed me to be raped again and again."[1]

The treatment of rape victims within the criminal justice system of England and Wales has been the subject of considerable research. This research has consistently shown that the ordeal of rape complainants is frequently exacerbated by their experience of the criminal trial process. The experiences of rape complainants in court have also been the subject of a number of studies. These have been based largely upon the observation of rape trials, interviews with victims of sexual assault and interviews with legal practitioners.[2] Researchers have reported that giving evidence in court is frequently a painful, traumatic ordeal for victims of rape. Women have described their treatment in court as further victimisation, in some cases, worse than the rape itself. In seeking to account for the treatment of rape complainants in court, trial judges, defence barristers and prosecutors have all been the targets of criticism. So too the ineffective limits placed upon cross-examination and the role played by cultural myths and stereotypes in rape trials.[3]

One of the aims of this research is to fill a perceived gap in the analysis of rape trials. In an insightful article published in 1983, McBarnet identified the limitations of

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1 Victim of rape interviewed by Victim Support and asked to describe her experience of the criminal justice system, Victim Support, *Women, Rape and the Criminal Justice System*, (1996, London:Victim Support), at 39

2 Adler, Z., *Rape on Trial*, (1987, London:Routledge& Kegan Paul), Brown, B., Burman, M., Jamieson, L., *Sex Crimes on Trial*, (1993, Edinburgh:Edinburgh University Press), Chambers, G., Millar, "Proving Sexual Assault:Prosecuting the Offender or Persecuting the Victim?", in (eds) Carlen, P., Worral, A., *Gender, Crime and Justice,* (1987, Milton Keynes:Open University Press), Lees, S., *Carnal Knowledge Rape on Trial,* (1996, London:Hamish Hamilton), McColgan, A., "Common Law and the Relevance of Sexual History Evidence", (1996a), 16 *O.J.L.S.* 300, Temkin, J., *Rape and the Legal Process,* (1987, London:Sweet & Maxwell), Victim Support, *Women, Rape and the Criminal Justice System,* (1996, London:Victim Support),

victimological analysis with regard to the treatment of victims within the criminal trial process.[4] Victimology, McBarnet argued, had failed to examine the deeper structural issues at play in the treatment of victims of crime in court. Victimology had focused heavily on the role of social prejudices, especially in rape trials, and how defence lawyers treat victims. According to McBarnet, this partial analysis has led to a flawed understanding of the treatment of victims within the criminal justice system.

> "The prevalent focus in victimology on rape victims is too narrow, and the prevalent model of the victim in court too simple. In focusing on what is done to the victim, explaining it by immediate and observable informal behaviour in court, and presenting court experience only from the victim's point of view, victimology underplays the complexity of its subject, encourages a stereotype of the victim and produces a distorted explanation of both the victim's experience and the functions of the court." [5]

McBarnet sought to locate the source of victims' experiences in court in the structure and function of the criminal trial. This research seeks to explore further the questions raised by McBarnet, to explore the relationship between the adversarial process and the plight of rape complainants in court. This study seeks to establish *why* rape complainants are treated in the manner documented by researchers.

In this study it is argued that the secondary victimisation of rape complainants in court may, in large part, be attributed to the adversarial process. It is argued that the experiences of rape complainants in court are shaped, to a large extent, by the assumptions that inform adversarial proceedings. While not denying the role certainly played by individual criminal justice professionals, including defence barristers and trial judges in the treatment of rape complainants in court, or the important role played by the cultural myths and stereotypes which surround rape, it is argued that the criminal trial process itself plays a major part in the ordeal of rape complainants, a part that is invariably overlooked. This failure to identify and explore the role played

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3 See Lees, S., (1996), *op cit*, McColgan, A., *The Case for Taking Date out of Rape*, (1996b, London:Pandora)

4 McBarnet, D., "Victim in the Witness Box -Confronting Victimology's Stereotype", (1983), 7, *Contemporary Crises*, at 293

5 *ibid*

by the adversarial process in the ordeal of rape complainants in court has meant that the basic assumptions of the adversarial process, the traditional safeguards of the adversarial trial, have largely escaped examination and escaped criticism. A central aim of this research is to challenge the assumptions of the adversarial fact-finding process, to question the claims made for adversarial proceedings, claims which are so rarely contested. This study seeks to re-evaluate a number of the fundamental evidentiary safeguards of the adversarial process. Research into the conduct of rape trials has shown that rape victims seeking justice are compelled to submit themselves to a gruelling courtroom ordeal. This study seeks to demonstrate that the case for subjecting women, traumatised by rape, to such an ordeal is not a strong one. For example, it is argued in this study that the justifications for compelling rape complainants to give evidence in court lack convincing foundation.[6]

The Victim Movement

In criminal proceedings the central relationship is that between the state and the defendant. The victim stands outside this relationship. The victim of crime has been marginalised within the criminal justice system, relegated to the periphery of the criminal trial process. In recent years there has been an increasing focus upon the victims of crime and promises have been made to improve their treatment within the criminal justice system. The plight of the victim of crime has received widespread recognition. In 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power*. The Declaration established basic standards for the treatment of victims of crime. One hundred and fifty-seven Governments, including the UK Government, declared their commitment to improving the treatment of victims of crime. In 1986, the Council of Europe issued *Recommendation R (85) 11 of the Committee of Ministers to the Member States on the Position of the Victim in the Framework of Criminal Law Procedure*. The Council of Europe proposed means by which the needs of victims may be taken into account at each stage of the criminal justice process. The issues identified as of particular

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[6] See Chapter Two

importance to victims of crime have been summarised as "the victim's right to be informed of the process; the victim's right to have his view and concerns presented; the victim's right to obtain proper assistance in the proceedings; the possibilities of minimising inconvenience and maximising the protection of the victim; the avoiding of unnecessary delay; and the sensitisation of those concerned to the needs of the victim."[7] Organisations concerned with the treatment of victims of crime have also issued statements of victims rights. The European Forum for Victim Services, an organisation set up to promote the rights of victims of crime in Europe, has issued the *Statement of the Victim's Rights in the Process of Criminal Justice.*[8] The rights outlined by the European Forum include a right to; respect and recognition at all stages of the criminal justice process; receive information and explanation about the progress of their case; provide information to officials responsible for decisions relating to the offender; have legal advice available, regardless of their means; protection both for their privacy and their physical safety; compensation both from the offender and from the State.

In the UK, Victim Support, a national charitable organisation that offers victims of crime emotional and practical support and campaigns for victims' rights, issued a policy paper *The Rights of Victims of Crime 1995.*[9] The statement sets out the following rights. The right to be free of the burden of decisions relating to the offender; to receive information and explanation about the progress of their case and to have the opportunity to provide their own information about the case for use in the criminal justice process; to be protected in any way necessary; to receive compensation; to receive respect, recognition and support.

The UK Government has issued basic standards for the treatment of victims now contained in the *Victim's Charter 1996.*[10] The first Victim's Charter was announced by the Home Secretary on 22 February 1990.[11] The *Victim's Charter 1990* claimed to

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7 Joutsen, M., *The Role of the Victim of Crime in European Criminal Justice Systems*, (1987, HEUNI:Helsinki), at 171

8 European Forum for Victim Services, *Statement of Victim's Rights in the Process of Criminal Justice*, (1996)

9 Victim Support, *The Rights of Victims of Crime A Policy Paper*, (1995, London:Victim Support),

10 Home Office, *The Victims's Charter: A Statement of the Service Standards for Victims of Crime*,(1996, London:HMSO)

11 Home Office, *Victim's Charter:A Statement of the Rights of Victims of Crime*, (1990, London:HMSO)

set out the rights and expectations of victims of crime. The declared guiding principles of the *Victim's Charter 1990* were that victims deserve to be treated with both sympathy and respect and that any upset and hardship connected with the victim's involvement with the criminal justice system should be minimised. The foreword to the *Victim's Charter 1996* states;

> "All the people involved in the criminal justice system are working together to make sure that victims get a better deal. Victims who report crime and give evidence in court play a crucial role in making the criminal justice system more effective. We are striving to make sure that in return, the criminal justice system treats them with respect and gives them what they need."[12]

The *Victim's Charter 1990* and *1996* basically provide a framework of good practices for criminal justice agencies including, the police, the Crown Prosecution Service and the Courts.

While it appears to be generally accepted that the treatment of victims of crime should be improved, important questions have remained unanswered. Missing from the debate has been any discussion of whether the adversarial process may in fact accommodate the interests and needs of complainants. The extent to which the interests of complainants, especially vulnerable complainants, conflict with the basic tenets of the adversarial process has not been addressed. This study argues that the adversarial process is unable to accommodate the interests of rape complainants and other vulnerable complainants. The assumptions of the adversarial fact-finding process, it is argued, dictate that little may be done to improve the treatment of complainants in court. Any moves to lessen the ordeal of rape complainants would necessarily be very limited. This study argues that the adversarial process simply may not deliver key 'victim rights' called for by campaigning organisations such as Victim Support. Even the limited aims set out in the *Victim's Charter 1996*, it is argued, can not be met within the existing framework of adversarial proceedings. For example, the *Victim's Charter 1996* states that the victim of crime may expect to be treated with

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[12] Home Office, (1996), *op cit*

respect and sensitivity. [13] The view that victims of crime should be treated with dignity and respect is supported in the Council of Europe Recommendation. Guideline 8 states;

> "At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity."[14]

However, in England and Wales, the complainant in a rape case, indeed any complainant, can not expect to be treated with respect and sensitivity in court. As argued in this study, there is an irreconcilable conflict between treating rape complainants with dignity and decency and the use of cross-examination as the mechanism for testing evidence in rape trials.[15]

The bounds imposed upon the improvement of the treatment of victims of crime within the adversarial process should be recognised. This study argues that while attempts to improve the treatment of victims outside the courtroom, such as through the provision of information, may be successful, the treatment of complainants in court will remain basically unchanged. Moves to improve the position of complainants in court will be necessarily piecemeal and limited. This study argues that solutions to the plight of rape complainants in England and Wales lie outside the existing framework of adversarial criminal procedure.

Criminal Justice in Crisis

Following the miscarriage of justice cases which prompted the appointment of the Runciman Royal Commission on Criminal Justice, it appeared that a radical re-evaluation of the adversarial trial process would take place. In the event, the basic assumptions of the adversarial system were not challenged. The criminal justice system of England and Wales now faces another crisis. Namely, its failure to serve

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13 *ibid* at 4

14 Cited in Joutsen, M., (1987), *op cit* at 212

15 See Chapter Six

vulnerable victims of crime.[16] There is now considerable evidence showing that involvement in the criminal justice process frequently exacerbates the ordeal of rape complainants and of child victims. Long delays in cases coming to court translate into months of anxiety for women traumatised by rape. Last minute adjournments cause considerable distress. Once in court, rape complainants are subjected to a gruelling ordeal that has been termed "judicial rape".[17] Women find themselves portrayed by defence lawyers as vindictive liars, as 'tarts'. Their personal lives are scrutinised in what amounts to a public character assassination. Women are denied the opportunity to describe what happened to them in their own words and to describe the impact of crime upon their lives. In England and Wales, victims of rape are put through this ordeal with little chance of seeing a conviction. The conviction rate for rape has drastically declined over the past twenty years. The conviction rate for reported rapes fell from 24 per cent in 1985 to 10 per cent in 1993. Such a decline has led Lees to describe rape trials as "cruel hoaxes".[18] Due to the high attrition rate in rape cases, Lees maintains, that the real conviction rate is lower;

> "Some cases do not even enter into the Home Office statistics, as they are discontinued or 'no-crimed'. In effect this means that the conviction rate is even lower than the 10 per cent of reported rapes."[19]

The number of women reporting rape and sexual assault has doubled over the past decade in Britain.[20] In 1985, 1,842 reports of rapes were recorded by the police. In 1993, this had increased to 4,589. However, it is claimed that this continues to represent the "tip of the iceberg".[21]

> "All the many surveys that have been carried out, both here and in the US, show that rape is vastly more common than the official figures show."[22]

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16 The term 'vulnerable' is used throughout this study to denote children, adults with learning difficulties and those made vulnerable by the crimes committed against them; victims of sexual violence.

17 Lees, S., "Judicial Rape", (1993), 16, *Womens Studies International Forum*, 11-16

18 Lees, S., (1996), *op cit* at xiii

19 *ibid* at 95

20 *ibid* at 23

21 *ibid* at 24

22 McColgan, A., (1996b), *op cit* at 94

Women are still reluctant to report rape. One reason for this it is submitted, undoubtedly lies in the unwillingness of women to submit themselves to a gruelling courtroom interrogation during which their private lives are publicly scrutinised and judged. Helena Kennedy QC, reports conversations with fellow barristers which suggest that the belief that the present trial process exacts too high a price from victims of rape is one shared by those with first hand experience of the adversarial trial;

> "When I ask women magistrates and lawyers who know the system what they would do if they were raped by an acquaintance, many say that they would think twice before exposing themselves to the legal process. Men in law express the same reservations for their wives and daughters, though often more vigorously."[23]

The criminal justice system is failing victims of rape. It is failing women in its failure to convict rapists;

> "The widespread failure of the criminal justice system to convict men who are guilty of rape amounts to a significant shortfall in its service to women who, after all, comprise half of those whose protection justifies its very existence."[24]

and also failing women in its treatment of complainants in court. The publication of the *Victim's Charter 1990* together with other recent developments would appear to mark the long awaited recognition of victims of crime and the vital role they play within the criminal justice system. Finally, victims are being seen as individuals, as persons who have suffered, who should consequently, be treated with dignity and respect. Unfortunately, concern that the ordeal of victims should not be exacerbated by their experience of the criminal justice system has not extended to their treatment in court. In court, victims continue to be seen and treated as tools of evidence with no special status. This study argues that if victims of crime are to be treated fairly within the system their experiences in court cannot be ignored.

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23 Kennedy, H., *Eve was Framed*, (1992, London:Chatto & Windus), at 138

24 McColgan, A., (1996a), *op cit* at 297

> "a system of criminal justice that ignores the victim overlooks the most fundamental tenets of 'justice'."[25]

This study argues that a trial process that fails to reflect the interests and needs of complainants is not a fair process.

> "Criminal law and criminal procedure could never really lead to justice being administered unless and until the system pays respect to the interests of victims of crime. This means that the victim should not just be viewed as an instrument enabling the prosecutor to procure convictions. Rather then dealing with the victim as a tool, which can be used in the process of reporting the crime and later on as a witness, he or she should be considered the injured party, as a human being with rights of his own that should be structurally taken into account at all stages of the criminal investigation and eventual trial."[26]

At the heart of this research is the claim that the adversarial trial process fails to achieve fairness for complainants and defendants. As a result, this study calls for an investigation into the possibility of devising a procedure that does achieve this dual objective. A procedure which balances fairness for defendants with the legitimate and competing rights of victims to be treated with respect, to have their voices heard and to be spared unnecessary anxiety and distress.

> "For a legal system to be fair it is of course, vital that the rights of the defendant to a fair trial be protected, but it is equally important for the complainant to be able to obtain justice. The rights of both defendants and complainants must be balanced. Women should be enabled to obtain justice without jeopardising the rights of the accused."[27]

Rape Trials in the Netherlands

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25 Waller, I., "International Standards, National Trail Blazing and the Next Steps", in (eds), Maguire, M., Pointing, J., *Victims of Crime- A New Deal?*, (1988, Milton Keynes:Open University Press), at 105

26 Groenhuijsen, M., *Conflicts of Victims Interests and Offenders Rights in the Criminal Justice System- a European Perspective*, (1994, paper presented at Eighth International Symposium on Victimology, Adelaide, Australia), at 1

27 Lees, S., (1996), *op cit* at xi

This investigation for an alternative procedure should be informed by comparative research of the experiences and treatment of rape complainants in other criminal justice systems, by a survey of the protection afforded rape complainants in other jurisdictions. There has been very little comparative research of the conduct of rape trials in other jurisdictions. Some commentators have looked to measures introduced in the United States as possible models for reform in England and Wales. The experiences of rape complainants in non-adversarial or inquisitorial systems have received little attention. In the search for an alternative procedure this study examines rape trials in the Netherlands, a country with an inquisitorial trial process. The basic assumptions that inform the Dutch fact-finding process in criminal proceedings contrast sharply with those that underlie the adversarial process. The form in which evidence is presented in Dutch criminal proceedings and the evidentiary safeguards of the Dutch system are very different. This study examines these fundamental distinctions between adversarial proceedings in England and Wales and the inquisitorial system of the Netherlands and their implications for complainants in rape cases. This study seeks to determine whether Dutch criminal procedure holds any advantages for rape complainants and other vulnerable victims of crime. It explores whether the adoption of inquisitorial style proceedings would result in a significant improvement in the treatment of rape complainants.

Adversarial vs Inquisitorial

Throughout this study the labels 'inquisitorial' and 'adversarial' are used to denote the criminal justice processes of the Netherlands and England and Wales respectively. The appropriateness of the labels 'adversarial' and 'inquisitorial' for contemporary comparative study has been questioned. It has been argued that these terms are out-dated and have confusing associations. It is certainly true that no system is an embodiment of either model. There is no archetypal adversarial system and no system which conforms entirely to the inquisitorial model of criminal procedure.

> "The old labels do not stick anymore. The systems have grown together and will continue to do so."[28]

The criminal justice system of England and Wales today, if indeed ever, does not represent a pure embodiment of adversarial principles.

> "The English legal system, often regarded as the paradigm of the adversarial tradition, is not a perfect example by any means; on close examination it is found even in criminal courts to allow deviations from the proper adversarial structure, more significantly in recent times."[29]

The rules regarding pre-trial disclosure may for example, be seen as a departure from orthodox adversarial tradition.

> "The classic adversary system was based on the concept of trial by ambush in which each side was free to conceal its evidence until the trial itself." [30]

Criminal proceedings in England and Wales may therefore constitute a 'diluted' version of adversarial theory yet they are still very much within the adversarial mould;

> "The key characteristics which remain are sufficient to make the Anglo-American criminal trial the most adversarial of criminal proceedings." [31]

The Dutch criminal justice system has also evolved but it still remains firmly planted within the inquisitorial tradition. Jörg et al, in a comparative examination of the nature of Dutch and English and Welsh criminal procedure, argue that the criminal justice systems of England and Wales and the Netherlands "may be regarded as typical examples of adversarial and inquisitorial systems respectively."[32]

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28 Vogler, R., "Learning from the Inquisitors", (1994) June, *L.Ex.* at 29

29 McEwan,J., *Evidence and the Adversarial Process,* (1992, Oxford:Blackwell), at 5

30 Zander, M., *Cases and Materials on the English Legal System* (1992, London:Butterworths) 327

31 McEwan, J., (1992), *op cit* at 4

32 Jörg, N., Field, S., Brants, C., Are Inquisitorial and Adversarial Systems Converging? in Harding, C., Fennel, P., Jorg, N., Swart, B., (eds) *Criminal Justice in Europe A Comparative Study,* (1995, Oxford:Clarendon Press),43

The label 'inquisitorial' also suggests a homogeneity between European continental legal systems that does not exist. There is no single identifiable model of continental criminal procedure. There are fundamental differences for example, between criminal proceedings in France, Germany and the Netherlands. Similarly, there are important differences between criminal procedure in England and Wales and the United States although both are firmly embedded within the adversarial tradition. Basic distinctions between criminal proceedings in adversarial and inquisitorial systems however remain.

Contest vs Inquiry

Adversarial proceedings are structured as a dispute; a conflict between two sides.

> "The fundamental matrix is based upon the view that proceedings should be structured as a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest. The procedural aim is to settle the conflict stemming from the allegation of commission of a crime."[33]

Confrontation is at the heart of adversarial theory;

> "The fundamental expectation of an adversarial system is that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting will come the information upon which a neutral and passive decision maker can base a satisfying resolution of a legal dispute."[34]

The adversarial trial is not structured as an investigation into the truth but to reach a just settlement between the parties. The adversarial trial is a contest to see if the prosecution can prove guilt to the requisite standard. The distinct objects of adversarial and inquisitorial proceedings are identified by Damaska;

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33 Damaska, M., "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure:A Comparative Study", (1973) 121 *U. Pa. L.Rev.* 563

34 Landsman, S., "From Gilbert to Bentham:The Reconceptualisation of the Evidence Theory", (1989) 36 *Wayne. L.Rev.* at 1150

> "Consider the "contest" model first.. The judgment itself is not so much in the nature of a pronouncement of the true facts of the case, it, rather, a decision *between* the parties. If however, proceedings are structured as an official inquiry, the concern for ascertaining the truth of the case is much more central."[35]

Inquisitorial criminal proceedings are structured as an official investigation. It is assumed that the truth is found through the independent inquiry of public officials with no partisan allegiance.

> "Non-adversary proceedings emerge from the following central structural idea. Rather than being conceived of as a dispute, they are considered an official inquiry, triggered by the initial probability that a crime has been committed. The procedural aim is to establish whether this is in fact the case, and whether the imposition of criminal sanctions is justified."[36]

Within the inquisitorial system public officials are engaged in what may be accurately termed as a search for the truth.

> "An inquisitorial system assumes that the truth can be, and must be, discovered in an investigative procedure, and, because it may be in the interests of the parties to conceal it, that the state is best equipped to a carry out such investigations."[37]

The emergence of adversarial procedure is frequently attributed to the historical distrust of public officials in common law jurisdictions. Fear of arbitrary prosecution by an all powerful State, it is argued, has shaped the adversarial process.[38]

> "..the adversary system in its modern variant is inspired to a great extent by an attitude of distrust of public officials and its complementary demand for safeguards against abuse."[39]

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35 Damaska, M., (1973), *op cit* at 581
36 *ibid* at 564
37 Jörg, N., et al, (1995), *op cit* at 43
38 See Damaska, M., (1973), *op cit* at 506
39 Damaska, M., (1973), *op cit* at 583

> "The adversary criminal trial can be understood as a check on a significant risk of persecution or an otherwise too enthusiastic prosecution policy."[40]

Within the adversarial system investigation is motivated by self interest as a opposed to public interest and it is argued that this best serves the citizen;

> "The argument is that zealous adversary advocacy of those accused of crimes is the greatest safeguard of individual liberty against the encroachment of the State."[41]

In continental systems, including the Netherlands, there is little evidence of distrust of public officials;

> "The legitimacy of the inquisitorial procedure in a democratic context requires an inordinate amount of faith in the integrity of the State and its capacity to pursue truth unprompted by partisan pressures of individual self interest and untrammelled by equality of arms."[42]

Centre of Gravity

The emphasis in adversarial proceedings is on the public trial. Proceedings are structured as a continuous hearing in which evidence is presented to an unprepared fact-finder. The trial, in contrast, generally plays a less significant role in inquisitorial proceedings. The heart of the process is the pre-trial stage.

> "the public trial is by no means as important in an inquisitorial system as it is in our own. It is merely the final procedural act of a lengthy and continuous judicial investigation conducted largely in private."[43]

> "Unlike inquisitorial systems, which represent a continuous process of proof, with perhaps a number of phases of investigation supervised and

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40 Goodpaster, G., "On the Theory of American Adversary Criminal Trial", (1987) 78 *J. Crim.L. & Criminology*, at 135

41 Luban, D., *Lawyers and Justice:An Ethical Study*, (1988, Princeton:Princeton University Press), at 58

42 Jörg, N., et al, (1995), *op cit* at 43

43 Vogler, R., (1994), *op cit* at 28

> conducted by judicial figures in serious cases, the adversarial system focuses on one particular event - the contested trial."[44]

The centre of gravity of inquisitorial criminal proceedings can be said generally to lie earlier in the process.

Role of the Trial Judge

The role of the trial judge in adversarial proceedings is that of impartial umpire. It is the parties who dominate proceedings. The court is largely dependent upon the evidence presented by the parties. In contrast, the trial judge in inquisitorial proceedings plays a very active role. The court dominates proceedings and actively searches for the truth;

> "The fundamental idea of inquisitorial proceeding is that the judge himself must investigate a complaint." [45]

Vogler, commenting on the contrasting role of the trial judge in inquisitorial proceedings states;

> "In its essence, the inquisitorial method of fact-finding is based upon the almost unlimited power of the judge to obtain and evaluate evidence. Whereas, in an adversarial system, the evidence is called by the parties and the judge sits as neutral umpire, in inquisitorial process the roles are reversed. It is the judge who calls and examines the evidence and it is the lawyers who are there largely to ensure that the proceedings are fair."[46]

If the experiences of rape complainants in both adversarial and inquisitorial proceedings are to be fully understood and compared it is however necessary to go beyond these commonplace distinctions. Comparative research of adversarial and

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44 Jackson, J., "Trial Procedures", in (eds) Walker, C., Starmer, K., *Justice in Error*, (1993, London:Blackstone), at 131

45 Spencer, J.R., *Jackson's Machinery of Justice*, (1989, Cambridge:Cambridge University Press), at 20

46 Vogler, R., (1994), *op cit* at 28

inquisitorial procedure has rarely had as its focus the experiences of victims or witnesses. Consequently, fundamental distinctions between the two traditions that have an important bearing of the treatment of these groups have remained largely unexplored. An aim of this research is to promote a fuller understanding of the differences between adversarial and inquisitorial systems. This study identifies and examines a number of features traditionally neglected within comparative research. These are features which must be considered when evaluating criminal proceedings from the perspective of the complainant. These include the role of storytelling in adversarial criminal trials, the law of evidence, the role of advocates and the nature of advocacy, the role of victims, the combativeness of the adversarial trial.

Methodology

As stated above, the treatment of rape complainants in court in England and Wales has been the subject of considerable research. Most recently research conducted by Sue Lees and recorded in *Carnal Knowledge Rape on Trial (1996)*[47], and by Victim Support.[48] This study draws extensively upon these two studies.

Sue Lees, together with Lynn Ferguson of the Channel 4 Dispatches programme, monitored all rape trials at the Old Bailey over a 4 month period in 1993. Researchers also took verbatim transcripts of a sample of ten trials and studied the court transcripts of eleven trials. In all, 31 trials were analysed. Through the observation of rape trials and the analysis of transcripts, Lees draws upon a unique body of data. Lees also distributed lengthy questionnaires through rape crisis centres, student unions, and counselling services to victims of rape. Out of 116 completed questionnaires, 21 of the cases had gone to trial. The aim of these questionnaires was to provide information, until now largely hidden, on the tactics used by rapists, who assailants were and how they behaved before, during and after the alleged rape.[49]

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47 Lees, S., (1996), *op cit*

48 Victim Support, (1996), *op cit*

49 Lees, S., (1996), *op cit* at xxiv

Victim Support is a national charity which offers support and information to victims of crime and campaigns for victims' rights. It is an organisation that has had considerable experience of helping victims of rape. In 1995, Victim Support schemes helped 3,431 rape victims.[50] Concerned with the treatment of rape complainants in court, Victim Support conducted a survey into the experiences of rape victims who had been in contact with Victim Support schemes or Witness Services in 1995. Questionnaires were sent to Victim Support schemes and Witness Services and completed by Victim Support staff. The questionnaire results are based upon the experiences of 938 rape victims in contact with Victim Support schemes and 590 rape cases with which Witness Services were involved. In addition, in-depth interviews were conducted with a small sample of women who had been raped and had been in contact with a local Victim Support scheme. The interviews focused on women's experiences of the criminal justice system. The Victim Support study does not purport to be statistically representative of the experiences of all victims of rape. Acknowledging for example, that Victim Support sees more women who have reported rape than those who do not. It is submitted however, that the research conducted by Victim Support provides an invaluable insight into the treatment of victims of rape within the criminal justice system.

Much has been written in recent years on specific aspects of Dutch criminal procedure and the status of the victim in the Netherlands. In its description of Dutch criminal procedure, this study draws extensively upon this recent work. The literature available on Dutch criminal procedure however offers only a limited analysis of the significance or meaning of formal legal rules for complainants and their treatment within the Dutch trial process. In order to corroborate the position described in the limited literature semi-structured interviews were conducted with two groups of Dutch legal practitioners, examining magistrates and lawyers from all women law firms based in Amsterdam. The decision to interview examining magistrates was made due to the decisive role played by examining magistrates in the treatment of rape complainants in the Netherlands. Interviews were conducted with this group of Dutch

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50 Victim Support, (1996), *op cit* at 6

lawyers due to the insight these practitioners have into the experiences of rape complainants within the Dutch trial process.

From the complainant's perspective, a crucial stage of Dutch criminal proceedings is the pre-trial hearing. It is here that rape complainants are generally examined. Generally present at the pre-trial hearing are the complainant, the examining magistrate and the defence lawyer. The pre-trial hearing is not open to the public. It is the examining magistrate who governs the conduct of the pre-trial hearing, he or she is the primary interrogator of the complainant. If the complainant is legally represented her lawyer may attend the pre-trial hearing at the discretion of the examining magistrate, although she is not permitted to play an active role in the proceedings. The lawyers interviewed had represented victims of rape and had attended pre-trial hearings in rape cases. Both groups of practitioners were therefore in a position to provide a valuable insight into the treatment of rape complainants in the Netherlands, to explain how specific features of Dutch criminal procedure shape the experiences of complainants. The aim of these interviews was to provide support for the limited analysis of the treatment of complainants, and rape complainants in particular, contained in the literature. The aim was to advance knowledge in this area through bringing together a consolidated analysis of the legal situation corroborated by original interviews with Dutch criminal justice professionals.

Chapter one of this study provides a guide to the fundamental features of English and Dutch criminal procedure. By examining the two systems from the perspective of the complainant, Chapter one seeks to provide a broader insight into the differences between criminal proceedings in England and Wales and the Netherlands. The relationship between the features identified in this chapter and the treatment of rape complainants in criminal proceedings in both countries is the subject of subsequent chapters.

Chapter two examines the insistence upon direct oral evidence in English criminal trials and explores its implications for complainants in rape cases. The assumptions underlying the principle of orality are examined and challenged. This chapter argues that the interests of vulnerable complainants conflict with the basic evidentiary

safeguards of adversarial proceedings and consequently, the protection that can be offered vulnerable complainants is very limited.

Chapter three explores how the very different assumptions which inform Dutch criminal procedure shape the experiences of rape complainants in the Netherlands. Key advantages of the Dutch system for rape complainants are identified. Chapter three also discusses the possible future impact of the European Convention on Human Rights on Dutch criminal procedure. This chapter argues against a forced shift towards adversarial style proceedings.

Chapter four examines the inability of rape complainants in English criminal proceedings to tell their stories. This chapter describes how complainants are tightly controlled by advocates in court and explains why the narrative freedom of witnesses must be severely curtailed in adversarial criminal proceedings. Chapter four also discusses the recent introduction of a scheme aimed at giving complainants the opportunity to describe the impact of a crime upon their lives.

Chapter five explores whether the different form in which evidence is presented in Dutch criminal trials allows rape complainants greater narrative freedom to tell their stories. This chapter also examines whether the existence of the adhesion procedure in the Netherlands which enables complainants to join a civil claim to criminal proceedings gives complainants a voice in criminal trials.

Chapter six examines the cross-examination of rape complainants in criminal trials in England and Wales. This chapter seeks to demonstrate that the treatment of rape victims during cross-examination is largely attributable to the structure and assumptions of the adversarial process. Chapter six argues that cross-examination is an inappropriate mechanism for testing the evidence of rape complainants.

Chapter seven seeks to explain the limited protection afforded rape complainants in court in England and Wales by both prosecution barristers and trial judges. It is argued that the vulnerability of rape complainants during cross-examination is largely a structural consequence of the adversarial process. Chapter seven also examines the case for legal representation for rape complainants in criminal proceedings.

Chapter eight explores the examination of rape complainants at pre-trial hearings in the Netherlands. This chapter addresses criticism of the treatment of rape complainants by both defence lawyers and examining magistrates. Chapter eight seeks

to explain differences in the questioning of rape complainants in England and Wales and the Netherlands as well as providing reasons for similarities in the treatment of rape complainants.

Chapter One - Fundamental Features of English and Dutch Criminal Procedure Compared

1.1. Introduction

Comparative research has rarely had as its focus the experience and treatment of victims within a given system. While the basic distinctions between adversarial and inquisitorial criminal procedure have been identified, their meaning for victims is invariably unexplored. This failure to consider the victim has meant that fundamental differences between adversarial and inquisitorial processes have either remained undeveloped or have escaped examination altogether. In English legal texts on criminal procedure the position of the victim/complainant within the trial process rarely features. Where the role of the victim is considered it is a matter dealt with only briefly. Similarly, while much has been written in recent years on Dutch criminal procedure, the position and treatment of the complainant rarely features prominently. As a consequence, features of English and Dutch criminal proceedings which have an important bearing on the experience of victims have escaped full examination.

This chapter provides a comparative guide to criminal procedure in England and Wales and the Netherlands that focuses on those features that hold particular significance for complainants in both systems, specifically rape complainants. Examining criminal procedure from the perspective of the complainant, it is submitted, yields, if not new, broader insights into criminal procedure in both countries.

1.2. The English Criminal Trial

Criminal procedure in England and Wales focuses upon the trial, the day in court.

> "Unlike the continental system of trials, based on the Civil Law, the English system is an adversary system, in which the contest is waged on a day in court."[51]

The court bases its decision upon evidence presented at the trial.

> "The crucial stage in adversarial proceedings is the public hearing. Here the process culminates, more or less isolated from the pre-trial investigation. It is the oral screening of evidence for which the public hearing is designed and the oral performance of witnesses, the defence, and the prosecution that is decisive. With a few exceptions, evidence gathered during pre-trial investigations is of no value unless tested at a public hearing."[52]

This is not to underestimate the importance of pre-trial processes that reduce the likelihood of a criminal case coming before a court, or to ignore the fact that the majority of defendants never experience the English criminal trial in 'all its glory'. In England and Wales, the majority of cases result in a guilty plea and no trial follows at all. Of cases that go to trial, most will be tried in the magistrates court because they involve summary only offences or, if triable either way offences are involved, because the defendant failed to elect trial by jury in the Crown Court. Ashworth argues that the adversarial trial is merely the tip of the iceberg and that a misplaced emphasis on the trial itself fails to acknowledge the importance of the pre-trial process.[53] Ashworth rejects the traditionally held view that the trial is the centrepiece of the English

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51 Egglestone, R., *Evidence, Proof and Probability* (1978, London:Wiedenfeld & Nicolson), at 35

52 Jörg, N., Field, S., Brants, C., 'Are Inquisitorial and Adversarial Systems Converging' in (eds) Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe:A Comparative Study*, (1995, Oxford: Clarendon Press), at 52

53 Ashworth, A., "Criminal Justice and the Criminal Process"(1988) 28 *Brit. J. Criminol.* at 113

criminal justice system and argues that the focus should now shift to pre-trial processes;

> "But an accurate description of the criminal process must now take account of the pressures toward the avoidance of the very adversary procedure which is said to characterise it - pressures to confess, to accept summary trial in many cases and to plead guilty to one or more charges."[54]

> "A full-dress trial may be less of a centrepiece than a monument to the failure of the many pre-trial machinations to produce a guilty plea."[55]

When a case actually comes before the Crown Court however, it is the evidence presented in court and the performance of witnesses and barristers on the day, that count. In this sense, the trial remains the centrepiece of English criminal proceedings.

1.2.1. A Contest

The English criminal trial is structured as a contest between the prosecution and defence. A contest in which the prosecution bears the burden of proof. The criminal trial is a hearing to decide whether the prosecution have discharged the burden of proof and proved the defendant guilty.

> "The trial itself is not an investigation into events or allegations, but rather a hearing to decide, within a complex set of rules, whether the defendant is proved to be guilty of the particular offences which the prosecution have charged him with."[56]

> "The trial is an adversarial one; a contest between prosecution and defence as to whether the prosecution can prove guilt to the requisite standard, rather than an inquiry by the state into certain events."[57]

The legal burden of proof stated simply is the obligation to prove.[58] The party upon whom the legal burden is placed must satisfy the court on that issue to the requisite

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54 *ibid*

55 *ibid*

56 Walker, R., *Walker and Walker's English Legal System,* (1994, London:Butterworths), at 433

standard. The standard of proof required to discharge the legal burden in criminal proceedings in England and Wales is beyond reasonable doubt. Whether the evidence presented satisfies this standard will be decided by the jury. The trial judge will direct the jury on the standard the prosecution are required to meet. When the defendant bears the legal burden the appropriate standard of proof is proof on a balance of probabilities. The party bearing the burden of proof will lose if he or she fails to discharge the burden. In general the legal burden of proving a fact essential to the prosecution case rests upon the prosecution.[59]

> "Under the adversarial method, the person (or body) with the duty of deciding guilt or the lack of it leaves the responsibility to the prosecution and defence to present their case. It is inherent in such a system that one side or the other must bear the burden of proof. It is central to our version of the adversarial system that in a criminal case that burden is upon the prosecution, who must discharge it beyond a reasonable doubt."[60]

There are certain exceptions to the general rule that the prosecution will bear the legal burden. These are where a statute expressly or impliedly places the legal burden on the defence and where the accused raises the defence of insanity.

1.2.2. Competing Stories

The English criminal trial is fundamentally a contest between competing versions of events; competing stories. Evidence is presented in the form of conflicting stories told by advocates in court. It was the researchers Bennett and Feldman who first analysed the organisation of criminal trials around storytelling. Bennett and Feldman studied the American criminal trial process and concluded that stories constitute an analytical

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57 Blake, N., "The Case for the Jury", in (eds), Findlay, M., Duff, P., *The Jury Under Attack* (1988, London:Butterworths), at 140

58 Keane, A., *The Modern Law of Evidence,* (1996, London:Butterworths) at 68

59 See *Woolmington v DPP* [1935] AC 462 (HL)

60 Sprack, J., "The Trial Process", in (eds) Stockdale, E., Casale, S., *Criminal Justice Under Stress* (1992, London:Blackstone), at 68

device which enables lay participants, particularly jurors, to manage the complex arguments and large amount of information presented in court.

> "The story is an everyday form of communication that enables a diverse cast of courtroom characters to follow the development of a case and reason about the issues in it. Despite the image of legal jargon, lawyers' mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of a story. Through the broadly shared techniques of telling and interpreting stories, the actors present, organise, and analyse the evidence that bears on the alleged illegal activity."[61]

The proximity of stories to everyday conversation, it is argued, enables jurors to play an effective role in criminal proceedings.

> "Stories are the stuff of courtroom interaction as they are the stuff of everyday conversation, so it is not difficult for untrained lay persons to enter into the spirit of the occasion and the task of judgment."[62]

The unique nature of courtroom stories must however be recognised. Unlike everyday stories, the stories told in court are shaped by complex rules of evidence and strategic considerations. The contest framework has a significant impact upon the stories told.

The presentation of evidence in English criminal proceedings in the form of competing stories told by advocates in court has implications for complainants. In this study it is argued that courtroom storytelling plays an important role in the denigration and humiliation of rape complainants during cross-examination.[63] The presentation of evidence in this form also explains in part, it is claimed, why complainants in criminal proceedings are denied the opportunity to tell their stories in their own words.[64]

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61 Bennett, W.L., Feldman, M., *Reconstructing Reality in the Courtroom* (1981, New Brunswick: Rutgers University Press), at 4

62 Stephenson, G., *The Psychology of Criminal Justice* (1992, Oxford:Blackwell), at 136

63 See Chapter Six

64 See Chapter Four

1.2.3. Principle of Orality

A defining characteristic of English criminal procedure is adherence to the principle of orality. [65]

> "English law, and more widely the Anglo-American common law, it is commonly asserted, rests on the orality of the trial process, and the primary place which oral evidence has within it." [66]

> "Perhaps the most important feature of an English trial, civil or criminal, is its 'orality'. Much greater weight is attached to answers given by witnesses in court on oath or affirmation than to written statements previously made by them." [67]

Within adversarial theory direct oral evidence is regarded as intrinsically more reliable than written evidence. Sworn oral testimony is preferred to written depositions.

> "One of the fundamental assumptions behind the rules of evidence in the English speaking world is that the oral testimony of live witnesses at trial is greatly superior to any other type of evidence."[68]

The examination of witnesses in court is consequently central to the English criminal procedure. As a general rule, witnesses are required to attend and give evidence in court;

> "The elucidation of the facts by means of questions put by parties or their representatives to witnesses summoned, for the most part, by them, called mainly in the order of their choice, before a judge, acting as umpire rather than inquisitor, is the essential feature of the English 'adversarial' or 'accusatorial' system of justice."[69]

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65 "The centrepiece of the adversary system is the oral system..." Devlin, P., *The Judge* (1979, Oxford:Oxford University Press), at 54

66 Honere, Tony., 'The Primacy of Oral Evidence?' in (ed) Tapper, C., *Crime, Proof and Punishment Essays in Memory of Sir Rupert Cross* (1981, London:Butterworths) at 172

67 Tapper, C., *Tapper and Cross on Evidence* (1995, London:Butterworths), at 284

68 Spencer, J.R., Flin, R., *Evidence of Children:the Law and the Psychology,* (1993, London:Blackstone), at 266

69 Tapper, C., (1995), *op cit* 265

This insistence upon direct oral evidence is grounded in the basic assumptions that inform the adversarial fact finding process. One assumption is that truthful testimony is promoted by a witness giving his or her evidence in public. It is assumed that a witness is less inclined to lie in court in the presence of an audience;

> "Awed by the presence of outside on-lookers, fearing exposure of any falsehoods, persons called to give testimony will do so more conscientiously than if they were totally shielded from scrutiny."[70]

A second assumption is that truthful testimony is promoted by the presence of the defendant. It is assumed that an accuser is less likely to lie in the physical presence of the accused. A confrontation between the defendant and the complainant is thought to be truth enhancing in adversarial theory. The formality and austerity of the courtroom are also believed to enhance the truth-finding process. It is assumed that the intimidating and imposing environment of the courtroom will deter dishonest testimony. Exposure to the truth promoting presence of defendant, the public and the intimidatory surrounding of the courtroom means that direct oral testimony in court is judged more reliable.

According to adversarial theory, live oral testimony is also exposed to three further important safeguards. The first of these is that the witness gives evidence upon oath. The sanction of perjury is assumed to deter dishonest testimony. Unsworn evidence is consequently viewed as less reliable. A second safeguard is the court's opportunity to observe the witness. Within adversarial theory great importance is attached to the observation of witness demeanour by the tribunal of fact;

> "It is accepted in courts that a witness's demeanour is a significant factor in the assessment of the credibility of his evidence."[71]

> "Traditionally, much stress has been placed on the importance of being able to observe the witness's demeanour."[72]

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70 Berger, V., "Man's Trial, Woman's Tribulation:Rape Cases in the Courtroom" [1977] 1 *Colum. L.Rev.* at 89

71 Stone, M., *The Proof of Facts in Criminal Trials* (1984, Edinburgh:Green), at 150

72 Spencer, J.R., "Orality and the Evidence of Absent Witnesses" [1994] *Crim. L.R.* at 637

It is believed that the demeanour of witnesses provides an insight into their sincerity. This assumption is based on the belief that the dishonest witness will betray herself through facial expression and other non-verbal behaviour.

> "The notion that viewing the appearance and demeanour of a witness significantly assists a trier of fact to determine the truthfulness of the witness's testimony appears to be as ancient as testimony itself. The supposed ability of jurors and judges to discern sincerity or deception from non-verbal manifestations has had an important role in legal discourse and doctrine."[73]

The demeanour of witnesses, it is assumed, enables the tribunal of fact to judge the credibility of testimony. The testimony of a witness whose demeanour has not been observed is consequently viewed as less reliable.

The primary claimed safeguard to which direct oral evidence is subjected is however, cross-examination. Cross-examination is extolled within adversarial theory as the most effective test of veracity.

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination.[74]
>
> " it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[75]

The effectiveness of cross-examination as a device for exposing inconsistency and deceit is mostly taken as read by common law lawyers. Much faith is placed in the capacity of cross-examination to expose the dishonest, mistaken, and unreliable witness, to uncover inconsistency, contradiction and inaccuracy in oral testimony. The confidence placed in cross-examination is exemplified by the little weight attached to evidence elicited in examination-in-chief from a witness who dies before cross-

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73 Wellborn, Olin Guy., "Demeanour" (1991) 76 *Cornell. L.Rev.* at 1104

74 Wigmore, J.H., *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940, 3rd ed., Boston:Little Brown) vol. 5 at sec. 1367

75 *ibid*

examination.[76] Testimony that has not been subjected to the rigours of cross-examination is considered to be of less probative force. It is seen as a fundamental right of the accused in a criminal trial to have the evidence of prosecution witnesses tested by cross-examination.

> "English law lays great store on the examination of witnesses in open court in the presence of the trial judge and regards it as of the utmost importance that they should be subject to cross-examination, so that opposing counsel may 'test the credit' of the witness."[77]

In this study it is argued that much of the distress caused rape complainants in criminal proceedings stems from the insistence upon direct oral evidence. It is argued that the experiences of complainants in court raise important questions about the validity of those assumptions which underlie the principle of orality, assumptions which are rarely challenged.

1.2.4. The Law of Evidence

A complex and elaborate set of rules of evidence is a defining characteristic of adversarial proceedings. The law of evidence in England and Wales is of a largely exclusionary character and is largely designed to regulate the presentation of evidence in court. Much of the law of evidence concerns the concept of admissibility. Clearly, considerations of time and cost ensure that limits must be set on what evidence can be heard irrespective of the model of criminal justice concerned;

> "In litigation, the facts must be ascertained by taking evidence and the exigencies of the legal process require that somewhere in the search for truth a halt must be called; otherwise litigation would become interminable." [78]

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76 *R v Doolin* [1882] 1 Jebb CC 123 cited in Keane, A.,*The Modern Law of Evidence* (1996, London:Butterworths)

77 Egglestone, R., (1978), op cit at 35

78 *ibid* at 4

The concept of relevance allows a line to be drawn on the evidence to be introduced in court. However, the law of evidence in England and Wales excludes relevant evidence.

> "One of the chief differences between the English and the continental systems is that the English excludes various categories of evidence in spite of the fact that they are relevant to the matters in dispute."[79]

According to Zander, the exclusionary rules of evidence fall into three main categories; unduly prejudicial evidence, inherently unreliable evidence and evidence excluded because it is against the public interest that it be admitted.[80] The reason most often cited for the existence of such evidentiary rules is the jury system. Fear that lay persons were incapable of according the appropriate probative force to classes of evidence led to its exclusion.

> "In the seventeenth century there were few controls over the evidence that a criminal jury could hear, and no treatises dealing with the subject. Modern juries, on the other hand, hear only evidence that has been filtered by a system of exclusionary rules, the assumption being that they have to be protected from evidence that might be in some way prejudiced."[81]

> "The adversarial trial system plays an important part in determining the rules that govern admissibility: many of the technical rules of evidence that exist do so because it has been considered necessary to regulate the type of evidence that can properly be put before a jury, in order to ensure a fair trial."[82]

Other commentators attribute the development of an exclusionary law of evidence to the dominant role played by the parties in adversarial proceedings. These commentators link the growth of exclusionary rules with the corresponding

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79 Zander, M., *Cases and Materials on the English Legal System* (1996, London:Butterworths) at 321

80 *ibid*

81 Beattie, J.M., *Crime and the Courts in England 1660-1800,* (1986, Oxford:Clarendon Press) at 36

82 Walker, R., (1994), *op cit* 54

ascendancy of lawyers in criminal trials and contentious advocacy. Evidentiary rules were required to ensure fairness between the parties;

> "The adversary system grew as a consequence of the steady narrowing of judicial authority. Lawyers supplanted judges as managers of the courtroom contest. The rules of evidence limited judicial discretion, and contentious examination replaced the inquisition."[83]

> "At the beginning of the century, non-adversarial methods were ascendant. Strong willed judges dominated the examination of witnesses while parties played only a modest role in the interrogative process. Few rules of evidence or procedure cabined judicial activity at trial.. Over the course of the century all of this changed. The parties, or more accurately, highly skilled advocates on their behalf assumed ever greater responsibility for interrogation, while the judges retreated from inquisitorial activism and accepted a far more neutral and passive role. Rules of evidence and procedure multiplied and a contentious mechanism arose."[84]

Much of the complexity of the law of evidence is owed to the rule against hearsay evidence with its numerous exceptions. Wigmore has described the hearsay rule as;

> "the most characteristic rule of the Anglo-American law of Evidence- a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure."[85]

Basically, the hearsay rule states;

> "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted." [86]

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83 Landsman, S., 'Rise of the Contentious Spirit:Adversary Procedure in Eighteenth Century England' (1990) 75 *Cornell L.Rev* 604

84 Landsman, S., "From Gilbert to Bentham:The Reconceptualisation of Evidence Theory" (1990) 36 *Wayne L.Rev.* at 1150

85 Wigmore, J.H., (1940) *op cit* at sec. 1364

86 Tapper, C., (1995), *op cit* at 564

Hearsay evidence is evidence that has not been exposed to the truth promoting and truth testing mechanisms of the adversarial trial and is therefore regarded as intrinsically unreliable.

> "(Hearsay) is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."[87]

Significantly, the acceptance of out of court statements by the courts as admissible evidence would deprive the court of the opportunity to test the veracity of the statement and the integrity of the maker through cross-examination. The exclusion of hearsay evidence is attributed largely to the fact that juries can not be trusted to attach the appropriate weight to such evidence.

> "Legal historians are divided between those who ascribe the development of the rule predominantly to the distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness."[88]

> "It is largely because of the increased dangers of impaired perception, bad memory, ambiguity and insincerity, coupled with the decreased effectiveness of conventional safeguards, that hearsay is regarded as so particularly vulnerable as to require a special exclusionary rule."[89]

The hearsay rule has obvious implications for complainants. The rule dictates that witnesses appear in court to give evidence in all but a number of very limited circumstances.

> "Although certain common law and statutory exceptions do exist, the hearsay rule provides a major obstacle for those seeking to introduce anything other than the direct oral evidence of witnesses at the trial."[90]

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87 per Lord Normand *Teper v R* [1952] AC 480, 486

88 Tapper, C., (1995), *op cit* at 565

89 *ibid* at 514

90 Beijer, A., Cobley, C., Klip, A., "Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice", in (eds), Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe: A Comparative Study*, (1995, Oxford:Clarendon Press), at 285

The exclusionary character of the law of evidence also explains in part, why the narrative freedom of complainants/witnesses is severely curtailed when giving evidence in court. It explains why complainants find themselves abruptly interrupted or skilfully manipulated by both prosecution and defence barristers as they attempt to tell their stories from the witness-box.[91]

1.2.5. The Course of the Trial

The first stage in the criminal trial is the arraignment where a defendant is asked to plead guilty or not guilty. Within the adversarial system a guilty plea brings the fact-finding process to a halt. A 'not guilty' plea is not necessarily synonymous with a positive assertion of innocence. Rather it can be seen as a challenge to the prosecution to prove the case against a defendant. Following an arraignment, the prosecution will deliver its opening speech in which the prosecutor will outline the prosecution case to the jury and will summarise the evidence she or he intends to call. Following the opening speech the prosecutor will call witnesses. Witnesses give evidence on oath, or alternatively by affirmation, in accordance with the Oaths Act 1978. The prosecution witness will firstly, be examined by the prosecutor; examination-in-chief. It will then be the turn of defence counsel to cross-examine the witness. Following cross-examination the prosecutor will have the opportunity to re-examine his or her witness. Once all the prosecution witnesses have been called, the defence may make a submission of no case to answer. It is for the judge to decide whether any jury properly directed could convict upon the evidence. The defence case will then follow. Defence witnesses will be called and examined. Counsel for the prosecution and then for the defence will make their closing speeches. The closing speeches are followed by the judge's summing up. In the summing up, the trial judge will give a summary of the facts of the case and will comment on the evidence presented before the court. The judge will also instruct the jury on points of law. This will include explaining to the jury all the matters that the prosecution have to prove to establish guilt. The trial judge

will also advise the jury of their respective roles. It is for the jury to decide whether facts have been proved while it is the role of the trial judge to decide on matters of law. The summing up will include instruction on the burden and standard of proof. Following a period of deliberation the jury will deliver their verdict. Verdicts may be majority verdicts in accordance with the Juries Act 1974 section 17. In general the judge has no power to reject a jury's verdict however much he may disagree with it. Once the defendant has pleaded guilty or been found guilty in the Crown Court, the next stage is sentencing. Responsibility for sentencing rests solely with the trial judge. It is not open to the prosecuting counsel to suggest an appropriate sentence. The court will also be informed of the offender's antecedents which will include previous convictions. The court will consider any reports compiled on the offender such as pre-sentence reports prepared by probation officers. The defence will then make a speech in mitigation. The court will then impose a sentence.

1.2.5.1. Open Court Principle

The open court principle is a central feature of the English criminal trial and the majority of criminal trials are held in open court.

> "It is an old adage that justice must not only be done but be seen to be done. It is therefore axiomatic that judicial business should be transacted in public."[92]

The general principle that courts should sit in public was laid down in *Scott v Scott [1913].*[93] The presence of the public it is argued, acts as an effective check on abuse;

> "Without publicity all other checks are insufficient: in comparison of publicity all other checks are of small account."[94]

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91 See Chapter Four

92 Zander, M., (1996), *op cit* at 315

93 [1913] AC 417 HL

94 Bentham, J., (1827) Rationale of Judicial Evidence vol 1 523-4 cited in (ed) Twining, W., *Rethinking Evidence:Exploratory Essays,* (1994, Evanston:Northwestern Press), at 183

There are exceptions to the rule, for example, cases involving matters of national security are conducted in camera. Criminal proceedings in youth courts trying young offenders do so in private. Courts also have statutory powers to remove the public when a child is giving evidence in criminal proceedings.[95] This power is however rarely exercised. Victims of sexual violence are generally compelled to relive their ordeal, to give evidence of an explicitly sexual nature, in public.

1.2.6. The Jury

Criminal cases tried in the Crown Court are tried by a jury.

> "Trial by jury is at the heart of the Anglo-Saxon system of criminal trial. The institution of the jury has moulded the whole of English criminal procedure."[96]

The jury is the final arbiter of matters of fact in criminal trials. A jury consists of twelve people randomly selected between the ages of 18-70.[97] Certain groups are excluded from sitting on a jury such as the judiciary and the clergy.[98] The jury system has been celebrated as a guardian of civil liberties, a symbol of participatory democracy. Increasingly however, the traditional justifications of the jury system are being questioned.

> "Adulation of the jury is based on no justification or spurious justification. It has fed public complacency with the English legal system and distracted attention from its evils: a systematic lack of due process pre-trial and post-trial and certain deficiencies in the trial process itself. It has distorted the truth. The truth is that for most people who pass through the criminal justice system this palladium is simply not available and for those who can and do submit themselves to its verdict, it will not necessarily safeguard their liberties."[99]

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95 Children and Young Persons Act 1933 s.37

96 Blake, N., (1988), *op cit* at 140

97 Juries Act 1974 s.1

98 Juries Act 1972 s.1 and Parts I and II of Schedule 1 to the Act.

99 Darbyshire, P., "The Lamp That Shows That Freedom Lives- Is it Worth the Candle?" [1991] *Crim.L.R.* 740, at 741

Criticism of pro-jury rhetoric centres, in part, upon the fact that only a small number of cases are tried before a jury prompting the question - if jury trial is second to none, why is it reserved for so few?

> "Of criminal cases, about 5 per cent. are dealt with by the Crown Court. Of those cases, over two thirds are resolved in a guilty plea, leaving just 2 per cent. to be tried by jury." [100]

There has for some time been debate as to whether juries should be used in long, complex, fraud cases and concerns expressed as to whether juries comprehend complicated jury directions. A major obstacle to evaluation of the jury system is the effective ban on research into jury decision-making. The Contempt of Court Act 1981 section 8 made it contempt to publish or solicit for publication details of what happens in the jury room. The need for such research is clear;

> "It is absurd to continue in the present state of ignorance in the pretence that the functioning of the jury is one of the great mystiques of the law which is so sacred that it cannot be questioned."[101]

The Runciman Commission are among those to recommend the abolition of section 8.[102] At present, the role played by the jury in the treatment of rape complainants in court remains a matter of speculation and surmise.

1.2.7. Summary

The assumptions which inform the adversarial fact-finding process that culminate in a contest waged in court where direct oral evidence is largely insisted upon shape the experiences of rape complainants in criminal proceedings. The importance attached to witness demeanour, performance and public confrontation, combined with the faith

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100 *ibid* at 746

101 Bannington, A., "The Jury- a suitable case for treatment?" (1995) 145(i) *N.L.J.* 848

102 Home Office, *Royal Commission on Criminal Justice Report* (1993, London:HMSO)

placed in live cross-examination, all have important roles to play in the secondary victimisation of rape complainants.

1.3. Dutch Pre-Trial Criminal Procedure

The focus of criminal proceedings in the Netherlands is very much upon the pre-trial investigative stage and not upon the trial.

> "..the trial stricto sensu plays a rather limited role in the Dutch prosecution process. The main emphasis lies upon the preliminary stages, and what has been found out there is of decisive importance for the trial itself."[103]

Inquisitorial criminal proceedings are structured as a continuous process of proof;

> "Proof is not constituted at the post-investigation stage, but throughout the entire process."[104]

At the heart of Dutch criminal procedure is the dossier. The decision of the trial court will be based primarily upon its contents. At each stage of the investigative process the dossier is added to and then handed on. The pre-trial stage of Dutch criminal procedure is centred around ensuring that the dossier contains all relevant evidence and ensuring that the dossier is a sound basis for judgment at trial.

> "It is not an internal unofficial document, as case files are in England but an official and legally competent basis for prosecution and conviction."[105]

A summary of the possible contents of the dossier is provided by Field et al;

> "(1) the police file: this consists of a formal account of arrest, search and seizure, police detention, witnesses' statements, the appearance of

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103 Beerling, H.W.R., "An Outline of Dutch Criminal Procedure", (1976) 5 *Anglo-Am.L.Rev* 50 at 60

104 Jackson, J., Doran, S., *Judge Without Jury Diplock Trials in the Adversary System*, (1995, Oxford:Clarendon Press), at 68

105 Field, S., Alldridge, P., Jorg, N., "Prosecutors, Examining Judges and the Control of Police Investigations", in (eds), Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe:A Comparative Study* (1995, Oxford:Clarendon Press), at 234

> counsel, (various) statements of the accused, police evidence from the scene of the crime, summary of the results of wire-tapping, and (where applicable),
> (2) the file of the investigating judge: a statement of the accused, and of witnesses interrogated by the investigating judge on request by the prosecutor or defence counsel; forensic expert evidence; social and psychiatric reports; results of wire-tapping and an inventory of seized objects.
> (3) the pre-trial detention file: a formal account of all the decisions taken on such detention, together with statements by the defendant before the examining judge and possibly before the court in chambers when further extended detention is requested,
> (4) a file of pre-trial proceedings: wire-tapping orders, seizure of property orders, record of appeal against pre-trial detention orders and/or decisions on requests to discontinue the prosecution."[106]

The decision of the trial judge(s) is made largely on the basis of these reports. Where no instruction has taken place, as in the majority of cases, the police file is clearly crucial.

> "Judges expect all relevant and exculpatory and inculpatory evidence to be already in the file."[107]

A number of officials are charged with ensuring that the dossier is thorough and complete including the public prosecutor, the examining magistrate and the defence lawyer. The role of these figures and the part they play in the compilation of the dossier is examined below.

1.3.1. The Public Prosecutor- (Officier van justitie)

All criminal cases commence with an investigation by the police. Following a complaint, the police will interview witnesses and the suspect. The police will then make a written record of these interviews, *proces-verbal*. These written records become the police file. The police file then becomes part of the dossier. The provisionally closed police file will then be passed on to the public prosecutor. The

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106 *ibid*

public prosecutor plays a crucial role in Dutch criminal proceedings. It is the public prosecutor who decides whether to prosecute a case and directs the investigation until the point of the trial.[108] One of the roles of the public prosecutor is chief of investigation.[109] The public prosecutor heads the investigation right up until the case comes to trial at which point responsibility passes to the court. The public prosecutor is however, rarely directly involved in the police investigation. As director of the investigation, the task of the prosecutor is to ensure that all germane evidence is contained in the file and to monitor the evidentiary quality of the dossier. The prosecutor must seek out both exculpatory as well as inculpatory evidence. The prosecutor may direct the police to pursue lines of inquiry favourable to the defence and may request a pre-trial hearing before an examining magistrate. The key to understanding the role of the public prosecutor within Dutch criminal proceedings is to understand both the institutional incentives which operate upon public prosecutors and that public prosecutors are regarded, and more importantly regard themselves, as judicial figures in the Netherlands.

1.3.1.1. Institutional Incentives

> "Dutch prosecutors are under pressure to use their power within the system to ensure that the dossier is thorough and complete as a statement of germane evidence pointing to both conviction and acquittal."[110]

It is open to defence lawyers to request further investigation into perceived ambiguities or alleged impropriety. If a public prosecutor fails to act upon such a request, the trial judge may postpone the trial for such investigation to be conducted. For the public prosecutor, this carries the stigma of failing to display proper judicial impartiality and of bureaucratic inefficiency. Where postponement leads to a lengthy delay of proceeding this may lead to a discharge. The importance of these incentives is emphasised by Field et al;

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107 *ibid*
108 C.C.P Art 148
109 C.C.P Art 148
110 Field, S., et al (1995), *op cit* at 325

> "It is institutional incentives to thoroughness in the of investigation of both inculpatory and exculpatory evidence that are the strength of the system."[111]

1.3.1.2. Judicial Figures

In the Netherlands, public prosecutors are seen, by the public and criminal justice professionals, as judicial figures;

> "..the prosecutor must not attempt to secure the conviction of the accused at all costs, but must approach the case impartially."[112]

> "In relation to his role in the pre-trial stage of the process, the prosecutor is legally seen as a public agent serving the general interest rather than a party."[113]

A twelve month study carried out by Van de Bunt, cited in Field et al, reports that Dutch public prosecutors do, in fact, perceive themselves as judicial figures and not as a contending parties.[114] Van de Bunt states that prosecutors are;

> "..keen to present themselves as magistrates; according to their own statements, they do not see themselves as one of the contending parties, but as dignitaries of the court, engaged in an impartial weighing of the different interests involved, just like any judge who passes right judgments."[115]

This view is confirmed by other Dutch commentators;

> "According to the view generally held in the Netherlands, the prosecutor may not simply think in terms of winning and losing."[116]

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111 *ibid*

112 Swart, A.H.J., 'The Netherlands', in (ed) Van den Wyngaert, C., *Criminal Procedure Systems in the European Community* (1993, London:Butterworths), at 278

113 Hulsman L.H.C., Nijboer, J.F., 'Criminal Justice System' in (eds) Chorus, J.M.J., Fokkema, D.C., Hondus, H., Lisser, E., *An Introduction to Dutch Law for Foreign Lawyers*, (1993, Kluwer:Law Tax Pubs.), at 323

114 Van de Bunt H.G *Officieren van Justitie:verslag van een participerend observatieonderzoek* cited in Field, S., et al (1995), *op cit* at 236

115 *ibid*

116 Hulsman, L.H.C., et al (1993), *op cit* 323

> "Strictly speaking, there are no parties in Dutch criminal procedure. As far as public prosecutors are concerned, the term is inappropriate, for they represent the public interest which will benefit most from the correct and just application of law."

The self image of public prosecutors is undoubtedly influenced by their judicial function and training;

> "It is particularly important in the Dutch system for the public prosecutors to be educated and trained together with future members of the Bench, both being future members of the judiciary. Although the two careers develop differently, and the Public Prosecutor's Department is seen as the administrative arm of the judiciary- and has accordingly to improve its managerial capabilities- it is to the benefit of a democratic and independent administration of justice that public prosecutors should think and operate in a judicial manner."[117]

1.3.2. The Examining Magistrate -(Rechter-Commissaris)

In the Netherlands the examining magistrate has a number of important functions. It is the examining magistrate who authorises coercive measures such as search and seizure, wire-tapping and the interception of mail. The examining magistrate also has an investigative role and directs pre-trial hearings. The function of the pre-trial hearing is to gather further information and the task of the examining magistrate is to ensure that the dossier contains all germane evidence and is a legally competent basis for judgment at the trial.

> "The preliminary judicial investigation is aimed primarily at clarifying the case to such an extent that the public prosecutor can duly decide whether or not to take the prosecution case further. A second aim is to collect relevant information that may help the trial judge to reach a correct decision."[118]

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[117] Holthuis, H., "The Role of the Public Prosecutor in the Netherlands" in NACRO *International Comparisons in Criminal Justice The London Seminars* (1993, London:NACRO), at 17

[118] Swart, A.H.J., (1993), *op cit* at 305

The pre-trial hearing also represents an opportunity for early intervention by the defence, where the suspect may tell his story and the defence raise any concerns about the evidentiary quality of the dossier. Pre-trial hearings are however, only held in serious cases;

> "Actual criminal instruction, in which the examining magistrate gets personally involved in the investigation process and questions witnesses and the defendant, only takes place in about 3 per cent of the cases that go to court."[119]

> "In general, the main task of the examining magistrate is to carry out the investigation in more serious and complex cases so that the trial judge is no longer confronted with disputed matters of fact."[120]

It is the public prosecutor who decides whether or not to refer a case to the examining magistrate. Referral to the examining magistrate is never mandatory whatever the offence. Defence counsel may also request an instruction. The trial judge may also refer a case to the examining magistrate if he or she decides further investigation is required. At the hearing the examining magistrate will examine the accused, witnesses, including the complainant, and interview any experts. As a general rule, an examining magistrate will examine witnesses and the accused separately although a confrontation may be arranged at the discretion of the examining magistrate or at the request of the defence or the public prosecutor.[121]

Neither the accused nor the defence lawyer have an absolute right to attend the examination of witnesses. The wide discretion of examining magistrates to exclude defence lawyers extends to the examination of witnesses who will not appear in court.[122]

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119 Field, S., et al (1995), *op cit* at 240 reporting findings of *Herziening van het gerechtelijk vooronderzoek: Een rapport van de Commissie Herijking Wetboek van Strafvordering* (1990, Arnhem: Gouda Quint)

120 Tak, P., *Criminal Justice Systems in Europe: The Netherlands* (1993, Kluwer: HEUNI), at 15

121 Lensing, H., Rayar, L., 'Notes on Criminal Procedure in the Netherlands' [1992] *Crim.L.R.* 623 at 629

122 Field, S., et al (1995), *op cit* at 239

> "Though there are statutory criteria which normally entitle the defence lawyer to be present, the exceptions to the principle are very vague, giving great discretion to the investigating judge."[123]

Field et al identify this as a point of weakness in the Dutch system.[124] A recent study cited by Lensing and Rayer reports that defence lawyers attended the witness examination in 58 per cent of cases.[125]

A verbatim record of the hearing is made and is signed by witnesses as accurate. The record then forms part of the dossier. The examining magistrate will close the inquiry when she or he believes it to be complete. Both the prosecutor and defence counsel may request the reopening of the inquiry and if refused by the examining magistrate either may apply to the district court to grant a reopening.

The role of the examining magistrate is not to draw conclusions but to collect information. It is clear that the function of the examining magistrate in the Netherlands is more limited than that of the juge d'instruction in France. The examining magistrate makes no judgments as to the guilt or innocence of the defendant or whether there is sufficient evidence for the case to go to trial.

The thoroughness of the investigation and the impartiality of the examining magistrate are safeguarded by institutional incentives to seek out exculpatory evidence. These are similar to those which operate upon public prosecutors. If a trial judge decides that further investigation should have been conducted the case will be referred back to the examining magistrate;

> "And the embarrassment of repeated referral back for further investigation should not be underestimated. RCs want to be seen to be efficient in their processing of cases and judicial in their decision-making. This provides a strong motive for them to show distance and impartiality in their day to day dealings with police and prosecutor."[126]

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123 *ibid*

124 C.C.P. Art 186, see Field, S., et al, (1995), *op cit* at 238

125 Study by Van der Werf, C., Bol, M.W., 'Het gerechtelijk vooronderzoek in woord en daad', cited in Lensing, H., Rayar, L., (1992), *op cit* at 629

126 Field, S., et al, (1995), *op cit* at 242

1.3.3. The Defence Lawyer

The defence lawyer plays a vital role at the pre-trial investigative stage of Dutch criminal proceedings. It is the role of the defence lawyer to identify any evidentiary weaknesses in the dossier, including allegations of impropriety, and ensure that the dossier contains all germane evidence. Once the police have passed the investigative file to the public prosecutor the complete file must be made available to the defence.[127] The defence will therefore have early access to the statements of prosecution witnesses.

> "The principle of full disclosure is regarded as being of great importance in the Netherlands."[128]

The defence may request that the public prosecutor or the examining magistrate carries out further investigation. In the Netherlands, a vital function of the defence lawyer is to monitor that the public prosecutor and the examining magistrate have acted impartially and have pursued exculpatory evidence. At pre-trial hearings, the examining magistrate is the primary interrogator of the accused and witnesses however, the defence lawyer may ask questions and draw the attention of the examining magistrate to any perceived deficiencies in the file.

1.3.4. Co-operation

> "Inquisitorial systems aim at the state actively discovering the truth, and the most salient feature of the pre-trial process in the Netherlands is probably the degree to which all parties cooperate in arriving at a

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127 *ibid* at 235
128 *ibid*

> pre-prepared version of it that is subsequently recorded in a dossier as the basis for coming to trial."[129]

Criminal procedure in England and Wales reflects adversarial theory's central assumption that partisan investigation, motivated by self-interest, will bring most evidence to light. In the Netherlands, in contrast, great faith is placed in investigation motivated by public interest. Dutch criminal procedure ultimately relies upon cooperation and relationships of trust between key criminal justice professionals, the police, public prosecutor, examining magistrate, and defence. All are entrusted with the task of compiling a dossier that will form a competent basis for judgment and limiting areas of ambiguity before the court. The diverse influences upon the dossier operate as an important safeguard in Dutch criminal proceedings,

> "At different times, prosecutor, defence counsel and judge will be looking at it for evidence of weakness with the prospect of further investigation by police or rechter commissaris."[130]

Leigh and Hall Williams studied the role of prosecution and defence lawyers in a number of jurisdictions including the Netherlands, and expressed surprise at the "consensus mentality" they encountered.[131] This mentality, so foreign to the adversarial tradition, is the key to Dutch criminal procedure;

> "In the end much of the system depends on the development of a relationship of mutual trust between the police, prosecutor, and court in the context of institutional incentives very different from those in the adversarial system."[132]

The emphasis upon the pre-trial stage of criminal proceedings in the Netherlands has important implications for complainants. In the Netherlands, witnesses are generally examined pre-trial. In a rape case, the complainant will generally be questioned at a pre-trial hearing held before an examining magistrate rather than in court.

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129 Jörg, N., Field, S., Brants, C., 'Are Inquisitorial and Adversarial Systems Converging?' in (eds) Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe:A Comparative Study* (1995, Oxford:Clarendon Press), at 46

130 Field, S., et al (1995), *op cit* at 235

131 Leigh, L.H., Hall Williams, J.E., *The Management of the Process in Denmark, Sweden and the Netherlands* (1981, Leamington Spa:James Hall), at 75

132 Field, S., et al (1995), *op cit* at 247

1.4. The Dutch Criminal Trial

The Dutch criminal trial is structured as an inquiry and not as a party contest. The emphasis upon the pre-trial investigative stage of proceedings in the Netherlands diminishes the importance of the trial and means that the criminal trial in the Netherlands has a very different function. The criminal trial is not a forum for oral argument but for the evaluation of the written evidence contained in the investigative file. The Dutch criminal court is engaged in a verification of the evidence contained in the dossier rather than an active inquiry. The Dutch trial is not a hearing of fresh evidence;

> "In short, the trial is not seen as the occasion for an independent judicial investigation, nor the occasion for the finding of the truth presented by conflicting witnesses. Rather it is the occasion at which it is demonstrated that the truth has been found elsewhere by prosecuting officials."[133]

> "Generally speaking the fact finding process is carried out before the trial. The trial itself tends toward an evaluative phase in respect to the evidence, mainly provided in written form, included in the files."[134]

In fact, if fresh evidence comes to light during the course of the trial the trial judge is likely to refer a case back to the examining magistrate or to the public prosecutor for further investigation. The English criminal trial is an arena of ambiguity, conflict, and disputed facts. In contrast, in the Netherlands, the pre-trial stage of criminal proceedings is centred upon limiting areas of dispute before the trial. Structured as an official inquiry, there is no burden of proof as such;

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133 Rossett, A., "Trial and Discretion in Dutch Criminal Justice" (1972) 19 *UCLA L. Rev.* 353 at 376

134 Nijboer, J.F., "The Law of Evidence in Criminal Cases (The Netherlands)", in (ed) Nijboer, J.F., *Forensic Expertise and the Law of Evidence* (1992, Amsterdam:Elsevier), at 63

> "A 'burden of proof' in the Anglo-American meaning as a burden of convincing the decision maker, does not exist in the Netherlands."[135]

The fact that Dutch criminal proceedings are structured as an inquiry and not as a contest has an important bearing on the treatment of rape complainants in the Netherlands. In this study it is argued that the competitiveness and combativeness of the adversarial contest play a significant role in the secondary victimisation of rape complainants in court in England and Wales. These features are largely lacking in the Dutch criminal trial process.

1.4.1. The Use of Written Evidence

In Dutch criminal proceedings direct oral evidence is not viewed as intrinsically more reliable than written evidence. Dutch courts rely heavily upon written statements made by witnesses during the preliminary investigation. One reason for this is that the traditional safeguards of the adversarial fact-finding process are not accorded the same importance within Dutch proceedings but are substituted by alternative safeguards. In England and Wales, the presence of the defendant and the public, the oath and the formality of the courtroom are all assumed to promote truthful testimony. In the Netherlands there is no assumption that the presence of the public when a witness gives evidence acts as an incentive to tell the truth. There also appears to be no assumption that a physical confrontation between accuser and accused will promote truthful testimony.

> "Traditionally, legal systems belonging to the civil law tradition have attached less weight to the right of accused to interrogate witnesses than those belonging to the common law tradition."[136]

In addition, the solemn and formal environment of the courtroom, and the oath are not recognised as important safeguards in Dutch criminal procedure. Witnesses who

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[135] Hulsman, L.H.C., et al (1993) *op cit* at 323

appear in court do give evidence on oath but Dutch criminal courts routinely accept unsworn evidence. Consequently, evidence that has not been exposed to these 'safeguards' is not viewed with the same suspicion as in English adversarial proceedings.

The observation of witness demeanour is also not accorded much importance within the Dutch fact-finding process. It is assumed that trial judges are capable of assessing the reliability and credibility of evidence without observing the source of the evidence. This represents a marked difference between the fact-finding processes of both countries. Perhaps a more striking difference is the limited role of confrontation in the Dutch fact-finding process. In the Netherlands faith in the competence and thoroughness of public officials replaces faith in the power of confrontation and adversarial examination. In England and Wales live cross-examination is considered a crucial safeguard and evidence that has not been subjected to this truth testing mechanism is deemed to be unreliable.

The Dutch fact-finding process has its own distinct safeguards. The dossier itself acts an important safeguard which serves as a record of the pre-trial investigative stage of proceedings. The judicial function of the public prosecutor and the examining magistrate and their duty to actively seek out exculpatory evidence are further important safeguards. So too is the level of cooperation between all the professional participants. The institutional pressures upon the defence, the public prosecutor and the examining magistrate to present the court with all germane evidence in the form of the investigative file are another strength of Dutch criminal procedure. Perhaps the most fundamental safeguard in the Dutch fact-finding process is the care taken by the trial judge(s) in assessing the evidence. In England, juries are not trusted to accord hearsay evidence with the appropriate probative force. In the Netherlands all criminal trials are bench trials. There is also no jury in the Netherlands, the jury system was abolished in 1813. Juries are replaced by professional judges, there is no lay element in the Dutch judiciary which consists solely of career judges. Trial judges are trusted to identify weaknesses in evidence and assess reliability accordingly. Within the

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[136] Swart, B., Young, J., 'The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom' in (eds) Harding, C., Fennell, P., Jörg, N., Swart, B.,

Dutch fact-finding process it is assumed that any failings in the evidence can be compensated for by judicial care in evaluating evidence.

The emphasis upon written evidence in the Netherlands, in contrast to the insistence upon oral evidence in England and Wales, is therefore attributable to the very different assumptions that inform the fact-finding process in both countries.

The emphasis on written evidence in Dutch criminal trials has obvious implications for complainants. Rape complainants in the Netherlands are largely spared the ordeal of giving evidence in public, of confronting the defendant and giving evidence in the intimidatory surroundings of the courtroom.

1.4.2. The Law of Evidence

English criminal procedure is characterised by complex evidentiary rules governing the admissibility of evidence in court. The rules of evidence in the Netherlands, contained in the Code of Criminal Procedure, *Wetboek van Strafvordering,* are conceived not as rules regulating the presentation of evidence but rather as a set of decision-making rules.

> "Whereas the Dutch courts decide without jury, it is clear that the rules of evidence (in the Code of Criminal Procedure) do not regulate the presentation of evidence from the perspective to prevent the disclosure of prejudicial or unreliable evidence. The rules of evidence form a set of regulations for the decision of the court rather than for the presentation of evidence as they are in the common law tradition."[137]

> "The Dutch trial has different roots from its common law counterpart. If the Anglo-American process is based on the model of the full jury trial, and thus is preoccupied with questions of procedure and evidence, the Dutch trial is dominated by dossiers containing formal written statements and the personal history of the accused, and thus is

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Criminal Justice in Europe:A Comparative Study (1995, Oxford:Clarendon Press), at 71

[137] Hulsman, L.H.C., et al (1993), *op cit* at 354

> preoccupied with the substantive correctness of the disposition to be made."[138]

The Dutch law of evidence is essentially concerned with rules laying down what evidence may form the basis of a decision and not with questions of admissibility.

> "Where the emphasis is not on presentation, concepts such as admissibility are in certain ways meaningless. The commentaries do not even know concepts such as admissibility, relevancy and materiality. That, however, does not mean that all evidence would be admissible in the sense that it may form the basis of a valid decision: there are exclusionary rules - as decision rules. For instance, a defendant cannot be convicted on his own confession without corroborative evidence."[139]

Professor Nijboer, a legal scholar and Dutch judge, contends that the Dutch rules of evidence can be summarised in eight principles. (1)The rules of evidence in their strictness only apply to the decision whether or not it has been proved that the defendant committed the alleged crime. (2)Only five means of proof are authorised by the legislation to be used as legal proof, these include; observation by the court itself, confessions/statements made by the defendant, statements made by witnesses, statements made by experts and written materials. (3)The court's verdict has to be based on information discussed during the trial. (4)The Code never compels the court to convict the defendant. (5)The Code sometimes compels the court not to acquit the defendant. (6)A statement by a witness, a single piece of written evidence or the confession of the defendant on its own can never be full proof, corroborative evidence is required. (7)The decision of the court must be argued extensively in written form. (8)Rules of general experience and generally known facts do not need any special proof. The fact that the court is obliged to give precise written reasons for its decision means that the Supreme Court may review the decision and ensure that it was based upon legally accepted means of proof. This contrasts with the inscrutability of jury verdicts in England and Wales.

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138 Rossett, A., (1972), *op cit* at 356

139 Nijboer, J.F., "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective" (1993) 41 *Am.J.Comp.L.* 299, 302

The lack of exclusionary, presentational, rules of evidence in Dutch criminal proceedings is, in part, attributable to the absence of the jury.

> "In countries where juries operate, the rules of criminal evidence normally regulate- and restrict- how and to what extent evidence is presented to the jury. In the Netherlands the parties are rarely restricted by rules from introducing evidence they would like to offer. The law of evidence deals with the assessment of the available evidence by the court." [140]

In the Netherlands, great faith is placed in the capacity of judges to weigh the evidence contained in the dossier. The lack of presentational rules may also be ascribed to the role of the judge as an active seeker of the truth.

> "As an affirmative investigator he (the judge) is likely to be less impressed by formal rules of evidence. Questions of admissibility, competence, relevance and sufficiency of proof tend to be submerged."[141]

In inquisitorial proceedings, "such rules would impede the inquirer in the quest for the truth."[142]

1.4.2.1. Code of Criminal Procedure vs. Practice

Mere examination of the Code of Criminal Procedure would deliver a misleading picture of the law of evidence in the Netherlands. There is a considerable divergence between day to day practice and the provisions of the Code. According to the Dutch Code of Criminal Procedure a criminal court may only rely on upon "legal means of evidence" in reaching its decision.[143]. According to Article 339, statements made by

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140 Nijboer, J.F., 'Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands' in (ed) Nijboer, J.F., *Proof and Criminal Justice Systems* (1995, Frankfurt:Peter Lang), at 90

141 Rossett, A., (1972), *op cit* at 371

142 Jackson, J., Doran, S., (1995), *op cit* at 69

143 C.C.P. Art.338

witnesses are listed as a legal means of evidence. Statements made by witnesses are defined in Article 342;

> "1. A statement by a witness is understood to be his statement, made in the investigation of the trial, of facts or circumstances which he himself has seen or experienced."

Article 295 C.C.P provides an exception to Art. 342;

> "An earlier statement by a witness who, having been sworn in or admonished to speak the truth in accordance with Article 216(2), has died or, in the opinion of the court, is unable to appear at the trial shall be considered as having been made at the trial, on the condition that it is read aloud there."

Article 187 provides;

> "If the examining magistrate is of the opinion that there are grounds for assuming that the witness or expert will not be able to appear at the trial, he shall invite the public prosecutor, the defendant and counsel to be present at the hearing before him, unless, in the interests of the investigation, that hearing cannot be delayed."

The designers of the Code clearly envisaged a procedure in which witnesses would be called to trial and in which hearsay evidence would be excluded. The style of procedure as contained in the Criminal Code, would have placed the emphasis upon oral evidence and upon direct confrontation in court. A decision by the Supreme Court on 20 December 1926 ensured that Dutch criminal procedure in practice would be very different from that envisaged by the drafters of the Code. The Supreme Court held that the pre-trial statements of witnesses were acceptable forms of evidence irrespective of whether the examining magistrate had complied with Art. 187.[144] The Court also held that it was permissible to use witness police statements as evidence. The pre-trial statements of witnesses are acceptable as evidence as long as they are recorded in the investigative file and read out in court. This decision enabled the

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[144] cited in Nijboer, J.F., (1995), *op cit* at 97

traditional emphasis upon written evidence and upon the pre-trial stage within Dutch criminal procedure to remain in place.

> "At the introduction of the present Code of Criminal Procedure (1926) this code was said to facilitate a kind of 'fair' or even 'England-like' procedure. The practice, however, upheld old traditions, such as the emphasis on written materials."[145]

> "As a result of the lenient attitude of the Dutch High Court, the criminal judge has been almost totally free in the choice and weighing of evidence. For the accused there seemed to be only one general safeguard left: the judge must weigh and use the evidence "with due care"."[146]

The out-of-court statements of witnesses are accepted therefore irrespective of whether that witness will be present and examined in court.

> "The written records of the police and the 'rechter-commissaris', including statements of other declarants to them, are - notwithstanding the contrary view of the legislature in 1926 - in practice the most important means of evidence after the confessions of the defendant."[147]

The assumptions of the Dutch fact-finding process mean that hearsay evidence is not considered to be as unreliable as in common-law jurisdictions. It is also assumed that any weaknesses in hearsay evidence are compensated for by the care taken by the judiciary.[148]

The acceptance of hearsay evidence in the Netherlands, together with an emphasis on written evidence rather than oral testimony, means that witnesses will rarely be required to attend court. In Dutch criminal proceedings written evidence largely replaces live oral testimony.

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145 Nijboer, J.F, (1993), *op cit* at 303

146 Henket, Maarten., "European Human Rights and the Pragmatics of Criminal Adjudication The Case of Cardot v France" (1992) 15 *I.J.S.L.* at 260

147 Nijboer, J.F., (1993), *op cit at* 315,

148 Recent rulings of the European Court of Human Rights have raised questions about the general acceptance of hearsay evidence in the Netherlands, in particular compatibility with Article 6(3)(d)

> "Instead of relying on live testimony given at trial, Dutch courts base their judgments in a large majority of cases mainly on the dossier."[149]

The general absence of witness examination in court is perhaps the most striking difference between criminal trials in England and Wales and the Netherlands.

The fact that the Dutch law of evidence is conceived largely as a set of decision-making rules rather than presentational rules also has important implications for the ability of complainants in the Netherlands to tell their stories in criminal proceedings.[150]

1.4.3. The Course of the Trial

In Dutch criminal proceedings the defendant is not obliged to appear at trial. The defendant is also not obliged to answer any of the questions put to him during the trial.[151] If the defendant does elect to give evidence then he or she does not give evidence under oath. There is no rule forbidding the use of the accused's silence against him.[152] Witnesses giving evidence in court testify under oath and may be compelled to answer questions. The first stage sees the arraignment of the defendant. The defendant's identity is verified by the trial judge and the public prosecutor then reads the accusation. There is no formal plea; the guilty plea is unknown in Dutch criminal procedure.[153] What follows resembles a conversation between the trial judge(s) and the defendant. The trial judge will then question any witnesses present. After the trial judge has completed questioning, the defence lawyer, the defendant and the public prosecutor may ask questions. Written evidence is read out to the court. A brief outline of a Dutch criminal trial is provided by Osner et al;

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of the European Convention on Human Rights. The possible implications for Dutch criminal procedure are examined in Chapter Three

149 Beijer, A., et al (1995), *op cit* at 287

150 See Chapter Five

151 Hulsman, L.H.C., (1993), *op cit* at 348

152 Osner, N., Quinn, A., Crown, G., *Criminal Justice Systems in Other Jurisdictions* (1993, London:HMSO), at 148

> "The trial procedure is conducted by the presiding judge who first asks the defendant his name, address, etc. The prosecutor then reads the indictment or a summary of it. Then there is the "investigation into the facts". The court inquires primarily on the basis of the written evidence included in the dossier. The witnesses, if any and then the accused are then questioned by the presiding judge. The Public Prosecutor and the defence lawyer are allowed to ask supplementary questions. However, there is no system of cross-examination and re-examination to test the veracity of witnesses. The written evidence is read aloud. After the investigation into the facts, the prosecutor and the defence make closing speeches. The defence always has the last word. The court then gives its verdict."[154]

Witnesses and experts may be brought to trial by the prosecutor, the defendant and defence counsel and the judge.[155] Witnesses are however generally not examined in court. The standard of proof in Dutch criminal proceedings is that of the English criminal trial. The court must be convinced on the basis of admissible evidence, that the defendant committed the offence he was charged with."[156]

> "In essence, the requirement that the court should be convinced of the defendant's guilt is the equivalent of the Anglo-American requirement that the court or jury should be convinced beyond reasonable doubt."[157]

The court must give precise written reasons for its decision. The accused's criminal record which will be contained in the dossier is relevant only when determining the sentence and not the guilt. The maximum penalty for each crime is set out in the Penal Code. There are no mandatory sentences for certain crimes.

1.4.3.1. Open Court Principle

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153 Lensing, H., Rayar, L., (1992), *op cit* at 625
154 Osner, N., et al (1993), *op cit* at 152
155 Hulsman, L.H.C., (1993), *op cit* at 348
156 Lensing, H., Rayar, L., (1992), *op cit* at 624
157 Nijboer J.F., (1992), *op cit* at 65

As in England and Wales, the open court principle is an important feature of Dutch criminal proceedings. The majority of criminal trials in the Netherlands are held in open court though there exceptions to the general rule.[158]

> "All trials in the Netherlands, with a few exceptions, such as in proceedings concerning minors, are open to the public."[159]

1.4.3.2. Length of Trials

On average, English criminal trials last much longer than Dutch criminal trials. In one study it was estimated that typically Dutch trials are of 10% duration of English trials.[160]

> "Where a panel of judges sit in judgment, the trial usually takes between half an hour to one hour, with the exception of difficult or serious cases."[161]

> "Trials themselves, in the Netherlands, are often very short and efficient, since most defendants do not deny the allegations and since witnesses are not extensively examined in court."[162]

A typical rape case will last one hour in the Netherlands whereas in England a complex case may last for days. [163]

1.4.4. Summary

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158 C.C.P. Art. 273
159 Nijboer, J.F., (1995), *op cit* at 93
160 See Fionda, J., *Public Prosecutors and Discretion.A Comparative Study* (1995, Oxford:Clarendon Press), at 96
161 Hulsman, L.H.C., et al (1993), *op cit* at 349
162 Nijboer, J.F., (1995), *op cit* at 93
163 Fionda, J., (1995), *op cit* at 96

Very different assumptions inform the Dutch fact-finding process. Proceedings are structured as a inquiry and not as a contest. The Dutch criminal trial is not a forum for stories told by advocates. Written evidence replaces oral testimony. The rules of evidence are conceived not as presentational rules but decision making rules. These factors all have important consequences for rape complainants in the Netherlands which are explored in this study.

1.5. The Role of the Advocate and the Nature of Advocacy

1.5.1. England and Wales

The English criminal trial is structured as a contest and the contestants dominate the proceedings. The parties are charged with the presentation of evidence and it is the advocates who call and examine witnesses. The court relies largely on the evidence presented by the advocates.

> "Few laymen realise how extensive, indeed, how dominant the powers given to the advocates on the two contending sides in our adversarial system. It is these powers which have given a special place to advocacy in our common law trial system in both civil and criminal courts."[164]

Despite the overshadowing importance of the advocate in English criminal proceedings, the role of the advocate and the nature of advocacy are themes that are never fully developed in comparative literature. This is also true of research of rape trials. The treatment of rape complainants in court may not be explained however, until the nature of advocacy in adversarial proceedings is understood.

Evidence in adversarial proceedings is presented in the form of conflicting stories told by advocates in court. The primary role of the advocate in adversarial proceedings is that of storyteller. Advocates play a pivotal role in the shaping of courtroom stories. The advocate in the adversarial trial is not engaged in a search for the truth. As Evans informs aspiring barristers;

> "..we are not principally concerned with getting at the truth in the courtrooms of the English-speaking peoples. What we are doing as

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[164] Du Cann, R., *The Art of the Advocate* (1993, London:Penguin), at 2.

> advocates is trying to get the fact-finder to arrive at an opinion, an opinion in our favour."[165]

The role of the advocate is to persuade, to tell a story that persuades the fact-finder. The advocate in adversarial proceedings is also a performer. In court, the performances of all the central protagonists can prove decisive. Acting ability is considered a desirable attribute in a courtroom advocate. Advocates are advised to be likeable and entertaining.[166] The adversarial criminal trial is structured as a conflict, a contest, and this inevitably shapes the nature of advocacy and the role of the advocate. The advocate is frequently portrayed as a combatant, a gladiator engaged in a war of words. It is a battle in which the witnesses of the opposition are largely the targets. In the 'win' or 'lose' adversarial contest there is necessarily competitiveness between advocates which also influences the nature of advocacy in adversarial proceedings.

In this study it is argued that the part played by the advocate in the English criminal trial and the nature of advocacy in adversarial proceedings play a fundamental, and yet largely unexplored, role in the courtroom ordeal of rape complainants in England and Wales.

The above description of the role of the advocate applies equally to prosecution and defence counsel however, there are important distinctions between the role of the prosecutor and the defence lawyer in the English criminal trial.

1.5.1.1. Role of the Prosecutor

The prosecutor in criminal proceedings represents the Crown. It is traditionally asserted that the prosecutor is to regard him or herself as a minister of justice.[167] The aim of the prosecutor is not to secure a conviction at all costs. It was stated in *Banks* that prosecutors;

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165 Evans, K., *The Golden Rules of Advocacy* (1993, London:Blackstone), at 8

166 *ibid*

167 *Puddick* (1865) 4 F & F 497 per Crompton J

> "ought not to struggle for the verdict against the prisoner but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice." [168]

The Farquaharson Committee, appointed to consider the duties and obligations of prosecuting counsel, confirmed that earlier judicial pronouncements as to the nature of the role of prosecuting counsel still hold;

> "Great responsibility is placed upon prosecution counsel and although this description as a "minister of justice" may sound pompous to modern ears it accurately describes the way in which he should discharge his function."[169]

In one of the few articles detailing the role of prosecution counsel Humphreys advocates neutrality on the part of the prosecutor;

> "His attitude should be so objective that he is, as humanly possible, indifferent to the result,"[170]

> "It not the duty of the prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success."[171]

For many a higher duty to justice precludes a impassioned campaign for a conviction;

> "Thus the aim of the prosecutor is to secure a result to which, on his view, the evidence fairly leads; his methods and his motivation should be dispassionate."[172]

As a minister of justice the prosecutor should conduct her or his case moderately, dispassionately, fairness to the accused being a constant and paramount consideration.

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168 *Banks* [1916] 2 KB 621 per Avory J see also General Council of the Bar of England and Wales, *Code of Conduct of the Bar of England and Wales* (1991, London:Bar Council), Annexe H 11.1

169 Farquharson Committee, "The Role of Prosecution Counsel" *L.S.G.* (1986) 26 November, at 3599

170 Humphries, C., "The Duties and Responsibilities of Prosecuting Counsel" [1955] *Crim.L.R.* 741

171 *ibid* at 740

172 Ashworth, A.J., "Prosecution and Procedure in Criminal Justice" [1979] *Crim. L.R.* 482

> "In action, both counsel are impersonal, but whereas some element of the theatrical, or forensic emotion is still permitted to the defence, any passion of argument, any grandiloquence of phrase or "playing to the gallery" is out of place in the representation of the Crown."[173]

It is however maintained that the prosecutor's duty to justice should not preclude effective advocacy. The prosecutor may still prosecute;

> "None of this means that prosecutors should not present a strong case strongly."[174]

> "The obligation to act fairly does not mean that the prosecuting counsel is compelled to avoid advocacy."[175]

The task of the prosecutor is to achieve a balance between effective advocacy and fairness to the accused;

> "The principle is that the prosecutor should be scrupulously fair to the accused, but need not be quixotically generous."[176]

It is submitted that an accurate description of the role of the prosecutor is provided by Weinreb;

> "The prosecutor is not expected to be quite as single-mindedly intent on a conviction as defence counsel is on avoiding one. For him also, however, the outcome of the trial is what counts. He views a case in which the jury does not convict or convicts of too minor a crime as a 'loss' and wonders how he might have done better."[177]

Fundamentally, prosecutors are trained as lawyers and regard themselves, and are regarded as contenders in the party contest.

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173 Humphries, C., (1955), *op cit* at 746
174 Ashworth, A.J., (1979), *op cit* at 482
175 Pannick, D., *Advocates* (1992, Oxford:Oxford University Press), at 115
176 Sprack, J., *Emmins on Criminal Procedure* (1995, London:Blackstone), at 118
177 Weinreb, L.L., *Denial of Justice* (1977, London:Free Press), at 103

1.5.1.2. Role of Defence Counsel

The defence advocate is not subject to the same constraints that apply to prosecution counsel in the sense of regarding himself as a minister of justice. Defence counsel do however, owe a duty to the court as do prosecution counsel, and must not deceive or knowingly or recklessly mislead the court. According to the *Code of Conduct of the Bar of England and Wales*, a practising barrister;

> "must promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person."[178]

The role of defence counsel may accurately be described as obtaining an acquittal within procedural and ethical boundaries.

> "The Crown is interested in justice; the defence in obtaining an acquittal within the limits of lawful procedure and bar etiquette."[179]

The distinct roles played by defence and prosecution barristers in criminal trials also have a bearing on the treatment of complainants. In this study it is argued that rape complainants often feel let down by both their lack of contact with prosecution barristers and the performance of prosecution counsel in court.[180] This study argues that the detachment and perceived passivity of prosecution barristers in relation to defence counsel in court can, in part, be attributed to the prescribed role of the prosecutor in the English criminal trial.

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178 General Council for the Bar of England and Wales, (1991), *op cit* at 203

179 Humphries, C., (1955), *op cit* at 746

180 See Chapter Seven

1.5.2. The Netherlands

The trial judge dominates the Dutch criminal trial and the advocates play a subsidiary role.

> "The influence of the 'parties', the prosecutor and the defendant, on the course of the trial itself is not an important one compared to the influence of the court."[181]

Compared to their English counterparts the Dutch prosecutor and defence counsel are largely passive figures within the criminal trial. The lesser role of the advocate is a defining characteristic of inquisitorial proceedings.

> "The contestants are relegated to the role of objects of inquiry, instead of being the subjects of the action who have charge of their own case. Contestants may suggest that certain lines of inquiry be followed and that certain witnesses be questioned, and they may be given some freedom in presenting evidence. Lawyers representing the contestants may therefore have a limited role in the process, but they do not have the central role which they occupy in the contest model. Ultimate control rests with the inquirer."[182]

As stated above, the Dutch criminal trial is not a forum for the presentation of fresh evidence but for the evaluation of the dossier compiled during the pre-trial stage.[183] Witnesses are generally not examined in court. Consequently, the nature of advocacy and the role of the advocate are entirely different in the Netherlands.

> "Diametrically distinct purposes thus lie behind the trial process and affect the atmosphere of the courtroom and the function of the participants."[184]

Evidence is presented not by the advocates but in the dossier. The Dutch advocate is not charged with the task of persuading the court, he or she is not a storyteller. The

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181 Nijboer, J.F., (1993), *op cit* at 310
182 Jackson, J., Doran, S., (1995), *op cit* at 67
183 See Chapter One at 1.4.

trial judge is the primary interrogator of the accused and any witnesses called. Neither is the Dutch advocate a performer. The court bases its decision largely on written evidence, the oral performances of witnesses do not inform the Dutch fact-finding process. In England and Wales the desirable attributes of the courtroom advocate include eloquence, a commanding presence, an ability to play to an audience. In the Netherlands, the effective advocate will have endeavoured, at the pre-trial stage of proceedings, to ensure that the dossier contained all germane evidence for the deliberation of the court.

The fact that advocates in the Netherlands do not play a central role in the presentation of evidence has important implications for rape complainants. In this study it is argued that the storytelling function of advocates in adversarial proceedings plays an important role in the secondary victimisation of rape complainants in England and Wales. So too the combative, competitive nature of advocacy. Advocates in the Netherlands play a very different role and the nature of advocacy is consequently distinct.

1.5.2.1. Role of the Public Prosecutor

In the Netherlands, the public prosecutor is expected to remain an impartial and judicial figure at the trial with the public prosecutor continuing to represent the public interest.

> "..in inquisitorial systems the judge is more active in examining witnesses at trial and the prosecutor plays a genuinely neutral, objective role in providing all relevant information to the court."[185]

The prosecutor plays a comparatively passive role at the trial but may ask the accused and any witnesses supplementary questions.

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184 Fionda, J., (1995), *op cit* at 7
185 Fionda, J., (1995), *op cit* at 6

> "Because the judge is an independent, active investigator the prosecution is relatively passive during the trial, in contrast to the Anglo-American model of criminal trial."[186]

The prosecutor will make a closing speech and will also recommend an appropriate sentence but this is in no way binding on the court.[187]

1.5.2.2 Role of Defence Counsel

The role of the defence lawyer in the Netherlands to ensure that all exculpatory evidence is contained in the dossier continues into the trial. The task of the defence counsel is to point out any deficiencies in the investigative file and if necessary, request further investigation. In this way, the defence lawyer safeguards the interest of his or her client. The defence lawyer may question the defendant and any witnesses but the trial judge will dominate any examination with the advocates playing a subsidiary role. The defence will also make a closing speech.

1.5.3. Summary

The role of the advocate and the nature of advocacy have an important bearing on the experience of complainants in criminal proceedings. The dominance of advocates in English criminal proceedings and the comparatively lesser role played by advocates in Dutch criminal proceedings are used in this study to help explain differences in the treatment of rape complainants in both countries.

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186 Hulsman, L.H.C., et al (1993), *op cit* at 323

187 Fionda, J., (1995), *op cit* at 104

1.6. The Role of the Trial Judge

1.6.1. England and Wales

The role of the trial judge in adversarial proceedings is that of impartial umpire of a party contest. The English trial judge is not engaged in a search for the truth but is largely confined to the evidence presented by the parties in court. The parties bear the burden of presenting evidence and control the construction and presentation of their competing stories. It is the parties who call and conduct the examination and cross-examination of witnesses. The trial judge acts as a referee, ensuring that the parties abide by the rules that govern the adversarial trial. In England and Wales, the trial judge plays no part in the preliminary investigative stages of criminal proceedings. In fact the "Olympian ignorance"[188] or unpreparedness of the trial judge is viewed as one of the strengths of the adversarial system. The classic statement of the role of the judge in the adversarial trial appears in Jones v National Coal Board; [189]

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens , we believe in some foreign countries.. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and to keep to the rules laid down by law; to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the judge and assumes the robe of an advocate; and the change does not become him well."[190]

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188 Frankel, M., "The Search for the Truth An Umpireal View" (1975) 123 *U. Pa.L.Rev.* 1031 at 1042

189 [1957] 2 QB 55,63 per Denning LJ;

190 This was a civil case but it applies equally to the role of the trial judge in criminal proceedings.

Clearly, the English trial judge is not a passive figure in criminal trials. The trial judge clarifies obscure points for the benefit of the jury and ensures that testimony is audible and comprehensible. The trial judge may also exclude irrelevant evidence, encourage counsel not to engage in repetition and generally ensure that time is not unnecessarily wasted. The trial judge may also call and examine witnesses. However, there are limits upon judicial intervention. Excessive intervention can lead to a conviction being overturned. The trial judge must be wary of appearing less than impartial through intervention and be sure not to compromise the ability of the advocates to present their versions of events.

> "Judicial intervention is considered particularly dangerous in jury trials, because the judge may then unduly influence the jury."[191]

In this study it is argued that the umpireal function of the trial judge in English criminal proceedings has an important bearing upon the protection afforded rape complainants during cross-examination. There is a conflict, it is argued, between the trial judge's duty to protect witnesses from improper questioning and his or her role as an impartial arbiter.

1.6.2. The Netherlands

In Dutch criminal proceedings the trial judge plays a very active, domineering role. Whereas the English trial judge relies largely upon evidence presented by the parties, the Dutch trial judge actively seeks out the truth.

> "The Anglo-American model of the criminal trial expects the judge to sit as the relatively passive and impartial listener. The judge's job is not to find the truth independently by launching his own investigation, but to determine(sometimes with a jury) whether the party has

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[191] Jackson, J., 'Trial Procedures' in (eds) Walker, C., Starmer, K., *Justice in Error* (1993, London:Blackstone), at 144

> sustained his burden of persuasion. If not, relief is denied and the case is over. In contrast, the Dutch judge is supposed to be an independent active seeker of the truth. He is not expected to sit and await proof but to move on his own initiative with the help of the advocates."[192]

The trial judge may call witnesses to trial and is the primary interrogator of the accused and witnesses with the advocates playing a subsidiary role. Unlike the English trial judge, the trial judge in the Netherlands will have read the investigative file before the trial and therefore be familiar with the facts. If the trial judge decides that further investigation is required he or she may refer a case back to the examining magistrate or public prosecutor. As in England and Wales, the impartiality of the trial judge is crucial in Dutch criminal proceedings;

> "The trial itself is dominated by the court. The impartiality of the court is a basic assumption in the whole system."[193]

Adversarial theory demands a sharp distinction between the functions of prosecution and judgment and perceives judicial intervention as a threat to impartiality. Adversarial theory assumes that the decision-maker would be inevitably influenced by involvement in the investigation of evidence.

> "Psychologically, the argument says, a non-adversarial trial is like trying to play chess against yourself."[194]

In the Netherlands, great faith is placed in the neutrality of trial judges despite their active and inquiring role.

> "As yet, there has been very little discussion or debate about whether the very active role of the judge in Dutch proceedings violates the standards of impartiality implicit in the very notion that the state is obligated to provide fair process."[195]

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192 Rossett, A., (1972), *op cit* at 371

193 Nijboer, J.F 'The Requirement of a Fair Process and the Law of Evidence in Dutch Criminal Proceedings' in (ed) Nijboer, J.F., *Forensic Expertise and the Law of Evidence* (1992, Amsterdam:Elsevier), at 168

194 Luban, D., *Lawyers and Justice:An Ethical Study* (1988, Princeton:Princeton University Press), at 71

1.6.2.1. Constitution of the Judiciary

The constitution of the judiciary in England and Wales and the Netherlands differs considerably with regard to the proportion of women among the ranks and the average age of judges. The English judiciary remains predominantly white, male and over the age of sixty.

> "The average age of judges in this country is between 60 and 65, which coincides with the time when most other people are retiring."[196]

Judges tend be younger in the Netherlands where it is usual to train as a judge directly after university for a period of six years.[197] In England and Wales, only a small percentage of judges are women;

> "In 1995 there were no women Law Lords among ten in the House of Lords, only one in the Court of Appeal, only six among ninety five high court judges and twenty nine among 514 circuit judges."[198]

In contrast, in the Netherlands nearly half of the sitting judiciary are women.[199]

1.6.3. Summary

The role played by the trial judge in criminal proceedings can have important ramifications for the treatment of complainants. The umpireal role of the trial judge and the limits placed on judicial intervention in English criminal trials, for example, explain in the part the lack of protection afforded rape complainants during cross-examination.

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195 Nijboer, J.F., (1992), *op cit* 165

196 Kennedy, H., *Eve was Framed* (1992, London:Chatto & Windus), at 30

197 Osner, N., et al (1993), *op cit*

198 Lees, S., *Carnal Knowledge Rape on Trial* (1996, London:Hamish Hamilton) at 246

199 Holthuis, H., The Role of the Public Prosecutor in the Netherlands in *International Comparisons in Criminal Justice* (1993, London:NACRO), at 19

1.7. The Combativeness of Adversarial Proceedings

A factor invariably unexplored in comparisons of adversarial and inquisitorial criminal proceedings is the combativeness of the former. The adversarial trial is structured as a dispute, a fight, and proceedings are therefore combative and competitive. The inherent hostility of the criminal trial is evidenced by the language employed by writers in its description. The trial is often referred to as the 'fight' or 'battle';

> "The centrepiece of the adversary system is the oral trial and everything that goes before it is a preparation for the battlefield."[200]

Practising advocates adopt similar terminology when describing the criminal trial in numerous advocacy manuals. Napley, for example, employs military metaphors to capture the essence of the criminal trial.

> "The conduct of a trial at law is in many respects comparable with the conduct of a military operation. Going to law is a great deal like going to war."[201]

The weapons of the adversarial battle are words;

> "There is an element of verbal pugilism which is so characteristic of the British trial which is entirely absent from the dossier systems."[202]

According to Danet and Bogoch, researchers who conducted a study of the adversarial trial, combativeness is a prerequisite of a successful adversarial system.

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200 Devlin, P., *The Judge,* (1979, Oxford:Oxford University Press), at 54

201 Napley, D., *The Technique of Persuasion,* (1991, London:Sweet & Maxwell), at 74

202 Devlin, P., (1979), *op cit* at 58

> "..to work properly, the adversary model of justice requires the attorneys representing each side to be highly combative and moreover to be evenly matched in combativeness."[203]

Dutch criminal proceedings lack the combativeness and competitiveness of the adversarial trial. Dutch criminal proceedings are structured as an official inquiry.

> "Simply put, the trial is much more of an investigation than a contest."[204]

The Dutch process relies ultimately upon co-operation and relationships of trust between officials rather than placing its trust in partisanship. Confrontation is at the heart of the adversarial trial where conflicting stories clash. Conversely, the Dutch process aims at limiting areas of dispute before the trial stage.

> "Prosecutors, police and examining magistrates endeavour to limit the area of ambiguity before the court. So far as possible, they seek to ensure that at least prima facie conclusions on disputed matters of fact go before the trial court."[205]

Criminal proceedings in the Netherlands lack the drama, the cut and thrust of the adversarial trial;

> "The court proceedings are ordinarily cut and dried, stripped of most conflict and strong emotion."[206]

1.7.1. Summary

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203 Danet, B., Bogoch, B., "Fixed Fight or Free For All? An Empirical Study of Combativeness in the Adversary System of Justice" in (1980) 7 *British Journal of Law & Society* at 41

204 Walker, R, (1994), *op cit* at 433

205 Leigh ,L.H., Hall Williams, J.E., (1981), *op cit* at 70

206 Hulsman, L.H.C., et al (1993), *op cit* at 352

As stated above, the combative nature of adversarial criminal proceedings is rarely explored in comparative literature and yet, as this study seeks to demonstrate, it has an important bearing on the treatment of complainants in court.

1.8. The Role of the Complainant in Criminal Proceedings

> "Traditionally, the victim has not occupied a prominent position in the criminal justice system in either the Netherlands or England and Wales."[207]

In England and Wales, the victim has no special status in criminal proceedings. The role of the complainant in criminal proceedings is restricted to that of witness.

> "In a public prosecution in England the victim has no special status. He will be a witness if the prosecution cares to call him - otherwise he is a nobody."[208]

The complainant is unrepresented in court with the prosecutor representing the State and not the victim of crime. The complainant plays a very passive role in criminal proceedings and is confined to answering the questions of counsel and trial judge.

1.8.1. Recent Developments in the Treatment of Victims of Crime in the UK

Recent developments in the treatment of victims of crime in the UK have centred largely on improving the provision of information and support to victims. Research conducted into the experiences of victims of crime within the criminal justice system in the 1980's found that victims were dissatisfied with their treatment.[209] Lack of

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207 Morgan, J., Willem Winkel, F., Williams, K.S., "Protection of and Compensation for Victims of Crime", in Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe:A Comparative Study* (1995, Oxford, Clarendon Press), at 301

208 Spencer, J.R.S., "French and English Criminal Procedure" in (ed) Markesinis, B.S., *The Gradual Convergence:Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century,* (1994, Oxford:Clarendon Press), at 38

209 Shapland, J., Willmore, J., Duff, P., *Victims in the Criminal Justice System* (1985, Aldershot: Gower), at 63

information was identified as one of the main causes of victim dissatisfaction with the trial process. Victims were provided, it was claimed, with insufficient information as to the progress of a case and their role within the criminal process.[210] Concern was also expressed about the lack of facilities for complainants attending court, primarily, separate waiting areas for victims.[211] The lack of support for victims attending court was also identified. The experience of being a witness was presented as an isolating and lonely one. In the UK attempts have been made to improve the provision of information to victims.[212] Most recently, The *Victims Charter 1996*, states that victims can now expect to receive information about the progress of their case;

> "The police will tell you if someone has been caught, cautioned and charged. You will be asked if you wish to receive further information about the progress of your case. If you do, you will be told about any decision to drop or alter the charge substantially. You will also be told the date of the trial and the final result, even if you are not required as a witness. The arrangements for doing this already exist in some areas. Where they do not, arrangements are being made and should be in place nationally by April 1997."[213]

The impact such schemes will have on the provision of information for victims awaits to be seen. [214] In the UK, Victim Support plays a major role in the provision of support for victims of crime.

1.8.1.1. Victim Support

Victim Support is a national, voluntary organisation that seeks to help victims of crime.[215] The service offers free, confidential advice and support to victims. Victim

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210 *ibid* at 69, see also NAVSS, *The Victim in Court:Report of a Working Party*, (1988, London:NAVSS), Raine, J.W., Smith, R.E., *The Victim/Witness in Court Project: Report of a Research Programme*, (1991, London:NAVSS)

211 See Shapland, J., et al, (1985), *op cit* at 176, also Shapland, J., Cohen, D., "Facilities for Victims:The Role of the Police and the Courts", [1987] *Crim.L.R.* at 28

212 Home Office, Victims of Crime, HO Circular 20, (1988, London:HMSO) Home Office, Domestic Violence, HO Circular 60 (1990, London:HMSO)

213 Home Office, *The Victim's Charter: A Statement of Service Standards for Victims of Crime*, (1996, London:HMSO)

214 In cases involving serious sexual or violent offences, the *Victim's Charter 1996* also states that the probation service will inform the victim when a prisoner is to be released, *ibid* at 12

215 Victim Support, *Annual Report*, (1994, London:Victim Support),

Support also campaigns for the greater recognition of the crime victim within the criminal justice system. Amongst those helped by the organisation are victims of serious offences such as rape, and the families of murder victims. This help may take the form of a telephone call, a home visit or the sending of a letter. Where needed longer term support is also provided. The first Victim Support scheme was established in Bristol in 1974 and in 1979 the National Association of Victim Support Schemes, now known as simply Victim Support, was formed. During the 1980's the organisation grew both in size and standing and a close relationship with the Home Office developed. Today Victim Support has 376 schemes covering England, Wales and Ireland.[216] In 1994 Victim Support offered help to over one million victims of crime.[217]

In 1994, Victim Support received 3,068 rape referrals.[218] In the case of complainants of sexual offences including rape, Victim Support operates a consent referral policy. The victims consent is required before Victim Support is involved. Victim Support works to a nationally agreed Code of Practice.[219] The Code states that volunteers who work with women who have been raped must have successfully completed a specialist training programme.[220] In 1994, Victim Support had 1.500 volunteers trained to help victims of crime. In addition, contact with women must always be made by a female volunteer.[221] Victim Support also produces a number of information leaflets; including a leaflet specifically aimed at victims of rape; *Rape and Sexual Assault: information for women.*

1.8.1.2. The Witness Service

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216 For the history of Victim Support see Rock, P., *Helping Victims of Crime*, (1990, Oxford:Clarendon Press)

217 Victim Support, (1994), *op cit* at 4

218 *ibid* at 14

219 Victim Support, *Code of Practice*, (1995, London:Victim Support)

220 *ibid*

221 *ibid*

Since April 1996, there has been a Witness Service in every Crown Court Centre. The Witness Service is run by Victim Support and funded by the Home Office.[222] The Witness Service was established to provide victims attending court with information and support. Witness Service volunteers provide information to victims and witnesses when they attend court. Victims may be told what to expect in court, the role they play in proceedings. The Service also arranges familiarisation visits to empty courtrooms before the trial.[223] The establishment of the Witness Service has been generally welcomed. [224]

A recent study conducted by Victim Support into the treatment of rape victims within the criminal justice system suggests that victims of rape still face difficulties in obtaining information.[225] The same study also suggests that facilities for victims in court are still lacking and that women are still experiencing problems with overcrowded or inadequate waiting areas and meeting defendants and their supporters.[226] Despite the growth of Victim Support it has been argued that the support provided for victims of crime is inadequate. Some commentators have questioned the appropriateness of a single organisation assuming responsibility for all victims of crime and argued that the service Victim Support is able to provide will be inevitably limited due to its reliance on volunteers[227] It has also been argued that the growth of Victim Support has had a deleterious impact upon other victim assistance organisations such as Rape Crisis.[228] It has been argued that "many women who have been raped are often left stranded" and calls have been made for the urgent funding of Rape Crisis.[229] Research conducted by Victim Support also indicates a continuing lack of professional support for victims of rape.[230]

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222 See Victim Support, (1994), *op cit* , Raine, J.W., Smith, R.E., (1991), *op cit*

223 See Victim Support, (1994), *op cit*

224 See Rock, P., "The Victim in Court Project at the Crown Court in Wood Green", (1991), 30, *Howard Journal*, at 309

225 Victim Support, *Women, Rape and the Criminal Justice System*, (1996, London:Victim Support), at 10

226 *ibid* at 15

227 For example see Mawby, R. I., Walklate, S., *Critical Victimology*, (1994, London:Sage), at 195

228 Dobash, R.E., Dobash, R., Noaks, L., *Gender and Crime*, (1995, Cardiff:University of Wales Press), at 352

229 Lees, S., (1996), *op cit* at 5

1.8.2. Summary

Victim policy in the UK has focused on the provision of services for victims of crime rather than the allocation of legally enforceable rights. Recent developments in the UK have not strengthened the legal position of the victim. Following the publication of the *Victims Charter 1990*, commentators were quick to point out that the Charter had not accorded the victim of crime any legally enforceable rights.

> "This document is a statement of what it is good practice for the police, the Crown Prosecution Service and the court to do: but there is nothing, needless to stay, that gives the victim any legal leg to stand on if a good practice is not followed, and his interests are ignored."[231]

While the victim of crime is increasingly the focus of attention, the treatment of complainants in court has remained unaddressed and unchanged. There have been some changes in the treatment of child witnesses but the position of rape complainants in court has not altered.[232]

1.8.3. The Netherlands

As in England and Wales, the complainant in the Netherlands serves only as a witness in criminal proceedings and plays a very passive role;

> "The term 'victim' does not occur in the Code of Criminal Procedure nor in any other criminal law statute. The victim has a procedural role only in the capacity of witness, informer or injured party."[233]

Again, the Dutch public prosecutor represents the state and not the complainant. An option available to Dutch complainants however, is to join criminal proceedings under

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230 Victim Support, (1996), *op cit* at 52

231 Spencer, J.R.S., (1994), *op cit* at 39, See also Tucker, D., "Victims' Rights?-Wrong", (1991) 141(i) *N.L.J.* at 192, and Fenwick, H., "Rights of Victims in the Criminal Justice System:Rhetoric or Reality?", [1995] *Crim.L.R.* at 852

232 See Chapter Two

233 Tak, P., (1993), *op cit* at 28

the adhesion procedure. The adhesion procedure enables the victim of crime to join a claim for civil damages to the public prosecutor's action for criminal sanctions.[234] The complainant will then join the criminal proceedings as a partie civile. The role of partie civile does not however, furnish the complainant with many rights. The complainant continues to play an essentially passive role. The adhesion procedure and its benefits for complainants are examined further in Chapter five.

1.8.3.1. Recent Developments in the Treatment of Victims of Crime in The Netherlands

As in the UK, measures have been introduced in the Netherlands to improve the position of victims of crime. Victim policy in the Netherlands has largely taken the form of guidelines. The guidelines in place are based on the recommendations of three committees. In 1979 the Committee on Victims of Violent Sex Crimes, chaired by L. de Beaufort was established to develop guidelines on the treatment of victims of violent sexual offences.[235] In 1983, the Committee on Judicial Policy and Victims, chaired by F.A. Vaillant, was established to examine how the treatment of victims could be improved. The recommendations of the Committee, together with the recommendations of the Committee de Beaufort, formed the basis of guidelines introduced in a circular to the police and public prosecutors in April 1986.[236] As in England and Wales, the guidelines have focused on improving the provision of information and support to victims of crime. The guidelines imposed duties upon both the police and public prosecutors and dealt largely with improving the provision of information to victims of crime.[237] Initially the guidelines were directed at victims of serious offences but in 1987 were extended to all victims. A survey conducted one

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234 C.C.P. Art.332

235 Ministry of Justice, *Rapport van de werkgroep aangifte sexuele geweldsmisdrijven*, (1981)

236 See Wemmers, J.M., *Victims in the Criminal Justice System*, (1996, Amsterdam:Kugler Publications), at 41,Wemmers, J.M., Zeilstra, M.I., 'Victim Services in the Netherlands', (1991), 3, *Dutch Penal Law and Policy*, at 2

237 Van Dijk, J.M.M., "Recent Developments in the Criminal Policy on Victims in the Netherlands", in HEUNI, *Changing Victim Policy: The United Nations Declaration and Recent Developments in Europe*, (1989, Helsinki:HEUNI), at 75, Penders, L., "Guidelines for Police and Prosecutors;

year after the Vaillant Guidelines were introduced revealed that victims were still not receiving information.[238] The third committee, the *Committee for Legal Provisions for Victims in the Criminal Justice Process, (Commissie wettelijke voorzieningen slachtoffers in het strafproces)*, chaired by C.A. Terwee-van Hilton, was established to examine means of expanding possibilities for victims to obtain restitution within the Dutch criminal justice system. The committee's report also led to new guidelines aimed at improving the provision of information to victims of crime. Research conducted by Wemmers into the operation of the new guidelines indicates that progress has been slow.[239] Wemmers concludes;

> "..the implementation of the guidelines has been problematic. Police officers are not always aware of the existence of the guidelines and often fail to treat victims in accordance with them. Similarly, the public prosecution often fails to notify victims of the developments in their case.."[240]
>
> "At present, the implementation of the victim guidelines is extremely poor:"[241]

The main victim assistance organisation in the Netherlands is Landelijk Buro Slactofferhulp, L.O.S. The organisation has developed along the lines of Victim Support in the UK[242] Substantial government grants have led to the rapid expansion of the service. Today there are 72 regional offices in the Netherlands and in 1994, the service assisted 105, 000 victims of crime.[243] The Service is free, consists mainly of

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an Interest of Victims; a Matter of Justice", in *First European Confernce of Victim Support Workers:Guidelines for Victim Support in Europe* (1989, Utrecht:the Netherlands), at 83

238 Van Hecke,T., Wemmers, J.M., Junger, M., Slachtofferzorg bij het openbaar ministrie, (1990), cited in Wemmers, J.M., (1996), *op cit* at 49

239 See Wemmers, J.M., *The Dutch Victim Guidelines:Their Impact on Victim Satisfaction*, (1994, paper presented at Eighth International Symposiyum on Victimology, Adelaide), Wemmers, J.M., "Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victim's Attitudes and Compliance", [1995] 3, *I.R.V.*, 323, Wemmers, J.M., (1996), *op cit*

240 Wemmers, J., (1996), *op cit* at 215

241 *ibid* at 210

242 *ibid* at 35

243 *ibid* at 39

volunteers, and provides information and advice on all kinds of practical matters, emotional support, help in filling in forms and writing letters and petitions.[244]

1.8.4. Summary

Recent developments in the Netherlands have also failed to strengthen the legal position of victims of crime. The Dutch guidelines are not backed by legislation and victims have been provided with services and not rights. Van Dijk reports;

> "The legal position of the victim is still very weak."[245]

Victim policy in the UK and in the Netherlands has followed a similar course. In both countries victim policy has focused on the provision of services for victims of crime rather than the allocation of legally enforceable rights. The role of the complainant in criminal proceedings has also remained the same, that of witness.

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244 Leaflet published by the Dutch Ministry of Justice, *Support and Compensation to Injured Parties for Victims of Burglary, Violent Crime, Discrimination etc.* (1995)

245 Van Dijk, J.M.M., (1989), *op cit* at 70

1.9. Conclusion

Fundamentally opposed assumptions inform the criminal trial processes of England and Wales and the Netherlands. These assumptions translate into marked differences in criminal procedure. The function of pre-trial proceedings and the trial itself are very different. So too are the roles played by the prosecutor, the defence, and the trial judge and the relationships between them. The emphasis upon written evidence and the general acceptance of hearsay evidence in the Netherlands contrasts starkly with the insistence upon live oral evidence in England and Wales. The role played by the victim in criminal proceedings in both countries is however similar. Victim policy has also followed a very similar course in England and Wales and the Netherlands.

This chapter has identified fundamental features of English and Dutch criminal proceedings. In following chapters the extent to which the experiences of rape complainants in England and Wales and the Netherlands are shaped by these features is explored. It will be argued that the focus on the trial, the insistence upon direct oral evidence, the exclusionary character of the law of evidence, the nature of advocacy and the combativeness of adversarial proceedings all have important implications for complainants in England and Wales. Similarly, it will be argued that the emphasis upon the pre-trial stage, the reliance upon written evidence in court and the centrality of the dossier as a record of a thorough and impartial investigation have significant implications for complainants in the Netherlands.

The focus of this study is the *treatment* of rape complainants in criminal proceedings. The attrition rate and the conviction rate in rape cases and surrounding issues are not explored in this study. It is submitted that a trial process may not be judged simply in terms of successful prosecutions but also by the regard and respect shown all those involved, defendants, witnesses and complainants.

Chapter Two - Rape Complainants and the Adversarial Fact-Finding Process

2.1. Introduction

In Chapter one, the fundamental assumptions of the adversarial fact-finding process were examined. An insistence upon direct oral evidence was identified as a defining characteristic of adversarial criminal proceedings. The primacy of oral evidence is, in part, explained by the structure of adversarial proceedings where the emphasis is very much upon the trial where evidence is presented before an unprepared fact-finder and tested in court. The insistence upon direct oral evidence in criminal trials may also be attributed to the faith placed in the power of cross-examination to expose the truth and the great importance attached to the observation of witness demeanour in court. The assumption that a physical confrontation between complainant and defendant, the presence of the public and the solemnity of the courtroom all promote truthful testimony is a further factor. This chapter explores the implications of this insistence upon direct oral evidence for rape complainants. These include having to relive the rape in public, facing their alleged attackers and his supporters in court, and enduring bruising cross-examination.

Those concerned with the plight of rape complainants in court have invariably sought solutions within the existing trial structure. This study argues that for a procedure that is fair to both defendants and complainants it is necessary to look outside the framework of the adversarial process. There is a conflict between the interests of vulnerable complainants and the evidentiary safeguards of the adversarial trial. As a result, the interests of vulnerable complainants can not be accommodated within adversarial criminal proceedings. This chapter seeks to demonstrate that the assumptions of the adversarial fact-finding process dictate that little may be done to lessen the ordeal of a courtroom appearance for rape complainants. It is argued that

any modifications to procedure to reduce the stress on vulnerable complainants in court are seen either to prejudice the interests of defendants or to diminish the reliability of evidence.

In order to emphasise the limited protection that the adversarial system can offer vulnerable complainants, this chapter examines the modifications to trial procedure that have been introduced to ameliorate the position of child witnesses in criminal cases.

The basic assumptions that inform the adversarial process and underlie the insistence upon direct oral evidence are rarely challenged. This chapter examines mounting evidence that suggests that the faith placed in oral evidence may be misplaced. It is argued that the case for compelling rape complainants to give evidence in court is not a strong one.

2.2. Experience of Rape Complainants in Court

> "Once inside the courtroom, the experience of standing in the witness-box can seem Kafkaesque and terrifying. Witnesses who may still be suffering badly from the effects of the offence have to enter a room full of strangers, some in costume. Then they have to relive the incident and recount the events in detail, usually under the gaze of a gallery packed with spectators."[246]

The treatment of rape complainants in court has been the subject of a number of studies.[247] Research has demonstrated that giving evidence in court can be a traumatic, degrading experience for complainants. The research of Sue Lees, *Carnal Knowledge Rape on Trial*, provides an invaluable insight into the experiences of rape victims within the criminal justice system. Reporting the results of the 116 questionnaires distributed by Lees and completed by victims of rape, Lees claims;

> "The majority of women found their experiences in court humiliating and distressing."[248]

Lees reports that 72% of women whose cases had gone to court, complained of being treated unsympathetically in court and 83% of women felt as though they were on trial and not the defendant.[249] In the questionnaires, some women described their treatment in court;

> "It's horrible, because your mouth goes dry and you walk into that court and they've all got wigs on and it's awful really. I thought I was going to drop. I must have a strong heart not to have had a heart attack

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246 Corbett, C., Hobdell, K., "Volunteer-Based Services to Rape Victims:some Recent Developments" in (eds) Maguire, M., Pointing, J., *Victims of Crime A New Deal?* (1988, Milton Keynes:Open University Press)

247 See for example Lees, S., *Carnal Knowledge Rape on Trial* (1996, London:Hamish Hamilton), Victim Support, *Women, Rape and the Criminal Justice System,* (1996, London:Victim Support), Adler, Z., *Rape on Trial*, (1987, London: Routledge & Kegan Paul), Temkin, J., *Rape and the Legal Process*, (1987, London: Sweet & Maxwell)

248 Lees, S., (1996) *op cit* at 31

249 *ibid*

> from all this. When I get night terrors, I think I'm going to get a heart attack."[250]

> "There's no such a thing as justice. That's what I truly believe. And especially in this circumstance where it's a rape trial. They don't understand that the person sitting there is looking you in your face. You're standing up there and you're trying to put your questions and your feelings across to what's happening and they refuse to listen. I don't think they listened to anything I'd said to them. I understand why a lot of women don't take rape to court, because it's a lot of stress. There are a lot of women out there who refuse to go to court."[251]

Recent research conducted by Victim Support confirms the plight of rape complainants in court.[252] The Witness Service survey found that common reactions to experiences in court included feeling re-victimised, embarrassed, and as though on trial.[253] 12% of Witness Services reported that women stated that the trial was worse than the rape.[254] The personal testimonies of rape victims provided by in-depth interviews conducted with a small sample of rape victims in contact with Victim Support reinforce these findings;

> "They don't compensate you for going through Crown Court trials and they should do. It was worse than the attack itself - certainly it was a darn sight longer."[255]

> "It was horrible. It's like you are up on stage. I am very shy and sitting there and having to talk about that, with everyone staring at you, it's vile. I wanted the ground to open up. I had to look at his face. It was horrible having to be in the same room as him. I hadn't done anything and he had - but he didn't have to say anything - his barrister did everything for him, and I had to keep talking, saying it again and again. He had everything on his side, it was like rubbing salt in your wounds. It was a nightmare. Sometimes I still think it must have been a bad dream."[256]

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250 *ibid* at 142
251 *ibid* at 173
252 Victim Support, (1996), *op cit*
253 *ibid* at 16
254 *ibid*
255 *ibid* at 26
256 *ibid* at 45

The plight of rape complainants in court was highlighted recently by two cases which received extensive press coverage. In one case, the complainant, Julia Mason, was subjected to a six day cross-examination conducted by the defendant himself, Ralston Edwards. Julia Mason, it is reported, wept in court, was prescribed a tranquilliser at one point to help her through the ordeal, and was sent home after Old Bailey medical staff ruled she was too unwell to continue.[257] Julia Mason waived her right to anonymity in order to call for a change in the law;

> "I feel like I have been raped twice: once in his filthy den and once in front of judge and jury in a British court of law."[258]

In the second case, a Japanese student who had been gang-raped, endured twelve days in the witness-box, spending a total of thirty one hours giving evidence. These cases prompted immediate calls for legal reform from women's groups, including Justice for Women,[259] and Helen Reeves, director of Victim Support.[260] The president of the Association of Chief Police Officers, Roy White, also called for curbs on the aggressive cross-examination of women by defence barristers.[261] Criminal lawyers were equally quick to warn of the dangers of knee-jerk reactions and to argue that concessions made to rape complainants would jeopardise the rights of defendants.[262]

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257 *The Daily Telegraph*, 23 August 1996
258 *ibid*
259 *The Times*, 7 September 1996
260 *The Guardian*, 7 August 1996
261 *ibid*
262 *The Daily Telegraph*, 24 August 1996

2.3. Giving Evidence in Court

The insistence upon direct oral evidence in criminal trials in England and Wales, means that rape complainants have to give evidence in court. This section identifies those aspects of a courtroom appearance that contribute to the ordeal of rape complainants. This section also explains that as these elements are assumed to enhance the reliability of evidence and to safeguard the interests of defendants, the ordeal of giving evidence in court may not be lessened for vulnerable complainants.

2.3.1. Before an Audience

The assumption that truthful testimony is promoted by the presence of an audience and a defendant's right to a public hearing mean that rape complainants must give their evidence in public. Chambers and Millar conducted interviews with women who had attended a court hearing and reported that the experience of giving evidence before a courtroom of strangers represents a significant source of distress for rape complainants.[263] The public gallery may contain relatives and friends of the defendant, members of the press, as well as spectators satisfying a prurient interest. The courtroom will already contain the trial judge, the jury, lawyers, the court ushers, the short-hand recorder and the defendant. Research conducted by Victim Support confirms that standing in the witness-box and announcing to a courtroom of strangers intimate details about a sexual attack is extremely difficult and distressing for rape complainants. 35% of Witness Services reported that women felt embarrassed at having to relate intimate details in court.[264] 30% of Witness Services reported that women experienced problems having to face the defendant and his supporters whilst

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263 Chambers, G., Millar, A., "Proving Sexual Assault:Prosecuting the Offender or Persecuting the Victim?" in (eds) Carlen, P., Worral, A., *Gender, Crime and Justice,* (1987, Milton Keynes:Open University Press), at 64

264 Victim Support, (1996), *op cit* at 16

giving evidence.[265] One woman interviewed described the experience of giving evidence in public;

> "..paralysed by everybody - all their friends and family - staring and looking at me. It shouldn't have been so bad if they hadn't been in the room when I gave evidence, that should not have been allowed. They were laughing and calling me a liar. No-one told them to shut up."[266]

Not only must the complainant relate extremely sensitive information to the court but she must do so in a loud voice audible to all present. Her testimony will be interrupted with calls to 'speak up' from the judge and from counsel if she fails to do so. No concessions are made for the embarrassment, distress, and humiliation this may cause. Lees' research confirms that recounting personal details in court is a source of considerable anguish for many women;

> "Explicit description is very difficult for many women... Women describe having to speak loudly about such intimate questions as one of the worst aspects of taking a case to court." [267]

This aspect of criminal trials is not only a source of embarrassment and discomfort for complainants in rape cases but for witnesses generally, as observed by Rock;

> "Witnesses, had, in effect to trumpet what they almost certainly wished to state quietly or not at all."[268]

Oral testimony is, in addition, recorded throughout the trial by a shorthand writer and notes are made by the trial judge. The complainant must therefore ensure not only that she speaks loudly but also at a speed that allows verbatim transcription. In the adversarial trial the rape complainant is compelled to relive her attack in court and to do so slowly and loudly in the presence of the public and the press. A painful task is made infinitely more difficult.

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265 *ibid* at 15
266 *ibid* at 28
267 Lees, Sue., "Judicial Rape" (1993) 16 *Womens Studies International Forum* at 26
268 Rock, P., *The Social World of the English Crown Court,* (1993, Oxford:Clarendon Press), at 49

Courts have a discretion to hold criminal trials wholly or partly in camera if necessary in the interests of justice. In the main, the interests of justice have not extended to ameliorating the distress of vulnerable complainants in court.[269] Rape complainants may not be spared the ordeal of giving evidence before strangers as the exclusion of the public while a complainant gives evidence would be regarded as an infringement a defendant's right to a public hearing. In addition, the complainant who gave evidence in such circumstances would not have been exposed to the truth-promoting presence of an audience. The assumptions of the adversarial fact-finding process dictate that rape complainants endure the embarrassment and distress of giving evidence in public.

2.3.2. Confronting the Defendant

The assumption that truthful testimony is promoted by the presence of the defendant has translated into a defendant's right to confront his accusers. Although not enshrined in English law, this 'right' is protected by the courts. Consequently, within the English adversarial criminal trial the complainant is forced into relatively close proximity to the defendant. She is required to render the details of her attack in the presence of her assailant. The experience of seeing her attacker again in the courtroom will however, undoubtedly cause a victim of rape fear and great distress. This is confirmed by the research of Victim Support. In response to the Victim Support survey, 47% of Witness Services reported that women felt fearful of facing the defendant and his supporters.[270] One woman interviewed stated;

> "I was absolutely terrified, I had never been to court before in my life. I was very scared about the fact that I would have to look at him again, to see his face."[271]

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269 An exception is the Children and Young Persons Act 1933, section 37.

270 Victim Support, (1996), *op cit* at 16

271 *ibid* at 45

2.3.2.1. Screens and TV Links

The belief that the presence of the defendant acts as an incentive to tell the truth means that a complainant will be spared the distress of seeing her assailant in court only in very limited circumstances. Screens are generally not available to rape complainants and neither is close circuit television (CCTV).

> "At the moment the use of screens for adult witnesses is very rarely allowed in practice."[272]

The use of screens for adult witnesses was raised in the case of *Cooper and Schaub.*[273] This case involved a 21 year old rape complainant. The court held that where an adult is giving evidence a screen should be used in only "the most exceptional circumstances" as the use of a screen is prejudicial to the defendant even where an appropriate direction is given. In the later case of *Foster* a screen was used where the complainant was a 20 year old rape victim.[274] In dismissing an appeal, the court stated that the test to be applied was that the judge should endeavour to see that justice was done. The trial judge had warned the jury not to be influenced by the use of the screen and it was therefore held that the defendant had not been prejudiced in this case. The Court of Appeal held that the court in *Cooper and Schaub* had not put a gloss upon the test for the use of screens. The risk of prejudice is a factor to be considered by the judge in striking an appropriate balance but it is no more than that. As trial judges appear rarely to exercise this discretion in favour of rape complainants it must be assumed that the majority consider the use of screens too prejudicial to defendants. This calculation of risk is based, in part, upon the assumption that a complainant shielded from the defendant by a screen, or removed from the courtroom by the use of CCTV, will be less inclined to tell the truth.

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272 *ibid* at 54
273 [1994] Crim.LR. 531
274 [1995] Crim.L.R. 333

2.3.2.2. Removing the Defendant

The defendant's right to confront his accusers ensures that he will not be removed from the courtroom while the complainant gives evidence. In England and Wales, only in exceptional circumstances may any part of criminal proceedings take place in the absence of the defendant.[275]

> "In Britain it seems to be generally assumed that it would be quite out of the question to exclude the defendant in a criminal case while a witness is giving evidence against him."[276]

The exclusion of the defendant in a criminal trial is permitted in foreign jurisdictions including France and Germany. The exclusion of the defendant is also allowed in Denmark, a country with an adversarial criminal justice system, where the practice is not restricted to child witnesses but also occurs in rape cases.[277]

Objections to the use of screens, CCTV, and the removal of the accused are in part, explained by the importance attached to a face to face confrontation within English adversarial proceedings. A physical confrontation is assumed to promote truthful testimony and consequently, to deny defendants this right is considered prejudicial. In England and Wales therefore, rape complainants and victims of other horrific, violent crimes may not be spared the distress of confronting their alleged attackers in court.

2.3.3. Cross-examination

The insistence upon direct oral evidence in adversarial criminal trials is largely attributable to the faith placed in the effectiveness of live cross-examination in court. As discussed in Chapter one, in England and Wales, cross-examination is believed to

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275 Preston and Others [1994] 2 AC 130 HL, The removal of the defendant is permitted in some civil proceedings involving children.

276 Spencer, J.R., Flin, R., *Evidence of Children: The Law and the Psychology,* (1993, London:Blackstone), at 112

277 *ibid*

be the most effective method of testing the veracity of witnesses and it is considered a fundamental right of defendants to cross-examine the witnesses against them in court. The experience of rape complainants during cross-examination is fully examined in Chapter six. Research has shown that cross-examination is a distressing ordeal for many women. The research of Lees and Adler has revealed that women's lifestyles, behaviour, and also sexual history continue to be scrutinised and judged during cross-examination. Defence advocates continue to depict rape complainants as disreputable, promiscuous and vindictive. Chapter six examines how women are deliberately harassed and degraded by defence barristers in order to undermine their performance in court. Recent research by Victim Support confirms that women find cross-examination one of the worst aspects of giving evidence in court;

> "Interviewees described their experiences of cross-examination as: undermining, patronising, insinuating, humiliating, as if they were on trial and worse than the rape."[278]

41% of Witness Services reported that women experienced problems with the nature of questioning during cross-examination, including feeling it was character assassination and feeling re-victimised by the defence barrister.[279]

In Chapter six, it is argued that there is an irreconcilable conflict between cross-examination as a mechanism for testing evidence and the decent treatment of vulnerable complainants. In England and Wales, however, no reform in the method of examining witnesses is entertained on the grounds that the interests of defendants would be prejudiced.[280]

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278 Victim Support, (1996), *op cit* at 56

279 *ibid* at 15

280 Recommendations of the Advisory Group on Video Evidence that child witnesses should be examined at a pre-trial hearing where questions would be relayed by a third party were rejected by the Government, see Chapter Two at 2.5.3.2

2.3.4. Defendant's Right to Self-Representation

The right of defendants to represent themselves is considered a fundamental right in England and Wales.[281] An exception to the general rule was introduced in the Criminal Justice Act 1991 section 55(7), which provides that defendants may not cross-examine children in abuse cases. The ordeal of Julia Mason who was cross-examined for six days by her rapist, has led to calls for this exception to be extended to rape complainants. Observers at the trial have claimed that the defendant exercised his right to self-representation in order to intimidate the complainant and to relive the rape. Julia Mason was forced to describe the attack in minute detail and face the man who subjected her to a sixteen hour ordeal, dressed in the same clothes he wore when the attack took place. Det. Sgt. Milne Davidson who led the investigation, was among those who claimed that Edwards seemed to relish the opportunity to further degrade and humiliate Julia Mason in court;

> "No doubt he was getting some kind of sexual gratification from it."[282]

Edward's decision to defend himself also meant that he had access to intimate details of her personal life including her medical history.
The Home Office is considering a change in the law but criminal lawyers have argued that making professional representation a mandatory requirement in rape cases would have serious and damaging repercussions for defendants. Adrian Fulford, QC, a criminal barrister claimed;

> "There would be endless miscarriages of justice if further fetters were placed upon cross-examination."[283]

In place of reform, some commentators have urged stricter control by trial judges of defendants who represent themselves in rape cases. The difficulties of this proposed solution are discussed in Chapter seven where it is argued that the role of the trial

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281 Criminal Procedure Act 1865
282 *The Daily Telegraph* 23 August, 1996
283 *The Daily Telegraph* 24 August, 1996

judge in the English adversarial trial conflicts with the judicial duty to protect complainants during cross-examination.

2.3.5. Courtroom Environment

2.3.5.1. Formality

Criminal proceedings in an English Crown Court are formal and ceremonious. Barristers and trial judges don wigs and robes. The architecture of the courtroom separates and isolates the courtroom participants. The defendant sits in the dock and the witnesses, including the defendant, give their evidence from the witness-box. The judge's seat places him or her above the other courtroom inhabitants. This elevated position reflects the authority of the judge and also provides him or her with a degree of aloofness. The jury are enclosed in the jury box; "placed roughly like a spectator at a theatre."[284] In fact, the pomp and ceremony that characterises court proceedings lends a certain theatricality to events.

> "There is punctilious attention to decorum, barristers addressing the judge as "My Lord" and bowing to him when entering or leaving the courtroom."[285]

The courtroom is designed to impress upon the participants the solemnity of the proceedings and it is assumed that the austerity and formality of the courtroom promote truthful testimony. However, researchers, such as Spencer, have argued that the imposing surroundings also serve to intimidate the already apprehensive witness.[286]

> "Courts are deliberately designed to be user-unfriendly places in order to ensure a suitable degree of respect for the seriousness of the proceedings. Whatever the effect the formality and ceremony have on

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284 Weinreb, L.L., *The Denial of Justice,* (1977, London:Free Press), at 104
285 Karlen, Delmar., *Anglo-American Criminal Justice,* (1967, Oxford), at 170
286 Spencer, J.R., Flin, R., (1993), *op cit* at 370

> the criminal fraternity the design of most courtrooms tend to intimidate innocent witnesses, particularly child witnesses."[287]

A study conducted by Flin at el 1988, asked criminal justice professionals to identify those aspects of the layout of the courtroom that, in their opinion, would contribute to the anxiety of children.[288] The isolation of the witness-box, the elevated position of the judge, and the size of the courtroom were frequently cited. It is not unreasonable to assume that these aspects of the courtroom have a similar effect on adult witnesses.

> "Criminal courts are deliberately designed to emphasise the majesty of the law, and the layout of most courtrooms is more likely to increase rather than assuage the anxiety of nervous witnesses."[289]

As well as the architectural design of the courtroom itself, the professional participants in the trial add to the ceremonious theatricality of criminal trials by donning robes and wigs. Only rarely will the Courts depart from rigid formality in the interests of vulnerable complainants. In the case of *R v Williamson,* which involved a 24 year old witness who was mentally handicapped, both the trial judge and counsel removed their wigs and gowns.[290]This is not a concession afforded to rape complainants. Resistance is, in part, based on the assumption that the formality of the courtroom promotes truthful testimony.

2.3.5.2. A Combative Arena

In England and Wales, rape complainants are compelled to give evidence in a hostile and combative arena. The adversarial trial is structured as a dispute and the examination of witnesses reflects the norms of competition and aggression upon which the criminal trial is based.[291] Within the adversarial criminal trial witnesses are

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287 *ibid*

288 Flin, R., Davies, G., Tarrant, A., *The Child Witness Final Report to the Scottish Home and Health Dept,* (1988) cited in Spencer, J.R., Flin, R., (1993), op cit

289 Flin, R., (1993), *op cit* at 287

290 *The Guardian* 10 June 1992

291 See Chapter Six

divided into two opposing camps. Those called by the prosecution and those by the defence. Witnesses appear for one side and are consequently the target of attack of the other side. Rock argues that within the adversarial system all witnesses are "translated into objects in conflict";[292]

> "It was dedicated to pitting the testimony, credibility and reputation of victims and defendants against one another."[293]

Similarly, Brown et al report;

> "All complainers giving evidence become the site of a battle between the defence's and prosecution's version of events."[294]

In the adversarial conflict, the complainant is cast as the ally of the prosecution and the enemy of the defence. Advocates are professional adversaries, familiar with the rules, the formalities and the language of courtroom conflict. The complainant enters the combative arena from a vulnerable and disadvantaged position.

As identified in Chapter one, combativeness is an inherent element of the adversarial trial. The adversarial trial could not operate effectively without a degree of belligerence, indeed, partisanship is considered the strength of adversarial proceedings. Consequently, the level of combativeness may not be reduced in cases involving vulnerable complainants. In fact, in serious cases such as rape cases, the cut and thrust of the adversarial criminal trial is likely to be intensified. The rape complainant is thrust into a combative and hostile arena where the risk of secondary victimisation is high.

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292 Rock, P., (1993), *op cit* at 86

293 *ibid*

294 Brown, B., Jamieson, L., Burman, M., *Sex Crimes on Trial,* (1993, Edinburgh:Edinburgh University Press), at 18

2.3.6. Summary

Insistence upon direct oral evidence has clear and distressing implications for complainants of rape. Complainants are compelled to relive their ordeal in the presence of their attackers, possibly endure being cross-examined by them, in an intimidating environment before strangers. Complainants may not give their evidence in advance of the trial and consequently, for the months before the trial have no choice but to keep the details of the attack alive to ensure an effective performance in court. A rape complainant may wait over a year before the case comes to court;

> "a delay of around 8 months is average, but some women have to wait as long as a year and a half before being called upon to appear in court."[295]

Any discrepancies, however incidental, between the rape complainant's evidence in court and her previous statement to the police will be fully exploited in cross-examination. At the trial she may be required to recall the smallest of details. The English adversarial trial process demands that complainants keep the distressing details of their ordeals at the forefront of their minds for months. Complainants may not begin the slow process of recovery. An insistence upon direct oral evidence translates into months of anxiety and stress for complainants. It is difficult to imagine an arena more inappropriate for a woman, traumatised by rape, than the adversarial trial. The assumptions of the adversarial fact-finding process ensure that any modification to trial procedure to lessen the ordeal of vulnerable complainants is seen as prejudicing the interests of defendants or as diminishing the reliability of evidence. Consequently, vulnerable complainants may not be afforded even minimal protection.

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[295] Adler, Z., (1987), *op cit* at 50

2.4. Calls for Reform

Calls for reform in the way rape cases are conducted have focused largely upon offering complainants protection in court. These have included the increased use of screens and CCTV, removing the defendant's right to self-representation in rape cases, and restricting the use of sexual history evidence in court.[296] However, some commentators concerned with the plight of vulnerable complainants, have advocated their removal from the courtroom altogether.

2.4.1. Criminal Justice Act 1988 Section 23

McEwan argues that, with a relaxation of the rules, vulnerable complainants could seek refuge in the documentary hearsay exceptions. McEwan argues that vulnerable complainants could be spared a courtroom appearance using the documentary hearsay exceptions contained in section 23 Criminal Justice Act 1988.[297] Under this provision a statement made by a person in a document shall be admissible in criminal proceedings provided;

> "(2)(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
> (b) that-
> (i) the person who made the statement is outside the United Kingdom; and
> (ii) it is not reasonably practicable to secure his attendance; or
> (c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found; or
> (3)(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

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296 See for example, Victim Support, (1996), *op cit* at 59

297 McEwan, J., "Documentary Hearsay Evidence-Refuge for the Vulnerable Witness", [1989] *Crim.L.R.* 629

> (b) that the person who made it does not give oral evidence through fear or because he is kept out of the way."

Statements that have been prepared for the purposes of criminal proceedings will only be admissible with the leave of the court.[298] Leave will not be granted unless the court believes the statement ought to be admitted in the interests of justice. McEwan argues that in cases involving vulnerable victims, including rape complainants, where the fact that the offence took place is not disputed and the only issue is that of the identity of the assailant, documentary evidence could replace a courtroom appearance by the complainant without unfairness to the accused. McEwan claims that in such cases cross-examination is rendered unnecessary. However, even if the documentary hearsay rules were relaxed to this extent, they would benefit only a small number of complainants. Where the defendant claims consent in a rape case the refuge created by section 23 would not be available.[299]

2.4.2. Reform of the Hearsay Rule

Spencer has advocated reform of the hearsay rule to enable vulnerable complainants to stay out of the courtroom.[300] Spencer argues that such reform would be in the interests of justice;

> "If we do not create some means by which the evidence of the old, the young, the sick and the foreigner can be taken on commission, we are faced with two equally unappealing possibilities: failures of justice because vital evidence is missing, or filling the evidential gap with the statements the absent witness made to the police - for letting in evidence from people whom the defence have had no chance to cross-examine, and probably infringing Article 6 (3) (d) of the European Convention on Human Rights."[301]

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298 Criminal Justice Act 1988 Setion 26

299 It is possible that the introduction of hearsay statements at trial, in line McEwan's recommendations, where the defendant has had no opportunity to challenge and examine the maker, may constitute a violation of the defendant's right to a fair trial enshrined in Article 6 European Convention on Human Rights - see Chapter Three

300 Spencer, J.R., "Orality and the Evidence of Absent Witnesses", [1994] *Crim.L.R.* at 629

Spencer advocates the introduction of a procedure for taking the evidence of vulnerable complainants on commission at a pre-trial hearing. Spencer argues that evidence recorded at a preliminary hearing would not exhibit any of the professed dangers of hearsay evidence. For example, there would be no risk of errors in transmission as the hearing would be videotaped. This would also enable the court to observe the demeanour of the complainant. The complainant would be examined and cross-examined in the normal fashion at the pre-trial hearing and evidence would be given on oath. The defendant would presumably not be present but be able to observe the hearing via a TV link. The videotaped hearing would replace a courtroom appearance.

The procedure envisaged by Spencer has many attractive features. The complainant would give evidence in the absence of the defendant and the public. The pre-trial hearing would be held in a less formal environment, wigs and gowns for example would not be worn. If pre-trial hearings were not subject to the same lengthy delays as trials, the complainant could also be spared months of unnecessary anxiety. However, the complainant would continue to be cross-examined by defence counsel. It is presumed that the structure of the pre-trial hearing would parallel that of the that of the criminal trial. The proceedings would be structured as a conflict between the defence and the prosecution. Many of the stressful aspects of adversarial proceedings would thus be retained.

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[301] Spencer, J.R., "Hearsay Reform:A Bridge Not Far Enough?", [1996] *Crim.L.R.* at 32

2.5. Child Witnesses and Modifications to the Fact-finding process

The plight of child witnesses has been the subject of considerable research.[302] Concern for the welfare of child witnesses has led to a number of modifications to trial procedure. This section examines these modifications and argues that the limited reform in this area illustrates the minimal protection the adversarial system can offer vulnerable complainants

2.5.1. Avoiding Confrontation

2.5.1.1. Screens and Television Links

As early as 1919, the possible intimidation of a child witness by the presence of the accused was recognised by the courts.[303] The Court of Appeal held in *Smellie* that if there was a fear that a witness may be intimidated, the witness could give evidence out of sight. In this case the defendant was allowed to remain in the courtroom but required to sit out of the sight of the child witness. Screens, to shield the child from the sight of the accused, were first introduced in 1987. The practice was upheld in the case of *X,Y,Z*. The argument that the use of screens may prejudice a jury against a defendant was rejected.[304] The court held that the trial judge was under a duty to see that the system operated fairly not only to the defendant but also to the prosecution witnesses; and sometimes the trial judge had to make a decision where the balance of fairness lay. One problem associated with the use of screens has been that the decision to allow their use was not made until the day of the trial by the trial judge. Hence, child witnesses could not be reassured before the trial that they would not have to face

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302 See Dent, H., Flin, R., *Children as Witnesses*, (1992, Chicester:Wiley), Goodman, G., Bottoms, B., *Child Victims' Child Witnesses*, (1993, London:Guilford Publications), Spencer, J.R., Flin, R., *Evidence of Children:The Law and the Psychology*, (1993, London:Blackstone)

303 (1919) Smellie 14 Cr APP R 128

304 (1990) X Y Z 91 CR APP R 36

a defendant in court. The Criminal Procedure and Investigations Act *1996*, gives judges the power to make a binding ruling as the use of screens and CCTV at a Plea and Direction Hearing before the trial.[305]

According to research conducted by Chandler and Lait, the number of applications for screens and the success of applications decreased in 1995.[306] As CCTV is not available in all court centres the researchers claim that this implies that less protection is being offered to child witnesses.[307]

A recognition of the distress associated with giving evidence in public, in the intimidating environment of the courtroom, led to the introduction of the television link in criminal cases involving child witnesses. The Criminal Justice Act 1988 section 32, provided for children up to 14 years old in cases alleging violence or sexual offences to give their evidence from an adjacent room by way of a two-way closed circuit link. The Criminal Justice Act 1991 section 55 extended the age to 17 in sex cases. Confrontation between the child and the accused is thus avoided although the defendant is able to observe the child witness throughout. The child witness also gives evidence is a more informal environment outside the public gaze. The use of television links in criminal trials is however problematic. There is conflicting research on the effect of the TV link on juries. Some studies indicate that a jury feels less sympathy for a witness who appears on screen than one who stands in the witness-box.

> "There is a belief in some quarters that once the child is removed from the courtroom, her testimony becomes less effective."[308]

It is therefore possible that prosecuting counsel will decline to make use of the video link, especially where older children are involved, to avoid jury alienation.[309] In addition, the removal of the child witness from the courtroom does not solve other

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305 Criminal Procedure and Investigations Act 1996

306 Chandler, J., Lait, D., "An Analysis of the Treatment of Children as Witnesses in the Crown Court", in Victim Support, *Children in Court,* (1996, London:Victim Support)

307 *ibid* at 104

308 Birch, P., "Children's Evidence", [1992] *Crim.L.R.* 273

309 *ibid* 274

problems associated with giving evidence within the English adversarial criminal proceedings. The child witness is still subjected to cross-examination by defence counsel.

> "The television link can do little to affect the tone of the proceedings and the way in which cross-examination is conducted. It will be business as usual except that the child is physically removed from the scene."[310]

This viewpoint is shared by leading researchers in the area of child witnesses. Dent and Flin, although acknowledging that the TV link avoids confrontation between the complainant and the accused, maintain;

> "It seems unlikely that technology alone will remove the genuine fears and anxieties of children testifying under the adversarial system."[311]

Despite its limitations, the live-link has generally been welcomed;

> "Overall, the verdict on the live link in England seems to be that it is helpful. It enables more children to give more and clearer evidence, and whilst suffering less stress; though at the possible cost - if it is a cost - of reducing the emotional impact of their evidence."[312]

Chandler and Lait report that the success rate of applications for CCTV remained high in 1995, but that CCTV is not available in all Crown Court centres.[313]

2.5.2. Courtroom Environment

The anxiety and apprehension instilled in the child witness by the court environment has also been recognised by the courts. In some Crown Court centres there have been

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310 Temkin, J., "Child Sexual Abuse and Criminal Justice", (1990) 140(i) *N.L.J.* at 410

311 Davies, G., Westcott, H., "Videotechnology and the Child Witness" in (eds) Dent,H., Flin,R. (1992), *op cit* at 226

312 Spencer, J.R., Flin, R.,(1993), *op cit* at 111

313 Chandler, J., Lait, D., (1996), *op cit* at 102

departures from rigid formality.[314] Wigs and gowns have been removed and the child witness seated in the well of the court rather than in the witness-box. This is a matter of discretion for the trial judge.

2.5.3. Advisory Group on Video Evidence

Concern for the plight of children in court led to the establishment of a committee to examine whether courtroom appearances could be made less of an ordeal. The Advisory Group on Video Evidence was established in 1988 to consider the use of video recordings as a means of taking the evidence of children and other vulnerable witnesses at criminal trials. The chairman of the group was His Honour Judge Thomas Pigot QC. The Pigot committee reached the unanimous conclusion that videotapes of previous interviews with child witnesses should be more widely admissible.

The Pigot committee concluded that the arena of the English adversarial criminal trial is so distressing for child witnesses that they should be removed entirely;

> "We have concluded that children who come within the ambit of our proposals.....ought never to be required to appear in public as witnesses in the Crown Court, whether in open court or protected by screen or closed circuit TV, unless they wish to do so." [315]

The Pigot Committee proposed that when an alleged offence is reported by a child the child should be interviewed. This interview would be informal but carried out by a trained interviewer in line with an official code of practice. The interview would be videotaped and would replace examination-in-chief at trial. This would relieve the child of having to repeat all the facts of the offence months later in court. The admissibility of the interview would be decided by the judge at a preliminary hearing

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[314] Morgan, J., Zedner, L., *Child Victims, Crime, Impact and Criminal Justice*, (1992, Oxford:Clarendon Press), at 133

[315] Home Office, *Pigot Committee:Report of the Advisory Group on Video Evidence*, (1989, London:HMSO), at para 2.25

attended by the advocates, the accused but not the child witness. At a subsequent preliminary hearing the judge would provide for the examination and cross-examination of the child witness and this would again be videotaped. The videotape of this pre-trial hearing would replace cross-examination at trial. The defendant would not be present at the hearing but view the proceedings via a live link or a two-way mirror. In the interests of the child witness, the Pigot Committee also recommended that the formality of the criminal trial be dispensed with at the preliminary hearing.

> "The arrangements, we think, should be within the judge's discretion, but we propose that wigs and gowns should always be removed and that he should control cross-examination with special care."[316]

The majority of the Pigot Committee recommended that questions should be relayed by a third person approved by the court. The child witness would be cross-examined by a social worker or psychologist and not the defence advocate. The only dissenting voice was unsurprisingly, the representative of the Bar.

2.5.3.1. Reaction to Pigot Committee Recommendations

The Pigot Committee recommendations were deemed too radical a departure from the adversarial fact-finding process. Following the Criminal Justice Act 1991 a pre-recorded interview with a child may replace examination-in-chief at the trial.[317]

> "(3) Where a video recording is tendered in evidence under this section, the court shall (subject to the exercise of any power of the court to exclude evidence which is otherwise admissible) give leave under subsection 2 unless-
> (a) it appears that the child witness will not be available for cross-examination;
> (b) any rules of the court requiring disclosure of the circumstances in which the recording was made have not be complied with to the satisfaction of the court, or

316 Home Office, (1989), *op cit* at para. 2.29
317 Section 54 amends section 32 Criminal Justice Act 1988

> (c) the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted;
> and where the court gives such leave it may, if it is of the opinion that in the interests of justice any part of the recording ought not to be admitted, direct that that part shall be excluded."

The Government decided that a video recorded interview may be admitted in place of examination-in-chief as an exception to the hearsay rule. However, the leave of the court will only be granted if the child witness is available for cross-examination at the trial. One of the main advantages of the Pigot recommendations was that child witnesses would have been able to give their evidence in advance of the trial. The videotaped interviews would replace live testimony in court. Child witnesses would therefore avoid the stress of lengthy delays in a case coming to court. This would have undoubtedly constituted a significant improvement in the treatment of child witnesses. This advantage was however lost. A recent study by Chandler and Lait reports that a significant percentage of video recorded interviews is not accepted as evidence, meaning that a child having made a video tape is still required to give both examination-in-chief and cross-examination.[318]

The interposing of a third party between the advocate and the child witness was also rejected. Undoubtedly, it was feared that the potency of cross-examination would be compromised in such circumstances. It would appear that testimony, not exposed to the truth promoting safeguards of the courtroom, is only redeemed by vigorous verbal advocacy by defence counsel. There was never any possibility of the Pigot Committee questioning the appropriateness or effectiveness of cross-examination as a mechanism for testing the credibility of child witnesses. The terms of reference of the inquiry precluded such debate.

> "Of course we agree that cross-examination is essential. Indeed, in appointing the group the Home Secretary made it clear that did not allow for this would be unacceptable."[319]

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318 Chandler, J., Lait, D., (1996), *op cit* at 104

319 Home Office, (1989), *op cit* at para. 2.22

Despite the distress associated with cross-examination no change to cross-examination was countenanced;

> "Cross-examination is likely to be the worst part of a witness's ordeal, yet it is the very part which it has been decided that she cannot be spared."[320]

The central tenet of the Pigot Committee's recommendations was that child witnesses should not appear in court. However, child witnesses will only escape a court appearance when a TV link is available. Where TV links are not used the child will be thrust into the adversarial arena and the advantages of the reforms are lost.

> "It is ironical that a child is able to give his or her story in examination-in-chief in an atmosphere less formal and pressured than that prevailing in the court, yet he or she has to endure the much more traumatic and fraught experience of being cross-examined in the formal court atmosphere."[321]

2.5.3.2. Other Vulnerable Complainants

The plight of other vulnerable complainants in criminal proceedings was recognised by the Pigot Committee. The Committee recommended that the proposed reforms for child witnesses should be extended to other "vulnerable" witnesses in the near future;

> "We have concluded that in a small number of serious cases elderly, handicapped, badly traumatised and similarly affected witnesses should, eventually, be able to give evidence on the same general terms as we have proposed for child witnesses."[322]

The plight of complainants in sexual offence cases was a particular concern of the committee. The 'vulnerability' of such complainants was considered indisputable.

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320 Birch, P., (1992), *op cit* at 275

321 Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics: A Consultation Paper No.138,* (1995, London:HMSO), at para. 13.23

322 Home Office, (1989), *op cit* at para. 3.4

> "There should, we think, be a rebuttable presumption that all alleged victims of serious sexual offences are vulnerable witnesses. The general evidence on this point seems to be overwhelming."[323]

An appreciation of the ordeal experienced by sexual offence complainants in court led the committee to recommend reform in this context as a priority ;

> "If changes of the sort which we have suggested cannot be introduced reasonably soon in respect of all adult vulnerable witnesses we would propose that the earliest provision should be made for victims of serious sexual offences, who face special and generally recognised difficulties."[324]

Despite the concern voiced for vulnerable complainants by the Pigot Committee no reform has followed. Vulnerable adult complainants continue to be treated as ordinary witnesses.

2.5.4. Summary

The reaction to the Pigot Report clearly illustrates the limits of protection for vulnerable complainants within adversarial criminal proceedings. The Criminal Justice Act 1991 has been described as a lost opportunity by those hoping for far-reaching reform;

> "With this limited scheme, most of the advantages of the Pigot scheme are thrown away."[325]

It is however submitted, that the Pigot Committee had set itself, or was indeed set, an impossible task in seeking solutions within the framework of the adversarial fact-finding process. The direct conflict between the interests of vulnerable complainants and the evidentiary safeguards of the adversarial trial means that reform will only ever

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323 *ibid* at para. 3.5

324 *ibid* at para 3.15

325 Spencer, J.R., "Children's Evidence and the Criminal Justice Act: A Lost Opportunity", (1991), November, *Magistrate* at 182

be piecemeal and inadequate. In the following section the value of these evidentiary safeguards is examined.

2.6. Valuable Safeguards?

Many of the problems faced by complainants stem directly from the insistence upon direct oral evidence. The assumptions that underlie this belief in the superiority of oral evidence are rarely examined. This section questions the faith placed in oral evidence. It examines mounting psychological research that suggests that non-verbal behaviour is an unreliable guide to sincerity and that stress can impair the ability to recall and relay information. This section also questions whether the tactics routinely employed by advocates during cross-examination really assist the fact-finding process.

2.6.1. Demeanour: a reliable test of credibility?

It is assumed that a trial judge or jury denied the opportunity of observing the performance of a witness, is deprived of valuable clues as to his or her credibility. The importance attached to witness demeanour in adversarial theory has significant implications for rape complainants. Firstly, it encourages juries to engage in crude popular psychology and draw upon stereotypes of appropriate behaviour. In a rape case, the credibility of the complainant will, in part, be judged by the extent to which her behaviour conforms to that of the stereotypical rape victim. Assessments are necessarily based upon the erroneous assumption that there is a typical, 'genuine' response to rape. Whereas, research has shown that responses vary, some women may appear upset, others calm.[326]

> "There is a further contradiction in that the complainant should appear upset as a victim but controlled and calm as a court witness. If in court she appears lucid as a witness, she is in danger of not coming across as

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[326] Lees, S., (1996), *op cit* at 121

> a victim. If she appears too upset, she runs the risk of being seen as hysterical and therefore not believable."[327]

The complainant who appears composed may be deemed too impassive and therefore unbelievable. Tears and emotion may be interpreted as signs of sincerity or judged due to fear of exposure. In addition, the observation of a witness in court may lead a jury to attach significance to irrelevant details such as the physical appearance of a witness. Barristers are aware of the importance of presenting the right image in court. This point is illustrated by the advice given by Evans to aspiring advocates;

> "The colours you wear, and that your client and witnesses wear, are much more significant than most of us ever pause to think about."[328]

The importance attached to witness demeanour also encourages barristers to engage in tactics to influence the behaviour of witnesses in court. The practice of defence advocates deliberately seeking to fluster and upset complainants in order to undermine their performance in court is examined in Chapter six.

The assumption that witness behaviour is an indicator of veracity is however, not supported by the evidence. In fact, there is considerable evidence to undermine such a contention. For demeanour to be a reliable factor in determining credibility, there would need to be recognised signs or indicia of dishonesty. In addition, those determining credibility would need to be efficient in the detection and interpretation of these signs. Research in the fields of physiology and psychology has shown that behaviour commonly interpreted as signs of untruthfulness are in fact signs of stress and that observers commonly misinterpret non-verbal behaviour.[329] The witness in a criminal trial is likely to experience a high degree of anxiety and therefore the potential for misinterpretation is great.

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327 *ibid* at xiii

328 Evans, K., *The Golden Rules of Advocacy*, (1993, London:Blackstone), at 11

329 See Wellborn, O.G., "Demeanour", (1991) 76 *Cornell.L.Rev.* at 1075

In *Demeanour*, Wellborn reviews the research on non-verbal behaviour and lie detection and claims that mounting experimental evidence contradicts orthodox legal assumptions as to utility of demeanour in assessing veracity.[330]

> "If ordinary people in fact possess the capacity to detect falsehood or error on the part of others by observing their non-verbal behaviour, then it should be possible, indeed easy, to demonstrate such a capacity under controlled conditions. Over the past twenty-five years, a large number of experiments involving thousands of subjects have searched for this capacity. With remarkable consistency, the experiments have shown that it simply does not exist."[331]

Rather than providing valuable clues to the veracity of witnesses, Wellborn concludes that demeanour is misleading;

> "According to the empirical evidence, ordinary people cannot make effective use of demeanour in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanour diminishes rather than enhances the accuracy of credibility judgments."[332]

Stone, in a sceptical appraisal of the reliability of demeanour as an indicator of sincerity, also argues that the risks of misinterpretation are high;

> "Even where signs of anxiety or relaxation exist and are detectable, to equate them to sincerity or deception automatically, is unjustified and dangerous."[333]

Stone concedes that demeanour may have some significance in normal relationships where people are familiar with each others' normal behaviour and therefore may observe deviations. In the courtroom the observers do not have this background knowledge. Stone concludes;

> "There is no sound basis for assessing credibility from demeanour." [334]

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330 *ibid*
331 *ibid* at 1104
332 *ibid* at 1075
333 Stone, M., "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" [1991] *Crim.L.R.* at 827
334 *ibid* at 829

Scepticism about the role of witness demeanour in court is shared by members of the judiciary;

> "The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think this is overrated."[335]

The Law Commission recently reviewed the importance of demeanour as a justification of the hearsay rule and appeared to accept its deficiencies;

> "A sizeable body of research indicates that physical signs that people often think are indicators that a person is telling lies are really signs of stress; and a witness may be stressed because he finds it uncomfortable to tell a lie, or because she finds it uncomfortable to tell the truth, the chances of the observer correctly guessing that someone is lying from his or her "demeanour" are little better than the chance of doing so by tossing a coin."[336]

Research therefore suggests that the fact-finder, deprived of the opportunity to observe the demeanour of a witness is, in fact, deprived of very little. Despite the evidence of research, barristers and judges continue to remind juries of the importance of demeanour and it continues to be used as a justification for denying vulnerable complainants protection in court.[337]

2.6.2. Confrontation

There is no evidence that a confrontation between a complainant and a defendant encourages the complainant to tell the truth. There is however considerable evidence that a face to face confrontation with defendants causes complainants significant anxiety and distress. Psychological research has demonstrated that stress has an

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335 Devlin, P., *The Judge,* (1979, Oxford:Oxford University Press), at 63

336 Law Commission, (1991), *op cit at* para. 6.24

337 Rock, P., (1993), *op cit* at 70

adverse effect on an individual's ability to recall facts.[338] The stress of seeing the defendant may impair a complainant's performance in court and cause her testimony to be accorded less weight. The presence of the defendant may also intimidate a complainant and inhibit testimony.

> "It should be obvious that it makes it harder rather than easier to tell the truth about another to have that person there, particularly if the truth is unpleasant."[339]

It is also likely that fear of facing their attackers again in court deters some women from reporting rape. It is fundamental that defendants have the right to challenge the witnesses against them. However, it is submitted that this challenge need not take the form of a face to face confrontation and that a physical confrontation does little to assist the fact-finding process.

2.6.3. Cross-examination: the most effective test of veracity?

The effectiveness of cross-examination is rarely challenged within common law jurisdictions. It is however possible to argue that cross-examination as a mechanism for testing evidence may in fact, be truth-distorting. One possible challenge to the effectiveness of cross-examination concerns suggestibility. During cross-examination the examiner will use leading questions, questions that assert more than they ask. Advocates use leading questions to enable them to elicit specific responses from witnesses. Psychological research has identified a potential for the distortion of testimony in this method of interrogation.[340] In suggesting answers within their questions, cross-examiners may be leading witnesses to give answers that more closely accord with the truth as advanced by the advocate rather than the actual truth.

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338 Spencer, J.R., Flin, R., (1993), *op cit* at 268
339 *ibid* at 278
340 See Spencer, J., Flin, R., (1993), *op cit* at 271

> "All the work that psychologists have done on suggestibility and questioning shows that the more the questioner suggests a particular answer, the less reliable the answer is likely to be."[341]

The control exerted by the cross-examiner over a witness may also have a distortional effect on witness testimony. In both examination-in-chief and cross-examination questions are strategically framed by advocates to limit the possible responses of witnesses. Witnesses who attempt to offer more information than their examiner requires will find themselves abruptly silenced. Advocates skilfully deny witnesses the opportunity of presenting the court with the whole truth.[342] Cross-examination is a device that may be used to prevent the truth in certain instances from emerging as well as exposing it.

As stated in Chapter one, great importance attaches to the performance of witnesses in court. The performance of a witness during cross-examination can prove decisive. Advocates employ an array of tactics to undermine a witness's performance in court. These may not appear in texts on advocacy but their use has been observed and reported by researchers of criminal trials.[343] Advocates deliberately seek to embarrass, intimidate and humiliate witnesses so that they are unable to answer questions effectively. Advocates engage in lengthy questioning and concentrate upon obscure points in order to confuse witnesses.

> "Cross-examination of witnesses is regarded by many Commonwealth lawyers as the perfect method of establishing the truth, hence the reluctance to abolish the hearsay rule. But is frequently used to confuse witnesses, to get them to contradict themselves, showing their unreliability."[344]

Advocates attempt to catch witnesses on the detail and thereby tarnish their entire evidence. Comments made by Ron Thwaites QC in an interview with David Rose illustrate this point;

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341 *ibid*
342 See Chapters Four and Six
343 See Chapter Six
344 McEwan, J., (1992), *op cit* at 16

> "I will acknowledge that the witness-box is a very lonely place. It is hard to withstand good cross-examination, even if you are telling the absolute truth. The art of good cross-examination is to seal all the exits, leaving only the chimney. Then smoke' em out.
> Sometimes police officers do make innocent mistakes. It can be easy to convert mistakes into sinister lies. It's not being hard, it's not being soft. It's only doing my job. You must go to the heart of the case by going for the witnesses - not its big toe." [345]

The question inevitably raised but rarely examined is whether a confused, intimidated and distressed witness is the best source of evidence and also whether 'converting mistakes into sinister lies' really aids truth discovery.

Although challenges to cross-examination are rare some commentators have questioned its effectiveness. The American judge, Judge Frankel has claimed

> "We should be prepared to inquire whether our arts of examination and cross-examining, often geared to preventing excessive outpourings of facts, are inescapably preferable to safeguarded interrogation by an informed judicial officer."[346]

The Australian Law Revision Committee concluded that cross-examination is far from an effective device for testing the reliability of testimony;

> "so far as obtaining accurate testimony is concerned it is arguably the poorest of the techniques employed at present in the common law courts."[347]

2.6.4. Right to Self-Representation

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345 Rose, D., *In the Name of the Law The Collapse of Criminal Justice*, (1996, London:Jonathan Cape), at 311

346 Frankel, M., "The Search for the Truth:The Umpireal View", (1975) 123 *U. Pa. L.Rev.* at 1053

347 *ALRC Research Paper No.8, Manner of Giving Evidence,* (1982), at para 5, cited in Zuckerman, M.,"Law Commission Consultation Paper No. 138 on Hearsay: The Futility of Hearsay ", [1996] *Crim.L.R.* at. 9

It would appear, that Ralston Edwards exercised his right to self-representation to intimidate Julia Mason in the hope that she would break down and the case would collapse. Following the case, criminal lawyers continued to declare self-representation an inalienable right of defendants. The defendant required to have professional representation gains a qualified and experienced advocate to fight his case. The rape complainant cross-examined by her attacker is put through a painful and humiliating ordeal. It is submitted that a defendant's right to a fair trial would not be infringed if professional representation were to be made mandatory in rape cases.

2.6.5. Before an Audience

There is no persuasive evidence that giving evidence in public promotes truthful testimony in court. There is however evidence that this is a distressing aspect of trials for vulnerable complainants. Given the effects of stress and anxiety on witness testimony discussed above, compelling vulnerable complainants to give evidence before a courtroom of strangers may have negative implications for truth discovery. The right of defendants to a public hearing is a fundamental right and one to be guarded. It is however submitted, that excluding the public while rape complainants give evidence would not prejudice the interests of defendants. It would not in any way impair a defendant's ability to mount an effective defence but would represent an important recognition of the interests of vulnerable complainants.

2.6.6. Courtroom Environment

There is no evidence that giving evidence in an imposing environment deters dishonest testimony. The formality of the courtroom has however, been identified as one aspect of the criminal trial that adds to the distress of complainants. Researchers concerned with the welfare of child witnesses in criminal proceedings have argued

that the formality of the courtroom may have serious implications for the course of justice.[348] The stress induced by the surroundings may inhibit the testimony of the child witness to the extent that the court is unable to obtain the full facts of an offence. With regard to the formality of the courtroom, the Pigot Committee stated;

> "It seems to us that this means the formality and solemnity of the court room context which are often thought to promote truthfulness by witnesses may actually have a deleterious effect on the fullness and accuracy of children's testimony."[349]

Unwillingness to dispense with wigs and gowns, it would appear, has its foundations in the conservatism of the legal profession rather than in a belief that such attire steers witnesses from the path of perjury. Further, it is submitted it is not a necessary feature of a fair trial that witnesses be compelled to give evidence in the formal surroundings of a courtroom.

2.6.7. The Hearsay Rule

The hearsay rule represents a major obstacle to vulnerable complainants giving anything but direct oral evidence in court. The hearsay rule has been the focus of considerable criticism and has, as a result, been referred to the Law Commission.[350] The Law Commission examined the main criticisms of hearsay rule and has summarised the present state of the law on hearsay as the following;

> "There is no unifying principle behind the rule, and this gives to anomalies and confusion. Court time is wasted because of the lack of clarity and complicated nature of the rule. Cogent evidence may be kept from the court, however much it may exonerate or incriminate the accused, because the fact-finders are not trusted to treat untested evidence with the caution it deserves, but if hearsay is admitted there is nothing to prevent them convicting on it alone. Witnesses may be put

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348 Spencer, J.R., Flin, R., (1993), *op cit* at 370

349 Home Office, (1989), at para. 2.17

350 See Zuckerman, A.A.S., "Law Commission Consultation Paper No. 138 on Hearsay:The Futility of Hearsay", [1996] *Crim. L.R.* at 4, Spencer, J.R., "Orality and the Evidence of Absent Witnesses", [1994] *Crim. L.R.* 629

> off by interruptions in the course of their oral evidence. Whether evidence will be let in or not is unpredictable because of the reliance on judicial discretion. The admission or exclusion of hearsay evidence could mean that the Strasbourg Court would conclude an accused had not had a fair trial." [351]

The Law Commission questioned a number of the traditional justifications of the hearsay rule namely, the observation of witness demeanour and the oath. The Commission concluded that the right to cross-examine witnesses remained a legitimate safeguard and thus a valid justification for retention of the hearsay rule. Comments made by the Commission make it clear that the plight of vulnerable complainants was considered beyond the scope of their report;

> "we believe that the introduction of a system for taking evidence on commission would constitute a radical change to English criminal procedure, and should perhaps be considered in the context of a separate enquiry into the evidence of vulnerable witnesses."[352]

2.6.8. Summary

It is submitted that the faith placed in live oral evidence within common law jurisdictions lacks convincing foundation. Claims that the out-of-court statement of a witness is necessarily inferior to direct oral testimony in court are unpersuasive. The importance attached to demeanour and public confrontation appear misplaced and the claims made for cross-examination overstated. The case for compelling rape complainants to give evidence in court, it is submitted, is not a strong one.

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351 Law Commission, (1996), *op cit* at para 7.84

352 *ibid* at para. 11.41

2.7. Conclusion

A fair procedure, it is submitted, would recognise and treat the victim as an individual, a person who had suffered, who was worthy of respect and whose concerns were worthy of consideration. It would, as a consequence, seek to protect complainants from unnecessary distress and anxiety and respond to the special interests and needs of vulnerable complainants. The English adversarial system clearly fails in this regard;

> "..our method of trial signally fails to protect from psychological damage any of the weaker members of society who may find themselves important witnesses for the prosecution. Elderly people who may have been victims of violence, women who have been sexually attacked, may feel doubly punished if the conduct of the trial effectively throws them to the wolves."[353]

The plight of rape complainants in England and Wales is attributable largely to the insistence upon direct oral evidence in criminal proceedings and yet, the justifications for compelling complainants to give evidence in court are not convincing. It is submitted that the experiences of vulnerable complainants, documented by researchers, represent a significant challenge to key assumptions which underlie the adversarial fact-finding process.

It is clear that the interests of complainants may not be accommodated within adversarial proceedings. If the fair treatment of defendants and complainants is to be achieved it will be necessary to look outside the existing framework of the adversarial trial. The possibility of devising a procedure that protects the interests of defendants but is also sensitive to the legitimate needs and welfare of complainants must be investigated. This path to reform is urged by McEwan;

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[353] McEwan, J., (1989), *op cit* at 629

"It would be a great step forward if they could grasp the nettle and investigate the possibility of a completely different procedure, rather than look for flexibility within the straitjacket of the traditional criminal trial."[354]

[354] McEwan,J.,(1988), *op cit* at 822

Chapter Three- Dutch Criminal Procedure and the Rape Complainant

3.1. Introduction

Chapter two dealt with the insistence upon direct oral evidence in criminal proceedings in England and Wales and identified the implications for rape complainants. In the Netherlands oral evidence is not regarded as more reliable than written evidence. In Dutch criminal trials oral testimony is replaced by written evidence. The trial judge(s) base their decision largely upon the evidence contained in the dossier. Hearsay evidence is largely accepted. This tolerance of hearsay evidence has extended to the almost unlimited use of the statements of anonymous witnesses. The use of such statements was accepted by the Dutch Supreme Court in 1980.[355]

Very different assumptions inform the Dutch fact-finding process. For example, little importance is attached to witness demeanour. Instead, great faith is placed in the care taken by trial judges in evaluating evidence. The meaning of these distinctions for rape complainants in the Netherlands are examined in this chapter. An aim of this chapter is to establish the extent to which Dutch criminal procedure achieves the dual objectives of fairness to defendants and complainants. It is argued that Dutch criminal procedure has many advantages for rape complainants. This chapter contrasts the experience of rape complainants giving evidence in the Netherlands with that of complainants in England and Wales. It is claimed that the structure and evidentiary safeguards of the Dutch fact-finding process allow the interests of vulnerable complainants to, in part, dictate procedure.

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[355] HR, 5 February 1980, [1980] *NJ* 319, cited in Beijer, A., Cobley, C., Klip, A., 'Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice' in (eds) Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe:A Comparative Study*, (1995, Oxford:Clarendon Press), at 293 Following the case of *Kostovski*, conditions have been laid down for the use of statements of anonymous witnesses. These are discussed below.

Recent rulings of the European Court of Human Rights have sparked a debate in the Netherlands as to whether Dutch criminal procedure is incompatible with the concept of a fair trial enshrined in Article 6 of the European Convention on Human Rights. This chapter examines the case law and the implications of the Court's rulings for Dutch criminal procedure are explored. This chapter argues against the ECHR imposing a standard based upon adversarial values which fails to give due weight to the evidentiary safeguards of the Dutch fact-finding process and to take into account the interests of vulnerable complainants.

As stated above, although much has been written in recent years on specific aspects of Dutch criminal procedure the experiences of complainants within Dutch criminal proceedings have not been fully examined. To provide supporting evidence for the limited Dutch literature on the treatment of rape complainants, semi-structured interviews were conducted with two groups of Dutch practitioners; examining magistrates and lawyers who had represented rape complainants in criminal proceedings. An aim of these interviews was to gain further information on how the assumptions and safeguards of the Dutch trial process shape the experience of rape complainants in the Netherlands. The practitioners were also asked their views on the potential impact of the ECHR on Dutch criminal procedure.

3.2. Keeping Rape Complainants out of Court

> "From the witness's point of view the Dutch practice has many advantages. In most cases a witness does not have to appear at court, which means he does not have to travel or spend many hours in a waiting room, and victims of violent crimes such as rape or robbery are spared the trauma of being compelled to testify in the presence of the accused."[356]

The primary advantage of Dutch criminal proceedings is that rape complainants are, in the main, spared a courtroom appearance.

> "One will rarely find victims of rape as witnesses in the courtroom. Their statements to the police or to the investigative magistrate are still crucial evidence. This kind of evidence is not barred by any restriction of hearsay, at least in practice."[357]

A defendant may request that a complainant appears in court. According to Article 263 of the *Code of Criminal Procedure* the prosecutor may refuse to call a witness where;

> "it must be reasonably assumed that the defendant can not be hampered in his defence when (his witness) is not heard in court."[358]

The defendant may appeal to the court to overrule the decision of the public prosecutor under Article 280 CCP. In deciding whether the request of the defendant should be upheld or not, attention will be paid to the interests of the complainant. This

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356 Beijer, A., et al (1995), *op cit* at 288

357 Nijboer, J.F., "Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands", in (ed) Nijboer, J.F., *Proof and Criminal Justice Systems Comparative Essays,* (1995, Frankfurt:Peter Lang), at 117

358 Cited in Henket, M., "European Human Rights and the Pragmatics of Criminal Adjudication", (1992) 15 *I.J.S.L.* at 256

was illustrated in a case before the Dutch Supreme Court in 1991.[359] The complainants were victims of sexual abuse. They had been examined by the police and by the examining magistrate. The Supreme Court upheld the decision to refuse the defendant the opportunity to have the complainants appear in court because of the emotional strain a court appearance would cause them. In this case the statements of the witnesses were supported by other evidence and the defendant had had an opportunity to confront and examine the complainants at a pre-trial hearing through his lawyer. Nijboer claims that typically in cases involving sexual offences the court is hesitant to have a complainant examined in court.[360] Nijboer explains that the reasoning behind keeping rape complainants out of court is to do with the avoidance of a direct confrontation.[361]

The Dutch practitioners interviewed confirmed that as a general rule rape complainants are kept out of the courtroom. It was explained that where a defendant had had an opportunity to examine a complainant at a pre-trial hearing he must have special reasons before a rape complainant will be called as a witness at the trial. A possible instance provided was where the defence provides strong reasons why the trial judges should observe the complainant themselves. If the reasons are sufficiently persuasive a request may be successful. One practitioner stated that examining magistrates and public prosecutors occasionally recommend that rape complainants appear as witnesses at trials to enable trial judges to observe their demeanour. This was confirmed by an examining magistrate interviewed who explained that if he was particularly unsure about the reliability of a complainant he would suggest to the court that they see her themselves. However, all the practitioners confirmed that it is generally very uncommon for rape complainants to appear at court and the distress caused rape complainants by a court appearance is an influential factor in any decision made by the court. The practitioners also expressed the view that the interests of defendants were not prejudiced where such requests were denied. In rape cases, it was explained, it was very likely that the complainant would have been questioned by the

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359 Cited in Groenhuijsen, M., *Conflicts of Victims Interests amd Offenders Rights in the Criminal Justice System-a European Perspective* (1994, paper presented at Eighth International Symposium on Victimology, Adelaide, Australia), at 17

360 Nijboer, J.F., (1995), *op cit* at 105

examining magistrate and defence lawyer at a pre-trial hearing. The defendant will have had the opportunity to put questions at that stage and therefore had little to gain from questioning the complainant in court.

3.2.1. Summary

In England and Wales, the structure and evidentiary safeguards of the adversarial process mean that victims are compelled to appear in court. In the Netherlands, the emphasis on pre-trial procedure and the general tolerance of hearsay evidence, means that rape complainants may generally, be spared this ordeal.

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[361] *ibid* at 116

3.3. The Pre-Trial Hearing

Due to the seriousness of the offence it is very likely that the complainant in a rape case will be compelled to attend a pre-trial hearing.[362] Here the complainant will be questioned by the examining magistrate and the defence lawyer and a verbatim record of the interview forms part of the dossier. As discussed in Chapter one, the role of the examining magistrate is to gather further information and not to draw conclusions as to the weight of evidence. The experience of rape complainants in the Netherlands, giving evidence at a pre-trial hearing, is very different from that of rape complainants in England and Wales in court.

3.3.1. No Physical Confrontation

A belief that a face to face confrontation adds little to the fact-finding process, together with the lack of importance traditionally accorded direct examination of witnesses by the defence, means that rape complainants are rarely compelled to confront defendants in the Netherlands. Whether a defendant attends the examination of a witness is a matter of discretion for the examining magistrate. An examining magistrate may elect to exclude a defendant in order to spare a complainant the distress of seeing her alleged attacker. Nijboer claims that sometimes a direct confrontation is considered necessary in rape cases.[363] There are no figures available on the frequency with which direct confrontations are staged in rape cases. The practitioners interviewed were asked whether they understood this to be a common practice. The examining magistrates interviewed all claimed that they never allowed a defendant to be present when the rape complainant was being examined. The practitioners claimed that they avoided such confrontations as it would not be in the interests of the complainant to see the defendant. It was also claimed that defendants

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362 Nijboer, J.F.,(1995), *op cit* at 104,

would gain nothing from such a confrontation. The defendant's lawyer would be present and relay any information to his client. The practitioners appeared to perceive no intrinsic value in a face to face encounter. It was assumed that the interests of the complainant could be respected without unfairness to the accused.

3.3.2. In Private

In the Netherlands, the examination of witnesses in open court is not deemed a necessary component of a fair trial and there is no assumption that an audience deters dishonest testimony. Pre-trial hearings are held in camera. Rape complainants are therefore spared the ordeal of giving evidence in public. Complainants will be required to render sensitive and embarrassing details only in the presence of the examining magistrate, the defence lawyer and the court clerk who compiles a verbatim account of the hearing. Complainants are therefore not forced to speak unnaturally loudly. Although giving evidence is undoubtedly a painful process for complainants they are spared the embarrassment and humiliation of telling all to a room full of strangers. Women are not forced to give evidence in front of the defendant's family and friends and whoever else wanders into the public gallery. This undoubtedly constitutes a major advantage for rape complainants in the Netherlands.

3.3.3. Examination

At a pre-trial hearing a rape complainant is questioned by an examining magistrate and by the defendant's lawyer. In the Netherlands, the examination of witnesses does not resemble cross-examination. Few rules regulate the questioning of witnesses at pre-trial hearings. The examining magistrate dictates the course of the hearing and the questions which are put to a complainant. The examination of rape complainants at pre-trial hearings is examined fully in Chapter eight.

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[363] *ibid at* at 117

3.3.4. Informality

The pre-trial hearing takes place in the office of the examining magistrate which is simply an ordinary room usually situated within the courthouse building. Compared to the criminal trial, the pre-trial hearing is an informal affair and there are few procedural rules. The rape complainant answers questions seated at an ordinary desk with the examining magistrate and the defence lawyer rather than from the isolation of the witness-box. The examining magistrate and the defence lawyer do not wear gowns or wigs. It is also possible, at the discretion of the examining magistrate, for a supporter of the complainant to attend the pre-trial hearing to lend moral support.[364] The practitioners interviewed stated that it was their belief that the anxiety of rape complainants was appreciated by themselves and their colleagues and that attempts were made to put complainants at ease. The practitioners however conceded that this depended on the individual examining magistrate. There appeared to be no concerns however, that a complainant put at ease was less inclined to tell the truth. It would appear that the Dutch pre-trial hearing constitutes a less intimidating and stressful environment in which to give evidence than the adversarial trial.

3.4. In Court

In the rare instance that a rape complainant is compelled to give evidence in court, her experience will more closely parallel in some ways, that of the complainant in England and Wales. As Dutch criminal trials are, as a general rule, tried in open court it is possible that the complainant will have to give evidence in public. The public prosecutor may apply to the court for the public and press to be excluded however there must be very strong reasons before such a request will be granted.[365] Interviews

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364 See Chapter Eight 8.6.2.

365 Art. 273 CCP.

with Dutch practitioners confirmed that while it was possible for the public to be excluded at the request of the prosecution this was far from a frequent occurrence;

> "It is very rare, the public will be excluded only in very limited circumstances."

One practitioner explained that if a case was considered "exceptionally shocking" the public may be excluded. In the Netherlands it is also open to the defence to request that a trial be held in camera. One interviewee recalled a case in which the defendant had made a successful application based on the fact that he had Aids and was concerned about this becoming public knowledge.

It is also possible that a rape complainant will have to face her alleged attacker in court. As a general rule, in the Netherlands the defendant has a right to be present at the trial. The public prosecutor may request that the witness be heard in the absence of the defendant.[366] If the court feels that the witness will be intimidated by the presence of the defendant he may be excluded from the courtroom. However, once again there need to be strong reasons before the court will depart from the general rule. If the defendant is removed while a witness gives evidence the Code of Criminal Procedure provides that he should be immediately told what happened in his absence.[367]

Where the complainant attends court she may also have to answer questions put directly by the defendant himself. The defendant in the Netherlands has a right to put questions when a witness appears in court.

In recognition of the distress caused rape complainants by the presence of the public and press and confronting the defendant, the Dutch Supreme Court held that rape complainants may give evidence via a TV link rather than in court.[368] The willingness of the Court to allow rape complainants use of close circuit television reflects the assumptions that a face to face confrontation adds little to the fact-finding process and an audience and formality of the courtroom do not promote truthful testimony.

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366 Art. 292 CCP.

367 Art. 280 CCP.

368 HR 22 June 1993 cited in Nijboer, J.F., (1995), *op cit* at 117

3.4.1. Summary

The structure and evidentiary safeguards of the adversarial fact-finding process create intractable problems for rape complainants in England and Wales. Within the framework of the adversarial trial any protection afforded vulnerable complainants is necessarily very limited. Dutch criminal procedure creates fewer problems for complainants, primarily because witnesses, as a rule, do not appear in court. Where problems arise, the assumptions of the Dutch fact-finding process allow the interests of rape complainants to influence procedure. Primarily, through avoiding a direct confrontation between a complainant and the defendant.

> "Dutch practitioners have shown a large creativity in finding ways to protect alleged victims of presumed sexual crimes."[369]

The impact all this has on the willingness of women to report rape is impossible to judge. Rape remains an under-reported crime in the Netherlands. Research has however shown that women do not report rape for many reasons, their likely treatment within the criminal justice system being only one.[370]

The Dutch criminal process has clear advantages for vulnerable complainants. It is submitted that in rape cases, the Dutch system manages to recognise the needs of complainants and offer them some protection while safeguarding the interests of defendants. A defendant's right to a fair trial, it is submitted, should guarantee defendants among other rights, the right to a public hearing, the right to legal representation and the right to challenge the witnesses against him. It is submitted however, that the right of a defendant to a fair trial is not necessarily infringed when a complainant/witness is examined at a pre-trial hearing from which the public are excluded or where professional representation is declared mandatory. It is further submitted that the observation of witness demeanour by the fact-finder is not a necessary component of a fair trial and neither is a physical confrontation between a

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[369] Nijboer, J.F., (1995), *op cit* at 105

defendant and the witnesses against him. Finally, it is submitted, that a defendant's right to a fair trial is not necessarily infringed when the challenge to opposing witnesses does not take the form of live cross-examination in court but rather examination at a pre-trial hearing conducted by an impartial inquisitor.

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370 See 6.2.3.2.

3.5. Dutch Criminal Procedure and Article 6 of The European Convention on Human Rights

Recent rulings of the European Court of Human Rights have led to a debate as to whether Dutch criminal procedure is at odds with the concept of a fair trial contained in Article 6 of the European Convention on Human Rights. In this section the case law is examined and the likely impact of the rulings on Dutch criminal procedure is discussed. It is argued that to compel a shift towards a more adversarial procedure would be to fail to give due weight to the evidentiary safeguards of Dutch criminal proceedings and to ignore the interests of vulnerable complainants.

3.5.1. Article 6

Article 6 of the ECHR guarantees a defendant the right to a fair trial.

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in language which he understands and in detail, of the nature and the cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;

> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and so obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have free assistance of an interpreter if he cannot understand or speak the language used in court."

3.5.2. Status of ECHR

In assessing the potential impact of the recent rulings of the European Court of Human Rights on the conduct of criminal trials, it is necessary to understand the status of the European Convention on Human Rights in the Netherlands. In the Netherlands, the ECHR is incorporated into domestic law. The Convention is therefore enforceable in the courts. Consequently, the European Convention on Human Rights plays an important role in the Dutch legal system;

> "The European Convention is now to Dutch case law what the national constitution is to courts in countries like the US or the Federal Republic of Germany."[371]

The Convention also plays an important role in criminal proceedings.

> "The Convention is at the heart of every debate in the Netherlands on the quality of criminal justice. It is invoked in court proceedings on an almost daily basis. The road to Strasbourg has become familiar to defence lawyers."[372]

Dutch lawyers regularly appeal to the provisions found in Article 6 in criminal proceedings and are well versed in the relevant case law. According to Henket, since the early eighties the principles guiding the Convention have become entrenched on the minds of Dutch defence lawyers;

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[371] Swart, B., Young, J., 'The European Convention on Human Rights and Criminal Justice in the Netherlands and the UK' in (eds) Harding, C., Fennell, P., Jörg, N., Swart, B., *Criminal Justice in Europe:A Comparative Study* (1995, Oxford:Clarendon Press), at 60

> "Nowadays, you can wake up the average criminal lawyer in the middle of the night and he will mumble (in English) "due process" or "equality of arms".[373]

Clearly, the European Convention on Human Rights already exerts a considerable influence upon Dutch criminal procedure.

3.5.3. Case Law

The current debate was sparked by the European Court's ruling in *Kostovski v Netherlands*.[374] In *Kostovski* the applicant was convicted "to a decisive extent" on the statements of two anonymous witnesses. The applicant had no opportunity to challenge and question the witnesses either directly or through his legal representative. The applicant could only submit written questions through the examining magistrate, or put questions to those who heard the witnesses. The European Court held that the Netherlands was in violation of Article 6(1) and 6(3)(d). The Court stated;

> "In principle, all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making the statement or at some later stage of the proceedings."

In the Netherlands it is believed that the inability of the defendant to question a witness can be compensated for by the care with which a court evaluates the available

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372 *ibid* at 61
373 Henket, M., (1992), *op cit* at 282
374 20 November 1989, Series A No.166

evidence. In *Kostovski*, the Court held that that judicial care was not a proper substitute for direct examination. The Court held that the use of pre-trial statements was not in itself inconsistent with Article 6 as long as a defendant had had the opportunity to challenge the witnesses against him at some point during the proceedings. This challenge could, the Court held, legitimately take place at a pre-trial hearing.

The Court also referred to the importance of the criminal court observing the demeanour of witnesses. The Court stated that caution in evaluating the evidence does not compensate for the trial court observing the demeanour of witnesses and thus forming its own impression on their reliability.[375]

There have been a number of other cases before the Court in which an applicant has claimed that he was denied the opportunity of challenging and examining witnesses against him and thereby, denied a fair trial. There has however been a degree of inconsistency in the approach of the European Court. In *Unterpertinger v Austria* where the conviction of the applicant was based "mainly on the statements" of witnesses that the applicant had had no opportunity to examine, the Court held that there had been a violation of Article 6.[376] In *Windisch v Austria*, the applicant's conviction was based "to a large extent" on two statements of anonymous witnesses who again the applicant had not been given the opportunity to examine either at the trial or at the pre-trial stage.[377]In this case, the Court held that there had been a violation of Article 6(3)(d). In *Delta v France*, the conviction of the applicant was based "solely" on the written statements of two witnesses who the applicant had had no opportunity to question and again the Court found in favour of the applicant.[378] However, in *Asch v Austria* the Court held that there had been no violation of Article 6(3)(d) where the hearsay police statement of a witness who the defendant had not examined was used at the trial. In this case the conviction was not based only on the

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375 *ibid* at para. 43
376 24 November 1986, Series A No.110
377 27 September 1990, Series A No.186
378 19 December 1990, Series A No.191

witness's statement but also on other corroborative evidence.[379] This decision seems to be inconsistent with the Court's approach in *Unterpertinger* and *Windisch.*

The Court's task is to determine whether the proceedings taken in their entirety were fair. Following *Asch* it would appear that the existence of other corroborative evidence is a factor when the Court considers whether the defendant received a fair trial. However, in *Ludi v Switzerland* the applicant's conviction was based only partly on the written statements of an anonymous witness who the defendant had had no opportunity of examining. Despite the existence of other evidence the Court held that the defendant's rights had been violated.[380]

From the case law it is therefore unclear whether the use of a witness statement where the defendant has had no opportunity to examine the witness will amount to a violation only when the statement is the sole basis of a conviction or even where the conviction is based, in part, on other evidence.

The case of *Cardot v France* has added to the uncertainty that surrounds this area. The significance of Cardot lies, not with the decision of the European Court, but with that of the European Commission on Human Rights. The European Commission judges the admissibility of applications in which violations of the Convention are alleged. The Commission then refers a case to the European Court which will decide the merits of the complaint. In *Cardot*, the applicant claimed that he had been denied the right to a fair trial as his conviction was based on the evidence of witnesses who he had not had the opportunity of examining. The Commission concluded that there had been a violation of Article 6(1) in conjunction with 6(3)(d). The Commission referred to the Court's decision in *Kostovski* and stated;

> "In the light of this case law, the Commission considers that the requirements of a fair trial and equality of arms generally make it necessary for all the prosecution witnesses to be heard at the trial court and during adversarial proceedings.

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379 26 April 1991, Series A No.203

380 15 June 1992, Series A No.238

> It is also of the utmost importance that those courts should be able to observe the witnesses' demeanour under questioning and to form their own impression of their reliability."[381]

The Commission, in its decision, advances a stricter test than that adopted by the Court in *Kostovski.* The Commission states that prosecution witnesses should be questioned at the actual trial. This was not the ruling of the Court in *Kostovski* where the Court stated that the challenging of witnesses could take place at a pre-trial hearing. The observation of demeanour is also described by the Commission as of the "utmost importance".

Ultimately, the Court never discussed the merits of the *Cardot* case as the Court decided that the application was inadmissible. The Court held that Cardot had failed to exhaust domestic remedies and therefore the application was inadmissible under Article 26 of the Convention.

3.5.4. The Impact of the Kostovski Judgment

The Kostovski judgment has not led to a radical reappraisal of the use of anonymous witness statements, or hearsay evidence generally, in the Netherlands. The impact of the decision was dissipated, in part, by the significant degree of interpretative freedom the national courts may exercise when applying European Court decisions. The decisions of the Court are also always presented as decisions on a particular set of facts;

> "The European Court is very reluctant in formulating general rules and always makes it clear that its decision is dependant upon the facts of the case."[382]

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381 European Commission on Human Rights, (1990), *Report of the Commission 3 April 1990; application no.11069/84; Jean-Claude Cardot against France,* para. 50

382 Henket, M., (1992), *op cit* at 265

This allows for the a restrictive interpretation of Court rulings. The Dutch High Court gave the Kostovski ruling a strict interpretation which permitted the continued use of the statements of anonymous witnesses.[383] The inconsistency of case law emanating from the Court also provides a haven for states that are unwilling to accept the wider implications of decisions.

> "..a lack of clarity in the case law of the European Court provides national courts with an opportunity to play down the importance of the Court's judgments. This is what has happened in the Netherlands."[384]

Following the Kostovski judgment the Dutch Supreme Court laid down conditions for the use of statements of anonymous witnesses. These are provided by Beijer et al;

> "(i) the statement has been made before a judge who knows the identity of the witness; and
> (ii) the judge has expressed his opinion about the reliability of the witness in an official report; and
> (iii) the defence has been given the opportunity to examine the witness; in practice this means that the defence is given the opportunity to submit written questions or to examine the witness by means of telecommunication."[385]

In 1993, legislation was enacted making the use of anonymous statements legitimate subject to certain conditions. Beijer et al report that, where corroborative evidence is available, anonymous statements continue to be used in the Netherlands.[386]

Reports that following the Kostovski decision, requests by defence lawyers for witnesses to be examined in court have increased suggests that the ruling has had some influence on Dutch criminal procedure. According to Nijboer;

> "The right of the defendant to examine the witness himself or have him examined is taken much more seriously."[387]

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383 HR 2-7 1990, NJ 19990, 692 cited in Henket, M., (1992), *op cit*
384 Swart, B., Young, J., (1995), *op cit* at 72
385 Beijer, A., et al, (1995), *op cit* at 296
386 *ibid*
387 Nijboer, J.F., (1995), *op cit* at 115

The practitioners interviewed were asked whether the Kostovski decision had had an influence on Dutch criminal procedure and whether they had witnessed any evidence of a shift towards summoning witnesses to court. The practitioners claimed that as yet, the Kostovski ruling has had little real impact upon Dutch criminal procedure.[388] It was acknowledged that the rulings of the European Court had sparked off a lively debate but maintained that talk had not yet translated into action. Two of the practitioners claimed that they had not noticed any real increase in the number of witnesses appearing in court. Other practitioners claimed to have identified a small scale shift towards hearing witnesses at trial but as yet, only small numbers were involved.

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388 "At the moment there is proposed legislation about the so-called 'protection of witnesses', in which the Government tries to organise the examination of witnesses in a way that meet the requirements set out by the Strasbourg court." Nijboer, J.F., (1995), *op cit* at 116

3.5.5. Possible Future Influence of the ECHR on Dutch Criminal Procedure

In this section an attempt is made to assess the possible future impact of the ECHR on Dutch criminal procedure.

3.5.5.1. Article 6: an Embodiment of Adversarial Values

An important factor when predicting the future impact of the ECHR on Dutch criminal procedure, is the extent to which Article 6 embodies adversarial values. The concept of a fair trial, as advanced by the Commission in Cardot, clearly draws heavily upon adversarial values. The importance attached to confrontation in the form of oral argument in court and to the observation of witnesses amounts to an equation of fairness with the evidentiary safeguards of the adversarial fact-finding process. In its interpretation of Article 6, the European Court also draws upon assumptions and concepts that inform adversarial theory. Henket argues that the Convention has always been of Anglo-Saxon character.[389] Originally, Henket explains, the Convention was a collection of principles and the adversarial bias of the Convention was overlooked by contracting states from civil law traditions, including the Netherlands. However, these principles have developed into detailed rules and consequently the Anglo-Saxon character of the Convention has become more transparent. Nijboer also supports this view;

> "These provisions are basically founded upon a kind of 'adversarial' model, with an emphasis on the independent role of the parties."[390]

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389 Henket, M., (1992), *op cit* at 264

390 Nijboer, J.F., 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective' (1993) 41 *Am.J.Comp.L.* 299 at 311

The role of the Court is to decide whether proceedings on the whole were fair. Traditionally, while setting out basic requirements of a fair trial, the Court has not sought to dictate the procedures by which national courts meet those requirements;

> "The right to a fair hearing in Article 6(1) does not require that any particular rules of evidence are followed in national courts in either criminal or non-criminal cases; it is for each state to lay down its own rules." [391]

The Court has respected the individual character of criminal procedure of the states;

> "Given the great diversity of practice in European criminal justice systems concerning, for example, the rules of evidence, the Court has applied a very wide margin of appreciation as to the conduct of trials by national courts."[392]

However, by equating fairness of criminal procedure with the evidentiary safeguards of the adversarial process the Court is, in effect, dictating the conduct of criminal trials. This conception of a fair trial has potentially far reaching implications for Dutch criminal procedure.

> "While it is not yet possible to say whether the Court will really adopt a common law approach to the hearing of witnesses, its frequent emphasis on the importance of the defence having the opportunity to question witnesses as an essential element of fairness has significant implications for civil law systems."[393]

3.5.5.2. A Fundamental Shift?

Some commentators have claimed that the Report of the European Commission in Cardot and recent rulings of the European Court, herald an inevitable shift to a more

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391 Harris, D.J., O'Boyle, M., Warbrick, C., *Law of the Convention on Human Rights,* (1995, London:Butterworths), at 210

392 *ibid* at 273

393 Swart, B., Young, J., (1995), *op cit* at 86

adversarial model of procedure. Nijboer claims that radical reform of Dutch criminal procedure is a realistic possibility;

> "It can be expected that the European Court on Human Rights will play a major role in the development of the style of proceedings in almost all European countries. It is therefore, not unrealistic to expect that the accent of the trial will be put more on direct, oral presentation, on challenging and evaluating of 'first-hand' evidence presented in the courtroom, than is presently the case in the Dutch courts."[394]

> "There is a fair chance that countries like France and the Netherlands will be 'forced' by the European Court on Human Rights in Strasbourg to change the practice of the trial, especially as regards the role of direct examination of witnesses and other aspects of an open, 'contradictoire', oral and public style."[395]

Nijboer envisages a trial process in which direct oral evidence plays a greater role, where witnesses would routinely be summoned to appear in court and presumably defence lawyers would play a greater role in their examination. Given that the Dutch Code of Criminal Procedure prescribes an oral trial, Nijboer asserts that any reform will necessarily be directed at day to day practice.[396] Stolwijk has claimed that the Cardot case marks;

> "the beginning of the end of the Dutch tradition of doing justice 'on the documents of the case, having heard the accused'."[397]

and that criminal trials will increasingly focus upon the oral interrogation of witnesses. Groenhuijsen has also claimed;

> "Article 6 ECHR still has a few surprises in store. At the end of the century one will wonder with amusement why so many of the consequences of this key-provision were not foreseen today."[398]

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394 Nijboer, J.F, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective", (1993) 41 *Am.J.Comp.L.* at 311

395 *ibid* at 304

396 *ibid*

397 Stolwijk, S.A.M., "Wachten op Cardot", (1991) 21 *Delikt en Delinkwent* at 109 cited in Henket, M., (1992), *op cit* at 262

398 Groenhuijsen, M.S., "Artikel 6 EVRM en de dagelijkse rechtspraktijk Inleiding en perspectief.", cited in Henket, M., (1992), *op cit* at 266

Despite the limited impact of the Kostovski ruling so far, it would appear that a number of Dutch commentators view the decision as just the beginning and that the Netherlands will ultimately be compelled to adopt a more adversarial model of criminal procedure.

3.5.5.3 The Views of Practitioners

The practitioners interviewed were asked whether they foresaw a fundamental shift in Dutch criminal procedure with specific regard to rape cases. All expressed the belief that, as a general rule, rape complainants would continue to be kept out of the courtroom. One examining magistrate claimed that this view was supported by the present trend;

> "Increasingly more witnesses are appearing at trials but not in rape cases."

It was claimed that in rape cases, and cases involving other vulnerable complainants, defence lawyers would be reluctant to summon witnesses to court. One judge explained that defence lawyers viewed such a course to be "tactically dangerous". Defence lawyers, it was claimed, feared that the visible distress of a rape complainant in court would enhance the credibility of her story and damage the defence case. The practitioners also claimed that there would be widespread opposition within the ranks of the judiciary to increased numbers of rape complainants appearing in court. Defendants, it is believed, would gain little from examining a complainant in court whereas the woman would be put through a distressing and unnecessary ordeal. Examination at a pre-trial hearing before an examining magistrate, the practitioners claimed, is a perfectly adequate substitute for courtroom examination.

3.6. Conclusion

At this time it is impossible to foresee what eventual impact the ECHR will have on Dutch criminal procedure. It is however clear that some commentators in the Netherlands believe that a shift towards a more adversarial model is inevitable. A shift which will see an increased emphasis on confrontation and the presentation of oral evidence at trial, although interviews with Dutch practitioners suggest that rape cases would be treated differently for some time at least. It is submitted that to compel inquisitorial systems, such as the Netherlands, to adopt the evidentiary safeguards of the adversarial fact-finding process would be misconceived and unfair to complainants.

Firstly, it is submitted, that defendants in the Netherlands would not necessarily benefit from such a move. A defendant should be given the opportunity to challenge the witnesses against him. It is however submitted, that this challenge need not take place in court and need not take the form of cross-examination. The inability of the fact-finder to observe the demeanour of a witness where examination takes place pre-trial, it is submitted, is inconsequential. The observation of demeanour, confrontation, and the oral interrogation of witnesses in court, are fundamental safeguards of the adversarial process. These safeguards are rooted in the structure of adversarial proceedings and the assumptions of adversarial theory regarding truth discovery. The structure of Dutch criminal proceedings and the assumptions that inform the Dutch system are very different. Alternative evidentiary safeguards protect the rights of defendants. To equate fairness with the safeguards of the adversarial process signifies a failure to give due weight to the institutional safeguards of Dutch criminal procedure.

The primary objection to the alignment of fair procedure with the evidentiary safeguards of the adversarial process concerns the implications for vulnerable complainants were this to lead to witnesses routinely being summoned to appear in

court. The plight of rape complainants giving evidence in court was highlighted in Chapter two. Chapter two concluded that the adversarial criminal trial is an entirely inappropriate arena for rape complainants and identified that, for vulnerable complainants, a courtroom appearance often translates into a gruelling ordeal. For some, an ordeal more harrowing than the rape itself. The Dutch fact-finding process creates fewer problems for vulnerable complainants in that the majority are spared a courtroom appearance. In addition, the evidentiary safeguards of the Dutch fact-finding process allow the interests of vulnerable complainants to influence procedure. If there is a shift towards adversarial procedure it will become increasingly difficult and ultimately impossible, to accommodate the interests of vulnerable complainants within Dutch criminal proceedings.

The report of the European Commission in Cardot and recent rulings of the European Court contain no discussion as to the interests of complainants. The plight of vulnerable complainants within adversarial proceedings appears to have been entirely overlooked. The experience of the complainant should, it is submitted, inform any debate on the fairness of criminal procedure. A fair procedure must seek to reflect the interests of both complainants and defendants. It is submitted, that were due consideration given to the competing and legitimate interests of victims, the concept of a fair trial advanced by the Commission and seemingly, by the Court, would take a different form.

Chapter Four- Courtroom Stories and Complainants' Stories in Adversarial Criminal Proceedings

4.1. Introduction

The view that victims of crime should be allowed to communicate any concerns they may have, to provide information on how they have been affected by the crime committed against them and have that information considered at each stage of the criminal justice process, is gaining ground. The *United Nations Declaration of the Basic Principles of Justice for Victims of Crime and the Abuse of Power* states;

> "6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
>
> (b) Allowing the views and concerns of the victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system..."[399]

Both Victim Support and the European Forum for Victim Services have campaigned for the right of victims to provide information in criminal proceedings.[400] In July 1996, the Government announced the introduction of a scheme which is aimed at giving victims a voice in criminal proceedings. The *Victim's Charter 1996* states that victims of crime can expect the chance to explain how a crime has affected them and have their interests taken into account.[401] The introduction of this new scheme is discussed in this chapter.

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399 Cited in Joutsen, M., *The Role of the Victim of Crime in European Criminal Justice Systems,* (1987, HEUNI: Helsinki), at 179

400 Victim Support, *The Rights of Victims of Crime A Policy Paper by Victim Support,* (1995, London:Victim Support), European Forum for Victim Services, *Statement of Victims' Rights in the Process of Criminal Justice*, (1996, European Forum For Victim Services)

401 Home Office, *The Victim's Charter A Statement of Service Standards for Victims of Crime*, (1996, London:HMSO), at 3

Giving victims a voice in criminal proceedings in the form of victim statements represents an important recognition of the needs and interests of victims of crime. The criminal justice system ultimately relies upon the co-operation of victims. In return for their co-operation, this study argues, victims should be treated with dignity and respect. This would include granting complainants the opportunity of describing what happened to them, victims' stories would be told in court. An important issue that has been missing from the debate on giving victims a voice in criminal proceedings is the fact that victims called to give evidence in court find that once in the witness-box, they are denied the opportunity of telling their stories, leaving complainants feeling frustrated and unheard. This chapter argues that the inability of complainants to present their stories in adversarial proceedings is largely attributable to the presentation of evidence in the form of conflicting stories told by advocates in court.

The importance of storytelling in adversarial proceedings is now widely accepted. Following the influential work of Bennett and Feldman[402] who first analysed the organisation of criminal trials around storytelling, a substantial amount of research has been conducted into courtroom discourse.[403] Much of this research has been the work of linguists whose interests lie in discourse structure, discourse strategy and semantics. Generally, the significance of the process of storytelling for lay participants in criminal trials, defendants, complainants and witnesses, has not been explored. Where the experience of lay protagonists has been considered research has focused to a large extent on the difficulties faced by defendants in presenting their version of events in the lower courts.[404] The difficulties experienced by complainants in telling their stories have never been adequately addressed. This chapter seeks to explain how the process of storytelling in adversarial trials denies complainants the chance to tell their stories.

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402 Bennett, W.L., Feldman, M., *Reconstructing Reality in the Courtroom*, (1981, New Brunswick:Rutgers University Press)

403 See Jackson, J.D., *Law, Fact and Narrative Coherence*, (1988, Liverpool:Deborah Charles), Matoesian, G., *Reproducing Rape: Domination Through Talk in the Courtroom,* (1993, Polity Press), Papke, D.R., *Narrative and Legal Discourse:A Reader in Storytelling and Law*, (1991, Liverpool:Deborah Charles),

404 See Carlen, P., *Magistrates' Justice,* (1976, Oxford:Martin Robertson), McBarnet, D., *Conviction:Law, the State and the Construction of Justice*, (1981, London:Macmillan)

Firstly, this chapter examines the construction of courtroom stories in adversarial proceedings. It is argued that the partisanship of case construction within the framework of the adversarial contest necessarily leads to a simplified and biased interpretation of a complainant's story. In addition, it is argued that the complex evidentiary rules that characterise the adversarial trial also represent a significant filter of lay stories. It is argued that complainants are summoned to court, not to tell their stories, but to support the story told by the prosecuting counsel. Consequently, complainants are subjected to an array of preventative tactics aimed at controlling the narrative told in court. In addition, the rules of evidence dictate that witnesses be controlled to ensure inadmissible evidence is not introduced. The discursive strategies employed by advocates to curtail the narrative freedom of witnesses are examined. It is also argued that the environment in which complainants give evidence may further inhibit the ability of complainants to tell their stories. Compelling rape complainants to appear in court means that they give evidence in a stressful and intimidating arena. The difficult process of recounting painful, explicit information, it is argued, is made more difficult.

4.2. Case Construction and the Adversarial Process

Irrespective of the system under examination, the process of case construction will be a feature. No system can hope to reproduce reality in the courtroom. Rather than attempting the impossible, judgments are made upon necessarily selective facts. Everyday events are transformed into legal cases. Events are translated into the 'facts of the case'. However, within adversarial criminal proceedings, everyday events are presented in the form of stories. Stories which are told by advocates in court within the framework of a contest. Consequently, 'facts' are subjected to a distinct filtering process. In any system the evidence presented in court must comply with the rules of evidence laid down. In England and Wales, courtroom stories are shaped by the complex exclusionary rules which characterise adversarial proceedings. The relationship between the law of evidence and the process of storytelling in adversarial criminal proceedings is one that is never fully explored in studies of courtroom discourse. In adversarial proceedings courtroom stories are told by advocates, advocates engaged in a contest. Partisanship is therefore central to case construction in adversarial proceedings. The implications of these distinctive features of case construction for complainants are examined below.

4.2.1. The Law of Evidence

A primary constraint on case construction is the law of evidence. The rules of evidence regulate the presentation of facts in court. One of the fundamental rules of evidence is that facts must be relevant. Evidence is relevant if it is logically probative or disprobative of a fact that requires proof. The concept of relevance therefore acts as a filter for the myriad of facts surrounding a given incident.

> "The concept of relevance thus allows artificial boundaries to be drawn around unbounded reality and the "whole truth" to be replaced by the "facts of the case"."[405]

The complainant's experience must be translated into legal relevances before being processed within the criminal justice system. It is the role of lawyers to translate every day events into processable legal stories. Maureen Cain identified the practice of translation performed by lawyers.[406] Cain examined the relationship between solicitors and their clients. Cain identified that life experiences must be translated into a discourse that can be used by lawyers and the legal system. Everyday discourse must be transformed into legal discourse. As a result, lawyers coerce their clients' experiences to fit legal definitions. According to Cain, lawyers are primarily translators.

> "Discursive translation is a lawyer's defining skill."[407]

The concept of relevance plays a significant role in the process of translation. Elements of a complainant's story that are deemed 'irrelevant' will not appear in the prosecution case. The concept of relevance acts as a filter of lay stories;

> "a woman is not allowed to tell her own story of rape, only what is relevant in legal terms will have any influence"[408]

Adversarial proceedings are characterised by elaborate evidentiary rules, rules which can exclude relevant evidence. In England and Wales, the law of evidence largely centres on the presentation of evidence in court. To be admissible, evidence must satisfy these exclusionary rules. Hearsay evidence is inadmissible in England and Wales, subject to numerous exceptions. Evidence which offends the hearsay rule will be excluded. Lay stories are filtered by a body of presentational rules. The simplification and modification of lay stories in adversarial proceedings is therefore, in part, attributable to the exclusionary character of the law of evidence.

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405 McBarnet, D., (1981), *op cit* at 16

406 Cain, M., "The General Practice Lawyer and the Client: Towards a Radical Conception", (1979) 7 *Int. J. Soc. L.* at 331

407 *ibid* at 339

4.2.2. Case Construction and the Adversarial Contest

The adversarial trial is structured as a contest between two sides. Adversarial theory is based on the assumption that a confrontation between competing stories will some how lead to the emergence of the truth. It is also assumed that partisan assembly and presentation of evidence unearths the greater number of facts. Investigation, it is assumed, should be motivated by self-interest;

> "The English say that the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light. Two prejudiced searchers starting from opposite ends of the field will between them be less likely to miss anything than the impartial searcher starting in the middle."[409]

The adversarial structure of criminal trials necessitates the construction of two polarised versions of events. It is the role of the prosecution and the defence to construct two conflicting alternative stories and this necessarily leads to black and white interpretations of events.

> "This (adversary) process takes the general form of a dramatic contest aimed at shaping two mutually inconsistent interpretation of common data."[410]

The advocate in adversarial proceedings is not engaged in a search for the truth but seeking to persuade the court that his or her story is the one to be believed. The role of the court is not to search out the truth but to be persuaded. It is not the duty of the advocate, as persuader, to furnish the court with all relevant evidence. Rather, the role of the advocate is to tell a story based on selected facts.

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408 Smart, C., *Feminism and the Power of Law*, (1989, London:Routledge), at 33

409 Devlin, P., *The Judge*, (1979, Oxford:Oxford University Press), at 61

410 Goodpaster, G., "On the Theory of American Adversary Criminal Trial", (1987) 78 *J. Crim.L. & Criminology* at 120

> "The responsibility of the prosecution and defence counsel is to present the evidence favourable to their respective sides in the strongest light."[411]

Partisanship is central to the process of case construction within the adversarial system.

> "Whilst case construction is a feature of any criminal justice system, the adversarial system makes case construction a particularly partisan process."[412]

The primary objective of the advocate in the adversarial trial must be to tell a good story. What makes a good story has been the subject of a significant body of research.[413] According to Bennett and Feldman, story structure is all important.[414] Structural ambiguity, it is claimed, renders a story less believable. Bennett and Feldman claim that prosecutors are confined basically to one strategy in storytelling due to the burden upon the prosecution to prove a case beyond reasonable doubt.[415] This is to tell a "structurally complete" and internally consistent story. The defence have a wider array of strategic options which the researchers categorise as challenge, redefinition, and reconstruction strategies.[416]

> "All prosecution cases must attempt to construct a structurally complete story that contains an internally consistent interpretation for the defendant's behaviour. "[417]

The prosecutor must therefore be acutely aware of the danger of introducing elements of uncertainty into the prosecution case. The grey areas of reality are not conducive to convictions within the adversarial trial, ambiguities lead to acquittals. Prosecution counsel will therefore seek to present a clear cut account that will avoid the arousal of reasonable doubts in the minds of a jury. Counsel on both sides will strive to maintain

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411 Weinreb, L.L., *Denial of Justice*, (1977, London:Free Press), at 99

412 McConville, M., Sanders, A., Leng, R., *The Case for the Prosecution*, (1991,London: Routledge), at 11

413 See Bennett, W.L., Feldman,M.S., (1981), *op cit*, Jackson, B.S., (1988), *op cit*

414 Bennett, W.L., Feldman, M.S., (1981), *op cit*

415 *ibid* at 94

416 See Chapter Six

417 Bennett, W.L., Feldman, M.S., (1981), *op cit* at 94

a sharp distinction between the two conflicting accounts presented in court and facts that may lead to the blurring of this distinction will be excluded. Rock's study of criminal cases within an English Crown Court led him to conclude;

> "A case was a deliberate simplification that obscured some issues, giving luminosity only to what were called the "facts at issue", the facts that were deemed to be causally related to the commission of the offence. It was so constructed that it tended to strip way volumes of context and history."[418]

The advocate's ultimate consideration will be the persuasiveness of the story. The story told by the advocate in court is a deliberate simplification. Clearly, the stories told by advocates in criminal trials are largely constrained by the oppositional structure of adversarial proceedings. In England and Wales, the stories of witnesses are modified and moulded to meet the specifications of the adversarial trial.

> "Victims and defendant alike may be central witnesses, but structurally that is all they are, witnesses not to their own experiences but to the professionals case shaped not by the complexities and ambiguities of real life but the black and white conceptions of the adversarial trial"[419]

> "The consequences of bifurcation are not only that occasionally witnesses who could aid the fact-finding process are not heard. More generally, the testimony of a witness is shaped and packaged to meet the particular needs of the side for which he testifies, according to the general assumption that all testimony favours one side or the other. The more simple, direct, and -above all- unequivocal a witness's testimony is, the "better" it is, although just those qualities perhaps would ordinarily make it suspect."[420]

4.2.3. Summary

The adversarial trial is structured not as an investigation into the truth but as a contest. Rather than the court digging for facts, the court relies upon the stories told by

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418 Rock, P., *The Social World of the English Crown Court*, (1993, Oxford:Clarendon Press), at 31

419 McBarnet, D., "Victim in the Witness Box- Confronting Victimology's Stereotype", (1983) 7 *Contemporary Crises* at 295

420 Weinreb, L.L., (1977), *op cit* at 99

advocates. There is no requirement that all germane evidence be presented in court. Courtroom stories are largely the creation of advocates and shaped by law and strategy. The advocate decides which questions are asked and often more significantly, which questions are not. The advocate decides which witnesses are called and which are excluded. It is the advocates who basically decide which facts are introduced. Trial judges have the power to call witnesses however it is a power that is rarely exercised;

> "In criminal cases the judge technically has the right to call a witness but virtually never does so."[421]

Trial judges also have a right to examine witnesses and put questions overlooked or deliberately omitted by the advocate. Excessive judicial intervention in the examination of witnesses may however lead to a conviction being overturned.[422] In general, in England and Wales, a criminal court is restricted to the evidence presented by the parties;

> "Even on points of law however the adversary system works on the basis that the court is not supposed to undertake its own research and is not supposed to go beyond the arguments presented by the parties."[423]

The prosecution story is a selective interpretation of a complainant's experience. The process of case construction ensures that reality is subjected to a filtering process and is left partial and impaired;

> " ..the evidence contains only kaleidoscopic fragments of the facts. It is as if a checker of light and dark patches were held over reality."[424]

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421 Zander, M., *Cases and Materials on the English Legal System*, (1996, London:Butterworths), at 285

422 See Chapter Seven

423 Zander, M., (1996), *op cit* at 285

424 Egglestone, R., cited in Frank, J., *Courts on Trial: Myth and Reality in American Justice* (1963, Antheneum:Massachusetts), at 86

The prosecution case will contain only "fragments" of a complainant's story. The story told in court is not the complainant's story but a story filtered by exclusionary rules, determinations of legal relevance and shaped by strategic considerations. The rape complainant who viewed the trial as her opportunity to tell what happened to her is left feeling unheard, her ordeal unrecognised. The inability of rape complainants to tell their stories was observed by Lees;

> "Each woman's testimony, her voice, her experience, her account of what happened, is from the start constricted and curtailed in the court process,"[425]

Lees reports;

> "In one rape trial I attended where the woman was explaining how she felt, the defence counsel successfully intervened with the words, "I sympathise, your honour, but I fear this is becoming a speech."[426]

Research conducted by Lees suggests that many complainants in rape cases feel frustrated and disappointed by their inability to tell their version of events, in their own words in court;

> "The majority of women found their experiences in court humiliating and distressing. A very common complaint by women was that they were not allowed to explain what happened to them, or how they felt during the rape."[427]

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425 Lees, S., *Carnal Knowledge Rape on Trial*, (1996, London:Hamish Hamilton), at 34

426 *ibid*

427 *ibid* at 31

4.3. The Need for Control

Complainants will find themselves tightly controlled when giving evidence in court. This section explains why this control over witnesses is necessary in adversarial proceedings.

Courtroom stories are told by advocates. In an opening speech, the prosecution counsel will summarise the story he or she is going to tell. The opening speech in itself is an important stage in the persuasive process.[428]

> "Even though the story of the opening statement must be brief, the story weaves a core narrative that becomes the central interpretative framework for the entire trial." [429]

An erroneous assumption contained in much analysis of courtroom questioning is that the aim of the advocate in examination-in-chief is to draw out the story of the witness. In fact in adversarial trials, prosecution witnesses are called, not to tell their stories, but to support the story told by the prosecuting counsel. It is the role of the advocate to elicit supportive testimony from their own witnesses;

> "Examination and cross-examination in court are principally designed to elicit from witnesses the elements of evidence that are central to the construction of one or other side's story."[430]

A prosecution witness who fails to cooperate with prosecuting counsel may be treated as a hostile witness and subjected to cross-examination by prosecuting counsel.[431] If the story told by the prosecution is to be convincing the testimony of prosecution witnesses must fit within the story framework outlined in the opening speech. The

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428 Holmes Snedaker, K., "Storytelling in Opening Statements: Framing the Argumentation of the Trial", in Papke, D.R., *Narrative and Legal Discourse:A Reader in Story Telling and Law*, (1991, Liverpool: Deborah Charles), at 132

429 *ibid* at 134

430 Stephenson, G.M., *The Psychology of Criminal Justice*, (1992, Oxford:Blackwell), at 136

431 Criminal Procedure Act 1865 Section 3, See Newark, M., "The Hostile Witness and the

evidence introduced by prosecution witnesses must be consistent with the prosecution's version of events if a coherent, believable story is to be told. Prosecution witnesses, including complainants, are persons to be controlled to ensure that the story that unfolds in the witness-box is the story the prosecution counsel want told.

In addition, courtroom stories must comply with the complex, exclusionary rules of evidence. Witnesses are unfamiliar with the procedural and evidential rules that govern the criminal trial, they are untrained in the art of courtroom discourse. Witnesses are, as a result, potential 'loose canons' in a tightly regulated arena. There is always the danger that a witness will 'waste' the court's time with irrelevancies or reveal evidence that contravenes one of the many exclusionary rules. Within the adversarial criminal trial control over witnesses is crucial. Munkman, in a chapter entitled "Retaining Control", warns barristers of the dangers of giving a witness a free rein;

> "If the witness is allowed to give the whole of his evidence in his own way, he may miss out important points and stray into irrelevant details."[432]

Similarly, Evans, advising advocates on the techniques of examining witnesses, states;

> "It is the advocate's job to control what they say and how they say it. The lawyer who can't control these two variables is as dangerous as a driver who can't control his car, a pilot who can't control his aircraft, a dentist who can't control his drill."[433]

4.3.1. Summary

The revelation of inadmissible evidence by a witness may jeopardise a trial. The revelation of unsolicited, damaging information may jeopardise the prosecution case.

Adversary System" [1986] *Crim. L.R.* at 441

[432] Munkman, J., *The Techniques of Advocacy*, (1991, London:Butterworths)

[433] Evans, K., *The Golden Rules of Advocacy*, (1993, London:Blackstone), at 76

In adversarial proceedings therefore, prosecution witnesses, including complainants, constitute a potential threat to proceedings;

> "From the prosecutor's perspective the victim is a problem requiring careful management. Failing to limit the victim's testimony to the minimum evidence required for conviction carries with it potential disaster for his case."[434]

Consequently, it is pivotal that the advocate exerts control over witnesses. The discursive strategies employed by advocates to curtail the narrative freedom of witnesses and retain control over courtroom stories are examined below.

4.4. Adversary Advocacy

During examination-in-chief the prosecutor will strive to exert control over the complainant. Jackson describes a battle between the advocate and the witness.[435] This struggle between advocate and witness is clearly apparent in cross-examination however it also occurs throughout examination-in-chief. Jackson has argued that witnesses are given relative narrative freedom during examination-in-chief;

> "Typically, examination-in-chief, though taking the form of questioning, will in fact allow the witness a fair degree of leeway to tell his own story in his own words, thus adopting the "narrative testimony style"."[436]

It is submitted that Jackson underestimates the control exerted by counsel over their own witnesses.

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434 McBarnet, D., (1983), *op cit* at 299

435 Jackson, B.S., (1988), *op cit*

436 Jackson, B.S., "Narrative Models in Legal Proof", in Papke, D.R., *Narrative and Legal Discourse:A Reader in Storytelling and Law*, (1991), *op cit* at 162

Adversary advocacy is the mechanism which enables advocates to exert considerable control over witnesses and storytelling in the courtroom. It is the form of presenting proof within the English adversary system and is interrogatory. Evidence is elicited by the use of questions and answers. A witness may only give information in response to questions put by the advocate. As stated above, the advocate decides which questions are asked. This places the advocate in a structurally powerful position. Within the adversarial trial the question becomes a potent manipulative tool. According to Marcus Stone, in examination-in-chief the advocate should employ what he terms "controlled questioning";

> "...this lets the advocate edit evidence for persuasive reasons, by selection, omission and subtle shaping."[437]

Du Cann has similar advice for advocates;

> "If the witness must not be led, he must be guided. The evidence is given responsively, in answer to questions, not spontaneously, and the advocate must keep the witness under control."[438]

Aspiring advocates are advised to limit each question to a single point in order to maximise editorial control.[439] Witnesses are taken through their evidence deliberately and with small steps to provide the court with a coherent and consistent account as well as limiting the opportunity for detrimental elaboration. Another familiar maxim of advocacy texts recommends that where possible advocates should not ask a question to which he or she does not know the answer. Prosecution counsel are also advised to avoid open ended questions that may give rise to a multitude of answers, prosecuting counsel rely on predictability of response during examination-in-chief.

The importance of question form in achieving linguistic dominance has been researched in a number of studies.[440] Questions may be framed so as to limit potential

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437 Stone, M., *Cross-examination in Criminal Trials*, (1988, London:Butterworths), at 82

438 Du Cann, R., *The Art of the Advocate*, (1993, London:Penguin), at 97

439 Stone, M., (1988), *op cit*

440 See Atkinson, J., Drew, P., *Order in Court,* (1979, London Macmillan), Matoesian, G., *Reproducing Rape*, (1993, Cambridge:Polity Press), Danet, B., Bogoch, B. "Fixed Fight or Free

responses. By setting the parameters with a strategically worded question, counsel can confine the complainant to very specific responses. The party who asks the questions is structurally very much in control. Maley and Fahey analysed the contribution of question form to the construction of courtroom narratives.[441] The study was based on a coronial enquiry which is not intended to be an adversarial arena. However, Maley and Fahey explain that the enquiry from which their data came was unusually controversial at which four counsel were present to represent the interests of the different parties involved. The researchers maintain that the questioning of witnesses in the enquiry closely resembled examination-in-chief and cross-examination.[442] The researchers classified courtroom questions into two categories. Questions looking for confirmation and requiring a yes or no response and questions seeking information. Maley and Fahey reported a consistent preference for confirmation seeking questions;

> "Counsel prefer confirmation seeking questions because they enable them to control the topic choice, topic focus, and to construct the desired reality. That is, confirmation seeking questions enable the counsel to assume the role of story teller in the trial process."[443]

Question form is only one device employed in courtroom questioning identified by linguists. Other strategies include the use of repetition and reformulation.[444] Research in this area has shown that the courtroom advocate has at his disposal an extensive repertoire of discursive strategies which allow him to effectively limit the narrative freedom of a witness.

Before testifying a rape complainant will swear to tell the 'whole truth' however these words are misleading. The complainant is not expected to furnish the court with the whole truth and she may be restrained from doing so if she attempts it.

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for All? An Empirical Study of Combativeness in the Adversary System of Justice" (1980) 7 *British Journal of Law and.Society* at 36

441 Maley, Y., Fahey, R., "Presenting the Evidence: Constructions of Reality in Court", (1991) IV/10 *I.J.S.L.* at 3

442 *ibid* at 6

443 *ibid* at 7

444 See Goodrich, P., *Languages of Law*, (1990, London:Wiedenfeld & Nicolson), at 197

> "The oath .... is an obligation on the witness to answer the questions, not to volunteer all he knows about the issue."[445]

The complainant is constrained to offering information in response to the questions put to her. If a question is not asked on a specific point there is no opportunity for the complainant to bring that information to the attention of the court. The adversarial system requires prosecution counsel to engage in the strategic manipulation of prosecution witnesses. The prosecuting advocate will actively endeavour to thwart any attempt made by the rape complainant to give information which deviates from the prosecution story. The rape complainant who erroneously assumes that the role of prosecution counsel is to present the court with her story will be quickly disabused;

> "Instead of finding their lawyer helpful they often found that he or she prevented the story they had come to tell coming out."[446]

The complainant may be cut off in full flow or interrupted abruptly if she strays beyond the parameters set down by the examiner;

> "Anyone who has listened to a layman's account of a court case will almost inevitably have heard the complaint that there were vital facts that he would have liked to communicate to the court, but which he was forbidden to mention."[447]

The rape complainant who insists on offering elaboration may be treated quite severely by the prosecutor. As McBarnet states;

> "...the degradation of witnesses in court is not just something meted out by their adversaries. Victim, or witnesses more generally, can find themselves treated just as abruptly and unpleasantly by "their own side"."[448]

> "The hazards involved in allowing the victim free rein thus lead to the employment of preventative techniques to manipulate the information

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445 Stone, M., (1988) *op cit* at 50

446 Jackson, J.D., "Law 's Truth, Lay Truth and Lawyers' Truth: the Representation of Evidence in Adversary Trials" (1992) 3 *Law and Critique*, at 41

447 Egglestone, R., "What is Wrong with the Adversary System?" (1975) 49 *Austrl. L.J.* at 434

448 McBarnet, D., (1983), *op cit* at 295

> presented. But these preventative techniques are abrupt, frustrating and degrading to the victim." [449]

4.4.1. Summary

The form of presenting proof in adversarial criminal proceedings, adversary advocacy, enables advocates to exert control over witnesses. Discursive strategies are employed by prosecution counsel to ensure that the narrative freedom of complainants is restricted and that the story told in court is that of the prosecutor and not of the complainant. The complainant does not tell her story in court but rather serves as a witness to the prosecutor's version of events.

> "In a legal system based on adversary advocacy a case is not the whole truth but a partial account limited to the facts of the case as defined by law and strategy rather than the victim's perceptions of his or her experience."[450]

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[449] *ibid* at 299
[450] *ibid*

4.5. The Courtroom Environment and Storytelling

The extent to which the environment in which a complainant gives evidence in adversarial proceedings constitutes a further obstacle to the presentation of her version of events is a matter that has not been adequately addressed. It is submitted that a number of features specific to adversarial proceedings may have such an effect.

Firstly, the process of storytelling within the adversarial criminal trial is far removed from story telling in everyday life where the storyteller will have relative narrative freedom. The interrogatory method of examination, eliciting evidence by the use of question and answer, will be unfamiliar to the witness. The witness in a trial is compelled to furnish information in a unnatural and artificial manner to which he or she is unaccustomed.

> "In general, witnesses, whether for the prosecution or for the defence, will not be able to tell their own story in the way they would tell it in their everyday lives. Courtroom discourse is a specialised art."[451]

Secondly, within the adversarial contest, a complainant is cast as the ally of the prosecution and the enemy of the defence. A complainant may consequently feel obliged to censor information which may be detrimental to the prosecution and potentially advantageous to the defence. Alternatively, a complainant may feel reluctant to challenge the manipulative tactics of her 'representative'.

> "Indeed, the whole system of eliciting evidence by question and answer is calculated to persuade the witness that he must only tell the favourable parts of his evidence in examination-in-chief and leave it to the cross examiner to extract the unfavourable parts."[452]

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451 Shapland, J., Willmore, J., Duff, P., *Victims and the Criminal Justice System,* (1985, Aldershot:Gower), at 66

452 Egglestone, R., (1975), *op cit* at 432

Thirdly, rape complainants, in England and Wales, are compelled to give evidence in court. The complainant gives her evidence from the isolation of the witness-box in the imposing, intimidating surroundings of the Crown Court. She is required to recount intimate, sexually explicit details to a courtroom full of strangers. Her audience may include supporters of the defendant and members of the press. A complainant is further compelled to describe events in a loud voice and at a speed which allows verbatim transcription. In addition, she must endure the gaze of her alleged attacker throughout her testimony. For a complainant in a rape case, giving evidence is inevitably a painful experience. She relives an traumatic ordeal. Defining features of adversarial proceedings however ensure that the fragmentary story that a complainant is allowed to tell is told in a manner and environment which undoubtedly makes a painful task more difficult.

> "..it is misleading to think that present procedures take much account of lay truth as they seem to manage to make lay persons of all kinds, witnesses, defendants and jurors, inarticulate and extremely uncomfortable, if not speechless." [453]

4.5.1. Summary

In Chapter two it was argued that a courtroom appearance is a source of considerable stress for rape complainants. It was also stated that psychological research has shown that stress has an adverse effect on an individual's ability to recall and relay facts.

> "The law, it seems, turns the most elementary rules of psychology on their head. By insisting that only courtroom testimony is acceptable it assumes that memory is improved with time, and secondly, that stress improves the process of recall." [454]

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[453] Jackson, J.D., (1992), *op cit* at 49

[454] Spencer, J.R., *Jacksons Machinery of Justice* (1989, Cambridge:Cambridge University Press), at 267

It is submitted that the environment in which rape complainants are compelled to give evidence is not conducive to the elicitation of full and frank testimony. Not only does this have implications for individual complainants but also clearly raises questions relating to truth-discovery in adversarial proceedings.

4.6. Giving Victims a Voice

The complainant is not heard in a criminal trial other than during examination by prosecution and defence counsel. Traditionally, the impact of a criminal offence upon the victim or a victim's concerns have not been formally addressed in court. At no stage in the proceedings is the rape complainant given an opportunity to tell the court how she has suffered and the effect the rape has had upon her life. Lees' research has revealed the devastating and long term affects of rape on women.[455] Questionnaires distributed by Lees provided many harrowing examples of the aftermath of rape;

> "I think torture is the only thing you can equate with it. If you've been tortured you come out very shaky and unsure of your personality and you've had something subjected on you against your will and it takes a lot to reconstruct your strength and your confidence."[456]

> "I wanted to die. I could not stop crying. I thought everybody was looking at me and could see what I was feeling inside. I felt dirty, bathing all the time as I needed to be clean. I couldn't sleep couldn't eat, I had nightmares. I was frightened to go out. I was scared of being left alone. I could smell him all the time. I kept scratching myself to get him out of my body. I smashed all the mirrors in my bedroom and cut up the clothes I had been wearing."[457]

Lees reports that many women became less trusting of men, several suffered severe depression, several felt suicidal. Lees also reports that following rape women felt unable to live in their homes, to go to work, to continue relationships.

> "I lost my job shortly afterwards. I lost my boyfriend. He once in an argument said I was 'soiled goods', which was cruel. We split up. I started reacting to stress by slashing my wrists. I took many overdoses, requiring immediate hospitalisation and treatment. They placed me in a

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455 Lees, S., (1996), *op cit* at 16
456 *ibid*
457 *ibid* at 19

> mental health institution twice. I have to this day become very anxious."[458]

Interviews with rape victims conducted by Victim Support yielded similar stories. One woman who had been raped two years earlier stated;

> "My nerves have gone. It has completely changed my life. I feel great for a couple of months and then I start to have nightmares. Its terrible."[459]

The aftermath of rape is however rarely heard in rape trials. Commenting on the experience of rape complainants within the Scottish criminal justice system, Brown et al report;

> "The trial itself is not an occasion for her to tell her own story in her own way, rather she can only answer the questions she is asked. She is simply one of the prosecution witnesses, positioned almost as an outside observer, a bystander of what she in fact as suffered; her suffering itself merely regarded as evidence, her anger unrepresented and inappropriate."[460]

This is the position for all victims of crime. As discussed in Chapter one, within the English adversarial trial the complainant is simply a witness; a source of evidence. The complainant plays a purely passive role in criminal proceedings. On entering the criminal justice system the complainant effectively surrenders definitional control over her own experience to the State. She no longer "owns" her own experience. Nils Christie states that when a victim of crime seeks redress in a court of law the victim's experience becomes the 'property' of lawyers and the legal process.[461] This view is supported by McBarnet;

> "By the stage of the trial the layman's experience has become the professional's property, and it has become a case."[462]

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458 *ibid* at 176

459 Victim Support, *Women, Rape and the Criminal Justice System*, (1996, London:Victim Support), at 33

460 Brown, B., Burman, M., Jamieson, L., *Sex Crimes on Trial*, (1993, Edinburgh:Edinburgh University Press), at 17

461 Christie, Nils., "Conflicts as Property", (1977), 17 *Brit. J. Criminol.* 1

462 McBarnet, D., (1983), *op cit* at 295

The prosecutor's case will only contain that information, those elements of a complainant's story, which will assist the prosecutor in proving the guilt of the defendant. The parts of a complainant's story which do not meet this criterion are disregarded, excluded. The complainant's suffering, her pain, is not voiced. It is submitted that all complainants in criminal proceedings should be given the opportunity to describe the impact of an offence upon their lives. This view has recently gained support, notably from the UK Government.[463] Whether this should take the form of a victim statement is discussed below.

4.6.1. Victim Statements

In June 1996 the Government announced the introduction of a new scheme which is aimed at giving victims a voice in criminal trials. Detailed "impact statements" will give complainants the opportunity to explain the effects of the crimes committed against them. Year long pilot schemes were launched in six police force areas in August 1996- Metropolitan, Merseyside, Lancashire, Hants, Suffolk, Beds.[464] A number of commentators have questioned the potential value of victim statements. Ashworth is among those to express doubts;

> "The right to submit a VIS may be high in profile but low in improving genuine respect for victims."[465]

Mawby and Walklate have argued against the introduction of such statements claiming that were they to influence sentencing "further inequity is introduced into the system;"[466] and if they were not, then "asking victims' opinions and not acting on them increases victims' feeling of frustration and impotence."[467] Morgan et al express similar concerns about victim statements influencing sentencing;

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463 Home Office, (1996), *op cit* at 5
464 *The Daily Telegraph*, 19 June 1996
465 Ashworth, A., "Victim Impact Statements and Sentencing", [1993] *Crim.L.R.* at 509
466 Mawby, R.I., Walklate, S., *Critical Victimology*, (1994, London:Sage), at 192
467 *ibid*

> "Most victims will lack knowledge of either the options available to the court or the wider policy considerations which must be considered in sentencing, which is supposed to reflect the moral wrong suffered by violation of societal rules and the personal responsibility and moral guilt of the offender. Any large increase in victims' rights in sentencing might destroy this relationship; interfere with the objective decision of sentencers; and blur the difference between civil wrong and crime. such far-reaching consequences would require a complete reconsideration of the whole area of criminal law, sanctions, and the moral right to enforce them. This may be excessive since the American experience indicates that few victims use the right to make a statement."[468]

Victim Support supports the introduction of victim statements and have expressed strong views on the appropriate form and purpose of victim statements. According to Victim Support, the purpose of the statement should be;

> "i) to ensure that the victim has a right to be heard;
> ii) to provide information needed for any award of financial compensation;
> iii) to alert the authorities to any continuing risk to the victim which could affect the defendant's release from custody, or the conditions on which he/she is released;
> iv) to enable the professional parties involved to take the victim's interests into account in decisions which have to be made;
> v) to inform the prosecutor of wider circumstances of the case to be taken into account during the management of the case in court;
> vi) to provide the prosecutor with information which could be used to refute the misleading statements made by the defence in mitigation;
> vii) to enable the prosecutor to provide additional relevant information to the court, for example, prior to sentence."[469]

As to the contents of the statement, Victim Support states;

> "We propose.. that victims be given the opportunity to provide a statement to the police. It could describe the crime and the

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468 Morgan, J., Willem Winkel, F., Williams, K.S., "Protection of and Compensation for Victims of Crime" in (eds) Harding, C., Fennell, P, Jörg, N., Swart, B., *Criminal Justice in Europe A Comparative Study*, (1995, Oxford:Oxford University Press), at 315

469 Victim Support, (1995), *op cit* at 16

> circumstances surrounding it in their own words. It might mention for example whether the victim had any previous knowledge of or contact with the offender; whether he or she had any continuing fears or had received threats; the extent of any losses or injuries, and the emotional impact of the crime; and any other aspect of the crime which they would like the authorities to know. This should be passed by the police with the other case papers to the Crown Prosecution Service; there should be an opportunity to update it before the trial."[470]

Victim Support argues that while victims should be permitted to provide information, to describe the effect a crime has had on their lives, they should not assume the burden of decisions relating to the offender;

> "The state is responsible for dealing with the offender and no attempt should be made to return the burden of this responsibility to the victim." [471]

Victim Support consequently advocates caution concerning the introduction of victim statements prepared for the purposes of sentencing.[472] According to Victim Support, the sentencing of offenders should remain the responsibility of the State. It is submitted that this is the correct view. There is no evidence that complainants in rape cases, or in other cases, wish to play a more active role in criminal proceedings or wish to influence sentencing.

4.6.2. Summary

Whether the introduction of victim statements will ultimately benefit complainants awaits to be seen. While in favour of victim statements, Victim Support has raised a number of concerns. These include the possibility that defence lawyers might attempt to delay a case so that "a more 'recovered' victim could be presented to the court". Alternatively, that prosecutors may "oppose a victim receiving counselling or support in case they are too recovered by the time of the trial."[473] It also awaits to be seen whether complainants will be subjected to cross-examination by the defence regarding

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470 *ibid* at 12
471 *ibid* at 15
472 *ibid* at 12

the claims made in victim statements. While the introduction of the scheme is broadly welcomed, the need for careful monitoring of the scheme and its implications for the treatment of complainants in court is clear.

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[473] *ibid* at 12

4.7. Conclusion

This chapter has argued that complainants in criminal proceedings should be heard, that their stories should be told. This chapter had sought to demonstrate that the presentation of evidence in the adversarial trial process in the form of conflicting stories told by advocates in court effectively denies complainants the opportunity to tell their stories. The process of case construction is constrained by the oppositional structure of the adversarial trial and the exclusionary character of the law of evidence. The reconstruction of evidence into courtroom stories ensures that the court is presented with a selective interpretation of a complainant's story. A complainant does not tell her own story but serves as a witness to the prosecutor's version of events. In court, complainants find themselves prevented from presenting their stories by their 'own' side, constrained to answering the specific questions of prosecution counsel. Questions which are strategically framed to limit the narrative freedom of the complainant. In addition, rape complainants are compelled to give evidence in an environment which may reasonably be assumed to make a necessarily painful process more difficult.

The fact that until now, victims have not been given a voice in criminal proceedings, (and it is by no means certain that victim statement scheme will be implemented nationwide), may also be attributed to the historical exclusion of the victim from the criminal justice process. There is a strong tradition of not listening to victims of crime. Complainants have been historically marginalised and so too have the stories they have to tell. The increased focus on the needs and interests of victims of crime in recent years, it appears, may finally give complainants a voice in criminal proceedings. The success of the victim statement scheme awaits to be seen.

If complainants' stories are to be told however it is clear that reform must extend beyond the introduction of new procedural rights. The very structure of adversarial

proceedings which relies on stories told by partisan advocates in court would require re-examination. Until such a re-evaluation takes place it is submitted, complainants and their stories, will continue to be manipulated, and complainants left feeling frustrated and unheard by a criminal justice system that ultimately relies upon their co-operation.

Chapter Five - Victims' Stories and Dutch Criminal Procedure

5.1. Introduction

In Chapter four it was argued that the rape complainant who gives evidence in an English criminal trial is denied the opportunity to fully present her version of events. The inability of complainants to tell their stories was attributed largely to the form in which evidence is presented in adversarial criminal proceedings namely, as conflicting stories told by advocates in court. This chapter explores whether victims' stories are told within Dutch criminal proceedings.

Firstly, this chapter examines the process of case construction in Dutch criminal proceedings. In the Netherlands, evidence is presented in the form of written evidence contained in the dossier. It is the dossier that tells the story rather than partisan advocates whose task is to persuade the fact-finder. In addition, the law of evidence in the Netherlands largely takes the form of decision-making rules rather than presentational rules governing admissibility. Consequently, the process of case construction is very different to that described in Chapter four. The implications of these differences for complainants in Dutch criminal proceedings are explored in this chapter.

Secondly, this chapter argues that the exertion of tight control over witnesses, crucial in adversarial proceedings, is rendered largely unnecessary in Dutch criminal proceedings and consequently, so too are the preventative techniques identified and examined in Chapter four.

This chapter also reports interviews conducted with two groups of Dutch practitioners; examining magistrates and lawyers with experience of representing rape complainants in criminal proceedings. The aim of these interviews was to provide supportive testimony for claims made in the limited Dutch literature that rape

complainants are denied the opportunity of telling their stories in Dutch criminal proceedings.

The environment in which rape complainants in the Netherlands generally give evidence is also examined. It is argued that, compared to the English courtroom, the Dutch pre-trial hearing provides a more appropriate environment for victims of sexual offences to tell their stories.

Finally, this chapter examines whether the use of the adhesion procedure, whereby a complainant joins a civil claim to criminal proceedings, affords complainants in the Netherlands the opportunity to inform the court of the impact of a criminal offence upon their lives.

5.2. Case Construction

In Dutch criminal proceedings, the term case construction refers to the compilation of the dossier. Dutch criminal procedure is structured to ensure that the dossier contains all relevant evidence and is a legally competent basis for judgment at trial. As discussed in Chapter one, the dossier will include the police file; statements of an accused, the complainant and witnesses. The dossier also contains expert evidence, social and psychiatric reports. The statements of the accused and witnesses taken at a pre-trial hearing before an examining magistrate are also included.[474] The process of case construction in the Netherlands varies greatly from the process described in Chapter four. The major differences are explored in this section.

5.2.1. A Collaborative Enterprise

Case construction in England and Wales is a process dominated by the parties. The adversarial trial is structured as a contest. A contest in which evidence is presented in the form of competing stories told by advocates. It is the advocates who construct these stories; they are the storytellers. It is the advocates who decide which facts are introduced. The court is largely dependant upon the evidence presented by the parties. There is no requirement that either party present all relevant evidence in court. Rather, the evidence presented by the advocates is shaped by tactical considerations. In England and Wales, case construction is a highly partisan process. In contrast, case construction in the Netherlands is a process characterised by co-operation. The Dutch trial process is structured as an inquiry and not as a contest. In Dutch criminal proceedings the public prosecutor, the examining magistrate, the defence and trial judges all have a role to play in the construction of the dossier which forms the basis

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[474] See Chapter One 1.3

for judgment at trial. Case construction is a collaborative enterprise. All are charged with ensuring that the dossier contains all the relevant evidence.

As discussed in Chapter one, in England and Wales, prosecutors are commonly described as 'ministers of justice', a title which denotes impartiality. However, the role of the prosecutor in adversarial proceedings is to present a partisan version of events. A version which presents the evidence in the best light for the prosecution. The role of the prosecutor does not extend to seeking out exculpatory evidence. In the Netherlands, the public prosecutor truly is a judicial and impartial figure. The prosecutor is regarded not as a contending party but as a representative of the public interest. As director of the investigation, the public prosecutor is under a duty to seek out both inculpatory and exculpatory evidence. As discussed in Chapter one, built into the Dutch investigative process are institutional incentives which put public prosecutors under pressure to ensure that an investigation is thorough and that the dossier constitutes a legally competent basis for judgment at trial.[475] The public prosecutor who does not conduct a thorough investigation risks being stigmatised as inefficient and deemed to be not impartial.[476] The public prosecutor is, for example, under pressure to respect requests made by defence lawyers for further investigation.

> "Dutch prosecutors are under pressure to use their power within the system to ensure that the dossier is thorough and complete as a statement of germane evidence pointing to both conviction and acquittal. If they do not do so, they run the risk of being discomforted at trial."[477]

The examining-magistrate, *Rechter-Commissaris*, is also a judicial, independent figure in Dutch criminal proceedings. The role of the examining magistrate is to conduct an impartial investigation into the truth and to collect relevant evidence. The examining magistrate is under a duty to ensure that the dossier is a complete and thorough statement of the evidence.

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475 See Chapter One 1.3.1.1

476 See Field, S., Alldridge, P., Jörg, N., "Prosecutors, Examining Judges, and Control of Police Investigations", in (eds) Harding, C., Fennel, P., Jörg, N., Swart, B., *Criminal Justice in Europe: A Comparative Study*, (1995, Oxford:Oxford University Press), at 237

477 *ibid* at 235

> "The RC, like the prosecutor, is under significant institutional pressure to investigate defence claims and to pursue relevant exculpatory evidence. If he rejects a defence suggestion that evidence be sought, the defence may raise the issue again at trial and, if the trial judges consider that the investigation might have yielded germane evidence, the case will be sent to the RC to conduct the investigation."[478]

The defence lawyer also plays an important role in the construction of the investigative file. As discussed in Chapter one, the role of the defence lawyer is to identify evidentiary weaknesses, deficiencies and ambiguities in the dossier. It is open to the defence lawyer to request further investigation.[479] Such requests may be directed at the public prosecutor, the examining magistrate and the trial judge. In the Netherlands the defence lawyer safeguards the impartiality and thoroughness of the investigation and the evidentiary quality of the dossier.

In England and Wales, the court is largely confined to the evidence presented by the parties. The Dutch criminal court is not so confined. In the Netherlands, the court actively seeks out the truth. The Dutch trial judge may move on his or her own initiative to explore the thoroughness of the dossier. If considered necessary, the trial judge may order further investigation postponing the trial.[480]

In the Netherlands the process of case construction is geared towards ensuring that the dossier constitutes a thorough and complete statement of the evidence and is a legally competent basis for judgment at trial. Key criminal justice professionals work together to ensure that the court is presented with all germane evidence. This process reflects the underlying assumption of Dutch criminal procedure that the truth is most likely to emerge through an independent investigation motivated by public interest as opposed to a party contest. In contrast, the process of case construction in England and Wales reflects adversarial theory's central assumption that the truth will emerge through confrontation, when evidence is assembled and presented by partisan advocates.

The significance that the process of case construction in Dutch criminal proceedings holds for complainants is examined below.

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478 *ibid* at 242

479 See Chapter One 1.3.3.

5.2.2. Contest vs. Inquiry

In England and Wales, the process of case construction is constrained by the oppositional structure of adversarial proceedings. Evidence is reconstructed into two mutually inconsistent stories. Evidence is presented by advocates whose role is to persuade. As stated above, the advocates are not under a duty to present all the relevant evidence. The process of case construction is dominated by considerations of what will make a good story. Structural coherence, consistency and clarity will be among the prosecutor's objectives. The adversarial process requires black and white interpretations of events, clear cut, conflicting accounts. Accounts stripped of ambiguity, shades of grey. This has important implications for complainants in criminal proceedings. Lay stories are simplified, modified. The prosecution case is a selective interpretation of a complainant's story shaped by strategy.

In the Netherlands, the process of case construction is not subject to such structural constraints. Evidence is not moulded into two conflicting accounts. The bi-polarisation of evidence in adversarial proceedings which results in the filtering and distortion of lay stories is not a feature of Dutch criminal proceedings. Rather than the court deciding between two conflicting versions of events, the Dutch criminal court pieces together a story from all the evidence contained in the dossier. Rather than seeking to magnify conflict and emphasise incongruity, in Dutch pre-trial proceedings, the public prosecutor, examining magistrate and defence lawyer all endeavour to limit areas of ambiguity in the dossier. They seek to reach, where possible, resolution of disputed matters before a case comes to court.

Evidence in Dutch criminal proceedings is not presented in the form of a story. Consequently, considerations of effective storytelling are not a feature of case construction. Elements of a complainant's story will not be excluded on the grounds that their inclusion may introduce ambiguity and inconsistency.

In England and Wales the reconstruction of evidence into conflicting courtroom stories leads to the simplification and the fragmentation of lay stories. The story told

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[480] Field, S., et al, (1995), *op cit* at 236

in court by the prosecution is not the complainant's story but a story shaped by strategy. In the Netherlands this reconstruction of evidence, of lay stories, does not occur. Complainants' stories are not therefore subject to the attendant filtering process.

5.2.3. Law of Evidence

A fundamental distinction between the process of case construction in the Netherlands and in England and Wales centres on the law of evidence. In England and Wales, the process of case construction is constrained by the body of complex exclusionary rules that characterise adversarial proceedings. In adversarial proceedings, lay stories are subject to a distinct filtering process. Elements of a complainant's story which constitute inadmissible evidence, such as hearsay evidence, are excluded and will not be heard in court. In the Netherlands, the law of evidence is conceived, not as a set of presentational rules, but as decision making rules. Dutch criminal procedure is not concerned with questions of admissibility. In the Netherlands, the jury is replaced by a career judge and as discussed in Chapter three, great faith is placed in the ability of trial judges to evaluate evidence.[481] It is assumed that trial judges are capable of identifying weaknesses in evidence and according such evidence appropriate probative force. Consequently, hearsay evidence is generally accepted in Dutch criminal proceedings. In the Dutch inquisitorial process lay stories are not filtered or strained by a body of exclusionary presentational rules. Elements of a complainant's story are unlikely to be excluded on the grounds of inadmissibility.

5.2.4. Relevance

[481] See Chapter One 1.4.2

In any legal system the concept of relevance plays a central role in the process of case construction. Everyday events are coerced to fit legal definitions. Lay stories are translated into legal relevances, legal discourse. In both adversarial and inquisitorial systems lay stories are filtered by the concept of relevance. In the Netherlands, the translation of lay stories into legal relevances is apparent when a complainant reports an offence to the police. When a complainant reports an offence she is interviewed by a police officer. A summarised version of the complainant's account is then compiled and this becomes part of the police file which in turn, becomes part of the dossier. As a summarised version, certain details of a complainant's story are inevitably omitted from the police statement, details which are deemed irrelevant by the police officer.

5.2.5. Summary

This section has identified the major differences between the process of case construction in the Netherlands and in England and Wales. Case construction in adversarial proceedings refers to the transformation of evidence into the distinct form of a courtroom story. A term which refers to the moulding of evidence into competing, highly stylised, versions of events by partisan lawyers. The ultimate aim of the advocate is to present the fact-finder with a persuasive interpretation of the evidence. In the Netherlands, the term case construction refers to the compilation of the dossier; the record of a thorough and impartial investigation. It is a process in which all key criminal justice professionals are involved. The ultimate aim of which is to present the fact-finder with all the germane evidence. In adversarial proceedings the concept of relevance, the exclusionary rules of evidence and the presentation of evidence in the form of conflicting stories all act as significant filters of lay stories. In the Netherlands, the primary constraint on the process of case construction is the concept of relevance and this would appear to be the only significant filter of lay stories.

5.3. Controlled Questioning?

In Chapter four it was argued that witnesses in adversarial proceedings are persons to be controlled and that advocates exert this control through the deployment of an array of discursive strategies. The preventative techniques employed by advocates to limit the narrative freedom of witnesses in court have been the subject of numerable studies.[482] Research into courtroom questioning has not however been replicated within inquisitorial jurisdictions. The style of questioning employed in Dutch criminal proceedings and its bearing upon the ability of complainants to tell their stories has not been investigated. Despite this lack of empirical research, this section seeks to demonstrate that the control of witnesses is rendered largely unnecessary in the context of the Dutch criminal trial process, that linguistic dominance is not a primary objective of those who examine witnesses in the Netherlands. This section focuses upon the questioning of complainants at pre-trial hearings before examining magistrates. It is argued that to restrict the narrative freedom of witnesses in the manner practised in adversarial proceedings, would be inconsistent with the role of the examiner to conduct a thorough investigation; to search for the truth.

5.3.1. Not seeking control

In England and Wales, complainants are examined by advocates. The role of the advocate in adversarial proceedings is to persuade. As stated in Chapter four, if a story is to be convincing, the information provided by a prosecution witnesses must fit within the story framework of the prosecution case. The complainant allowed to offer explanation or clarification may introduce irrelevancies and inconsistencies or she may tell a story that conflicts with the version of events the prosecutor is attempting to

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[482] See Chapter Four 4.4.

present. In other words, granting a complainant narrative lee-way may jeopardise the prosecution case. Consequently, tight control of questioning is crucial in adversarial proceedings.

At pre-trial hearings in the Netherlands a complainant is questioned primarily by an impartial inquisitor, the examining-magistrate. The examining magistrate has no story to tell. The role of the examining magistrate is not to persuade but to conduct an investigation into the truth. A complainant is summoned, not to support a story told by the prosecutor, but in order that the examining-magistrate can be satisfied that the dossier contains all germane evidence. The examining magistrate is an impartial figure whose task is to dig for the truth irrespective of its potential value or otherwise to the parties. As a result, controlling witnesses through preventative techniques, it is submitted, is not a primary objective of the examining magistrate.

In England and Wales, advocates' attempts to exert control over witnesses are also attributable to the exclusionary nature of the law of evidence. In adversarial proceedings the examiner must ensure that inadmissible evidence is not introduced before the fact-finder. The introduction of such evidence may jeopardise the trial. In the Netherlands, witnesses are not generally questioned before the fact-finder but at a preliminary hearing. In addition, the Dutch law of evidence contains few presentational rules. The examining magistrate need not therefore, be concerned with questions of admissibility. The law of evidence in the Netherlands does not necessitate the rigorous control of witnesses at pre-trial hearings.

In both countries a witness, including a complainant, is a source of evidence. Within the structural framework of the adversarial trial the witness becomes a source of evidence which, if not carefully managed, may jeopardise proceedings. In the Netherlands, a witness does not constitute such a threat and therefore, it is submitted, control over witnesses is rendered largely unnecessary.

5.3.2. Style of Questioning

Despite the absence of empirical research into the style of questioning employed at pre-trial hearings in the Netherlands, it is argued in this section that the fact that control over witnesses is rendered largely unnecessary in Dutch proceedings also renders the discursive strategies employed in adversarial proceedings unnecessary. It is argued that the use of the discursive strategies identified in Chapter four, may be attributed to the structural constraints of the adversarial process. Constraints which are largely absent in Dutch criminal proceedings. To allow witnesses greater narrative freedom to present their version of events, to offer explanation and clarification, it is argued, is more fitting with the Dutch inquisitorial process than to curtail and control witnesses through strategic questioning.

5.3.3. Omission of Relevant Evidence

Both the complainant in court in England and Wales and the complainant at a pre-trial hearing in the Netherlands give evidence responsively to the questions put by their examiner. As discussed in Chapter four, the advocate in the adversarial trial may deliberately seek to omit relevant evidence. The advocate may decide not to question a witness about certain matters or he or she may decide not to call a witness altogether. The decision whether to ask a specific question or not is governed by a number of considerations in adversarial trial proceedings. The advocate must consider for example, whether a question will elicit evidence that is admissible or whether the response of a witness will support the story the advocate is trying to tell. An effective advocate must be equally capable of identifying questions that should be avoided as well as those that should be raised. In the Netherlands the examining magistrate is not constrained by such considerations. The examining magistrate is not telling a story, he or she is not seeking to persuade the fact-finder. Rather the examining magistrate is engaged in a search for the truth, gathering all relevant evidence. To fail to question a witness on matters which the examining magistrate believes would furnish relevant information and assist the court in determining the facts, it is submitted, would be inconsistent with the duty of the examining magistrate to conduct a thorough enquiry. The same would apply to the failure to call a witness.

5.3.4. Question Form

In Chapter four, question form was identified as an important discursive strategy employed by advocates to achieve linguistic dominance and restrict the narrative freedom of witnesses. In England and Wales witnesses are confined to answering the specific questions put by advocates. Questions which may be strategically framed to limit the potential response of the witness to ensure that the witness offers only supportive testimony. As discussed in Chapter four, open ended questions which allow those under examination a greater degree of latitude in their response are tactically avoided. In the Netherlands, the examining magistrate is not seeking to elicit supportive testimony. The examining magistrate is concerned with gathering relevant evidence. It is submitted that to restrict the potential response of a complainant with strategically framed questions would be inconsistent with the role of the examining magistrate to investigate the truth. It is submitted that the use of open ended questions which grant witnesses a degree of narrative lee-way would be more consistent with the role of the examiner as inquisitor, questions which allow witnesses to provide explanation, clarification and present their version of events. Danet makes the same assumption;

> "Whereas the modern inquisitorial model combines questioning by the judge with relative freedom for witnesses to tell their stories in open-ended narrative style, the adversary model requires tight control of questioning so that claims are generally expressed as answers to very specific questions."[483]

5.3.5. Interrupting Witnesses

In an English criminal trial attempts by a witness to communicate unsolicited information are commonly met with abrupt interruptions from counsel and the trial

judge. As discussed in Chapter four, a witness will be informed that she is to confine her testimony to the specific question put by her examiner. Interruption and insistence upon precise answers are preventative techniques employed by advocates in adversarial proceedings. The witness who seeks to offer explanation, 'irrelevant' details, or unknowingly adverts to inadmissible evidence will be effectively silenced. In the Netherlands, the need to control a witness through such preventative techniques is reduced. It is submitted once again that to seek to exert control over a complainant through frequent interruption or to confine a complainant to a very limited response during questioning would be inconsistent with the examining magistrate's duty to conduct a thorough investigation.

5.3.6. Summary

The tight control of witnesses, crucial in adversarial proceedings, is to a large extent, unnecessary in Dutch criminal proceedings. The witness in Dutch criminal proceedings is questioned primarily by an impartial inquisitor investigating the truth. Examination takes place in the context of a public enquiry. This section has argued that in the absence of the structural constraints which necessitate the tight control of witnesses in adversarial criminal proceedings, the discursive strategies employed by advocates in England and Wales are rendered largely unnecessary in the Netherlands. In the absence of empirical research into the questioning of witnesses in the Netherlands, it is submitted that there is a strong case for assuming that attempts to limit the narrative freedom of complainants through the use of preventative techniques are less evident in Dutch pre-trial hearings than in the English courtroom.

The fact that specific discursive strategies are rendered unnecessary in the context of Dutch criminal proceedings does not automatically mean however that complainants in the Netherlands are free to tell their stories. The ability of complainants to present their version of events at pre-trial hearings is discussed below.

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[483] Danet, B., "Language in the Legal Process" (1980) 14 *Law and Society Review* at 514

5.4. Views of Dutch Practitioners

Confronted with limited research into the ability of complainants to tell their stories in Dutch criminal proceedings, semi-structured interviews were conducted with two groups of Dutch legal practitioners; examining magistrates and lawyers belonging to all women law firms based in Amsterdam. These were lawyers who had represented victims of rape and attended pre-trial hearings. The aim of these interviews was to corroborate limited literature in which it is argued that rape complainants in the Netherlands are denied the opportunity to tell their stories in criminal proceedings.

5.4.1. Interviews with Dutch Lawyers

Van Driem claims that rape complainants are denied a voice in Dutch criminal proceedings and attributes this largely to the passive role played by the victim in criminal proceedings.[484] Stuart has also argued that rape complainants in Dutch criminal proceedings are denied the opportunity of describing what happened to them in their own words.[485] Interviews conducted with Dutch lawyers sought to establish the basis of this criticism, to establish how complainants in criminal proceedings are denied this opportunity.

All the lawyers interviewed expressed concern about the limitations placed upon the narrative freedom of complainants at pre-trial hearings. The practitioners interviewed strongly opposed the practice of summarising police interviews. It was argued that the police file should include a verbatim record of an interview with a complainant. This translation of a woman's account it was argued, clearly denied a complainant the

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484 Van Driem, G., " Waarom Slachtoffers van Seksueel Geweld het Strafproces Moeten Mijden", in (ed) Soetenhorst-de Savorin Lohman, J., *Slachtoffers van misdrijven ontwikkelingen in hulperverlening recht en beleid* (1989, Arnhem:Gouda Quint)

485 Stuart, Heikelien Verrijn, "Towards a Civilised Law Against Sexual Violence"(1990, unpublished paper)

opportunity to tell her story in her own words. Criticism was also directed at examining magistrates and their unwillingness to hear the stories of complainants. The practitioners explained that the extent to which a complainant was allowed to tell her story can vary dramatically. At a pre-trial hearing, it was claimed, a complainant may be asked to repeat her version of events in her own words. In such circumstances a complainant is clearly given the opportunity to tell her story. Alternatively, it was claimed, an examining magistrate may put to a complainant a limited number of questions relating only to specific matters on which the examining magistrate is seeking clarification. The ability of a complainant to tell her story, where this is the case, is obviously impaired. More significantly, the practitioners claimed, that an examining magistrate may simply ask a complainant to verify her police statement and ask no further questions. Given that the police statement is a summarised version of a complainant's account, this was presented as a severe restriction upon the ability of complainants to tell their stories. The practitioners were unable to state how often complainants in rape cases were restricted to mere verification of their police statement but maintained that it was not a rare occurrence.

Interviews with Dutch lawyers provided support for the claims made by Van Driem and Stuart and provided an insight into how complainants may be denied the opportunity of presenting their version of events at pre-trial hearings. Primarily, through restricting complainants to a mere verification of their police statement. These interviews also confirm that within the framework of Dutch criminal procedure, victims' stories could be told. In stating that complainants are sometimes requested to give their version of events in their own words, the interviewees confirmed that lay stories can be accommodated within Dutch criminal proceedings. The interviewees attributed the inability of some women to tell their stories not to structural constraints, but largely to the unwillingness of examining magistrates to listen to complainants. The validity of this criticism was explored in interviews with examining magistrates.

5.4.2. An Inappropriate Forum?

At a pre-trial hearing the role of the examining magistrate is to gather relevant evidence. The extent to which a complainant's story is told will depend on how much information the examining magistrate deems necessary and relevant. In semi-structured interviews, examining magistrates were asked whether they felt it was important that complainants be given the opportunity to tell their stories at pre-trial hearings. The aim of these interviews was to establish whether there was support for the argument advanced by the Dutch lawyers interviewed, that examining magistrates are unwilling to listen to the stories complainants have to tell.

All the examining magistrates interviewed expressed the opinion that the pre-trial hearing was not an arena for complainants to tell all they had to tell. It was claimed that time constraints demanded that the freedom of complainants to present their version of events be restricted. One examining magistrate explained that complainants cannot be given complete freedom to tell their own stories in their own manner as there simply was not the time to listen to "such outpourings". The examining magistrates explained that they would interrupt or seek to contain a witness who offered 'irrelevant' information. The examining magistrates interviewed clearly did not view the pre-trial hearing as an appropriate forum for complainants to tell their stories. As complainants in the Netherlands rarely appear in court and the police statement and statement of examining magistrate are often the only channel through which a complainant may tell her story, the pre-trial hearing would however appear to be the only available forum.

Interviews with examining magistrates would suggest that at least some examining magistrates are unwilling to allow complainants free rein to fully describe what happened to them at pre-trial hearings. This unwillingness would appear to be attributable, in part, to structural constraints, namely time considerations. However, interviews with examining magistrates also reveal that the obstacles faced by complainants are also attitudinal. The examining magistrates interviewed clearly did

not regard the pre-trial hearing as an appropriate setting for complainants to tell their stories.

In the Netherlands, as in England and Wales, the complainant has been traditionally marginalised in the criminal trial process. The victim of crime is simply treated as any other witness and plays a very passive role in Dutch criminal proceedings. It is submitted that as a result little importance has traditionally attached to listening to victim's stories in the Netherlands. As complainants have been marginalised so too have their stories. It is submitted that the attitudes expressed by the examining magistrates interviewed may, in part, be attributed to the historical exclusion of the victim in Dutch criminal proceedings.

5.4.3. Summary

In the Netherlands a complainant's story is told in the dossier through her police statement and the statement from the pre-trial hearing. Where the complainant's pre-trial hearing statement represents little more than a verification of her police statement then it is unlikely that the complainant's story is told. Where a complainant is asked to recount events in her own words at a pre-trial hearing the dossier is more likely to accurately reflect her experience. In Chapter four it was argued that the structural constraints of the adversarial trial process effectively deny complainants the opportunity to present their version of events in their own words. Victims' stories could be told at pre-trial hearings in the Netherlands. Lay stories are not filtered, moulded and fragmented in the manner prescribed by the adversarial trial process. Were it to be decided that the dossier should contain a full account of a complainant's version of events this could be achieved without structural reform. The task of ensuring that the victim's story is told in the dossier could be ascribed to examining magistrates and carried out with minimal disruption to the Dutch criminal process, only attitudes would need to be challenged.

5.5. Environment and Storytelling

In Chapter four it was argued that the environment in which rape complainants are compelled to give evidence in England and Wales may have a negative impact on the ability of complainants to tell their stories. It was argued that the painful process of describing what took place is made infinitely more difficult for example, by the presence of the defendant, the public, and the need to speak unnaturally slowly and loudly in court. In the Netherlands, rather than giving evidence in court, the complainant in a rape case will usually attend a pre-trial hearing held in the office of the examining magistrate. The complainant gives her evidence only in the presence of the examining magistrate, the defence lawyer and the clerk. As a general rule, a rape complainant will not be examined in the presence of the defendant. The complainant is also spared the ordeal of rendering painful and sexually explicit information in public. Rather than giving evidence from the isolation of the witness-box, the rape complainant is seated at an ordinary desk and is therefore, not obliged to speak unnaturally loudly although she will be required to speak at a pace which allows transcription.

5.5.1. Summary

While complainants in rape cases will inevitably find giving evidence a painful experience the attendant tribulations of giving evidence in adversarial proceedings are largely absent in the Netherlands. Dutch criminal procedure, it is submitted, provides a more appropriate environment for complainants of sexual offences to tell their stories. The pre-trial hearing, it is submitted, provides an environment more conducive to full and frank testimony.

5.6. A Voice for Victims in Court

As in England and Wales, there is no procedure in place in the Netherlands which gives victims an opportunity to describe the impact of a criminal offence upon their lives.[486] Traditionally, the impact of crime has not been explored in Dutch criminal proceedings. According to Van Driem, the victim of rape is denied the opportunity to inform the court of her suffering. The court never hears for example, of the sleepless nights and the effect the attack has had upon her relationships.[487]

As discussed in Chapter one, complainants in the Netherlands have the possibility of joining a civil claim to criminal proceedings. The extent to which the adhesion procedure allows complainants to describe the impact of an offence upon their private lives is examined below.

5.6.1. Adhesion Procedure

In the Netherlands victims of crime may claim financial compensation for both material and non-material damages by joining as an injured party in criminal proceedings. A complainant may join proceedings either before or during the court session.[488] If joining before the trial a complainant must complete a "joining form" available from the Office of the Public Prosecutor. The form itself provides little space to provide details of damage. If joining in this manner a complainant need not attend court. A complainant joins proceedings during a court session either in writing or orally.

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[486] Van Driem, G., (1989), *op cit* at 60

[487] *ibid*

Nijboer suggests that a complainant's opportunity to the describe the impact of an offence afforded by the adhesion procedure is restricted.

> "During the trial the victim can introduce a claim for the compensation of damage. Such a claim can be accepted by the court. The trial, however, as it concerns the discussion about such a claim is very brief."[489]

This claim was supported by the Dutch practitioners interviewed who explained that joining a civil claim to criminal proceedings does not enable complainants to present the court with much information. The practitioners explained that the complainant may not call witnesses or refer to any matter other than the damage she has suffered.

In addition, to be considered at a criminal trial, a civil claim must be simple. If a claim would take too much time to judge the court may decide not to consider the claim at all or to split the claim. The complex part of the claim will then be considered separately in the civil courts.[490]

> "The case must remain simple and clear cut. Simple means that the victim may not bring witnesses or experts to the trial to support his/her claim. The claim must stand on its own and therefore only straightforward cases will be considered within the criminal trial."[491]

The practitioners interviewed explained that claims in rape cases would often be complex and as a result they believed that a separate civil action would always be preferable.

The complainant joining criminal proceedings in the Netherlands does not enjoy the same role as that of the partie civile in France. In France the partie civile may call

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488 Ministry of Justice, *Joining in Criminal Proceedings*, (1995), (leaflet produced by Ministry of Justice)

489 Nijboer, J.F., "Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands", in Nijboer, J.F., *Proof and Criminal Justice Systems*, (1995), Frankfurt:Peter Lang), at 98

490 Ministry of Justice, (1995), *op cit*

491 Wemmers, Jo-Anne., *Victims in the Criminal Justice System,* (1996, Amsterdam:Kugler Publications), at 45

witnesses who may testify to the character of the accused and refer to matters beyond the specific claim;[492]

> "Moreover, the partie civile or his lawyer, in his address to the court, does not have to confine himself to the issue of damages. For example, he may address the court on the question whether the accused in guilty or not, and on the heinousness of the offence charged."[493]

The complainant in the Netherlands plays a relatively passive role. Joutsen's study of the procedural role of victims within European criminal justice systems revealed that the adhesion procedure was not commonly used in the Netherlands. Joutsen concluded that this was due to "built-in difficulties".[494] These difficulties have, to a large extent, been removed since April 1995.[495] There is for example, no longer a limit on compensation and complainants are no longer compelled to appear in court. These reforms may well lead to more widespread use of the adhesion procedure however, any increase will remain restricted to simple cases.

Dissatisfaction with the adhesion procedure led a number of the Dutch lawyers interviewed to advocate a separate civil action in rape cases. The practitioners were very critical of the passive role of complainants within criminal proceedings. It was claimed that complainants are able to tell their stories freely in civil proceedings in which they play a more active role. It was argued that victims of rape should be encouraged to transfer their energies into civil proceedings. Stuart argues that in civil proceedings, complainants are granted "maximum narrative amplitude".[496]

> "The witness's statements are not filtered by the police and judicial terminology, nor moulded into legal terms. No, the witness or her lawyer present her story exactly as she herself wants to or finds it useful."[497]

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492 Jones, R.L., "Victims of Crime in France", (1994) 158 *J.P.* at 795

493 *ibid*

494 Joutsen, M., *The Role of the Victim of Crime in European Criminal Justice Systems,* (1987, Helsinki:HEUNI), at 196

495 Wemmers, Jo-Anne., (1996), *op cit* at 45

496 Stuart, H., (1990) *op cit* at 9

497 *ibid* at 7

It would appear that the Dutch adhesion procedure does not represent an effective channel through which rape complainants may convey the impact of crime upon their lives. The procedure is only open to those with simple claims and where available, the procedure does not allow complainants free rein in providing information.

5.6.2. Summary

Van Driem advocates the introduction of victim impact statements in line with developments in the United States.[498] The introduction of victim statements, detailing the extent of a victim's losses, injuries and the emotional impact of the crime upon the victim and forming an integral part of the investigative file, would go some way to meeting the criticisms and concerns of the Dutch lawyers interviewed. The statement would give complainants a voice that is currently denied. However, there appear to be no plans to introduce victims statements in the Netherlands.

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[498] *ibid* at 66

5.7. Conclusion

In Chapter four it was argued that in a fair trial process complainants in criminal proceedings would be given the opportunity to present their version of events in their own words and to describe the impact of an offence upon their private lives. It was argued that the presentation of evidence in adversarial proceedings in the form of conflicting stories told by advocates in court results in the simplification and fragmentation of lay stories and the strategic manipulation of complainants through the use of preventative techniques designed to limit their narrative freedom. This chapter has sought to demonstrate that in the Netherlands, lay stories are not subject to the distinct filtering process described in Chapter four. The concept of relevance is identified as the only significant constraint on the process of case construction in Dutch criminal proceedings. This chapter has also argued that the need to control witnesses through the use of preventative techniques is greatly reduced within the context of Dutch criminal proceedings. Victims' stories could be told within the Dutch trial process and indeed, are sometimes told according to the Dutch practitioners interviewed. The fact that they are not always told may be attributed to the traditionally marginalised role played by complainants in Dutch criminal proceedings. Were due consideration to be given to the needs of victims to tell their stories, complainants in the Netherlands could be accorded this opportunity without structural reform. The only apparent obstacle to providing complainants with this opportunity is the unwillingness of examining magistrates to grant complainants the freedom to give their version of events at pre-trial hearings. Were this obstacle to be removed, the result would be a fairer process from the perspective of the victim.

With regard to providing complainants with the opportunity to describe the impact of crime upon their lives, complainants in the Netherlands are in a similar position to complainants in England and Wales. In both countries the impact of crime upon complainants has traditionally not been addressed in court. While a victim statement

scheme has been introduced in England and Wales, similar developments have not taken place in the Netherlands.

Chapter six- Cross-Examination, the Adversarial Trial and the Rape Complainant

6.1. Introduction

This chapter argues that cross-examination is an inappropriate mechanism for testing the veracity of rape complainants. It is argued that the humiliation and degradation of rape complainants is in part, directly attributable to the role and nature of cross-examination in the English adversarial fact-finding process and that there is an irreconcilable conflict between cross-examination as a device for testing evidence and the decent treatment of complainants.

This chapter examines how during cross-examination, the character and lifestyle of complainants are effectively put on trial. How rape complainants are humiliated and shamed through defence advocates' attempts to discredit their testimony in the stories they tell. This chapter also explores how the mechanics of the adversarial fact-finding process compel advocates to exploit prevailing prejudices during cross-examination. The relationship between the nature of cross-examination within the adversarial fact-finding process and the hostile treatment of rape complainants by defence counsel is examined. It is argued that the rough and insensitive handling of rape complainants is a structural consequence of the adversarial process. It is also argued that cross-examination is a device that is used by advocates to humiliate, intimidate and antagonise witnesses in order to undermine their oral performance in court.

Finally, the great degree of latitude afforded defence counsel during cross-examination and the ineffectiveness of the limits placed upon cross-examination are discussed.

This chapter begins however, by describing the experiences of rape complainants during cross-examination as documented by researchers of the conduct of rape trials.

6.2. The Experience of Rape Complainants during Cross-examination

As discussed in Chapter two, research has shown that cross-examination is a gruelling ordeal for many women.[499] Research has revealed that during cross-examination, rape complainants are subjected to an aggressive verbal interrogation during which their lifestyles are scrutinised and their characters attacked. Lees has summed up the experience of the rape complainant in the English adversarial criminal trial stating;

> "She is subjected to a ruthless character assassination, a humiliating trial, indeed a form of judicial rape."[500]

Interviews conducted with rape victims by Victim Support yielded the following descriptions of cross-examination;

> "it was awful. They made you feel that it's all your fault. They twist and turn your words."[501]
>
> "I was on trial, not him, without doubt."[502]

Chambers and Millar report similar findings;

> "The actual experience of the trial for the majority of women confirmed their worst expectations principally because defence cross-

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499 Lees, S., "Judicial Rape", (1993), 16, *Womens Studies International Forum,* 11, Lees, S., *Carnal Knowledge*, (1996, London:Hamish Hamilton), Victim Support, *Women, Rape and the Criminal Justice System,* (1996, London:Victim Support)

500 Lees, Sue., (1993), *op cit* at 14

501 Victim Support, (1996), *op cit* at 45

502 *ibid* at 38

> examination made the complainer feel that her own character and behaviour was on trial."[503]

This section addresses how rape complainants are treated during cross-examination, the questions put to them by defence barristers and the manner of questioning. In seeking to describe the victimisation of rape complainants during cross-examination, the concept of the 'ideal rape' provides a focus for analysis, as the concept is at the heart of every rape trial. The ideal rape is defined by Adler;

> "The 'ideal' rape, most approximating to the stereotype, is one where the victim is sexually inexperienced and has a 'respectable' lifestyle, whose assailant was a stranger and whose company she had not willingly found herself in. She will have fought back, been physically hurt and, afterwards, promptly reported the offence."[504]

A central element of the ideal rape is the ideal rape complainant. 'Ideal' translates as 'respectable'.

> "The complainant in a rape case is required to be the ideal victim, sexually inexperienced or at least respectable."[505]

6.2.1. The Ideal Rape Victim

Researchers have reported how, during cross-examination, rape complainants are asked a barrage of questions that relate, not to the actual rape, but to the complainant's lifestyle. Questions which are designed to portray complainants as disreputable. A woman's reputation has been traditionally judged with reference to her sexual character and conduct and consequently, a rape complainant's sexual reputation will be the focus of defence questioning. Such questions do not simply relate to her sexual history but to any aspect of her lifestyle from which her 'sexual morality' may be

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503 Chambers, G., Millar, A., "Proving sexual Assault:Prosecuting the Offender or Persecuting the Victim?"; in (eds) Carlen, P., Worral, A., *Gender, Crime and Justice,* (1987, Milton Keynes:Open University Press), at 64

504 Adler, Z., *Rape on Trial*, (1987, London:Routledge & Kegan Paul), at 119

505 Kennedy, H., *Eve was Framed*, (1992, London:Chatto & Windus), at 114

inferred. The range of questions put to rape complainants that purport to sexual reputation is reported by Lees;

> "Questions addressed to the women in the trials I monitored included whether she has had previous sex with men other than the defendant; whether she was a single mother; whether she was living with the father of her children; the colour of past and present boyfriends(where the woman was white); who looked after her children while she was at work; whether she was in the habit of going to night-clubs on her own late at night; whether she smoked cannabis and drank alcohol(when there was no evidence of this); what underwear she had on; whether she wore false eyelashes and red lipstick; whether the defendant "had used her previously"(rather than raped her); details of her menstrual flow; and on one occasion whether she had a vibrator in her drawer wrapped in a purple sock."[506]

Women are asked about their marital status. As Lees notes; "being single, divorced or a single mother also carry the implication of promiscuity or lack of respectability."[507]

> "DC: Being a single mother must be hard?
> C: Not really.
> DC: Were you keen to have a relationship?
> C: Not really.
> DC: Were you keen to have a man around?
> C: Not really."[508]

Complainants are also asked about their appearance. It has been argued that such questions are designed to suggest that the complainant in some way provoked the attack or was 'asking for it';

> "A common defence technique is to comment on the victim's clothes and culpability."[509]

Only in sexual offences is the clothing of complainants the subject of courtroom examination. Rape complainants are routinely asked to describe their underwear in court. Defence counsel will ask a complainant if she was wearing tights or stockings.

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506 Lees, S., (1996), *op cit* at 134
507 *ibid* at 133
508 Lees, S., (1993), *op cit* at 21
509 Adler, Z., (1987), *op cit* at 107

Items of clothing including underwear also appear as exhibits at the trial and are held up for inspection. The defence counsel in one case observed by Lees clearly thought the amount of make-up worn by a complainant was a matter to be explored in depth;

> "Defence Counsel: Forgive me for asking. I needn't put it to you again. Did you have make-up on in court yesterday?
> Stephenie: Yes. Yes. Do you want to know why?
> Judge: Well, I think he's more interested in whether yesterday's make-up would be termed your normal make-up.
> S: It's my normal make-up.
> DC: Foundation cream?
> S: Yeah.
> DC: Eyeshadow, bright red lipstick?
> S: Did I have bright red lipstick on yesterday?
> DC: Bright red lipstick.
> S: I can't remember what lipstick I had on.
> DC: Eye pencil.
> S: Don't wear eyepencil.
> DC: Never?
> S: I used to.
> DC: At time of this incident?
> S: Probably.
> DC: Mascara?
> S: Yeah.
> DC: Hair done prettily?
> S: If you could call it pretty. No more than what I normally only do everyday."[510]

Such questioning is clearly based upon the sexist assumption that a woman's sexual character may be inferred from her appearance. That a woman's sexual 'availability' may be ascertained from the length of her skirt, the colour of her lipstick and her use of eye-liner. The reasoning of defence counsel is never explicit but the implicit insinuation in such questions is that this woman is a 'slut', a 'loose woman' and she invited the sexual advances of the defendant by her appearance. The questions contain a series of moral judgements which are based upon sexist perceptions of 'appropriate' female behaviour. The normal behaviour of women is presented as inappropriate and improper.

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[510] Lees, S., (1996), *op cit* at 140

> "Women are asked questions which are never put to men about why they were out alone in the street or in a pub or disco. They are asked about their clothing; the tightness of the fit, the absence of a bra. They are asked about their use of contraception."[511]

6.2.2. Sexual History Evidence

In 1975 the Advisory Group on the Law of Rape; the Heilbron Committee was established to examine rape legislation following a public outcry regarding the conduct of rape trials. The Heilbron Committee reported that the introduction of evidence of a rape complainant's previous sexual history during cross-examination was often unnecessary and invariably caused the complainant considerable distress.

> "We have come to the conclusion that unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial." [512]

The Committee's report led to the enactment of the Sexual Offences Amendment Act 1976 section 2. Section 2 states;

> "(1) If at trial any person for the time being charged with a rape offence to which he pleads not guilty, then except with the leave of the judge no evidence and no question in cross examination shall be adduced or asked at trial by or on behalf of any defendant at the trial about any sexual experience of a complainant with a person other than the defendant
>
> (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of the defendant ; and on such an application the judge shall grant leave if and only if he is satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked."

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511 Kennedy, H., (1992), *op cit* at 114

512 Home Office, *Report on the Advisory Group on the Law of Rape* (London:HMSO) Cmnd 6352 at 15

The section was designed to alleviate the ordeal of rape complainants in court however, subsequent research has revealed that the cross-examination of rape complainants remains largely unchanged. In 1982, Adler carried out research into the implementation of section 2 in a number of Old Bailey cases. Adler found that section 2 had had a minimal impact upon the introduction of sexual history evidence during cross-examination.[513] Adler found that questions regarding a rape complainant's sexual history were still being asked. Adler also found that evidence that came within the ambit of the legislation was being introduced by defence counsel without an application having been made.[514] When this did in fact occur, trial judges routinely failed to intervene.[515] Indeed, Adler observed trial judges themselves asking the damaging questions the section was designed to prevent.[516] Lees' more recent observations of rape trials revealed that sexual history evidence is still routinely introduced in rape trials.

> "Irrelevant past sexual history evidence is still brought up again and again."[517]

Questions are asked about a complainant's sexual history which attempt to portray the complainant as promiscuous and suggest that the complainant is indiscriminate in her choice of sexual partners. Women are asked about their previous sexual relationships with other men and about the nature of sexual activity they have previously engaged in. Women are also questioned about past abortions and asked if they have ever had a sexually transmitted disease. Even where the complainant appears to fit the stereotype of the ideal victim, i.e. sexually inexperienced, she will not necessarily escape such questioning. The sexually inactive woman is asked whether she was sexually frustrated. The married woman is asked whether she is bored with her sex life and single older women are portrayed as embittered towards men.

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513 See Adler, Z., "Rape- the Intention of Parliament and the Practice of the Courts" (1982) 45 *M.L.R.* 664, Adler, Z., (1987), *op cit*

514 Adler, Z., (1982), *op cit* at 674

515 *ibid* at 673

516 *ibid*

Rape complainants are also questioned about other aspects of their lifestyles including their financial circumstances. Both Adler[518] and Lees observed that if a complainant is unemployed or without permanent accommodation it will be used in cross-examination;

> "Being homeless and on Social Security came up in one case and was used to imply that the complainant had 'asked for it'."[519]

Such questioning also suggests the possibility that the complainant's need for money may have led her into prostitution. Complainants are also questioned about any past misconduct or criminal convictions;

> "A victim with a criminal record is a real bonus for the defence."[520]

Women are also asked questions that suggest emotional or mental instability. Complainants will be questioned about any medication they have been prescribed and any psychiatric problems they have experienced. Adler reported how evidence of a suicide attempt by a complainant which preceded the alleged rape by two years was introduced by defence counsel in one case.[521]

> "When the defence have something more tangible and concrete to hand, such as evidence of suicide attempts, periods of hospitalisation in psychiatric institutions or outpatient psychiatric treatment, no matter how long before the rape incident, these are certain to be explored in great detail during the trial."[522]

The complainant's use of drugs and alcohol will also be explored in cross-examination. Lees identifies the sexist stereotypical assumptions about women and female sexuality that lie behind such questions;

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517 Lees, S., (1996), *op cit* at 134
518 Adler, Z., (1987), *op cit* at 92
519 Lees, S., (1996), *op cit* at 135
520 Adler, Z., (1987), *op cit* at 104
521 *ibid* at 105
522 *ibid*

> "Drinking and drug use were introduced to discredit the complainant in two ways. The first was to suggest that their consumption would lower the woman's inhibitions and unleash her sexuality. Thus she would have been likely to consent to something which she would regret later. The second was to suggest that a woman under the influence of alcohol would be more likely to act irrationally or vindictively and make a false complaint. Often the only evidence for the complainant's use of drugs was the defendant's allegation."[523]

6.2.3. The Ideal Rape

The concept of the ideal rape prescribes the appropriate behaviour of a woman who is raped. This behaviour includes strenuous resistance by the complainant, a prompt report to the police and the complainant not being viewed to have put herself at risk. During cross-examination the defence lawyer will exploit any divergences between the alleged incident and the ideal rape. The fact that this stereotype, far from reflecting the common experience of rape complainants is a misleading representation of rape, makes the task of the defence advocate all the more easy.

6.2.3.1. Resistance

In the 'ideal rape', the woman will have vigorously resisted her attacker and will have the physical injuries to prove it. A complainant may be asked questions about her attempts to repel her alleged attacker which contain the implicit insinuation that she failed to resist with sufficient force or resolve. Where there is little or no evidence of physical injury it will be put to the complainant that this is indicative of consent. Lees argues that such questioning fails to acknowledge that many women who are raped fear for their lives and as a result feel unable to fight back.

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[523] Lees, S., (1996), *op cit* at 146

> "Women often use various tactics to survive, such as humouring the rapist or not running away, if frozen in fright this is often held against them in trials."[524]

McColgan also challenges the traditional focus on resistance in rape trials;

> "Surely it is time to recognise that women should not be expected to resist rape any more than we are expected to resist mugging, burglary or assault."[525]

As well as identifying divergences, McColgan argues that the defence advocate must also defuse any similarities between the 'ideal' rape and the events in question.[526] The defence lawyer must normalise the alleged rape into sex.[527] Any evidence of resistance on the part of the complainant will be redefined as 'playing hard to get', token resistance. The defence advocate draws upon a coercive model of sexuality in which the predatory male may legitimately disregard a level of resistance. In a rape trial, to press a woman until she submits to intercourse is presented as 'normal'.[528] It is a model of sexuality in which the onus is upon the woman to demonstrate her refusal rather than the man to actively inquire into consent.[529] Lees argues that defence advocates invoke an old-fashioned model of sexuality;

> "The idea that some resistance is part of the normal sequence of events in sexual encounters is taken for granted. This depiction of sex used in courts is out of date, being based on a model of sexuality where women were expected to resist men's advances."[530]

Even if the complainant has suffered significant physical injuries, she will not necessarily escape the challenges of an inventive defence counsel, especially a defence lawyer with a working knowledge of Freudian psychoanalysis. Evidence of physical injuries, presented by the prosecution as evidence of lack of consent, will be

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524 *ibid* at 113

525 McColgan, A., *The Case for taking the Date out of Rape*, (1996a, London:Pandora), at 86

526 McColgan, A., "Common Law- Relevance of Sexual History Evidence" (1996b) 16 *O.J.L.S.* at 300

527 *ibid*

528 See Smart, C., *Feminism and the Power of Law*, (1989, London:Routledge), at 42

529 See Lees, S., (1996), *op cit* at xviii

530 *ibid*

redefined by the defence advocate as evidence of 'enthusiastic' sex. Women who claim to have been punched and kicked by their assailant are asked whether they enjoy 'rough sex'.

It is by no means uncommon for a complainant in a rape case to be asked if she enjoyed it. A complainant may be asked if she was sexually aroused and whether her vagina was lubricated at the time of the attack. Kennedy confirms the use of this argument by defence lawyers;

> "Crude populist psychology is used in courtrooms to suggest subconscious desires that are not even acknowledged by the woman herself. A woman is asked whether her vagina naturally lubricated to enable penetration thereby encouraging the jury to infer that sexual gratification was being found in the sexual contact."[531]

Lees challenges such questioning on the grounds that lubrication is not necessarily evidence of sexual excitement but could be due to a number of factors including fear. Lees views such questions as particularly pernicious;

> "It reduces the whole issue of consent to an absurdity, in which the woman is denied any subjectivity or knowledge of her own desire."[532]

6.2.3.2. Promptly Reported

If there was a delay between the rape and a subsequent report to the police the rape complainant will be required to account for this in cross-examination. It will be implied by defence counsel that the lapse in time is indicative of fabrication. It will be suggested to the complainant by defence counsel that a genuine victim of rape will have reported it immediately. However, women may delay reporting rape for many understandable reasons. These include fear of an unsympathetic response by the police or the courts, of retaliation by her assailant, of the reaction of friends and relatives, embarrassment, self-blame, or an unwillingness to relive the ordeal in court.

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531 Kennedy, H., (1992), *op cit* at 115
532 Lees, S., (1996), *op cit* at 118

Defence barristers directly accuse rape complainants of lying during cross-examination. Defence counsel accuse women of fabricating rape allegations for a variety of reasons. Possible motivations for making a false allegation of rape that are commonly suggested by defence counsel include fear of parental disapproval and fear of a husband or boyfriend discovering infidelity. Alternatively, defence counsel may seek to portray the complainant as a spiteful, malicious woman out for revenge. It may be suggested that the complainant had a particular grudge against the defendant or simply that the complainant dislikes men in general.

6.2.3.3. Assuming Risk

During cross-examination rape complainants are asked questions that imply that they in some way precipitated their attacks or were 'asking for it'. Questioning in this category includes asking the complainant why she was out alone late at night and why she accepted a lift from a man who she hardly knew. The complainant's behaviour leading up to the alleged rape will be scrutinised for culpability. When the defendant is an acquaintance of the complainant she will be quizzed about her behaviour towards him. Did she find him attractive, had she flirted with him, had she kissed him? Had she consumed alcohol or drugs? Such questioning clearly implies that women who incite the uncontrollable sexual urges of men deserve their fate and that women who enter 'risky' situations 'ask for it'. In rape trials the normal behaviour of women is portrayed as inappropriate and imprudent.

6.2.4. Summary

Research of the conduct of rape trials in England and Wales has revealed that cross-examination is an undeniably traumatic, degrading and humiliating experience for many rape complainants. Complainants are subjected to a ruthless character

assassination. During cross-examination women are portrayed as 'sluts' and whores, as vindictive harridans, as villainous liars. Their private lives are exposed to public scrutiny and they are treated aggressively by defence barristers. Cross-examination is unquestionably a gruelling ordeal for many women.

Having described *how* rape complainants are degraded and humiliated in court, the rest of this chapter is devoted to explaining *why* complainants are treated this way during cross-examination.

6.3. The Role Cross-Examination Within the Adversarial Criminal Trial

In this section the relationship between the ordeal of rape complainants in court and the role of cross-examination in adversarial proceedings is explored. It is argued that to lay blame solely on defence advocates for the treatment of rape complainants during cross-examination is misleading. Criticism should, it is argued, also be directed at the system which compels advocates to engage in the ritual vilification of complainants.

6.3.1. An Alternative Version of Events

The role of the advocate in adversarial criminal proceedings is that of storyteller. The role of the defence lawyer is to present an alternative version of events to that presented by the prosecution;

> "The lawyer's job is to establish the truth of his client's story and destroy the credibility of the other side's story."[533]

> "It was the job of defence counsel to supply a rival way of explaining what had occurred, what might be called the antithesis, although that term was not used in the courts."[534]

In Chapter four, Bennett and Feldman's claim that prosecuting barristers have a clear strategic mandate; to tell a structurally complete, internally consistent story, was discussed. According to Bennett and Feldman, the defence lawyer has an array of

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533 Stephenson, G., *The Psychology of Criminal Justice*, (1992, Oxford:Blackwell), at 143

534 Rock, P., *The Social World of an English Crown Court*, (1993, Oxford:Clarendon Press), at 33

storytelling strategies at his disposal.[535] A defence lawyer may employ 'challenge' strategy; identifying weakness, inconsistencies in the prosecution story.[536] Defence counsel may choose to redefine a central element of the prosecution story; 'redefinition' strategy.[537] Alternatively, he may present an entirely new story; 'reconstruction strategy'.[538] Using these strategies the defence lawyer is able to present a rival interpretation of events.

6.3.2. Testing Credibility

The role of the advocate is however not simply confined to storytelling. The advocate must also 'test' the evidence presented by his opponent. The mechanism employed by advocates to test evidence is cross-examination.

> "Mere competition between contradictory assertions would not be enough. Sound judgment is helped by contentious advocacy, which directly tests the evidence for accuracy, and exposes errors and lies. The opposing points of view must actually meet head-on in confrontation, as occurs in cross-examination."[539]

As discussed in Chapter one, in adversarial proceedings great faith is placed in cross-examination to expose inconsistency and contradiction in witness testimony. Cross-examination is however a device employed to test not only the evidence, but is also a tool for testing the credibility of witnesses. The adversarial trial is structured as an oral contest in which the credibility and reputations of witnesses are pitted against each other. Not only must the evidence withstand the testing process in adversarial proceedings but so too must the source of the evidence; the witness.

> "The defence lawyer's role is to 'test' the version of reality offered by the victim. It is his or her role to discredit, or at least undermine, the

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535 Bennett, W.L., Feldman, M., *Reconstructing Reality in the Courtroom*, (1981, New Brunswick:Rutgers University Press), at 98

536 *ibid*

537 *ibid* at 102

538 *ibid* at 104

539 Stone, M., *Cross-examination in Criminal Trials*, (1988, London:Butterworths), at 3

> reliability and credibility of the victim's testimony, even if the lawyer believes the witness is being truthful."[540]

A fundamental safeguard of the adversarial fact-finding process is the testing of witness credibility in open court. Testing of witness veracity is not confined to the events in question but extends to the truthfulness, the integrity, of the witness per se. It is the role of defence counsel to investigate the moral credibility of prosecution witnesses to determine whether they can be believed.

> "Witnesses were people whose very moral status were in contention."[541]

The moral credibility of witnesses is an important consideration in adversarial criminal proceedings.

> "When a cross-examiner attacks the moral standing of a witness he often does so not only with a view to showing that the witness's word carries less truth-value but also to suggest that the morality and humanity of the witness is so inferior that no verdict can be based on his testimony."[542]

It is an assumption of the adversarial process that the honest witness, the genuine complainant, will withstand such an assault upon his or her character and integrity.

> "The contribution to justice made by unsuccessful cross-examination should be noted. Able cross-examination, instead of destroying evidence, may actually strengthen it. Many innocent persons owe their acquittals to the way in which they withstand forceful cross-examination by the Crown."[543]

The personal affairs of complainants are a legitimate area of scrutiny during cross-examination. Commenting on the experiences of prosecution witnesses in criminal proceedings, Rock states;

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540 Yaroshefsky, E., "Balancing Victims Rights and Vigorous Advocacy for the Defendant", [1989] 1 *Ann. Surv. Am. L.* 135, at 137

541 Rock, P., (1993), *op cit* at 86

542 Zuckerman, A.A.S., *Principles of Criminal Evidence* (1989, Oxford:Clarendon Press), at 248

543 Stone, M., (1988), *op cit* at 5

> "They could be vilified and shamed as they defended in public and perhaps for the first time, testimony about matters that were painful, embarrassing and once personal."[544]

In seeking to discredit a witness, the evidence introduced need not directly relate to the actual proceedings but may include private, embarrassing events from the witness's past. This is confirmed by Du Cann;

> "It is important to remember that in order to serve the interests of his client to the best of his ability he [defence counsel] is entitled to range at will over the life history of any or all the witnesses he has to examine."[545]

The court may be presented with any evidence of discreditable conduct or previous criminal convictions.[546] Complainants may be confronted with previous inconsistent statements,[547] and asked questions designed to reveal bias,[548] prejudice and unreliability as a result of any physical or mental disability. Rock reports;

> "Witnesses unknowingly come to be assailed in court, and to be seen and heard closely as they are assailed. They are confronted with a form of trial by ordeal in which their claims to knowledge and veracity were subjected to organised and sustained attack by professional adversaries."[549]

Complainants in rape cases are also the targets of such assaults. The moral standing, the integrity, of the rape complainant will be tested during cross-examination. Her lifestyle, her character, will be scrutinised in open court. It is unsurprising that women complain of feeling as though they themselves were on trial. In the adversarial trial, the characters and conduct of witnesses are on trial.

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544 Rock, P., (1993), *op cit* at 34
545 Du Cann, R., *The Art of the Advocate,* (1993, London:Penguin), at 121
546 Criminal Procedure Act 1865 section 6
547 Criminal Procedure Act 1865 sections 4 and 5.
548 R v Mendy (1976), 64 Cr App Rep 4
549 Rock, P., (1993), *op cit* at 86

6.3.3. Defence Stories

Adversarial proceedings are structured as a contest between competing stories. The role of advocates is to present the court with mutually inconsistent versions of events. It is assumed that a confrontation between conflicting stories will lead to the emergence of the truth. Cross-examination plays an important role in courtroom storytelling. Through cross-examination, the advocate may present an alternative version of events, as well as discredit the version told by his opponent. The advocate may redefine or reconstruct events to cast doubt upon or destroy the prosecution story. The role of the defence barrister is to provide a rival interpretation of events to that presented by the prosecution. This has important implications for complainants in criminal proceedings.

6.3.3.1. Alternative Portrayal of the Victim

The task of the defence lawyer is to provide a rival interpretation of events. This will necessarily involve an alternative portrayal of the victim, the complainant. It is the role of the advocate to portray the complainant as at best, mistaken and at worst, a liar. In defence stories, the complainant is transformed into the villain. It is the role of the defence advocate is to paint as black a picture of the complainant as possible, to denigrate the complainant. During his research of proceedings at an English Crown Court, Rock observed;

> "Defence lawyers would routinely try to turn matters on their head, transforming victims and their supporting witnesses into villains and fools."[550]

Defence advocates routinely portray complainants as spiteful, vindictive, disreputable and consequently incredible. Rock reports;

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[550] *ibid* at 72

> "Almost as a matter of course, counsel would as one judge put it, so 'blackguard' the witnesses that they were no longer believable."[551]

The defence advocate presents a one-sided, distorted picture of the complainant. As stated above, in constructing the defence story the defence advocate may delve into the private life of a complainant in court and use any aspect of their lifestyle and reputation to lend credence to the defence's depiction of the complainant. Frequently, complainants are confronted with painful and sensitive incidents from their past.

6.3.3.2. Portrayal of the Victim in a Rape Case

The rape complainant will also be subjected to this alternative portrayal. The role of the defence advocate in a rape case, as in other cases, is to discredit and vilify the complainant. As in other cases, the defence advocate may explore her private life and bring sensitive and embarrassing incidents in her past to the attention of the court. In his portrayal of the complainant in a rape case the defence lawyer will draw upon the concept of the ideal rape victim. The defence advocate in a rape case will seek to paint a picture of a woman who is far removed from that of the 'genuine' victim stereotype of the popular imagination. The defence advocate will seek to present the court for example, with a woman who is sexually experienced, indiscriminate in her choice of sexual partner, a woman who leads an 'unrespectable' lifestyle, who is emotionally unstable.

The adversarial trial is structured as a contest between competing stories told by advocates. Complainants are frequently the losers in this storytelling contest. Character assassination, the vilification of complainants, is not confined to rape cases but is a structural consequence of the adversarial process. Criticism should be directed not simply at defence advocates for their disparaging portrayals of rape complainants, but at the system which fashions the stories told in court.

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[551] *ibid* at 34

6.3.3.3. A Rival Interpretation of Events

The role of the defence lawyer is to supply an alternative interpretation of events, the antithesis to the prosecution case. Invariably, this reconstruction of events will necessarily involve the defence advocate accusing the complainant and other prosecution witnesses of lying. At least, it will involve the imputation that the complainant is mistaken, confused and unreliable. If an allegation of dishonesty is to be credible, the defence advocate must supply a motive. Hence, complainants are routinely portrayed as greedy, spiteful, malicious and jealous. Accusations of mendacity are not reserved for complainants in rape trials. All complainants are potential targets.

Invariably, the reconstruction provided by the defence will cast imputations on the conduct of the victim. In the defence's alternative portrayal, responsibility for what took place is commonly attributed to the complainant and the defendant is cast as the true victim. As stated above, rape complainants are blamed for not resisting their alleged assailant vigorously enough, for inviting his advances by her appearance, for provoking the alleged rape. The complainant finds her conduct before, during and after the alleged rape criticised and challenged. Victim-blaming is not confined to rape cases but rather an inherent feature of adversarial proceedings. In all criminal trials the 'culpability' of the victim forms an important component of defence stories.

6.3.3.4. Standard Stories

Research into the conduct of rape trials suggests that rape complainants are subjected to routine, standard assaults upon their credibility. Defence advocates present juries with tired, cliched, portrayals of rape complainants. Women of different ages, backgrounds, are subjected to uniform attacks upon their character. Defence advocates appear to tell the same stories again and again. Observation of criminal trials led Rock

to conclude that the stories told in criminal trials are formulaic.[552] Lawyers, Rock maintains, do not develop original themes and theories in the stories they tell, but rely upon a standard repertoire of storylines. Rock argues that prosecution witnesses are the targets of formulaic defence attacks.[553]

> "Witnesses are translated into routine categories and then subjected to the routine attacks that those categories warrant."[554]

6.3.4. Non-Rape Cases

Analysis of rape trials often fails to acknowledge that complainants in non-rape cases can also suffer during cross-examination. In fact, all prosecution witnesses are liable to an offensive and humiliating portrayal by defence advocates. The fact that cross-examination can be highly stressful and demeaning for all classes of complainant and not only rape victims is clear. Research undertaken by Rock has revealed that other crime victims, and prosecution witnesses in general, often feel humiliated, degraded, and frustrated by the process of cross-examination. Following interviews with prosecution witnesses, Rock reports;

> "Many witnesses detested cross-examination so much that they reacted viscerally."[555]

> "Witnesses frequently leave the box angrily and in tears."[556]

Prosecution witnesses described their treatment under cross-examination as being 'bullied', 'traduced' and 'on trial'.[557] The plight of non-rape complainants during cross-examination is also recognised by McBarnet;

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552 *ibid* at 78
553 *ibid* at 83
554 *ibid* at 88
555 *ibid* at 176
556 Rock, P., "Witnesses and Space in a Crown Court", (1991) 31 *Brit. J. Criminol.* at 267
557 Rock, P., (1993), *op cit* at 176

> "Discrediting techniques are not something specially reserved for rape victims in particular or even victims in general. Everyone who enters the witness box is a 'victim' of the court in this sense. Crimes against the person merely exacerbate this vulnerability to discrediting cross-examination. Since both victim and offender are directly and personally involved, there is a wide scope for not just generally discrediting but for specifically blaming the victim. This is not confined to the offences of rape."[558]

Brown et al also identify the similarity between the treatment of male complainants of sexual assault and female rape complainants;

> "Male complainers who were homosexual were liable to be subject to similar sorts of stories and stereotypes as female complainants, they were presented as seeking sex, promiscuous, immoral and vindictive."[559]

Research suggests however that rape complainants are particularly vulnerable during cross-examination. The reasons for the heightened vulnerability of rape complainants are examined below.

6.4. Heightened Vulnerability of Rape Complainants

6.4.1. Nature of the Offence

One reason for the heightened vulnerability of rape complainants is undoubtedly the nature of the offence. The ordeal of the rape complainant during cross-examination is exacerbated by the frequent lack of evidence associated with a rape allegation. The nature of the crime ensures few, if any, witnesses. The court will be confronted with

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558 McBarnet, D., "Victim in the Witness Box- Confronting Victimology's Stereotype" (1983) 7 *Contemporary Crisis* at 294

559 Brown, B., Burman, M., Jamieson, L., *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts,* (1993, Edinburgh:Edinburgh University Press), at 208

two conflicting versions of events provided by the defendant and the complainant. The credibility of the rape complainant is therefore pivotal.

> "Evidence is often effectively limited to that of the parties and much is likely to depend upon the balance of credibility between them."[560]

As a result, rape trials in England and Wales are largely reduced to credibility fights between the defendant and the complainant.

> "If the only issue is consent and the only witness is the complainant the conclusion that the complainant is not worthy of credit must be decisive of the issue."[561]

It is the decisiveness of the credibility of the complainant that ensures that all the strategies employed by defence counsel during a routine cross-examination are intensified in a rape trial. Defence counsel will pull out all the stops to undermine the evidence of the complainant and the attack upon the complainant's character will be particularly ruthless.

> "In sexual offence cases, there may be specific difficulties in proving the offence, due to the typical lack of eye-witnesses, which justify particularly vigorous testing of complainers. Hence it can be expected that the ordeal of the complainer in a sexual offence case is even greater."[562]

The lack of evidence in rape cases also means that defence lawyers resort to the introduction of what Chambers and Millar term 'quasi-extra legal' information.[563] This includes the character of the complainant and her lifestyle. This happens to a degree in all cases but the frequent lack of evidence in rape cases means a greater proportion of the defence case will focus on quasi-legal matters. Hence the lifestyle of the complainant and her sexual character become the focus of the defence case.

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560 Tapper, C., *Cross and Tapper on Evidence*, (1995, London:Butterworths), at 341

561 *ibid*

562 Brown, B., et al, (1993), *op cit* at 26

563 Chambers, G., Millar, A., (1987), *op cit* at 65

> "Questioning on lifestyle was clearly extraneous to the crime itself and provided the court with highly selective items of information about a woman, often with strong moral overtones designed both to discredit her personally and reduce the credibility of her story."[564]

The vulnerability of rape complainants during cross-examination is also attributable to the exploitation of sexist stereotypes and rape myths by defence advocates. Counsel for the defence will attack the credibility of the rape complainant as he or she will any prosecution witness but in the case of rape the sexist assumptions and myths surrounding rape are there to aid the defence counsel in his assault.

6.4.2. Rape Myths

> "'True' rape in the popular imagination involves the use of weapons, the infliction of serious injury and occurs in a lonely place late at night. The 'true rapist' is over-sexed, sexually frustrated or mentally ill, and is a stranger. The 'true rape victim' is a virgin (or has had no extra-marital affairs), was not voluntarily in the place where the act took place, fought to the end and has the bruises to show for it!"[565]

The myths surrounding rape are well catalogued in feminist literature on rape.[566] These myths are used by defence lawyers in the stories they tell in rape trials. This section explores a number of these myths

6.4.2.1. Women Lie About Rape

The pervasive myth that women lie about rape has effectively turned men into the real rape victims; "victims of Eve"[567]. The plight of innocent men was a great concern of

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564 *ibid* at 70

565 Morris, A., *Women, Crime and Criminal Justice* (1987, Oxford:Blackwell) at 165

566 See Adler, Z., *Rape on Trial*, (1987, London:Routledge & Kegan Paul), Estrich, S., *Real Rape*, (1987, London:Harvard University Press), Lees, S, *Carnal Knowledge*, (1996, London:Hamish Hamilton), McColgan, A., *The Case for taking the Date out of Rape*, (1996a, London:Pandora)

Wigmore, a figure who undoubtedly had a significant influence on common perceptions about rape;

> "The unchaste mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man."[568]

The well-cited pronouncement of Hale is also frequently identified as having a profound effect on the jurisprudence of rape;

> " an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."[569]

Edwards has charted the history of the fear of false allegations in rape cases and documented the influence of a number of disciplines in the establishment and perpetuation of the myth that women lie about rape;

> "From the mid-nineteenth century the belief in the false allegation hypothesis gathered increasing momentum, supported in all the disciplines of medicine, psychology, law and medical jurisprudence."[570]

There is no lack of modern day pronouncements on the mendacity of women. Commonly cited are examples of judicial advice to juries in rape cases. For example the advice given by Sutcliffe, J;

> "..it is well known that women in particular and small boys are liable to be untruthful and invent stories."[571]

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567 Weisstub, D., "Victims of Crime in the Criminal Justice System",in (ed) Fattah, E.A., *From Crime Policy to Victim Policy,* (1986, London:Macmillan), at 201

568 Wigmore, J.H., *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940, Boston:Little Brown) vol. 7 at sec. 2061

569 Hale, Sir Matthew., *The History of the Pleas of the Crown*, (1736) 634, cited in Geis, G., "Lord Hale, Witches and Rape" (1978) 5 *British Journal of Law and Society* at 26

570 Edwards, S., *Female Sexuality and the Law*, (1981, Oxford:Martin Robertson), at 126

Fear of feminine duplicity has prompted warnings to trial advocates to exercise all their skill when examining women;

> "The man that cross-examines a woman faces, indeed a delicate task. They are quicker-witted than men and some of them seem to know intuitively what your next question is going to be and have the answer ready before you ask the question. Then too, they use every weapon in their armoury, smiles, coquetry, shrugs, sauciness, and if you press them too closely, they will resort to tears; then too they always have as last resort, the ability to faint at a convenient and dramatic time."[572]

In 1993, Du Cann described the difficulties of examining a female witness;

> "Some become blatantly flirtatious, others unnecessarily shy, all are unnatural to a greater or lesser extent because they are suspicious."[573]

The supposed reasons women have for lying about rape are wide-ranging and frequently outlandish;

> "Some supposed motivations for false allegations of rape are so preposterous that they would be funny if it weren't for the fact that people actually believe them."[574]

Glanville Williams includes "sexual neurosis, phantasy, jealousy, spite, or simply a refusal of a girl to admit that she consented to an act of which she is now ashamed" among possible motivations.[575] Elliott cites the following as causes of lying in rape cases;

> "Extrication from difficulties caused by arriving home late, becoming pregnant, contracting V.D., or being caught in the act of intercourse; feelings of guilt about what was done in two minds and is now

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571 Sutcliffe, Judge, 1976 cited in Kennedy, H., (1992), *op cit* at 117, See Pattullo, P., *Judging Women*, (1983, London:NCCL)

572 Linton, N., "The Witness and Cross-examination", (1965) vol. x *Berkeley J. Soc.* at 7

573 Du Cann, R., (1993), *op cit* at 108

574 McColgan, A., (1996a), *op cit* at 58

575 Williams, G., *Proof of Guilt,* (1958, London:Hamlyn Trust), at 159

> repented... getting one's own back on the unfaithful, or contemptuous, lover; blackmail; confusion of fantasies with reality."[576]

Fear of false allegations has also been attributed to deep rooted assumptions regarding female sexuality. Female sexuality, Smart argues, has been pathologized in a phallocentric culture[577];

> "From the judge to the convicted rapist there is a common understanding that female sexuality is problematic and that women's' sexual responsiveness is whimsical or capricious."[578]

In recent years a new fear has emerged, fed by a number of high profile rape cases such as the *Tyson*, *Kennedy*, *Donnellan*[579], *Kydd*[580] cases, that women have redefined rape to include bad sex. Women who regret consensual sexual intercourse, it is claimed, are crying rape.[581]

> "Men, rather than women, are now the victims of rape. Men are being victimised by a flood of false allegations of rape, by the redefinition as rape of bad sex, of drunken sex, of any sex which is less than orgasmic and stone-cold sober. Innocent men, we are told, are suffering. And women are to blame."[582]

As well as confusing bad sex and rape it is also assumed that women can not be trusted to distinguish rape from sexual fantasy.

> "The evidence of Lady Wishfor complaining of rape may be dangerous because she may be indulging in undiluted sexual fantasy."[583]

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576 Elliott, D.W., "Rape Complainants' Sexual Experience with Third Parties", [1984] *Crim.L.R.* at 13

577 Smart, C., (1989), *op cit* at 28

578 *ibid* at 31

579 See Lees, S., (1996) *op cit* at 79

580 *ibid* at 85

581 Roiphe, K., *The Morning After*, (1993, New York:Little Brown)

582 McColgan, A., (1996a), *op cit* at 5

583 per Lord Hailsham, *Kilbourne*, [1973] *AC* 729, 748

The assumption that women desire rape is largely a product of Freudian psychoanalysis in which female sexuality is defined as ultimately masochistic.[584]

> "Men have always raped women, but it wasn't until the advent of Sigmund Freud and his followers that the male ideology of rape began to rely on the tenet that rape was something that women desired."[585]

Defence lawyers draw upon this masochistic model of female sexuality when they ask complainants in rape cases whether evidence of physical injuries is not really attributable to 'rough sex'. Whereas theories of female sexuality are routinely expounded in rape cases, Edwards notes that male sexuality remains invariably unexplored;

> "Male sadism, dominance and aggression are not invoked in an attempt to make sense of his behaviour, in the way that masochism and fantasy are introduced to make sense of hers."[586]

The myth that women lie about rape has translated into evidentiary safeguards in rape trials in order to offer innocent men necessary protection.[587] The corroboration warning is one such safeguard. Until 1995 trial judges were required to warn juries of the dangers of convicting a defendant on the uncorroborated testimony of a woman in a rape case. McColgan cites a typical warning given by trial judges in a rape case;

> "This is a sex case. Experience has shown that women can and do tell lies for some reason, some for no reason at all."[588]

The Criminal Justice and Public Order Act 1994 removed the requirement for the warning. However, a number of commentators have expressed doubts as to the likely impact of this legislation. Lees states;

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584 See also Deutsch, H., *The Psychology of Women*, (1944), cited in Brownmiller, S., *Against our Will,* (1975, Harmondsworth:Penguin), at 315

585 Brownmiller, S., (1975), *op cit* at 315

586 Edwards, S., (1981), *op cit* at 107

587 See Mack, K., "Continuing Barriers to Women's Credibility:A Feminist Perspective on the Proof Process", [1993] 2 *Crim.L.F.* 327

588 McColgan, A., (1996a), *op cit* at 80

> "It is doubtful whether the abolition of the mandatory corroboration ruling introduced by the Criminal Justice and Public Order Act (1994) will prevent the introduction of such comments by some judges."[589]

McColgan shares Lees' scepticism stating that when the mandatory warning was abolished in Canada in 1976 so many judges continued to issue the warning that it had to be banned in 1982. McColgan reports a similar response in Australia.[590]

There is no evidence that there are more false allegations of rape than any other crime.

> "There is absolutely no evidence that bogus complainants are any more common for rape than for any other criminal offence."[591]

> "All the evidence shows that false claims of rape are very uncommon, and that claims against particular men (as opposed to vague stories about assault by unidentified strangers) are even more unusual."[592]

In fact, all the available evidence points to the opposite, that the majority of rapes go unreported.[593] According to Lees, despite the fact that the number of women reporting rape has doubled over the past decade, all the evidence suggests that reported rapes represent only the tip of the ice-berg.[594] Lees cites a student union study at Cambridge University where it was found that only one in fifty students who had been victims of rape or attempted rape had told the police and a similar study at Oxford Brookes University where only 6 percent of victims of rape reported it to the police.[595]

> "The real lies that are told about rape are told by women who pretend that they have not been raped when, in fact, they have."[596]

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589 Lees, S., (1996), *op cit* at 110
590 McColgan, A., (1996a), *op cit* at 79
591 Lees, S., (1996), *op cit* at ix
592 McColgan, A., (1996a), *op cit* at 103
593 See Lees, S., (1996), *op cit* at 215
594 *ibid* at 23
595 *ibid* at 215
596 *ibid*

The reasons women have for not reporting rape are now well known. They include a lack of confidence in the criminal justice system, fear of not being believed, fear of reprisals by an assailant or his family, embarrassment, not wishing to testify in court, feeling that they were somehow responsible.[597] Kennedy also points out that many of the supposed motivations for false allegations are now outdated;

> "There are a few misguided or malicious women who make false allegations of rape, and it is essential that the strong protections for defendants which exist within our system our jealously maintained. However, the change in social mores means few women now cover up their own indiscretions or pregnancies by laying a false allegation at the door of some innocent lover. The days of tyrannical fathers raging at the deflowering of their daughters have happily receded, and women do not feel under so much pressure to deny their willing participation in sexual acts. The premium on virginity has largely disappeared and women feel freer to include sexual activity in their lives, but they want their sexual relationships to be based on mutuality and equality. The emphasis is on choice, and women are rightly indignant that they are viewed and tested according to outmoded assumptions."[598]

6.4.2.2. Women are Responsible for Rape

The myth that women are responsible for rape is based on the assumptions that women provoke men to rape and that it is for women to avoid rape.

The defence advocate who seeks to portray a complainant in a rape case as a temptress, a seductress, who 'led on' the defendant, exploits the myth that women provoke rape.[599] A myth based on the erroneous assumption that men are unable to control their sexual urges once aroused.[600] Women are questioned about their appearance, clothes and make-up worn and asked whether they flirted with the defendant. Women's behaviour is depicted as inappropriate and improper. Conversely, the behaviour of men is regarded as 'normal' and goes unchallenged;

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597 *ibid* at 24
598 Kennedy, H., (1992), *op cit* at 118
599 See Edwards, S., (1981), *op cit* at 50
600 See Adler, Z., (1987), *op cit* at 9

> "Embedded in the idea of male sexuality as natural and therefore uncontrollable is the idea that women are responsible for tempting men and, by the way they dress or behave, leading them on into rages of violence and rape."[601]

> " in the rape trial male sexuality and its satisfaction is always its own excuse or justification.[602]

A woman may also be blamed for creating the opportunities for a man to rape her or failing to take evasive action.[603]

> "She can be blamed for having let a situation get out of hand, for having failed to take steps to avert the sexual contact she should have anticipated."[604]

Her behaviour is scrutinised and judged while his behaviour is accepted as normal.

> "They are assuming that men are women's natural enemies, that all men are potential predators upon women, and that women know this and must protect themselves. If they do not, they are asking for what they get. Mens' behaviour is taken for granted, not judged."[605]

The assumption that women should avoid rape effectively shifts responsibility for rape from men to women. According to Brownmiller, rapists use such rationalisations to justify their actions;

> " "She was asking for it" is the classic way a rapist shifts the burden of blame from himself to his victim. The popularity of the belief that a woman seduces or "cock-teases" a man into rape, or precipitates a rape by incautious behaviour, is part of the smoke-screen that men throw up to obscure their actions. The insecurity of women runs so deep that many, possibly most, rape victims agonise afterward in an effort to

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601 Lees, S., (1996), *op cit* at xix
602 Smart, C., (1989), *op cit* at 42
603 McColgan, A., (1996b), *op cit* at 305
604 *ibid* at 306
605 French, M., *The War Against Women*, (1992, London:Hamilton), at 197

> uncover what it was in their behaviour, their manner, their dress, that triggered this awful act against them." [606]

In a rape trial the woman's behaviour becomes the focus of attention. Did she engage in 'risky' behaviour, did she put herself in a 'perilous' situation, was she 'asking for it'?[607] Defence lawyers invite juries to drew conclusions as to why a complainant ventured out alone at night, why she invited a mere acquaintance into her home, in fact, why she engaged in perfectly usual behaviour. It is unsurprising that women complain of feeling as though they themselves were the ones on trial in rape cases. In a rape trial a complainant's culpability will be under investigation.

> "The trial turns on her "innocence of experience" or freedom from guilt."[608]

Soothill and Soothill have claimed that prosecution counsel frequently collude with defence barristers in making judgements about 'appropriate' female behaviour;

> "Equally damaging for the victim may be the spoken or unspoken shared assumptions of defence and prosecuting counsel which most commentators seem to overlook."[609]

Comments made by prosecuting counsel reported by the researchers include;

> "it would have been much better if these girls had been tucked up in bed"
>
> "Perhaps unwisely she accepted a lift."[610]

The myth that women are to blame for rape often plays a central role in the stories told by defence lawyers in court. The myth is used to undermine a complainant's credibility and the plausibility of her story.

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606 Brownmiller, S., (1975), *op cit* at 312

607 See Jeffreys, S., Radford, J., "Contributory Negligence or being a Woman?:The Car Rapist", in (eds) Scraton, P., Gordon, P., *Causes for Concern*, (1984, London:Penguin)

608 Bumiller, K., "Fallen Angels: The Representation of Violence Against Women in Legal Culture", (1990) 18 *Int.J.Soc.L* at 127

609 Soothill, K., Soothill, D., "Prosecuting the Victim? A Study of the Reporting of Barristers' Comments in Rape Cases", (1993) 32 *Howard Journal*, at 12

6.4.2.3. The Monster in the Bushes

The myth that 'real' rape involves the abnormal, psychologically disturbed rapist who pounces on his victim in the street also appears in defence stories. Defence lawyers will seize upon any divergence between the alleged rape and the stereotypical rape to discredit a complainant's version of events. However, research has shown that the 'monster in the bushes' is a wholly inaccurate characterisation of rape. In fact, most women are raped by men they know. McColgan cites Women Against Rape's 1985 London survey which found that 30 per cent of the women who reported rape to W.A.R. had been raped by their husbands and 54 per cent of women knew their attackers.[611]

> "Some women are raped by strangers who jump on them from behind dark bushes at night. Some women are raped by strangers who break into their home. Many more are raped by men who are not strangers to them. Women are raped by their husbands, they are raped by their boyfriends, they are raped by their ex-partners and family friends. They are raped in the sanctity of their marriage bed, in the flats that they share with their lovers, in the homes of their friends." [612]

Research also suggests that the typical rapist is not a psychopath but is in fact, fairly indistinguishable from other men[613];

> "The majority are perfectly normal men, married and unmarried, with and without girlfriends."[614]

Despite the inaccuracy of the stereotype, it continues to inform defence stories in cases of non-stranger rape. 'Typical' rapes are portrayed by defence barristers as abnormal and consequently improbable.

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610 *ibid* at 21
611 McColgan, A., (1996a), op cit at 99
612 McColgan, A., (1996a) *op cit* at 108, See Lees, S., (1996), *op cit* at 223
613 See Lees, S., (1996), *op cit* at 210-236
614 *ibid* at 235

6.4.3. Summary

In adversarial criminal proceedings complainants are effectively put on trial as their character and reputations are tested. Defence lawyers are free to delve into the private lives of complainants and expose all to public scrutiny and condemnation. Complainants are routinely vilified and demeaned. Complainants in rape cases are uniquely vulnerable during cross-examination as defence counsel are aided in their attacks upon the credibility of rape complainants by a multitude of sexist and erroneous assumptions about rape, women and female sexuality. Whether the defence lawyer ascribes to the sexist assumptions he espouses is not really significant. Within the framework of the adversarial trial it would be unrealistic to expect counsel not to take advantage of cultural biases when seeking to undermine the credibility of rape complainants. Fair treatment of the complainant is not an objective of the defence advocate. It is the role of the defence advocate to vigorously defend his client and provide a rival interpretation of events. Defence lawyers are compelled to exploit prejudices in their attempts undermine the prosecution case. This study questions whether victims of rape are appropriate targets for the brutal character assassination that attends cross-examination;

> "There is little incentive for rape victims to come forward when the system which is supposed to protect the public from crime serves them up in court like laboratory specimens on a microscope slide." [615]

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[615] McEwan, J., "Documentary Hearsay Evidence-Refuge for the Vulnerable Witness?", [1989] *Crim.L.R.* at 642

6.5. The Jury

In adversarial proceedings the ultimate aim of the advocate is to tell a persuasive story. If a story is to be believed, the story teller must appeal to the values and assumptions of the audience; the jury.

> "Telling a good story depends as much on the expectations of the listeners as on the skills of the story-teller."[616]

Defence advocates will use arguments that they believe will impress jurors.

> "Jurors decide verdicts by reflecting upon the competing stories of the defence and the prosecution and by choosing the narrative that they believe gives the most reasonable account of the action. For them, reasonable means the narrative of the case which presents a probable explanation that fits within the juror's knowledge and experience of human behaviour."[617]

Research into the decision making of juries in England and Wales is prohibited by the Contempt of Court Act 1981, section 8. Consequently, very little is known about jury deliberations in rape cases. Studies conducted in the United States suggest that jurors are greatly influenced by the character of complainants in rape cases;[618]

> "Perhaps no single variable is thought to produce more discriminatory effects in rape trials as the introduction of the victim's sexual reputation or moral character as evidence."[619]

Commenting on jury studies McColgan states;

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616 Stephenson, G., *The Psychology of Criminal Justice*, (1992, Oxford:Blackwell) at 147

617 Snedaker, K.H., "Storytelling in Opening Statements: Framing the Argumentation of the Trial", in Papke, D.R. *Narrative and the Legal Discourse a Reader in Storytelling and the Law*, (1991,Liverpool:Deborah Charles)

618 See Kalven, H., Zeisel, H., *The American Jury*, (1966, Boston), La Free, G., Reskin, B.F.,Vischer, C, A., "Jurors' Responses to Victims' Behaviour and Legal Issues in Sexual Assault Trials", (1985) 32 *Social Problems*, cited in Ward, C.A., *Attitudes Towards Rape*, (1995,London:Sage), at 103

619 Field, H.S., Bienen, L.B., *Jurors and Rape*, (1980, Lexington), at 103

> "It seems that jurors male and female, share the assumption that women who are sexually active lie about rape, that they consent indiscriminately and/or that their lack of consent to any particular sexual contact is not the lack of consent which may result in punishment for a man who chooses to ignore it."[620]

In the absence of empirical research juries are assumed to use their common sense.

> "For pragmatic reasons, and perhaps for want of anything better, the jury were thought to employ common sense in their reasoning."[621]

In fact, following his observations of criminal trials in a Crown Court, Rock reports;

> "Jurors were told to use common sense in judging the facts."[622]

It may be assumed that in employing common sense in rape trials jurors draw upon prevalent myths and stereotypes about rape and women.

> "Their influence is not limited to men who would accept the use of force as an appropriate method of overcoming resistance to sex. They have, rather, become part of the dominant culture, a culture historically dependent, for its existence, upon the control of women's sexuality. Women as well as men jurors are the product of this culture."[623]

In their portrayal of complainants defence barristers exploit this fact;

> "Such sexist attitudes are manipulated successfully because they remain in our society as well as in our courts and hence impress jurors."[624]

Kit Kinport accepts this explanation of defence counsels' use of sexist stereotypes;

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620 McColgan, A., (1996b), *op cit* at 287
621 Rock, P., (1993) *op cit* at 76
622 *ibid*
623 McColgan, A., (1996b), *op cit* at 307
624 Brown, B., et al, (1993), *op cit* at 207

> "They may feed on the jury's tendency to view women as less credible than men.....by taking advantage of inaccurate stereotypes about rape victims."[625]

Brown et al conducted interviews with defence barristers together with other legal practitioners within the Scottish legal system regarding the introduction of sexual history evidence in rape trials. These interviews provide confirmation of the exploitation of rape myths and prejudice by defence barristers;

> "A number of defence interviewees freely admitted that they would do what they could to suggest that a woman was of 'easy virtue' precisely because they believed that juries were swayed by it."[626]

One defence advocate interviewed by the researchers explained;

> "I think a lot of males think a woman of 'easy virtue' is more likely give to her consent than a 15 year old virgin. I think it is a male attitude and these male attitudes manifest themselves in cross-examination. But you can't get away from the fact that advocates are in court to win. Now they are there to present the case as best they can on behalf of an accused person. If an accused person says that this lady is of easy virtue and if you know that it can be established that she is of easy virtue, you know that the people in the jury will take that into consideration. It would be foolish to say that they will not. The common-sense of the situation demands that they will."[627]

The complainant's sexual character is so often the focus of rape trials because defence lawyers believe that if they manage to portray the complainant as of 'easy virtue' the jury are less likely to believe her story. The same is true of other aspects of the complainant's lifestyle. If the complainant is portrayed as disreputable it is assumed that the chances of an acquittal increase. Any detail of the complainant's private life that the defence believes will influence jury decision-making is likely to be included in the cross-examination of the rape complainant. For example, Kennedy recognises the potency of psychiatric evidence in rape trials;

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625 Kinport, K., 'Evidence Engendered' [1991] 2 *U.ILL.L.Rev.* at 427
626 Brown, B., et al, (1993), *op cit* at 206
627 *ibid* at 110

> "The slightest hint of anything which might affect the mind, particularly of a female witness, can jeopardise a case."[628]

Temkin advances the proposition that defence lawyers do not simply exploit cultural myths that prevail in wider society but in fact, appeal to the prejudiced assumptions of the past.

> "Within the enclosed and cut-off realm of the courtroom, a jury may accept an account of the world as set out by the defence which in no way corresponds to the actual sexual mores of today's society but exemplifies the double standard of sexual morality in its most virulent form."[629]

6.5.1. Summary

The stories told by defence advocates in rape trials are clearly designed to influence jurors. With no empirical evidence upon which to draw, barristers assume that jurors use their common sense and are swayed by sexist stereotypes and arguments grounded in rape mythology. In the absence of research into jury decision-making in rape cases it is impossible to draw firm conclusions as to the role played by the jury system in the treatment of rape complainants in court. There is no evidence that the stories told by defence advocates would contain less denigrating, less offensive portrayals of rape complainants if the jury were to be replaced by a trial judge. The research conducted by Jackson and Doran into Diplock trials suggests that the removal of the jury would not necessarily lead to marked differences in the ways the parties decide to present their evidence.[630]

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628 Kennedy, H., (1992), *op cit* at 115

629 Temkin, J., 'Sexual History Evidence- The Ravishment of Section 2' [1993] *Crim.L.R.* at 4

630 Jackson, J., Doran, S., *Judge Without Jury: Diplock Trials in the Adversary System*, (1995, Oxford:Clarendon Press), at 289

6.6. The Nature of Cross-examination

This section examines the relationship between the nature of cross-examination and the hostile treatment of rape complainants by defence counsel. It is argued that within the adversarial trial advocates are compelled to be hostile and insensitive in their handling of rape complainants.

6.6.1. The Combativeness of Cross-examination

As discussed in a Chapter one, the adversarial trial is a combative arena. The adversarial system is based upon the assumption that vigorous advocacy is the most effective mechanism for testing evidence.

> "Confrontation is at the heart of the system since it is thought that the best result is obtained through this "constrained battle procedure."[631]

The adversarial process dictates that advocates are robust in their encounters with witnesses. The adversarial trial is structured as a conflict and it is the advocate and witnesses who are in combat.

> "Defence counsel were required to be hostile to prosecution witnesses inside the courtroom. They were belligerents whose job was to serve their clients by attacking the standing, credibility and evidence of those who testified against them."[632]

The combative nature of adversary advocacy is embodied in the following extract;

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631 Yaroshefsky, E., (1989), *op cit* at 137

632 Rock, P., (1993), *op cit* 168

> " the trial lawyer must possess a combativeness, a bellicosity which responds to the challenge of impending conflict by some unconscious remembrance he is linked to the first stand in trial combatant and as his heir it is he who now grasps the cudgel to swing on behalf of his client. he must relish the thwack of a well landed left hook tingle with the thump of a rushing block. The physical crudities will not be there but the verbal jousting, the tactical thrusts, the legal clouts will be."[633]

In adversarial proceedings cross-examination is wielded by defence counsel as a weapon. The 'potency' of cross-examination is, in part, accredited to its brutality. It is assumed that a dishonest or mistaken witness will be exposed during a hostile and aggressive verbal attack. Advocates speak of 'breaking' and 'destroying' a witness. Conversely, honest witnesses are assumed capable of withstanding such an assault. The implications for complainants are clear;

> "By its nature a criminal trial is likely to be a testing experience for the key witness in which the ability to withstand gruelling questioning is seen as an appropriate mark of the truth."[634]

Cross-examination is often likened to a physical fight between advocate and witness;

> " quite often the most devastating cross-examination can be a fairly short build up rather like in boxing with one blow to the body followed by a quick blow to the chin."[635]

Evans in offering advocates advice on conducting cross-examination uses the term "butchering" the witness.[636] Devlin refers to "verbal pugilism" as a defining feature of adversarial proceedings. The nature of cross-examination has led commentators to cite the adversarial trial as the modern day successor to mediaeval trial by ordeal;

> "That battle, that ordeal, is today made manifest in the ritual combat of counsel and witnesses - for many, no less terrifying an experience."[637]

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633 See Danet, B., Bogoch, B., "Fixed Fight or Free For All? An Empirical Study of Combativeness in the Adversary System of Justice", (1980) 7 *British Journal of Law and Society* at 42

634 Brown, B., et al, (1993), *op cit* at 16

635 Sherr, A., *Legal Practice Handbook -Advocacy,* (1993, London:Blackstone), at 99

636 Evans, K., *Golden Rules of Advocacy,* (1993, London Blackstone), at 97

637 Jackson, B.S., *Law, Fact and Narrative Coherence,* (1988, Liverpool:Deborah Charles) at 9

Research of rape trials has revealed that vigorous advocacy easily descends into bullying and browbeating.[638] It is by no means unusual for a complainant to be brought to tears by defence counsel;

> "Trials could be cruel, and it was counsel who were the perpetrators of that cruelty."[639]

The brutal treatment of rape complainants may not simply be attributed to the malevolence of individual barristers but to the nature of cross-examination as a process. An effective advocate within the adversarial system must be indifferent to the distress and hurt of those he or she cross-examines.

> "Those who dwelt too much on the pain of the lay witness would not last long as effective advocates."[640]

6.6.2. The Competitiveness of Cross-examination

The competitiveness of adversarial proceedings also helps explain the treatment of complainants during cross-examination. The adversarial criminal trial is a contest between the two sides. In any contest there is a winner and a loser and both sides naturally want to win. The adversarial structure instils competitiveness into its advocates. The criminal trial is a competitive arena, an environment in which advocates will attempt to push the boundaries and to do all they can 'get away' with. Within the adversarial system the success of counsel is to a degree measured by his or her performance in court. The competitiveness of adversarial proceedings undoubtedly adds to the zealousness of advocates during cross-examination;

> "A courtroom is a laboratory of life, and the trial is to a great extent a battle that each of the lawyers wants to win. Although we may speak of truth and justice as the goals of the system, once in the courtroom

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638 See Chambers, G., Millar, A., (1987), *op cit*
639 Rock, P., (1993), *op cit* at 174
640 *ibid*

> arena, each lawyer's wish to win may lead to him or her to exploit prevailing cultural biases."[641]

Brown et al's interviews with defence advocates identified the pressure upon advocates to push the boundaries. One advocate interviewed confessed;

> "You try and get away with anything which you think that the jury will use in assessing the credibility of the complainer or the credibility of your client."[642]

6.6.3. Summary

Within the adversarial fact-finding process the ability of a witness to withstand a taxing cross-examination is seen as a mark of veracity. Defence advocates are compelled to be aggressive and hostile towards complainants. Within the combative and competitive arena of the adversarial criminal trial vigorous advocacy imperceptibly descends into intimidation and harassment. The faith placed in confrontation within the adversarial fact-finding process dictates that no concessions may be made for rape complainants and other vulnerable complainants. Vulnerable complainants may not be treated less robustly during cross-examination, they are simply expected to withstand the same gruelling testing process. Again, this study questions the appropriateness of subjecting women who have been raped and other victims of horrific crimes to such treatment.

> "The defence counsel's task is to try to prove the complainant to be a liar which can often result in bullying and aggressive questioning, quite inappropriate for a woman who has been traumatised by rape."[643]

Cross-examination is extolled within common law jurisdictions as the most effective mechanism for exposing inconsistency, contradiction and inaccuracy in testimony. Great faith is placed in the ability of the skilful cross-examiner to expose the

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641 Yaroshefsky, E., (1989), *op cit* at 152
642 Brown, B.,et al, (1993), *op cit* at 108
643 Lees, S., (1993), *op cit* at 22

unreliable and dishonest witness. The experiences of rape complainants during cross-examination raise important questions regarding the effectiveness of cross-examination, especially in cases involving vulnerable complainants. Primarily, the extent to which the process of truth-discovery is aided by the 'butchering' or bullying of complainants and how the secondary victimisation of vulnerable complainants in this manner can be justified.

6.7. Cross-examination and Witness Performance

In this section the tactics employed by defence counsel in undermining the oral performance of complainants in court are examined. It is argued that defence advocates deliberately set out to humiliate, intimidate and antagonise complainants in order to diminish their credibility.

6.7.1. A Theatrical Spectacle

The adversarial criminal trial is often referred to as a theatrical spectacle;

> "A court of law is a theatre."[644]

The wigs and gowns worn by the judges and advocates make distinctive costumes. The oral contest offers drama and suspense. The entertainment value of court proceedings is evidenced by the popularity of courtroom scenes in films, books and other media. If the courtroom is the stage then the jury is the audience and the advocates and the witnesses the central protagonists. The courtroom is a theatre in the sense that the participants are required to perform. The jury will be judging both the advocates and the witnesses on their oral performance in court. A good performance can be decisive. Advocates are well aware of the need to perform well in court and to be constantly aware of the impression they are conveying to the jury. Evans advises advocates to study their body language in front of a mirror,[645] to learn to control their facial expressions so as not to inadvertently betray disappointment or surprise and to make frequent eye contact with the jury.[646] Evan also advises advocates to try and

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644 Evans, K., (1993), *op cit* at 33
645 *ibid* at 10
646 *ibid* at 13

build a rapport with the jury, to be likeable.[647] According to Evans, all aspiring advocates should have a degree of acting ability and be at least a little stage-struck.

> "To be a real advocate you have got to be an actor and you have got to be a brave one."[648]

Advocates are also aware of the need to entertain their captive audience. The advocate is advised to vary pace and tone of delivery to promote attentiveness,[649] to appreciate the importance of timing and the power of the pause. Evans even suggests bringing props into the courtroom to arouse interest.[650]

6.7.2. Witness Performance

The oral performance of witnesses is of crucial importance within the adversarial criminal trial. The jury will be trying to assess the credibility of the witness and his or her performance in the witness-box may be decisive. The importance attached to witness demeanour was examined in Chapter two. The advocate is only too aware of the pivotal importance of witness performance. A flustered, disconcerted witness may well be a less credible witness. During cross-examination the defence counsel will engage in tactics designed to undermine witness performance.

> "The adversarial nature of the litigation process encourages lawyers to use tactics to intimidate opposing counsel and her witnesses hoping it rattle them so that they will be unable to effectively present their evidence, or will at least appear less credible in the jury's eyes."[651]

Although not apparent in advocacy texts, research suggests that such tactics are common place in criminal trials. Chambers and Millar, in their research into the prosecution of sex offences within the Scottish criminal justice system, identified the

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647 *ibid* at 53
648 *ibid* 34
649 *ibid* at 46
650 *ibid* at 12
651 Kinports, K., (1991), *op cit* at 247

employment of tactics by the defence to undermine the oral performance of complainants.

> "..in attempting to understand the complainer's experience at trial, attention should be focused on how the defence use certain tactics to discredit a woman's evidence, and unsettle her performance in the witness box."[652]

According to Chambers and Millar, these tactics included insensitive questioning, persistent questioning, and intimidation.[653] The researchers describe how defence counsel used questions to unsettle and disconcert complainants. Chambers and Millar report that defence counsel asked questions that were simply designed to embarrass and humiliate complainants. Another tactic was to repeatedly demand precise recollection of seemingly obscure facts, continuing a line of questioning despite its rejection by the complainant and continual references to the seriousness of the allegation in an attempt to intimidate the complainant. Research of rape trials led Chambers and Millar to conclude that;

> "much of the distress and anxiety suffered by women at trial is due to pernicious and prurient lines of questioning which make no attempt to introduce factual evidence but would appear to be mainly attempts to humiliate or degrade the complainer with a view to spoiling the prosecution case."[654]

Weinreb identifies further tactics employed by advocates;

> "So far as he can, counsel 'shakes' an opposing witness's testimony by revealing if not indeed creating minor inconsistencies, insisting on precision about trivia and then either lamenting the imprecision or pouncing on another inconsistency, and making the witness behave nervously and otherwise look unreliable."[655]

The use of such techniques in the cross-examination of rape complainants is confirmed by McEwan;

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652 Chambers, G., Millar, A., (1987), *op cit* at 71
653 *ibid*
654 *ibid* at 79
655 Weinreb, L.L., *The Denial of Justice* (1977, London:Free Press), at 102

> "...cross-examination of rape complainants is often used simply to humiliate them and therefore undermine the confidence with which they describe alleged events."[656]

Further evidence of the harassment of rape complainants during cross-examination is provided by Brown et al;

> "Cross examination in rape trials and other sexual offences continues to produce examples of the art of the advocate which involves the harassment and vilification of witnesses."[657]

The use of tactics to fluster and unsettle a witness in order to diminish the impact of testimony is not reserved for rape complainants but is in fact routine in the cross-examination of prosecution witnesses. An emotional outburst, whether it be tears or anger, from any key witness may cause the jury to question the reliability of his or her testimony. Wherever the defence perceives that strategic capital may be made from antagonising or distressing a witness he or she will devise questions to achieve this result. Rock reports;

> "Almost every cross-examination will contain a passage in which counsel puts on a mocking or stern face and presses the witness hard as if trying to drive him or her to anger."[658]

6.7.3. Summary

Research suggests that cross-examination is a tool employed to harass, confuse and antagonise witnesses. However, given the role and nature of cross-examination and the importance of demeanour in adversarial proceedings, this is unsurprising. In fact, it would be more surprising if advocates did not resort to such tactics within the adversarial arena. To blame defence advocates for the treatment of complainants in

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656 McEwan, J., *Evidence and the Adversarial Process* (1992, Oxford:Blackwell), at 16
657 Brown, B., et al, (1993), *op cit* at 201
658 Rock, P., (1991), *op cit* at 268

court is short-sighted. The adversarial fact-finding process expects advocates to display a high degree of inventiveness and ingenuity in presenting their cases;

> " if there is criticism it should be directed at the system that virtually compels there use, a system that treats a law-suit as a battle of wits and wiles."[659]

> " the assumptions of the adversary system permit, nay rather demand, that the defendant's advocate use every skill he has in cross-examining the State's witnesses to test the accuracy of their testimonial evidence."[660]

The fact that advocates are compelled to engage in such tactics during cross-examination raises important questions regarding truth-discovery in adversarial criminal proceedings. As discussed in Chapter two, can it be said that a distressed, intimidated and confused witness is the best source of evidence. Does too much defence advocacy, as McEwan claims, consist of "theatricality or the planting of improbable doubts for the benefit of the jury"[661], and can the resulting ordeal of rape complainants be justified?

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659 Frank, J., *Courts on Trial: Myth and Reality in American Justice*, (1963, Antheneum: Massachusetts), at 85

660 Barrett, E., "The Adversary System and the Ethics of Advocacy", (1962) 37 *Notre Dame Lawyer* at 487

661 McEwan, J., "Child Evidence:More Proposals for Reform", [1988] *Crim. L.R.* at 820

6.8. A Vulnerable Target?

Complainants are powerless to contest the insulting and demeaning remarks made by defence advocates during cross-examination. This is undoubtedly a source of frustration and distress for complainants. A rape victim interviewed by Victim Support expressed her frustration stating;

> "I felt as if he wouldn't let me say my piece."[662]

This section addresses how the method of interrogation employed in cross-examination denies complainants the opportunity to challenge their disparaging portrayal in court.

6.8.1. The Need for Control

As discussed in Chapter four, in adversarial proceedings control over witnesses is crucial. The exclusionary character of the law of evidence means that advocates must ensure that witnesses do not introduce inadmissible evidence in court. Defence counsel must also exert control to prevent a complainant from revealing facts prejudicial to the defence or reiterating the case for the prosecution.

> "If the witness is allowed any freedom, he may give evidence which is harmful to the cross-examiner's case."[663]

> "For the lawyer to win he must, then, control and thwart the self-presenting activity of the witness."[664]

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662 Victim Support, (1996), *op cit* at 33
663 Stone, M., *op cit* at 309
664 Linton, N., (1965), *op cit* at 4

The adversarial trial is structured as a contest between competing stories. It is in the interests of the advocate to deny opposing witnesses the opportunity to challenge his version of events. The ultimate success of the defence may depend on the ability of the defence advocate to check the attempts of a complainant to refute his or her demeaning and offensive portrayal in court. In a rape trial, where proceedings are often reduced to a credibility fight between the defendant and the complainant, the ability of the defence to present a negative portrayal of the complainant can be decisive. Restricting the narrative freedom of the rape complainant during cross-examination will therefore be a primary objective of the defence advocate.

6.8.2. Discursive Strategies Employed

Complainants are unpractised in the art of interrogation, unfamiliar with legal terminology and unversed in the rules that govern the adversarial contest. The advocate and the complainant are unevenly matched opponents. This is likely to be the case in any legal system. A lawyer will always have a number of advantages over a witness. However, the vulnerability and powerlessness of the complainant is heightened within an adversarial system. This is due to the method of examination employed within adversarial criminal trials; adversary advocacy. In Chapter four, the discursive strategies employed by advocates to exert control over witnesses were examined. It was stated that advocacy manuals advise advocates for example, to avoid open ended questions, to avoid asking questions to which the advocate does not know the answer, and guide witnesses firmly through their evidence. The control exercised in examination-in-chief is magnified during cross-examination.

In the art of witness manipulation, the cross-examiner has the aid of the leading question. A leading question is a question that asserts more than it asks. In cross-examination questions may be so tightly framed that the witness is frequently restricted to mere agreement or denial; a yes or no response. A witness may only give evidence responsively, she may not volunteer information;

> "Witnesses are not entitled to add to their account material that has not been asked for and so counsel can manipulate them to obtain the least damaging version of the facts."[665]

Evans offers the following advice to aspiring advocates;

> "Know what you want them to say and then make them say it."[666]

According to Evans, during cross-examination advocates should never ask 'why' and never ask 'how';

> "Almost anything is responsive to a question that asks How? or Why? Those words are to be avoided like the plague in cross-examination."[667]

In this way the complainant is denied the possibility of effectively challenging the assertions of defence counsel. If the complainant's response is in danger of exceeding the narrowly constructed bounds posited by the cross-examiner it will be met with vigorous objection. The complainant who raises objections, who volunteers information, will be effectively silenced.

> "Any deviation from the point of the question or evasiveness may be countered by warnings, reminders, repetition of questions and the insistence of proper answers."[668]

When confronted with a barrage of insulting and distressing questions complainants are not in a position to protest. If complainants feel that their evidence has been distorted and that they have been unfairly treated they are unable to object;

> "Rarely are witnesses permitted to fight back, or, of course, ever to ask a question."[669]

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665 McEwan, J., (1992), *op cit* at 13
666 Evans, K., (1993), *op cit* at 76
667 *ibid* at 108
668 Stone, M., (1988), *op cit* at 107
669 Stephenson, G., (1992), *op cit* at 136

The defence counsel has a further advantage over rape complainants. Women traumatised by rape may well not be willing, or able, to engage in a war of words with defence advocates. Vulnerable complainants are potentially easy prey for defence counsel during cross-examination.

6.8.3. Summary

It is submitted that rape complainants whose characters have been maligned by defence counsel should have the right to challenge the damning picture that has been painted in court.

> "Can it be right to deprive a person of the right to negotiate his or her identity through free-flowing talk just when it matters most."[670]

Ideally, complainants should be able to refute defence accusations as they occur, not at a point later in the trial when the damage may be said to be already done. This section has sought to demonstrate that while cross-examination is retained as the method of witness interrogation, complainants will be denied this right.

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670 Danet, B., "Language and the Legal Process", (1989) 14 *Law & Society Review* at 539

6.9. The Ineffectiveness of Limitations

In this section the ineffectiveness of the limitations placed upon cross-examination by defence advocates is examined. These limitations include; the *Code of Conduct of the Bar of England and Wales*, the duty of trial judges to protect witnesses from improper questioning, the Sexual Offences Act 1976 and the Criminal Evidence Act 1898.

6.9.1. The Code of Conduct of the Bar of England and Wales

The *Code of Conduct of the Bar of England and Wales* lays down rules for the conduct of cross-examination. These include;

> "A barrister must guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or some other person.[671]
>
> A barrister may only suggest that a witness is guilty of fraud, misconduct or crime if allegations go to a matter in issue which is material to a client's case. Where the only such matter is the credibility of the witness the barrister must be satisfied as to the reasons for such allegations being made and that they are supported by reasonable grounds."[672]

The Code basically seeks to prevent counsel making unnecessary allegations and to discourage unnecessarily lengthy cross-examination and cross-examination conducted with a view to browbeating a witness. Research has revealed that defence advocates routinely ask questions that are designed to insult and distress rape complainants without incurring any penalty from the court or any other quarter. Lees reports that in the rape cases she monitored the Code was routinely breached by defence counsel and

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671 General Council of the Bar of England and Wales, *Code of Conduct of the Bar of England and Wales*, (1991, London:Bar Council) para. 22.4.2 cited in Archbold, *Pleadings, Evidence and Practice in Criminal Cases* (1995, London:Sweet & Maxwell) at para. 4-317 and Appendix C

672 *ibid* at para. 22.8.1

there was no intervention by either prosecution counsel or the trial judge on these occasions.[673] Edwards also doubts the impact of the Code on the conduct of barristers;

> "The Bar, like any other professional body, is bound by its own rules or Code of conduct. But these rules are frequently breached or stretched to say the least, particularly with regard to the way in which victims of sexual offences are cross-examined."[674]

Clearly, the *Code of Conduct of the Bar of England and Wales* does not act as an effective limit upon cross-examination. Du Cann identifies the limitations of the Code;

> "They do no more than state the broad principles which should guide him, for the substance and form of the questions which may be put by the advocate must be a matter of his own choice."[675]

6.9.2. Duty of the Trial Judge

Trial judges have a duty to prevent questioning of an unduly offensive, vexatious improper and oppressive nature; *Mechanical and General Inventions Co. Ltd and Lehwess v Austin and Austin Motor Co. Ltd.*[676] In this case Lord Sankey stated;

> "Cross examination is a powerful weapon entrusted to counsel and should be conducted with restraint and a measure of courtesy and consideration which a witness is entitled to expect in a court of law."

The trial judge should exercise this discretion if questioning relates to matters so remote as to have negligible impact on the credibility of the witness or if there is a

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673 Lees, S., (1996), *op cit* at 249

674 Edwards, S., "Evidential Matters in Rape Prosecutions from "First Opportunity to Complain" to Corroboration.", (1986) 136(i) *N.L.J.* at 292

675 Du Cann, R., (1993), *op cit* at 122

676 [1935] AC 346

disproportion between the importance of the imputation and the importance of the evidence.[677]

As this chapter has sought to demonstrate, cross-examination is being conducted with neither restraint nor courtesy by defence counsel in rape cases. Trial judges have a discretion to prevent offensive questioning and to rebuke counsel for haranguing witnesses but clearly, this discretion is not being exercised in rape cases. Defence counsel are granted a great deal of latitude in their cross-examination of rape complainants. The reasons for the lack of protection afforded rape complainants during cross-examination by trial judges are examined in Chapter seven. Chapter seven makes it clear that judicial discretion is an ineffective limit upon the interrogation of witnesses in the adversarial criminal trial.

6.9.3. Sexual Offences Amendment Act 1976 section 2

The research of Adler and Lees has shown that the legislation designed to restrict the use of sexual history evidence has had a limited impact on the cross-examination of complainants in rape trials.[678] The decision of a trial judge to grant leave is not a matter of judicial discretion but a judgment as to the relevance of the evidence in question. The central role played by the concept of relevance in the implementation of section 2 has been examined by a number of commentators.[679]

6.9.3.1. The concept of relevance

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677 Hobbs v Tinling, [1929] 2 KB 1 cited in Keane, A., The Modern Law of Evidence, (1996, London:Butterworths), at 152

678 See Adler, Z., *Rape on Trial*, (1987, London:Routledge & Kegan Paul), Lees, S., *Carnal Knowledge*, (1996, London:Hamish Hamilton)

679 See Adler, Z., "The Relevance of Sexual History Evidence in Rape:Problems of Subjective Interpretation", [1985] *Crim.L.R.* 769, McColgan, A., "Common Law and the Relevance of Sexual History Evidence", (1996b), 16, *O.J.L.S. at* 275, Temkin, J., "Sexual History Evidence-The Ravishment of Section 2", [1993] *Crim.L.R.* 3

The classic definition of relevance is contained in Article 1 of Stephen's *Digest of the Law of Evidence:*

> "..any two facts to which it is applied are so related to each other that according to the common-sense course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non existence of the other."[680]

Evidence is therefore relevant if it is logically probative or disprobative of a fact that requires proof. The evidence must be found suitable for rational inference. There is no legal test of relevancy. It is for judges to decide the probative force, and therefore the relevance, of evidence.

> "The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience, assuming that the principles of reasoning are well known to it's judges and ministers."[681]

Relevance is presented by the courts as an objective concept, a matter of common-sense. Whether the trial judge considers evidence probative or disprobative will largely depend on the life experiences, assumptions and values that inform that decision making process. The beliefs and standpoint of the trial judge are therefore central.

> "Given absolute discretion in this area, judges must ultimately rely on personal experiences and individual perceptions of what constitutes "relevance" or "unfairness."[682]

Relevance is therefore not the objective, neutral concept it is presented to be but a highly subjective concept.

> "..though seemingly neutral and impartial relevance is in fact in the eye of the beholder."[683]

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680 Stephen, Sir James, *Digest of the Law of Evidence*, (1979), cited in Adler, Z., (1985), *op cit* at 772

681 Thayer, J.B., *A Preliminary Treatise on Evidence on Evidence at Common Law 1898* (1969, South Hackensack) cited in Zuckerman, A.A.S., *The Principles of Criminal Evidence*, (1989, Oxford:Clarendon Press)

682 Adler, Z., "Rape- The Intention of Parliament and the Practice of the Courts" (1982) 45 *M.L.R.* at 675

Feminist analysis of the legal concept of relevance has exposed the bias inherent in relevance determinations. Adler argues that the subjective nature of the legal concept of relevance allows the sexist assumptions of individual judges to inform the decision making process;

> "It is a matter of considerable concern that the question of sexual history evidence, prone to biased interpretations, is at present left entirely in the hands of judges whose tendency to prejudice against women has been clearly documented at all levels of the jurisdiction."[684]

According to Kinports, leaving relevance determinations to trial judges necessarily solidifies a white male perspective.[685] The trial judge will base his decision on his understanding of human behaviour. As discussed in Chapter one, the majority of judges in England and Wales are male. The rape complainant's experience is translated using values, assumptions and norms shared by men. Relevant evidence is evidence deemed logically probative from a male perspective. In a rape trial a decision as to the relevance of evidence will be based, in part, on the judge's understanding of the nature of rape, women and female sexuality. Lees also argues that far from being objective the legal concept of relevance embodies a male perspective;

> "British judges are overwhelmingly old, upper class, white, highly privileged, and male. They hold themselves ostentatiously aloof from everyday life and their courts are prescribed as neutral islands of rationality, sealed off from imperfect society."[686]

> "The very concepts of "neutrality" and "rationality" to which the courts adhere are infused with male ideologies. No where is this more apparent than in rape trials. Masculinity stands revealed in their procedures and judgment."[687]

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683 Kinports, K., (1991), *op cit* at 431
684 Adler, Z., (1985), *op cit* at 770
685 Kinports, K., (1991), *op cit* at 431
686 Lees, S., (1993), *op cit* at 32
687 *ibid* at 33

According to Adler's research, the majority of applications made under section 2 are argued on the grounds of relevance to consent.[688] Adler's observations of rape trials reveal that an inventive advocate can introduce far ranging evidence of a complainant's previous sexual history using this argument. Defence counsel argue for example, that evidence of the complainant's sexual history should be admitted to show that the complainant has previously had sexual intercourse with a man that shared certain characteristics with the defendant.[689] Where the complainant is white and the defendant is black, the defence counsel may seek to ask questions about previous black sexual partners upon the premise that this shows that the complainant has no aversion to sex with black men. If the defendant is an old man or a particularly young man or judged to be middle-class or working class the defence will apply the same flawed logic. If it was part of the prosecution case that the complainant claims that she would never entertain the idea of having sexual intercourse with a black man, then naturally, previous sexual relationships with black men become relevant. However, where used to illustrate "no aversion", where no aversion has been claimed by the prosecution, this represents nothing more than manipulation of the statute to introduce the type of evidence the section was designed to prevent.

Defence counsel also argue that evidence of a complainant's sexual history should be admitted on the grounds that it shows that the complainant had previously consented to sexual intercourse of the same nature as the alleged rape. If the complainant was anally penetrated, for example, defence counsel will attempt to introduce evidence that the complainant has previously engaged in consensual anal intercourse. Again, if the complainant asserts that she would never consent to anal intercourse, such defence questioning would be appropriate. In the absence of such an assertion the defence's argument is spurious.

According to Adler's research, defence counsel also argue that evidence that a complainant has consented to sexual intercourse indiscriminately in the past also goes to the issue of consent. Evidence of consensual sexual intercourse on a number of occasions in the past, it is argued, shows that a complainant was more likely to consent to the defendant.

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688 Adler, Z., (1982), *op cit* at 669

689 Adler, Z., (1985) *Crim. L.R. op cit* at 772

> "It remains an important defence strategy to portray the alleged victim of rape as "bad", and to appeal to the widely shared attitudes undoubtedly present among the jury that women with a normal sexual past are more likely to consent to sexual intercourse than those without."[690]

The concept of relevance, far from protecting rape complainants from distressing and unnecessary questioning, allows defence counsel to delve into the personal and intimate details of a complainant's life. The concept opens the door to prejudiced assumptions about rape, women and female sexuality;

> "Thus, in many cases, far from being relevant, such evidence is introduced to play on the jury's prejudices and widely believed myths regarding the role of the alleged victim in sexual assaults."[691]

The concept allows defence counsel to ask questions designed to humiliate and distress a complainant and thereby undermine her performance in court.

> "For the victim 'relevant' testimony is perceived as character assassination."[692]

McEwan, identifies a further reason for the failure of section 2 to significantly alter the questioning of rape complainants during cross-examination.[693] McEwan argues that the distinction between evidence that goes to credit and evidence that goes to an issue in the trial is often arbitrary and a distinction that lawyers find difficult to appreciate. According to McEwan, where reform is not understood it does not achieve anything.[694]

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690 *ibid* at 779
691 *ibid*
692 Yaroshefsky, E., (1989), *op cit* at 154
693 McEwan, J., (1992), *op cit* at 103
694 *ibid*

6.9.4. The Criminal Evidence Act 1898: section 1 (f)

It has been argued that the rules that govern cross-examination operate discriminately between the defendant and the complainant;.

> "In some ways the victim is particularly vulnerable in court. There are legal rules limiting the discussion of a defendant's previous convictions or bad character in court; the victim's history and character are less sacrosanct."[695]

The defendant may of course elect not to give evidence at all and therefore may escape cross-examination completely. If the defendant does give evidence there are certain restrictions governing the cross-examination of the defendant in a criminal trial. The Criminal Evidence Act 1898 section 1(f) states;

> "A person charged and called as a witness in pursuance of this Act shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been convicted of such other offence other than that wherewith he is then charged, or is of bad character unless -;"

The section proceeds to list three exceptions upon the satisfaction of which questioning relating to the bad character of the defendant and evidence of previous convictions becomes permissible. Section 1 (f) effectively provides the defendant with a shield that protects him from cross-examination about his character. The defendant may however 'throw his shield away' and therefore lose this protection if he has made his character a relevant issue. Section 1(f)ii states;

> "- he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

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[695] McBarnet, D., (1983), *op cit* 294

Once the defendant has thrown his shield away he is liable to be cross-examined like any other witness. Under section 1(f)(ii), the defendant waives the protection afforded by section 1(f) if for example, he or she asserts his or her own good character by personally giving evidence or through his or her advocate asking questions of prosecution witnesses aimed at establishing the defendant's good character. In this situation, counsel for the prosecution may cross-examine the defendant on his or her bad character and previous convictions. The defendant may also lose his or her shield by attacking the character of prosecution witnesses. The defendant is allowed a certain latitude to assert his or her innocence without losing the shield. An emphatic denial of guilt is not regarded as 'casting imputations' and the shield remains in force. If however the defendant accuses the prosecutor or prosecution witnesses of deliberate fabrication the shield will be lost.[696]

The trial judge also has a discretion under section 1 (f) ii to prevent the prosecution from cross-examining about certain previous convictions even if the shield is lost. It was held in *Selvey v DPP* [697] that this judicial discretion should be exercised where it would be unfairly prejudicial to the defendant to allow evidence of his or her previous convictions. Even if the defendant has attacked the credibility of prosecution witnesses and or asserted his or her good character the defendant's previous convictions may therefore never become evidence before the court.

6.9.4.1. Section 1 (f) (ii) and the Rape Complainant

If the conduct of the defence necessarily involves casting imputations on the prosecutor or prosecution witnesses the accused may still lose his shield. The only exception to this rule is where an accused relies on the defence of consent in a rape case. The defendant's assertion that the rape complainant consented to sexual intercourse was held not to cast an imputation upon the rape complainant's character

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[696] See Tapper, C., *Cross and Tapper on Evidence*, (1996), Chapter Ten

[697] [1970] AC 304

for the purposes of section 1 (f) (ii) in *R v Turner*.[698] The court also held in that case that allegations that a rape complainant was guilty of gross indecency as a preliminary did not amount to an imputation under the Act. This view was upheld in *Selvey v DPP*.[699]

There seem to be no reasons for making rape a special case. According to Iller, the 'mud-slinging' that routinely takes place in rape cases could be constrained if the defendant risked a similar attack upon his character.[700] According to Duncan, the rule leaves complainants in rape cases uniquely vulnerable during cross-examination;

> "In any other offence, an attack on the character of the complainant leaves the defendant open to having his previous convictions put in evidence. In the rape trial alone, the complainant can be constructed as whore, as temptress, as liar, with impunity."[701]

6.9.5. Summary

Research into the conduct of rape trials has revealed that the rules governing the cross-examination of witnesses are grossly inadequate. Defence barristers are free to besmirch and denigrate complainants without fear of rebuke. Such is the ineffectiveness of these rules that Rock concludes;

> "There are rules of evidence and cross-examination, but these are not designed to protect the feelings of those who are interrogated."[702]

This chapter has sought to show that the ordeal of rape complainants during cross-examination is largely attributable to the adversarial structure of criminal trials. It is submitted that while the adversarial framework remains in place, no ethical code will be able to offer rape complainants protection from the attacks mounted by defence

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698 [1944] KB 463

699 [1970] AC 304

700 Iller, M., "A Fair Trial for Rape Complainants", (1992) 4 March, *L.S.G.* at 2

701 Duncan, S., "The Mirror Tells its Tale: Constructions of Gender in Criminal Law", in (ed) Bottomley, A., *Feminist Perspectives on the Foundational Subjects of Law*, (1996, London: Cavendish), at 179

702 Rock, P., (1991), *op cit* at 269

counsel and neither will judicial discretion prove a refuge for vulnerable complainants, as discussed in Chapter seven.

6.10. Conclusion

This chapter has sought to illustrate that cross-examination is an inappropriate mechanism for testing the veracity of rape complainants. Complainants are humiliated and degraded as their personal lives and characters are publicly scrutinised and effectively put on trial. Given the nature of the offence and the wealth of myths and prejudice surrounding rape and female sexuality rape complainants are uniquely vulnerable during cross-examination. A woman's sexual reputation becomes the focus of questioning. Being forced to reveal very intimate details of her sexual experience in court is a humiliating and painful experience for a woman who has been raped. Rape is a crime of sexual violation, the scrutiny of her sexual history in a courtroom of strangers represents a further violation of her sexual integrity.

Women traumatised by rape are inappropriate targets for a brutal verbal interrogation. Complainants are treated harshly and crudely by an advocate necessarily indifferent to the psychological harm he or she inflicts. The adversarial system demands that women seeking justice subject themselves to a gruelling and demeaning ordeal. This study arges that it is time that this was seen for the injustice that it undeniably is and for other methods of testing the evidence of rape complainants and other vulnerable complainants to be investigated.

> "There is a consensus today that physical torture is a bad means to elicit evidence, not only because such testimony may be unreliable but also because torture is abhorrent. It was not so many centuries ago that torture was considered a perfectly appropriate method of eliciting testimony and not a punishment at all. Can we change our thinking about cross-examination too?"[703]

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[703] Danet, B., (1989), *op cit* at 539

Chapter Seven - Protection of Rape Complainants in Court in England and Wales

7.1. Introduction

This chapter addresses the failure of the adversarial process to offer vulnerable complainants protection during cross-examination. As discussed in Chapter six, the trial judge in England and Wales has a duty to prevent questioning of an unduly offensive, vexatious, improper and oppressive nature.[704] Judicial indifference to the plight of rape complainants is often cited as the reason trial judges fail to intervene on the part of complainants during cross-examination. Consequently, there have been calls for the reform of the judiciary. Lees for example, has recommended special training for judges as to the effects of rape and the appointment of more female judges.[705] While individual trial judges are criticised for not adopting a firmer stance, the relationship between judicial non-intervention in rape trials and the adversarial trial process has remained largely unexplored. This chapter argues that the lack of intervention by trial judges on behalf of rape complainants is, in part, attributable to the adversarial structure of criminal trials and the prescribed role of the judge within adversarial theory. It is argued that there is a conflict between the trial judge's duty to protect witnesses from improper questioning and the umpireal function of the trial judge within adversarial criminal proceedings. The result of this conflict is that rape complainants are afforded inadequate protection during cross-examination.

This chapter also examines why the offensive and brutal attacks upon rape complainants are not met with objections from prosecution counsel. The failure of prosecution barristers to intervene on behalf of rape complainants or to mount an

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[704] See Chapter Six at 6.9.2.

[705] Lees, S., *Carnal Knowledge:Rape on Trial*, (1996, London:Hamish Hamilton), at 250

effective counter-attack on the defence is again, often attributed to a lack of sympathy and empathy for victims of rape. The criminal trial process itself has again escaped examination and criticism. This chapter argues that the perceived passivity of prosecution barristers is linked to the adversarial structure of criminal proceedings and the role of prosecution counsel within the English adversarial trial. The vulnerability of the complainant during cross-examination it is argued, is largely a structural consequence of the adversarial process.

The vulnerability of rape complainants in court has led a number of commentators to advocate legal representation for rape victims. In this chapter the arguments for and against the introduction of 'victim advocates' in rape cases are discussed. It is argued that within the existing framework of the adversarial criminal trial a victim advocate would ultimately have little impact upon the treatment of rape complainants in court.

7.2. Cross-examination and Judicial Intervention in Rape Trials

7.2.1. Criticism of Trial Judges

Researchers concerned with the conduct of rape trials have often criticised trial judges for failing to take a more active role in protecting rape complainants during cross-examination.[706] Trial judges, for example, have been blamed for the continued introduction of sexual history evidence following the implementation of the *Sexual Offences (Amendment) Act 1976 section 2.*

> "The role of the judge in a rape trial is crucial, and this has not been affected by the provisions of the 1976 Act. Most judges remain creatures of their time and circumstances, their social opinions largely shaped by education, class and occupation. Their view of the proper sexual roles of men and women, and the social status and situation of women reflect, by acceptance or sometimes by rejection, the values of the generation to which they belong. These are bound to affect their decisions under section 2 of the Act."[707]

Criticism has not been confined to feminist researchers. Lord Hailsham has argued that there would be fewer calls for reform in the area of the cross-examination of rape complainants if trial judges exercised greater control or "a tighter rein" over defending counsel.[708] The *Royal Commission on Criminal Justice Report* (1993) also recommended that trial judges adopt a firmer stance in protecting witnesses from the excesses of counsel;

> "Judges should act firmly to control bullying and intimidatory tactics on the part of counsel.[709]

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706 See Adler, Z., *Rape on Trial*, (1987, London:Routledge & Kegan Paul), Lees, S., (1996), *op cit*

707 Adler, Z., 'The Relevance of Sexual History Evidence in Rape:Problems of Subjective Interpretation' [1985] *Crim.L.R.* 779

708 Lord Hailsham, HL Deb. vol. 375 col. 1773, 22 Oct. (1976)

709 Home Office, *Royal Commission on Criminal Justice Report*, (1993, London:HMSO), at para. 182

> Judges should be particularly vigilant to check unfair and intimidatory cross-examination of witnesses who are likely to be distressed or vulnerable."[710]

Following the Mason case, where a rape complainant was subjected to a cross-examination that lasted 30 hours, the trial judge is the case, Judge Ann Goddard, QC, was criticised by a number of commentators.[711] Sir Frederick Lawson, a retired Lord Justice of Appeal was reported as stating;

> "I cannot conceive how it lasted that long or how some of those questions could be relevant. The judge can stop irrelevant questions and what is more, a judge has a duty to do so."[712]

It is submitted that those who have recommended that trial judges adopt a firmer stance or exercise greater vigilance during the cross-examination of vulnerable complainants have failed to consider the deeper structural issues at play in judicial non-intervention during the examination of witnesses. These issues are identified and examined below.

7.2.2. The Umpireal Judge of Adversarial Theory

As discussed in Chapter one, the umpireal judge is a defining characteristic of the adversarial trial.

> "The passive, disinterested judge in the trial process is a *sine qua non* of the adversarial theory."[713]

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710 *ibid* at para. 201

711 *The Daily Telegraph* 23 August, 1996

712 *ibid*

713 McEwan, J., *Evidence and the Adversarial Process*, (1992, Oxford:Blackwell), at 14

The trial judge of adversarial theory is a scrupulously impartial, largely passive figure. In the contest between the two contending parties the trial judge acts an neutral umpire. In adversarial theory the trial judge must be, and be seen to be, unbiased.

> "..one of the basic requirements of the adversary system is for the judge to be impartial."[714]

The English trial judge may, however, be distinguished from the model judge of adversarial theory. It is the role of the English judge to ensure a fair trial. To this end, in English law, the trial judge may depart from a strictly umpireal role and may call witnesses that both parties neglect to call and engage in the examination and cross-examination of witnesses if the trial judge deems this necessary in the interests of justice. As a result, intervention from the bench is common place in criminal trials. McEwan argues that the English trial judge barely resembles the judge of adversarial theory;

> "The passive umpire is a creature of theory rather than practice,..In the average criminal trial you will be interrupted far more by the judge than by your opponent."[715]

The increasingly active role played by the English trial judge in criminal trials is identified by Evans;

> "It has become the rule, now, for the English judge to come down into the arena and to take part to quite a surprising degree."[716]

The English trial judge may be far removed from the ideal of adversarial theory but there are still significant limitations upon judicial intervention in criminal trials.

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[714] Danet, B., Bogoch, B., "Fixed Fight or Free-For-All? An Empircal Study of Combativeness in the Adversary System of Justice", (1980) 7 *British Journal of Law and Society* at 45

[715] McEwan, J., (1992), *op cit* at 14

[716] Evans, K., *Advocacy at the Bar*, (1983, London:Financial Training Publications), at 91

7.2.3. Limits Upon Judicial Intervention

7.2.3.1. Upsetting the Balance

In *Cain*, the Court of Criminal Appeal stated;

> "There is no reason why the judge should not from time to time interpose such questions as seem to him fair and proper."[717]

The trial judge may intervene at any time during the trial and ask questions of the accused or other witnesses if he or she believes it necessary in the interests of justice to do so. However, in the case of *Hamilton* the Court of Appeal provided guidelines as to when a trial judge's intervention may lead to a conviction being overturned;

> "(a) interventions which invite the jury to disbelieve the evidence for the defence in such strong terms that they cannot be cured by the common formula that the facts are for the jury alone to decide;
> (b) those that make it impossible for counsel for the defence to carry out his duty in properly presenting the defence;
> (c) where the defendant himself has been prevented from doing himself justice and telling his story in his own way."[718]

In adversarial proceedings the parties are charged with the presentation of evidence. Advocates are storytellers who must be allowed to present their version of events. Interventions from the trial judge must not compromise the ability of counsel to tell their stories.[719] It is not the role of the trial judge to investigate the truth. It is a fundamental assumption of adversarial theory that the court relies on the evidence presented by the advocates. The role of the judge is that of referee in the party contest. The trial judge may intervene, but if that intervention is deemed excessive, as having upset the balance of proceedings, a conviction may be overturned. In *Gunning* the Court of Appeal held;

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717 (1936) 25 Cr App R 204
718 [1969] Crim. L.R. at 486
719 Hirock and Others [1970] 1 QB 67

> "..when a judge's interventions were on such a scale as to deprive the accused of the chance, to which he was entitled under the adversarial system, of developing his evidence under the lead and guidance of defending counsel, the trial must be regarded as a mistrial even in the absence of an allegation that the judge's questioning was hostile to the accused."[720]

In *Perks*, the Court of Appeal stressed that excessive intervention from the trial judge may prevent a fair trial;

> "It was the duty of prosecuting counsel, and not of the judge to cross-examine. If during or after cross-examination the judge felt that questions were not asked which should be asked he was free to intervene within the limits of propriety. But until that point he would be wise to limit his interventions to a minimum and principally to intervene only to clarify answers for the assistance of the jury."[721]

The Court of Appeal in 1994 underlined the limits upon judicial intervention and the dangers of overstepping the boundaries;

> "A judge should not intervene, when cross-examination is being conducted by competent counsel, save to clarify matters which he did not understand or thought that the jury might no have understood.....If the judge's interventions and criticisms of counsel are unnecessary and unjustified, this can result in the quashing of the conviction on the ground of a material irregularity in the trial."[722]

The Court of Appeal in the case of *Sharp* also referred to the dangers of intervention during the cross-examination of witnesses;

> "the judge may be in danger of seeming to enter the arena in the sense that he may appear partial to one side or the other. This may arise from the hostile tone of questioning or implied criticism of counsel who is conducting the examination or cross-examination, or if the judge is impressed by the witness, perhaps suggesting excuses or explanations for a witness's conduct which is open to attack by counsel for the opposite party."[723]

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720 Gunning, [1980] Crim.L.R. 592

721 [1973] Crim.L.R. 388

722 (1994) 98 Cr App R. 144

723 *R v Sharp* [1993] 3 All Er 225, 235, cited in Jackson, J., Doran, S., *Judge Without Jury: Diplock Trials in the Adversary System*, (1995, Oxford:Clarendon Press), at 100

It is the quality and not the quantity of interventions that is significant. In *Matthews*, where the trial judge put 524 questions to counsel's 538, the Court of Appeal stated;

> "On any basis the number of interventions and questions asked by this judge were extremely great, and seemed to be more than ought to have been necessary for him to fulfil his functions in supervising the conduct of the trial. However, it appeared that he did not commit the cardinal offence of diverting counsel from the line of the topic of his questions into other channels. In spite of the exceptional number of interventions there was no ground for thinking that the convictions were unsafe."[724]

Where a trial judge intervenes to protect a complainant during cross-examination, he or she runs the risk of being deemed to have interfered unduly with counsel's presentation of the defence. A lawyer commenting on the Mason case highlighted the dilemma faced by the trial judge, Ann Goddard, QC;

> "She is a very tough cookie. But had she intervened too much, she would have had any verdict against Edwards open to appeal on the grounds that he had not been allowed to present a proper defence."[725]

Stephen Holt, prosecuting counsel in the Mason case, claimed in a letter to *The Times* that the trial judge was powerless in law to stop Edwards in his questioning of Julia Mason;

> "The judge could have stopped the cross-examination but the Court of Appeal would be bound to quash any conviction if the defendant could show that he had been prevented from putting his case."[726]

As discussed in Chapter six, in adversarial proceedings 'presenting a proper defence' necessarily entails an aggressive attack upon a complainant's character, her lifestyle, her sexual conduct. Conducting a proper defence involves blaming victims, calling witnesses liars, and having no regard for the welfare of complainants. A number of

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724 (1983) 78 Cr App Rep 23
725 *The Daily Telegraph* 24 August, 1996
726 *The Times* 24 August, 1996

commentators sought to portray the Mason case as an isolated incident. The gruelling nature of her cross-examination was attributed to the fact that Ralston Edwards, the defendant, chose to represent himself. However, research into the conduct of rape trials has shown that cross-examination is routinely a humiliating ordeal for rape complainants. In fact, in a rape trial reported only days after the Mason case, the complainant, a Japanese student who had been gang raped, spent 31 hours in the witness box reliving the ordeal.[727]

7.2.3.2. A Threat to Judicial Impartiality?

Judicial neutrality is fundamental to adversarial theory and intervention from the trial judge should not threaten impartiality by seeming to favour one side. The trial judge may intervene in the interests of justice but not to advance the case of one side. In the English adversarial criminal trial the jury is the fact-finder and the judge should be wary of interfering with this function by asking questions that suggest satisfaction of either the guilt or innocence of an accused.[728] The trial judge must not invite the jury to disbelieve the defendant.

> "Added to the basic adversarial principle that each side should proceed largely unhindered to present its case is the real danger that a judge who intrudes will improperly influence the lay fact-finder."[729]

Judicial intervention to prevent insensitive, hostile, questioning of a vulnerable complainant may well be interpreted within the framework of adversarial procedure as a departure from impartiality and neutrality. It is feared that such intervention may unduly influence the jury.

> "It is always open to the judge to probe, but the tradition is strong that he is an arbiter and not an inquisitor and that the coming to the aid of a party in distress might impair his impartiality."[730]

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727 *The Times* 7 September, 1996
728 *Rabbitt*, (1931) 23 Cr App R 112
729 Doran, S., "Descent to Avernus", (1989) 139(ii) *N.L.J.* at 1147
730 Devlin, P., *The Judge,* (1979, Oxford:Oxford University Press), at 62

The conflict between the role of the trial judge as umpire and the duty to protect witnesses is apparent.

7.2.3.3. Ill-Equipped for intervention

The adversarial system ill-equips trial judges for effective intervention on behalf of vulnerable complainants. Prior to a criminal trial the judge will only be familiar with the basic facts of the case. The trial judge will hear a fuller rendition of the facts only once the trial has commenced and prosecution counsel delivers his or her opening speech. Within the English adversarial system the trial judge takes no part in the preliminary investigative stages of a criminal prosecution and is not furnished with an investigative file. This state of ignorance is seen to enhance judicial impartiality as the trial judge necessarily comes to a case free of preformed opinion.

> "The ignorance and unpreparedness of the judge are intended axioms of the system."[731]

The trial judge therefore possesses only a partial knowledge of the material facts. In such circumstances intervention may well be inappropriate and ineffective.

> "The judge views the case from the peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. He risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions."[732]

The role of the defence lawyer is to act on his client's instructions. The trial judge will not know whether an assertion made by defence counsel during his cross-examination of a rape complainant is simply a ruse, designed simply to humiliate the complainant,

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731 Frankel, M., "The Search for Truth:An Umpireal View", (1975) 123 *U. Pa. L. Rev.* at 1042

732 *ibid*

or whether it is based on allegations made by the defendant. Consequently, scope for judicial intervention is severely curtailed.

The role of the trial judge as umpire is a prerequisite of an adversarial system. When the arbiter has not participated in the investigative process, adversarial theory claims, impartiality is better achieved. The duty of the trial judge to protect witnesses from improper questioning is ultimately incompatible with the role of passive umpire.

7.2.4. Summary

The lack of judicial intervention in rape cases has been cited as evidence of indifference on the part of trial judges to the anguish of women alleging rape. Trial judges are accused of colluding with defence lawyers in their attacks upon the character and behaviour of rape complainants. Comments made by trial judges presiding in rape trials certainly reveal the sexist and prejudiced assumptions held by some members of the judiciary;

> "As the gentlemen on the jury will understand, when a woman says "no" she doesn't always mean it."[733]
>
> "Women who say no do not always mean no."[734]
>
> "The victim was guilty of a great deal of contributory negligence."[735]

The attitudes of trial judges certainly play a role in the treatment of rape complainants in court. This section has sought to show however, that judicial protection of vulnerable witnesses is necessarily problematic within the adversarial trial. There is a conflict between the duty of trial judges to protect witnesses and the function of the trial judge as umpire of adversarial proceedings. The trial judge who intervenes to shield a complainant from the barraging of a defence barrister picks a precarious path;

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733 Judge Dean, cited in Lees, S., (1996), *op cit* at 262

734 Judge David Wild, cited in Smith, J., *Misogynies*, (1993, London:Faber & Faber), at 15

735 Judge Bertrand Richards, cited in *ibid* at 15

> "A judge or magistrate treads a judicial tightrope when he or she intervenes in the course of a criminal trial. The court's motives may be entirely proper: to protect witnesses from unnecessary bullying, to prevent insensitive questions being put, or, to rule on a point of procedure or evidence. But if the Judge or magistrate gets it wrong, then he/she may be the subject of a successful appeal and possible criticism because the appearance of justice may have been unduly tainted."[736]

This study argues that it is time to stop simply blaming trial judges and to redirect criticism at the adversarial system which demands that defence advocates mount such ruthless verbal assaults upon vulnerable complainants and effectively denies them protection in court.

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[736] (1994) 158 *J.P.* at 217

7.3. Prosecution Counsel and the Protection of Rape Complainants

This section examines the criticism directed at prosecution counsel for their failure to protect complainants in court and to subject defendants to a vigorous interrogation comparable to attacks upon rape complainants. It is argued that the lack of protection afforded complainants by prosecution barristers is attributable to the role played by prosecution counsel in the English adversarial trial.

7.3.1. Criticism of Prosecution Counsel

Interviews conducted by Victim Support with a number of rape victims revealed disappointment with the performance of prosecuting counsel in court;

> "I felt totally and utterly unsupported by the CPS - they did not intervene."[737]

> "I feel that victims are just not represented in court. The control that is taken away from you when you are raped is repeated."[738]

Chambers and Millar also identified disillusionment with prosecution counsel;

> "Women felt particularly let down by the prosecutor who they thought could have acted in a more robust way to provide protection from defence questioning."[739]

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737 Victim Support, *Women, Rape and the Criminal Justice System,* (1996, London:Victim Support), at 26

738 *ibid* at 35

739 Chambers, G., Millar, A., "Proving Sexual Assault:Prosecuting the Offender or Persecuting the Victim?", in (eds), Carlen, P., Worral, A., *Gender, Crime and Justice*, (1987, Milton Keynes:Open University Press), at 64

Adler's research revealed that prosecution counsel routinely fail to secure protection of the rape complainant from questioning that should be excluded under the Sexual Offences Amendment Act 1976. Adler found that in the majority of cases prosecution counsel failed to intervene in any way when defence counsel asked questions expressly prohibited by the Act.[740] Brown et al, in a study of sexual offence trials within the Scottish criminal justice system, identified the failure of prosecution counsel to intervene when defence counsel were engaged in speculative questioning;

> "It is possible that a more spirited resistance to such innuendo on the part of the prosecution could have an effect and this should be encouraged, just as the prosecution should be encouraged to attack routinely the character of the accused if such tactics are made on the complainer."[741]

As well as failing to protect rape complainants during cross-examination, prosecution counsel have also been criticised for their failure to challenge the use of sexist stereotypes and rape myths by the defence and to mount an effective counter-attack upon the character of the defendant.[742]

> "Certainly, in rape trials in Britain the prosecution rarely presents a convincing case for the complainant."[743]

Prosecution counsel are criticised for failing to attack defendants as ruthlessly and aggressively as defence barristers attack complainants. According to Lees, the focus in rape trials upon the character of the complainant should be counterbalanced with an equally vigorous examination of the defendant's character. Lees argues that prosecuting barristers should be asking the following questions;

> "What evidence is there of his views of women and sex? Is he prone to violent behaviour? Why not ask questions that make evident the

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740 Adler, Z., "Rape -the Intention of Parliament and the Practice of the Courts", (1982) 45 *M.L.R.* at 674

741 Brown, B., Burman, M., Jamieson, L., *Sex Crimes on Trial*, (1993, Edinburgh:Edinburgh University Press), at 209

742 Lees, S., "Judicial Rape", (1993) 16 *Women's International Forum* at 26

743 *ibid* at 24

> implicit sexist assumptions of the defence's questioning. Why was the defendant out late on his own? Why did he go to a late-night disco? How much did he have to drink? How much does he usually have to drink?"[744]

Lees argues that in order to present a more effective case, prosecution counsel should be encouraged to focus on a number of points. Prosecution counsel should determine the circumstances of the alleged rape;

> "Did the defendant desire the complainant? Was the desire reciprocal? What exactly led up to the alleged rape? Was there any foreplay? What exactly did the couple say to each other? What evidence was there of consent?"[745]

This includes where the alleged rape took place. If it took place in an unlikely venue, such as in an alley or on waste ground, prosecution counsel should press the defendant for the reasons for this. Counsel should also inquire whether there was any discussion about birth control or protection from sexually transmitted diseases including AIDS. Lees also argues that evidence should be introduced as to the effect of the alleged rape upon the complainant;

> "Evidence of the effect of the experience on the woman's life is rarely given- has she changed her job, been unemployed, moved house, changed her sexual habits, suffered from anxiety or ill-health? Has she suffered from unreasonable fears, horror of smells, panic attacks or other such symptoms, often described as 'rape crisis syndrome".[746]

The comparative passivity of prosecution counsel in rape trials is, according to Lees, partly due to the fact that prosecutors belong to male dominated profession that share the same sexist prejudices about female rape complainants as defence barristers. In addition, Lees argues, male prosecutors simply do not comprehend the anguish of complainants;

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744 Lees, S., (1996), *op cit* at 254
745 *ibid* at 253
746 *ibid* at 254

> "Part of the difficulty is that the prosecutors are usually male and often have no idea what the woman has been through."[747]

The failure of prosecution barristers to mount an effective case is also attributed to the fact that barristers generally do not meet complainants before a trial.

> "Not meeting the complainant beforehand must contribute to the prosecution counsel's often appearing disinterested and failing to object to the cross-examination of the claimant's character and past sexual history which was evident in my monitoring of trials."[748]

It is unlikely that the prosecuting barrister and the complainant will have met before the trial. Certainly, the two will not have discussed the case. Prosecution counsel consequently confront no direct challenge to any misconceptions about rape that they may have. Prosecution counsel will have only limited information as to the character of the complainant, her version of events, and the impact the alleged rape has had upon her life. The ability of the prosecution barrister to counter the defence's portrayal of the complainant is therefore limited.

> "..the prosecution often does little to refute such outlandish accusations and, since he or she has not even met the complainant beforehand, is in no position to do so."[749]

This of course, applies to other categories of complainants. No alliance is formed between the prosecutor and the victim. The *Bar Council Code of Conduct (1991),* has been amended to allow prosecution barristers to introduce themselves to prosecution witnesses before the trial. A number of the complainants interviewed by Victim Support however, claimed that no such approach was made;

> "I didn't even know who my barrister was."[750]

> "The worst thing in the world is not being able to talk to the CPS and the prosecution barrister and not knowing the law. Its so evil. In court the

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747 Lees, S., (1993), *op cit* at 26
748 Lees, S., (1996), *op cit* at 106
749 *ibid* at 125
750 Victim Support, (1996), *op cit* at 28

> prosecuting barrister nods at you from the other end of the room when the defendant is chatting to his barrister."[751]

> "I was annoyed I didn't get to see a barrister the defence gets everything. I walked into the court and I had never seen the barrister before."[752]

A further reason offered for the failure of prosecution counsel to object and intervene during the cross-examination of key prosecution witnesses is that such action is perceived as ineffective. The research of Chambers and Millar revealed a certain resignation on the part of counsel for the prosecution. It was well recognised that defence counsel employed 'dirty tactics' and engaged in speculative questioning but prosecution counsel saw no available means of countering such defence techniques.

> "Our own analysis of prosecution decision-making suggests two things: first, it had come to be expected by the prosecution that illegal tactics would be employed by the defence and that nothing could be done about this."[753]

> "At present the prosecutor's case is often undermined and demoralised by passive acceptance of what is pessimistically perceived as the inevitable impact on a jury of defence attacks on the woman's credibility."[754]

The reasons cited above undoubtedly play a part. However it is submitted that central to the perceived passivity of prosecution barristers in rape trials is the role of the prosecutor in the adversarial process.

7.3.2. The Role of the Prosecutor in Adversarial Proceedings

7.3.2.1. Representative of the State

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751 *ibid* at 37
752 *ibid* at 40
753 Chambers, G., Millar, A., (1987), *op cit* at 76
754 *ibid* at 78

Disappointment with the performance of prosecution counsel in court is not confined to rape complainants but has been expressed by complainants in general. Rock identified this dissatisfaction in interviews with prosecution witnesses following their involvement in criminal proceedings. The prosecution witnesses interviewed by Rock appeared to have expected the prosecutor to have represented their interests at the trial. They were in turn let down when the prosecutor did little to protect them in the courtroom.

> "Prosecution counsel turn out not to be 'their' champion at all."[755]

The prosecutor represents the State not the complainant in a criminal case. This is in contrast to the role of the defence counsel which is to vigorously defend his or her client. There is a lawyer-client relationship between the defendant and the defence counsel. The defence counsel is clearly "on the side" of the defendant. In contrast, prosecutors feel no direct responsibility for complainants. The complainant is simply another prosecution witness. Brown et al observed this abdication of responsibility of prosecutors towards complainants in criminal cases within the Scottish system.

> "Most interviewees were emphatic that the prosecution did not have what one judge termed, any "direct" responsibility for the complainer."[756]

Prosecution counsel do not perceive themselves as allies of complainants and consequently, they do not judge it to be their role to offer them protection during cross-examination.

7.3.2.2. A 'Minister of Justice'

The role of prosecuting counsel in adversarial proceedings was examined in Chapter one. It was argued that prosecuting counsel, as ministers of justice, should present the prosecution case fairly and dispassionately. The prosecutor, it is claimed, should

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[755] Rock, P., "Witnesses and Space in a Crown Court" (1991) 31 *Brit. J.Criminol.* at 279

[756] Brown, B., et al, (1993), *op cit* at 172

remain indifferent to the outcome of the case. In contrast, the role of the defending advocate is to defend his or her client vigorously. However, the adversarial criminal trial is structured as a contest, a dispute between two sides. Prosecution counsel are engaged in a partisan presentation of the facts. Prosecutors also talk of 'winning' and 'losing'. The adversarial trial should therefore not be presented as a one-sided contest. Prosecutors are far from impartial figures within the English adversarial trial. However, it is not open to prosecution counsel to mount as unrestrained an attack upon defence witnesses as defence advocates may upon prosecution witnesses. Defence lawyers simply have a freer rein.

> "In action, both are impersonal, but whereas some element of the theatrical, or forensic emotion is still permitted to the defence, any passion of argument, any grandiloquence of phrase or 'playing to the gallery' is out of place in the presentation of the Crown."[757]

> "The function of the prosecutor is not to tack as many skins of victims as possible to the wall but to present the case fairly and completely."[758]

The restraints placed upon prosecution counsel have led Brown et al to describe the adversarial as "asymmetric".[759] Brown et al recognise that defence counsel are permitted to present their cases with a "greater gusto".[760] This 'inequality' helps explain the perceived ambivalence of prosecution counsel in rape trials.

> "While both prosecution and defence advocates bring prior experience of presenting evidence in ways which they believe will impress the jury, the defence have a much freer rein. It is the defence who more often conjure up popular stereotypes in their character constructions, like the 'loose woman' or the 'precocious, seductive girl'. For the prosecution, discrediting defence witnesses is only embarked on when professional judgement deems it appropriate; for the defence discrediting key prosecution witnesses, particularly the complainer in a rape trial, is stock-in-trade." [761]

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757 Humphries, C. "The Duties and Responsibilities of Prosecuting Counsel", [1975] *Crim.L.R.* at 746

758 Pannick, D., *Advocates*, (1992, Oxford:Oxford University Press), at 114

759 Brown, B., et al, (1993), *op cit* at 188

760 *ibid*

761 *ibid*

7.3.3. Strategic Non-intervention

A further possible explanation for the prosecutor's failure to protect the rape complainant during cross-examination can be found in the adversarial structure of English criminal proceedings. The adversarial trial is structured as a contest. The actions of advocates in criminal trials are governed in part by strategic considerations. Such considerations will also govern intervention by prosecution barristers during the cross-examination of prosecution witnesses. The prosecutor it is submitted, will only be inclined to object to lines of questioning pursued by the defence if he or she perceives it to be strategically advantageous to intervene. Where the prosecutor perceives no tactical advantage in an objection, none will be made. In addition, from the point of view of the prosecutor, an aggressive attack on the complainant, that results in considerable visible distress, may serve to alienate the jury from the defence and therefore benefit the prosecution case. The prosecuting counsel may decide not to intervene on strategic grounds. The prosecutor's primary allegiance is to the prosecution case. In adversarial proceedings, the case takes precedence over the welfare of the complainant.

A further strategic consideration that may serve as a disincentive to raising objections in court, is the potential effect of such action upon the jury. As explained in Chapter six, in the adversarial trial the performances of all the central protagonists can be decisive. Prosecution counsel must always be aware of the impression he or she is conveying to the jury. Frequent objections it is feared, may alienate the jury. Advice offered by Sir David Napley, suggests that such fears on the part of prosecution barristers are justified;

> "The prosecutor, who gives the impression of an overweening anxiety to secure a conviction, who feels the need to interrupt or nullify every point made for the defence however small, or to cross-examine in an aggressive fashion is far more likely to arouse the displeasure of the

> court, or even psychologically to enlist its sympathy in favour of the defence."[762]

The prosecutor that frequently objects to defence questions may be perceived as seeking to unfairly undermine the defence case. For a number of reasons objections by prosecution counsel are not commonplace in the English courtroom. There appears to be a norm of not objecting.

> "In England it is rare for counsel on either side to object to evidence offered by the other side." [763]

7.3.4. Summary

It is not the role of prosecution counsel to protect rape complainants from improper and distressing questioning during cross-examination. Prosecution counsel have no direct responsibility for the interests and welfare of complainants in court. The adversarial process also generates a number of disincentives to intervention. The claim that there is a norm of not objecting in criminal trials in England and Wales is supported by the fact that advocacy manuals which advise advocates on their courtroom technique are silent on the circumstances in which barristers should or should not intervene on the part of their own witnesses during cross-examination. The *Code of Conduct of the Bar of England and Wales* is also silent on the matter.

Critics of prosecution counsel have advocated the introduction of training and education initiatives;

> "Prosecution counsels should undergo training before they undertake to represent women in rape cases."[764]

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762 Napley, D., *The Technique of Persuasion*, (1970, London:Sweet & Maxwell) at 71
763 Karlen, D., *Anglo-American Criminal Justice*, (1967, Oxford), at 186
764 Lees, S., (1996), *op cit* at 253

It is submitted, that within the existing adversarial structure of criminal trials, training will have a limited impact on the protection afforded rape complainants during cross-examination. As long as criminal proceedings are structured as a contest between two opposing sides, prosecutors will always put the prosecution case before the individual interests of prosecution witnesses. The interests of complainants and prosecutors are not necessarily compatible but may diverge sharply. The prosecutor will only step in and protect the complainant where he or she believes such intervention will serve the prosecution case. Where the prosecution case will derive no direct benefit from intervention or in fact, the raising of objections may harm the prosecution case, protection will not be forthcoming. Prosecutors may sacrifice the interests of vulnerable complainants in order to secure a tactical advantage at the trial.

While this chapter has argued that the relative passivity of prosecution barristers in rape trials may, in part, be attributed to the role played by the prosecutor in the adversarial criminal trial, it is submitted that the adversarial process need not bar prosecution barristers from challenging the sexist stereotyping which plays a central role in rape trials. For example, as Lees suggests, through putting to defendants the questions typically put to complainants in rape cases and exposing the implicit sexist assumptions of defence questioning. It is therefore submitted that while training may have little impact upon the protection afforded rape complainants by prosecution barristers, training may have a beneficial impact upon the performance of prosecutors in court.

It is also submitted, that encouraging prosecution barristers to engage in the same tactics as defence advocates, to be equally belligerent, will ultimately do little to improve the treatment of rape complainants in court. Such a move would only serve to compound the combativeness of the adversarial process and make for a bloodier fight. Rather an alternative to cross-examination should be sought.

7.4. Legal Representation for Rape Complainants

> "The failure to provide a barrister for the complainant or the alternative of a different relationship between the prosecution and the complainant results in a highly disinterested representation on the woman's behalf."[765]

The lack of protection afforded rape complainants in court has led a number of commentators to advocate the introduction of legal representation for rape complainants. In this section arguments for and against legal representation are examined. It is argued that while victim advocates may have a valuable role to play in the provision of information and support to complainants, their impact on the treatment of rape complainants in court would necessarily be very limited.

7.4.1. Calls for of Legal Representation

Research conducted by Victim Support suggests that many women feel unrepresented in criminal proceedings. One woman interviewed by Victim Support stated;

> "It is unfair that you are not allowed any legal help. That was very hard to deal with. I felt left out of the proceedings."[766]

Having researched the conduct of rape trials in England and Wales, Temkin has advocated legal representation for rape complainants.

> "There is clearly a strong case for permitting a complainant to be accompanied by a lawyer. His presence is bound to be reassuring and

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765 Lees, S., (1993) *op cit* at 23

766 Victim Support, (1996), *op cit* at 34

> should make the prospect of confronting the defendant, his family and friends less intimidating."[767]

Temkin appears to have based her recommendations on her research of rape trials in Denmark and Norway, where rape complainants are entitled to legal representation. Temkin argues for a victim advocate with a clearly defined and limited role. The victim's legal representative would not act as another prosecutor. According to Temkin, victim advocates should be able to do three things. Firstly, the victim advocate should be permitted to object to improper questioning during cross-examination. Secondly, the victim advocate should be allowed to contest applications made under Sexual Offences (Amendment) Act 1976 section 2. Thirdly, the victim advocate could assist the complainant in seeking compensation.[768] Helena Kennedy, QC, advocates representation for rape complainants but with a more restricted role;

> "We should explore the possible role of a victim representative in the court, whose function it is to explain the process to the witness and familiarise her or him with the procedure without treading in the realm of evidence, so that coaching is avoided. The victim counsel or "amicus", would act only in sensitive cases and would not participate in the adversarial process in front of the jury. However, they could participate in arguments to the judge about the admissibility of evidence concerning the victim's history." [769]

Kennedy envisages a situation whereby victim advocates would only participate at the pre-trial stage rather than having an active role at the trial. Yaroshefsky also argues against participation at the trial;

> "The role of counsel, however, should not be expanded to allow the victim's counsel to participate in the trial. While victim's counsel can play a critical role in empowering the victim, allowing the victim's attorney to examine prosecution and defence witnesses threatens to be unwieldy, time consuming, and impractical for the prosecution, the defence and the court. "[770]

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767 Temkin, J., *Rape and the Legal Process*, (1987, London:Sweet & Maxwell), at 184

768 Temkin, J., (1987), *op cit* at 187

769 Kennedy, H., Eve was Framed, (1992, London:Chatto & Windus), at 138

770 Yaroshefsky, E., "Balancing Victim's Rights and Vigorous Advocacy for the Defendant", [1989] 1 *Ann. Surv. Am. L.* at 146

While not specifying the appropriate role of a victim advocate, McEwan argues that all complainants would benefit from legal representation;

> "Certainly, legal representation would alleviate the position of all victims who give evidence for the prosecution."[771]

Legal representation for vulnerable complainants would appear to have a number of attractive benefits. Primarily, the victim advocate could prove a valuable source of information and support.

7.4.2. Provision of Information

In 1986, Shapland et al identified a lack of information as one of the main causes of victim dissatisfaction with the trial process.[772] The researchers found that victims were provided with insufficient information as to the progress of a case and their role within the criminal process.

> "In general, one has the impression of victims being isolated and confused at court, not knowing what they may be required to do or what they are allowed to do. They do not realise what is happening around them and it is rare for anyone to explain it to them."[773]

A recent study conducted by Victim Support into the treatment of rape victims within the criminal justice system examined the provision of information.[774] A survey of Witness Services suggests that victims of rape are still facing difficulties in obtaining information. Victims, the survey found, were not kept informed about the progress of their case especially with regard to bail decisions and not informed when cases were

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771 McEwan, J., (1992), *op cit* at 111

772 See Shapland. J., Willmore, J., Duff., P., *Victims and the Criminal Justice System*, (1985, Aldershot:Gower)

773 *ibid* at 69

774 Victim Support, *Women, Rape and the Criminal Justice System*, (1996, London:Victim Support)

dropped due to insufficient evidence.[775] The victim advocate could therefore prove a valuable source of much needed information.

7.4.3. Provision of Support

Shapland and et al reported in 1985 that victims were offered no support when they attended court.[776] The experience of being a witness was presented as an isolating and lonely one.

> "The experience of victims waiting outside the courtroom was one of feeling superfluous and ignored."[777]

Rock's study of criminal proceedings in Crown Courts confirmed that prosecution witnesses were often ignored by court officials.[778] According to Rock, the police were the only professionals to spend time with victims at court.[779] In addition, complainants often expected a reassuring word, or at least acknowledgement, from prosecution counsel but this was not forthcoming.[780]

> "Few talk to witnesses as they sit, frequently in dejection, on the yellow metal benches outside the courtroom."[781]

Rock reports that prosecution counsel readily deny any responsibility for the complainant or prosecution witnesses in general. One barrister interviewed by Rock is reported as stating;

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775 *ibid* at 10
776 Shapland, J., et al, (1985), *op cit* at 63
777 *ibid*
778 See Rock, P., *The Social World of the English Crown Court*, (1993, Oxford:Clarendon Press)
779 Rock, P., "The Victim in Court Project at the Crown Court at Wood Green", (1991a), 30, *Howard Journal*, at 308
780 Rock, P., "Witnesses and Space in a Crown Court", (1991,b), 31, *Brit. J. Criminol.* at 279
781 Rock, P., (1991a), *op cit* at 308

> "A distressed witness is none of my business- the police will look after prosecution witnesses."[782]

Until recently, the *Code of Conduct of the General Council of the Bar of England and Wales* effectively barred prosecution barristers from talking to prosecution witnesses.[783] The rule against consulting with witnesses was aimed at preventing briefing or coaching. Rock reports that prosecution counsel would actively avoid contact with the victim and other prosecution witnesses outside the courtroom;

> "It should be noted that even to be seen with victims was thought reprehensible."[784]

The Code has since been amended and barristers may now introduce themselves to prosecution witnesses. The *Victims Charter 1996* states that a victim may expect a Crown Prosecution Service representative to introduce themselves and tell them what to expect.[785] Rock's research however strongly suggests that complainants may still not look to prosecution barristers for support.

7.4.3.1. Outsiders

Rock argues that prosecution barristers and other professional court users deliberately avoid complainants. According to Rock, victims threatened the conduct of cases, and the "appearance of neutrality so carefully cultivated by staff"[786].

> "Lawyers, judges jurors and staff kept their distance from prosecution witnesses for fear of appearing to conspire, collude, and coach. Witnesses were isolated, not to talk with anyone about their evidence."[787]

Victims and prosecution witnesses are 'outsiders';

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782 Rock, P., (1993) *op cit* at 171
783 General Council of the Bar of England and Wales, *Code of Conduct of the Bar of England and Wales*, (1991, as amended, London:Bar Council)
784 Rock, P., (1993), *op cit* at 171
785 Home Office, (1996), *op cit* at 4
786 Rock, P., (1993), *op cit* at 179
787 *ibid* at 89

> "Together with others collectively labelled 'the public' the defendants, spectators, support teams and friends and relations of the belligerents, they were thrust to a distance, never fully trusted, denied knowledge about much of what transpired, relegated to the safe, outer margins of the court's social organisation. Victims were outsiders. That was a most fundamental division."[788]

While indispensable in criminal trials, Rock observed that victims are kept at a safe distance.

Recent research conducted by Victim Support indicates that rape complainants feel this lack of support keenly.[789] One woman interviewed by Victim Support complained;

> "I felt like everything was working against me- really let down. I felt totally abandoned by the whole system. I received no professional help from anybody."[790]

Another interviewee commented;

> "I would have liked to have met the CPS before the case. I was on his side but there was no chance to get a rapport. You are anxious anyway and it makes it worse that you don't know who is who."[791]

A victim advocate could compensate for the lack of a lawyer-client relationship between the prosecutor and the rape complainant. The victim advocate could be an ally for the rape complainant and a source of much needed support. The complainant would have the benefit of seeing that someone was on "her side" and consequently, would no longer be so isolated and marginalised within the criminal justice system. Legal representation may alleviate feelings of vulnerability and powerlessness.

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788 *ibid* at 179

789 Victim Support, *Women, Rape and the Criminal Justice System*, (1996, London:Victim Support), at 55

790 *ibid* at 35

> "The lawyer-client relationship may be the most important component of empowering victims of crime. The adversary system, which is dependent upon case presentation by attorneys, does not provide for representation for the person who has been injured and is now asked to participate in the criminal justice process."[792]

7.4.4. In Court

It has been argued that the very presence of a victim advocate in court may discourage defence barristers from embarking upon ruthless attacks upon rape complainants during cross-examination;

> "Very often, the mere presence in court of a lawyer for the complainant is sufficient to ensure that she is properly treated."[793]

Alternatively, it is argued that the presence of the victim advocate in court may encourage the prosecutor to adopt a less passive stance and to object more frequently to improper questioning. Berger claims that the presence of a representative;

> "..may subtly spur the prosecutor to put forth his most vigorous efforts."[794]

However, it is submitted that allowing a victim advocate an active role at trial would not necessarily lead to the better treatment of rape complainants in court. The preceding chapters have sought to show that the ordeal of rape complainants in court is largely attributable to the adversarial structure of criminal trials. It is submitted that legal representation for rape complainants fails to address the ultimate source of the complainants treatment in court and consequently, would do little to improve the situation of rape complainants during cross-examination. In Chapter six it was

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791 *ibid* at 25

792 Yaroshefsky, E., (1989), *op cit* at 145

793 Temkin, J., (1987), *op cit* at 176

794 Berger, V., "Man's Trial, Woman's Tribulation:Rape Cases in the Courtroom", [1977] 1 *Colum. L. Rev.* at 86

claimed that the ruthless and degrading treatment of rape complainants by defence barristers is, to a great extent, attributable to the role and nature of cross-examination within the adversarial trial. It was argued that the bullying and humiliation of complainants is an inevitable consequence of the adversarial fact-finding process. It is therefore improbable that the presence of the victim advocate would inhibit the attacks mounted by defence counsel. In fact, the presence of the victim advocate in court may well result in a more vitriolic attack from a defence counsel who perceived the victim advocate to represent an unfair advantage to the prosecution.

In this chapter it has been argued that the perceived passivity of prosecution counsel is largely due to the role of the prosecutor in the English adversarial trial. The presence of a victim advocate is therefore, it is submitted, very unlikely to influence the performance of prosecution barristers or encourage barristers to object to improper questioning by defence barristers.

This chapter has also sought to demonstrate that the lack of protection afforded rape complainants by trial judges is also in part, a structural consequence of the adversarial process. As it would be the task of trial judges to rule on the validity of a victim advocate's objections, it is submitted that to side too frequently with the victim advocate would carry the same dangers as personal intervention by the trial judge. Allowing victim advocates a participatory role in criminal proceedings would not guarantee rape complainants fairer treatment in court.

In addition, it is difficult to envisage how a third party could practically be injected into the trial process. The adversarial trial is structured as a contest between two sides. Were victim advocates to be given an active role in court this would undoubtedly upset the balance of the party contest. If victim advocates were to be given so limited a role that proceedings were not disrupted, the value of their presence would be questionable.

As an alternative to the introduction of legal representation for rape complainants it has been argued that the role of prosecutors could be reformed to more closely resemble representatives of the complainant. Lees advocates a closer relationship between the complainant and the prosecutor in line with the United States;

> "... it is essential for the woman to prepare her case with the prosecution counsel as is the case in the San Diego system in the United States."[795]

Lees also advocates a reformed Crown Prosecution Service which would be responsible for informing complainants about the criminal process and providing information and support.[796] However, reforming the role of prosecution counsel so that the prosecutor may be more accurately described as the complainant's representative would, it is submitted, clearly conflict with the prosecutor's role in England and Wales as a 'minister of justice'.

7.4.5. Summary

There is a case, it is submitted, for the introduction of legal representation for rape complainants and for other vulnerable complainants including children and adults with learning difficulties. The victim advocate could assume responsibility for providing vulnerable complainants with information about their case and be a source of support in a criminal justice system in which complainants are reportedly shunned by other criminal justice professionals. It is however submitted, that allowing victim advocates to play an active role in court would not lead to a marked improvement in the treatment of rape complainants. The victim advocate would not prevent or compensate for the ruthless attacks mounted by defence lawyers during cross-examination and neither would the presence of the victim advocate lead to the greater protection of rape complainants in court.

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795 Lees, S., (1993) *op cit* at 34

796 Lees, S., (1996), *op cit* at 253

7.5. Conclusion

Trial judges and prosecution barristers have been criticised for their failure to provide rape complainants with adequate protection during cross-examination. They have been accused of indifference and collusion with defence lawyers. It is undoubtedly true that there are trial judges and advocates who are ignorant of the effects of rape, who believe the myths that most allegations of rape are false, that women are ultimately responsible for rape and consequently, that complainants in rape cases are 'fair game'.[797] This chapter has sought to demonstrate that the lack of protection afforded women during cross-examination is also largely attributable to the adversarial process and the roles prosecuting counsel and trial judges are required to play in criminal proceedings. While the adversarial process provides the complainant with a formidable opponent in the form of the defence lawyer, it offers her no protector, no ally. This chapter has also sought to show that injecting a 'victim advocate' into the present procedural framework would not necessarily lead to the increased protection of rape complainants in court. While cross-examination is retained as the mechanism for testing evidence in rape cases, the secondary victimisation or 'judicial rape' of rape complainants will continue.

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[797] McEwan, J., (1992), *op cit* at 103

Chapter Eight - The Examination of Rape Complainants in Dutch Criminal Proceedings

8.1. Introduction

In Chapter six it was argued that cross-examination is an inappropriate device for testing the evidence of rape complainants and that an alternative mechanism should be sought. In the Netherlands there is no such thing as cross-examination. As a general rule, rape complainants in the Netherlands are examined at a pre-trial hearing by an examining magistrate and a defence lawyer. This chapter examines criticism of the treatment of rape complainants at pre-trial hearings. Namely, that rape complainants are asked improper and offensive questions by defence lawyers and that they are inadequately protected by examining magistrates.[798] Comparative literature on Dutch criminal procedure contains little discussion of the examination of witnesses in the Netherlands. There is also limited empirical research data on the questioning of rape complainants at pre-trial hearings. To compensate for this, semi-structured interviews were conducted with two groups of Dutch practitioners. Firstly, a group of lawyers belonging to all-women law firms who had represented victims of rape in criminal proceedings. These were lawyers who had observed both trials and pre-trial hearings in rape cases. The second group of practitioners interviewed were examining-magistrates who had conducted pre-trial hearings in rape cases. These two groups were chosen, as opposed to public prosecutors or police officers for example, because of their first-hand experience of pre-trial hearings. Both groups were in a strong position to comment upon the treatment of rape complainants during examination. The aim of the interviews was to provide supporting evidence for claims made by

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[798] Van Driem, G., "Waarom slachtoffers van seksueel geweld het strafproces moeten mijden" in (ed) Soetenhorst de Savorin Lohmen, *Slachtoffers van misdrijven: ontwikkelingen in hulpverlening recht en beleid* (1989, Arnhem:Gouda Quint)

feminist lawyers in the Netherlands regarding the treatment of rape complainants at pre-trial hearings.

Elsewhere in this study it has been argued that Dutch criminal procedure holds a number of significant advantages for vulnerable complainants. An aim of this chapter is to explore whether a shift towards inquisitorial style proceedings would mark a departure from gruelling and demeaning interrogation in rape cases.

8.2. Criticism of Defence Lawyers

Van Driem, a lawyer who has attended pre-trial hearings and trials in the capacity of a rape complainant's legal representative, has described the treatment of rape complainants at pre-trial hearings in terms of secondary victimisation. Van Driem claims that women are subjected to a painful and sexist interrogation.[799] The group of Dutch lawyers interviewed were also very critical of the treatment of rape complainants at pre-trial hearings. Defence lawyers were the focus of considerable criticism. In a number of ways the criticisms voiced reflected those of researchers of rape trials in England and Wales. Defence lawyers were accused of blaming women for rape, of suggesting outlandish reasons for a false allegation of rape and of requiring complainants, in certain circumstances, to provide irrelevant details of a past sexual relationship.

8.2.1. Victim-Blaming

Van Driem claims that victim-blaming is common place in rape cases in the Netherlands.

> "It is almost impossible for the lawyer of a suspect of sexual violence to defend his client without simultaneously laying blame on the behaviour of the victim."[800]

According to Van Driem, in rape cases, defence lawyers present their client as the true victim and question the propriety of a complainant's behaviour prior to an alleged rape. Typically, rape complainants are required to account for their 'risky' conduct. Among the questions routinely put to complainants in rape cases Van Driem cites;

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[799] Van Driem, G., (1989), *op cit* at 53

> "Why did you let your ex-boyfriend in and offer him a cup of coffee.?"[801]

Leuw claims that a common defence strategy in rape cases involves the defendant blaming the woman.[802] The defendant excuses his actions, and thereby seeks to escape criminal sanction, by ascribing responsibility for what took place to the complainant.[803]

The interviewees also claimed that defence lawyers frequently suggest that a woman has acted with implausible naivety or foolishness when, for example, she invited a male acquaintance into her home or accepted a lift. In Chapter six, it was explained that the 'culpability' of the victim plays an important role in rape trials in England and Wales. Women are blamed for creating opportunities assailants to rape them or for failing to take evasive action. According to the lawyers interviewed, the 'culpability' of a complainant is thoroughly explored in at pre-trial hearings in rape cases. The interviewees also explained that suggestions that a complainant precipitated or in some way 'contributed to' her assault can be devastating for victims.

According to the interviewees, complainants in rape cases are also blamed for not resisting enough. Victims of rape, the lawyers explained, are expected to vigorously resist their attackers and have sustained physical injuries in the process. Women, it was alleged, are rarely believed when there is little evidence of physical injury. Leuw claims that it is common for defendants in rape cases to present what took place as an 'unfortunate misunderstanding'.[804] According to the interviewees, defence lawyers blame women for such 'misunderstandings'. Complainants are asked for example, whether they invited the advances of a defendant, whether they were unequivocal in their refusal, whether it is possible that a defendant misinterpreted their protestations or that their behaviour was misleading. Again, a woman's behaviour is scrutinised for culpability. Doomen provides an example of questions typically put to complainants;

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800 *ibid*
801 *ibid*
802 Leuw, E., "De Behandlung van Verkrachtinszaken voor de Rechtbank", (1985) *TvCr.* at 147
803 *ibid*
804 *ibid*

> "..did you go out together, did you kiss him, at what moment and how did you make it clear that his advances were not welcome, how did you behave during the rape, did you continue to resist, did he hit you, did he threaten you, why did you submit, what happened after the rape."[805]

According to the lawyers interviewed, a woman will also find the 'appropriateness' of her behaviour after an alleged rape questioned. Complainants will be asked why they did not report an alleged sexual assault immediately. Defence lawyers will argue that a time lapse is indicative of fabrication, claiming that a 'genuine rape victim' would have made a prompt report. As discussed in Chapter six, research has demonstrated that the reactions of women both during and after rape vary. There is no typical response to rape.

8.2.2. Why Women Lie About Rape

Van Driem claims that defence lawyers in rape cases routinely claim that their client is the victim of a mendacious, vindictive or deluded woman.[806] The lawyers interviewed were also critical of the likely motivations suggested by defence lawyers for an allegation of rape. According to the interviewees, complainants in rape cases are accused of being malicious, jealous and unstable. Other reasons offered by defence lawyers in rape cases observed by the lawyers interviewed included blackmail, fantasy, and guilt. The claims of the Dutch lawyers interviewed suggest that rape complainants in the Netherlands are accused of lying about rape for reasons as outlandish and out-dated as those introduced in rape trials in England and Wales.

8.2.3. Irrelevant Sexual Details

Where a complainant has had a sexual relationship with the defendant the interviewees claimed, she will often be asked to give unnecessary sexual details. According to the interviewees, women they had represented found giving intimate

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805 Doomen, J., *Heb Je Soms Aanleiding Gegeven, Handeleiding voor Slachtoffers van Verkrachting bij de Confrontie met Politie en Justitie*, (1978, Amsterdam), at 39

806 Van Driem, G., (1989), *op cit* at 54

details about a previous sexual relationship very distressing. Leuw states that giving evidence in a rape case will inevitably be a painful experience as a complainant will have to talk about explicit details.[807] However, the interviewees claimed that defence lawyers routinely ask intrusive and unnecessary questions about a complainant's sexual relationship with a defendant.

8.2.4. Sexual History Evidence

The lawyers interviewed were asked whether complainants in rape cases were questioned about their sexual history or their reputations at pre-trial hearings. In marked contrast to the experience of rape complainants in England and Wales, the interviewees reported that a woman's sexual character does not play an important role in rape cases. The appearance of a complainant, her clothes, her make-up, it was claimed, were matters not generally explored. The number of sexual partners a woman has had would also not generally be investigated. It was explained that the sexual character of a rape complainant was considered more relevant five years ago when rape complainants were asked questions about their sexual history and their appearance at the time of an alleged sexual assault.

8.2.5. Lifestyle

The interviewees were also asked whether the lifestyle of a complainant played an important role in rape cases. Again, in contrast to the experience of rape complainants in England and Wales, the interviewees claimed that the 'respectability' of a complainant was generally not explored at pre-trial hearings. In the same way that the sexual character of complainants had, according to the interviewees, become less significant over the last five years, so too it was claimed, had the importance attached to the 'respectability' of complainants. Research into the conduct of rape trials in England and Wales has shown that rape complainants are frequently questioned for

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807 Leuw, E., (1985), *op cit* at 139

example, about their financial situation, their use of drugs and alcohol. According to the interviewees, rape complainants are generally not asked about such matters at pre-trial hearings.

8.2.6. Summary

The criticisms of the Dutch lawyers interviewed parallel, in many ways, those raised by researchers of rape trials in England and Wales and provide support for claims made by Van Driem. Defence lawyers are criticised for being insensitive in their handling of rape cases, they are accused of asking irrelevant and offensive questions. Defence lawyers are also criticised for invoking stereotypes of appropriate female behaviour and for blaming women for rape. Interviews with Dutch lawyers also suggest important differences between the questioning of rape complainants in England and Wales and the Netherlands. Namely, that rape complainants in the Netherlands are generally no longer subjected to ruthless character assassinations based upon their sexual history and personal lives.

8.3. Response of Examining Magistrates

The examining-magistrates interviewed were asked to respond to the criticisms outlined above. The examining-magistrates rejected the claim that rape complainants are victimised at pre-trial hearings and that complainants are subjected to painful and sexist interrogations. One examining-magistrate accepted that the questioning of complainants at pre-trial hearings could be 'tough' to compensate for the fact that rape complainants were generally not examined in court. The same examining-magistrate however maintained that the majority of defence lawyers are considerate in the way they ask questions in rape cases;

> "Lawyers try to find a way between defending their client and not hurting the feelings of the victim."

When asked if it was common for defence lawyers to criticise the behaviour of rape complainants prior to an alleged rape, the majority accepted that defence lawyers do suggest that complainants in rape cases have acted foolishly or recklessly. One examining magistrate declared however, that a defence lawyer "would not dare" suggest that a victim deserved or had asked to be raped while she was presiding over proceedings. While conceding that defence lawyers often seek to ascribe responsibility to complainants, the examining magistrates were keen to stress that they, and the majority of their colleagues, did not engage in 'victim blaming'. The examining magistrates maintained that such attitudes were no longer expressed. One interviewee stressed that this was also true of his older, male colleagues.

It was also accepted that defence lawyers accuse women of lying about rape for many reasons including jealousy, fantasy, spite, and fear of parental disapproval. Where a defence lawyer made such an accusation, it was explained, a complainant would generally be questioned about it. The examining magistrates rejected any suggestion however, that allegations of rape are generally met with scepticism.

With regard to the sexual character of rape complainants, the examining magistrates confirmed the situation described by the lawyers interviewed. It was claimed that a complainant's sexual reputation or sexual history was regarded as largely irrelevant. The sexual reputation of a complainant it was maintained, no longer played a significant role in rape cases. Typical responses from examining magistrates included;

> "In my opinion there is no difference when the victim is a prostitute or a 16 year old virgin."

> "A woman can have the sex life that she wants, she is still entitled to say no."

The examining magistrates also supported the claim that a complainant's lifestyle and her 'respectability' were generally not the focus of defence questioning in rape cases. The examining magistrates explained that a complainant's lifestyle, like her sexual history, would be considered largely irrelevant. It was conceded that the respectability of complainants may have been considered pertinent five years ago but attitudes had changed and this was no longer the case.

> "Nowadays the lifestyle of the complainant does not play an important role."

The examining magistrates explained that they would be far more concerned with the facts surrounding an alleged rape than with the general character and lifestyle of a complainant. More attention, it was claimed, would be paid to any inconsistencies between a complainant's police statement and her evidence at the pre-trial hearing and any weaknesses in her story.

8.3.1. Summary

Generally, the examining magistrates interviewed rejected the idea that rape complainants are treated unfairly at pre-trial hearings or are subjected to improper questioning by defence lawyers. The examining magistrates did however confirm that

the importance attached to the sexual history or 'respectability' of complainants in rape cases had diminished in recent years.

8.4. Limitations placed upon Questioning

The ineffectiveness of the limitations placed upon cross-examination by defence lawyers in England and Wales was examined in Chapters six and seven. In Dutch criminal proceedings there are few rules regarding the examination of witnesses. There are no rules specifically governing the questioning of rape complainants. There is for example, no equivalent of the Sexual Offences (Amendment) Act 1976 section 2 regulating the introduction of sexual history evidence.

> "There is no special regulation for victims of rape in the black letter law."[808]

The examining magistrates interviewed explained that the only limits placed upon the questioning of rape complainants at pre-trial hearings are those imposed by examining magistrates. It is the examining magistrate that conducts the hearing and has the power to disallow questions that are deemed irrelevant or improper. No similar restraints are imposed upon examining magistrates. The examining magistrate therefore plays a decisive role in the questioning of rape complainants.

Van Driem claims that examining magistrates routinely fail to object to the improper interrogation of rape complainants by defence lawyers.[809] The reason offered by Van Driem for the failure of examining magistrates to object to improper lines of questioning is largely inexperience. According to Van Driem, the examining magistrates who preside at pre-trial hearings are often young and inexperienced and consequently do not appreciate the traumatic effects of rape on victims and the need to protect women from unnecessary and distressing questioning;

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[808] Nijboer, J.F., "Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands", in (ed) Nijboer, J.F., *Proof and Criminal Justice Systems*, (1995, Frankfurt:Peter Lang), at 116

[809] Van Driem, G., (1989), *op cit* at 53

> "Most examining magistrates have absolutely no experience of hearing victims of sexual violence."[810]

In this section the views of both groups of practitioners as to the effectiveness of the limitations placed upon the questioning of rape complainants at pre-trial hearings are discussed.

8.4.1. Criticism of Examining Magistrates

The lawyers interviewed claimed that they had attended pre-trial hearings where examining magistrates had not intervened to protect a complainant from irrelevant and offensive questioning. They also cited ignorance of the impact of rape on victims as underlying the failure of examining magistrates to intervene. It was conceded that there are some examining magistrates who are sympathetic to the plight of rape complainants and who do object to defence questions. However, the interviewees maintained that in their experience, many examining magistrates do not seek to control or regulate defence questioning of rape complainants. The level of protection afforded complainants, it was claimed, ultimately depends upon the individual examining magistrate.

> "Different judges have different criteria for what is improper."

The failure of examining magistrates to protect rape complainants from improper questioning, it was argued, leaves women very vulnerable. In the absence of empirical research in this area it is impossible to identify clearly the extent of the problem. The interviews with Dutch practitioners provide some support for the claims made by Van Driem and would indicate that at least some examining magistrates are failing to protect rape complainants at pre-trial hearings.

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[810] *ibid*

8.4.2. Criticism of Trial Judges

The lawyers interviewed also directed criticism at trial judges. Trial judges, the interviewees claimed, fail to object to the disparaging comments and unsubstantiated accusations made by defendants in rape trials. In Dutch criminal trials, defendants are free to address the court.[811] The interviewees claimed that in rape cases, defendants use this opportunity to make insulting and unfounded remarks about complainants.[812] As discussed in Chapter three, rape complainants are rarely examined in court. According to the lawyers interviewed, it is however, common for women, provided they have been informed of the date of the trial, to attend court and observe proceedings from the public gallery. The interviewees claimed that a source of frustration and distress for rape complainants within Dutch criminal proceedings, is the fact that they are given no opportunity to rebut or answer the improper insinuations and observations made by defendants in court and the fact that trial judges do not prevent defendants making such denigrating comments. Again, it is impossible to draw firm conclusions as to the extent of this problem.

8.4.3. Views of Examining Magistrates

The examining magistrates interviewed claimed that they saw themselves as under a positive duty to protect vulnerable complainants from improper questioning. One examining magistrate stated;

> "It is part of the role of the Rechter-Commissaris to protect witnesses."

Commenting on the questioning of rape complainants another examining magistrate stated;

> "There are no legal rules but there are ethical rules."

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[811] See Chapter One

The majority of examining magistrates interviewed, claimed that they would, and regularly did, object to questions asked by defence lawyers and inform complainants that they were not obliged to answer improper questions. When asked in what circumstances they would intervene typical responses included;

> "When a lawyer goes too far."
>
> "If a defence lawyer is too rude."

One examining magistrate interviewed however explained that he rarely objects to defence questions on the grounds that arguing with a defence lawyer "takes up too much time". The same examining magistrate added that if the questions were "especially hurtful" or "very distressing" and also irrelevant, he would inform the complainant that she need not answer those questions. One examining magistrate admitted that he would be more protective of a rape complainant if she was young and visibly distressed and stated;

> "I like to think of myself as a person who takes care of witnesses."

All the examining magistrates claimed to be particularly protective of young complainants. The majority of the examining magistrates interviewed stressed that they appreciated that women who had been raped had suffered a traumatic experience and this knowledge shaped their handling of pre-trial hearings. It was explained that the primary consideration however, would be the relevance of the question. It was explained that if an examining magistrate deems defence questioning to be irrelevant he or she will intervene or require the defence lawyer to explain the relevance of a specific question. It was accepted that different examining magistrates would have differing views as to what constituted relevant questioning and in turn, that the protection afforded rape complainants could vary considerably;

> "Lawyers and judges are human and they do not all treat rape complainants in the same way."

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[812] See also Doomen, J., (1978), *op cit* at 41

However, all the examining magistrates interviewed claimed that the introduction of further limitations upon the questioning of rape complainants would be unnecessary. It was claimed that examining magistrates exercising their discretion constituted a sufficient safeguard.

With regard to comments made by defendants in court, the examining magistrates claimed that trial judges are particularly vigilant in rape cases and would object to improper and offensive remarks and accusations made by a defendant. Although, again it was it accepted that this would depend on the individual trial judge.

8.4.4. Summary

Interviews with Dutch practitioners suggest that judicial discretion does not prove to be an effective limitation upon the questioning of rape complainants in all cases. The lawyers interviewed attributed this largely to the inexperience and indifference of many examining magistrates. In Chapter seven, it was argued that the documented failure of trial judges and prosecution barristers to intervene effectively during cross-examination in rape trials may not simply be attributed to indifference to the plight of rape complainants or to social prejudices. It was argued that the limited protection afforded vulnerable complainants in criminal trials in England and Wales is in part, a structural consequence of the adversarial process. The section below explores whether examining-magistrates in the Netherlands are subject to similar structural constraints.

8.5. Structural Constraints?

In Chapter seven it was argued that the duty of trial judges to protect witnesses from improper questioning conflicts with the role of the trial judge within adversarial proceedings as a neutral umpire. Firstly, it was claimed that the trial judge risks his efforts to protect a vulnerable complainant being interpreted as a departure from impartiality. If, on appeal, it is decided that the jury were unduly influenced by the actions of a trial judge a conviction could be found unsafe. Secondly, it was argued that the trial judge must be wary that his interventions do not in any way compromise the ability of the defence barrister to conduct his or her case. A conviction may be overturned where it is considered that a trial judge unduly interfered with counsel's presentation of the evidence.

The role of the Dutch examining magistrate may be clearly distinguished from that of the English trial judge. The role of the examining magistrate is not that of umpire, he or she is an active investigator. As stated in Chapter one, the role of the examining magistrate is to conduct a thorough and impartial investigation and to ensure that the dossier is a legally competent basis for judgment at trial. Whereas the English trial judge is largely confined to the evidence presented by the parties, the examining magistrate is under a duty to gather relevant evidence and to play a dominant role in proceedings. The examining magistrate for example, will be the primary interrogator of witnesses. While the examining magistrate is expected to be impartial, he or she is not required to be passive. In the Netherlands, great faith is placed in the impartiality of examining magistrates despite their active, inquiring role. Therefore, it is unlikely that intervention by an examining magistrate on behalf of a vulnerable complainant would be perceived as a threat to impartiality in the Netherlands.

In England and Wales, the defence barrister is charged with presenting the case for the defence. It is accepted that defence counsel should be allowed to tell his or her story without unnecessary interference and this includes intervention from the bench. In the Netherlands, the defence lawyer is not a storyteller. It is not the role of the defence

lawyer to present the evidence for the defence. In the Netherlands evidence is not presented as such. It is submitted therefore, that the examining magistrate who objects to defence questioning may not be deemed to have compromised the ability of the defence lawyer to present his or her case.

In Chapter seven, it was argued that the adversarial process ill-equips trial judges for protecting complainants from irrelevant and offensive questioning. The unpreparedness of the trial judge, it was claimed, necessarily limits the scope for effective intervention. The examining magistrate in the Netherlands will have had access to the police file containing the statements of the complainant, the defendant and other witnesses. The examining magistrate is therefore, it is submitted, in a stronger position to distinguish between lines of questioning relevant to the defence case and irrelevant and improper questioning.

In Chapter seven the perceived failure of prosecution counsel to object to offensive and irrelevant defence questions in rape cases was also examined. It was argued that prosecution barristers fail to intervene on behalf of complainants in part, on strategic grounds. It was claimed that the prosecutor may, for example, allow a particularly ruthless attack upon a complainant in the belief that it may enlist the sympathy of a jury. In addition, it was claimed that prosecution counsel may refrain from intervention for fear of alienating the jury themselves by appearing to compromise the ability of the defence barrister to present his case. As a impartial investigator conducting an official investigation, the examining magistrate clearly secures no tactical advantage from non-intervention.

8.5.1. Summary

In Chapter seven it was argued that there is a conflict, a tension, between the role of the English trial judge to protect witnesses from improper questioning and the trial judge's role in adversarial proceedings. A similar argument was advanced with regard to prosecution counsel. In the Netherlands there does not appear to be a conflict between the duty of examining magistrates to protect witnesses and their duty to conduct a thorough and impartial inquiry. It would appear that the failure of some

examining magistrates to protect rape complainants during defence questioning may not be attributed to structural constraints within the Dutch fact-finding process. In the absence of perceptible structural constraints, it is submitted that the answer must lie in the attitudes and beliefs of individual examining magistrates. Interviews with examining magistrates provided some support for this claim. One examining magistrate interviewed claimed not to intervene on behalf of complainants as it 'wasted time'. All claimed that the primary consideration would be the relevance of defence questioning. There is no legal test for relevance, it is a subjective concept. In deciding the relevance of evidence, the examining magistrate will draw upon his or her personal experiences and beliefs. When deciding in a rape case whether a line of questioning is irrelevant or improper, the examining magistrate will draw upon his or her understanding of the nature of rape. It is therefore unsurprising that the Dutch lawyers interviewed claimed that the protection afforded rape complainants at pre-trial hearings could vary considerably depending on the examining magistrate in question.

8.6. Calls for Reform

Both groups of practitioners were asked what they believed could be done to improve the position of rape complainants within Dutch criminal proceedings. The recommendations of both groups are discussed below.

8.6.1. Recommendations of Dutch Lawyers

Among the recommendations advocated by the group of Dutch lawyers interviewed, was the introduction of a procedure whereby a defence lawyer would be required to submit his or her questions to the examining magistrate prior to a pre-trial hearing. The examining magistrate would then rule on the acceptability of defence questions. Within present procedure, an examining magistrate may only advise a rape complainant that she is not obliged to answer a question. The interviewees argued that often the asking of insulting and offensive questions itself causes complainants considerable distress. Compulsory training for examining magistrates was also recommended, as well as training courses for lawyers to raise awareness of the effects of rape and to encourage defence lawyers to employ greater sensitivity in their questioning of rape complainants.

The need for legal representation for all rape complainants was also strongly advanced. The lawyers interviewed belonged to law firms who offered women in rape cases legal representation. The interviewees explained that only a small minority of rape complainants had such representation as women were represented at their own cost. The interviewees were very critical of the fact that a victim's legal representative has no legal right to attend either a pre-trial hearing or a trial. It was explained that whether to permit the presence of victim's lawyer is a matter of discretion for examining magistrates or trial judges. While a victim's lawyer may attend a trial as an ordinary member of the public, a victim's legal representative may be excluded from the pre-trial hearing. According to the interviewees, a defence lawyer will be asked by the examining magistrate whether he or she has any objections to the presence of the

complainant's lawyer and the wishes of the defence lawyer will prevail. According to Van Driem, the policy of examining magistrates allowing the legal representatives of victims to attend pre-trial hearings varies between districts. Van Driem reports that in some districts victims' lawyers are welcomed and in others they are excluded, there is no national policy. [813]

The lawyers interviewed were also very critical of the very narrow role 'victim lawyers' are permitted to play in Dutch criminal proceedings. The practitioners criticised the fact that even where a complainant's lawyer is permitted to attend either a pre-trial hearing or a criminal trial, she has no official status within Dutch criminal proceedings. A victim's legal representative, it was explained, may not intervene in the legal process in any way. The victim's lawyer may not put questions to the defendant, the complainant, or any other witness and may not call witnesses. The complainant's lawyer may not even object to what she perceives to be improper and offensive questioning. The interviewees regarded the exclusion of a victim's legal representative as indefensible. It was argued that victims' legal representatives should be granted a wider role and permitted to participate fully in the criminal process. Primarily, it was argued, a victim's lawyer should be entitled to object to improper questioning at pre-trial hearings. Van Driem also advances this argument;

> "The victim's lawyer should have the opportunity to disallow all the improper questions of the examining magistrate and the defence lawyer."[814]

It was also argued that a victim's lawyer should also be allowed to call and examine witnesses at pre-trial hearings. The interviewees also advocated a wider role for victims' lawyers in court. It was argued that the victim's lawyer should again be entitled to object to the offensive remarks and insinuations made by defendants and be entitled to call and examine witnesses on behalf of the complainant.

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813 Van Driem, G., (1989), *op cit* at 52

814 *ibid* at 53

8.6.2. Recommendations of Examining Magistrates

When asked what they believed could be done to improve the position of rape complainants within Dutch criminal proceedings the examining magistrates all claimed that no changes were necessary. It was argued that rape complainants did not require any further protection or support. One examining magistrate stated;

> "Nowadays, we are doing the maximum we can do. Others may say that this is ridiculous but we have a good system. It can't be done any better."

All the examining magistrates interviewed opposed the idea of an increased role for victim advocates. The examining magistrates argued that there was no role for a victim lawyer within criminal proceedings. It was frequently stated that it was the duty of examining magistrates and trial judges to protect complainants and therefore there was no need for legal representation. One examining magistrate interviewed claimed;

> "The way of questioning her just by me and the defending lawyer may be very stressful but not so stressful that she needs a lawyer."

All the examining magistrates interviewed expressed the belief that an enhanced role for complainants' lawyers would result in adverse interference in the criminal process. One examining magistrate argued that as a complainant is not the one on trial she has no need for legal advice. One examining magistrate was particularly scornful of the lawyers acting for rape complainants who he had encountered. He argued that lawyers needs to retain a degree of objectivity and detachment from their clients and that a lawyer should never seek to become the 'friend' of a client. In this respect, the examining magistrate argued, these lawyers are "bad lawyers".

> "They become too attached to their clients and as a result, are invariably prejudiced."

A further argument against legal representation for rape complainants put forward by the examining magistrates, was that it would lead to calls by complainants of other offences for the same treatment. The practitioners claimed that it would be difficult to justify special treatment for victims of rape. Generally, the examining magistrates interviewed were hostile towards legal representation for rape complainants. Victim lawyers were viewed as unnecessary and potentially disruptive influences upon criminal proceedings. The practitioners rejected the need for reform favouring instead retention of the present system.

The examining magistrates explained that in the Netherlands it is possible for a support person, *hulpverlener*, to accompany a complainant at a pre-trial hearing. This could be a friend or a volunteer of a victim support organisation. Again, whether a support person is permitted to attend a pre-trial hearing is a matter for the examining magistrate. It was also emphasised that a support person attends only to provide moral support. As one examining magistrate explained, to "hold her hand". The examining magistrates interviewed claimed that some of their colleagues were in favour of support persons accompanying complainants while others firmly opposed the practice. One examining magistrate interviewed claimed that she never allowed support persons to attend pre-trial hearings. She explained that she believed that complainants were less inclined to tell the truth when a support person was present. One examining magistrate claimed that in general, he was quite willing for a support person to be present but that he would never allow police officers to attend in this capacity. The examining magistrate explained that it was possible for a bond to form between a police officer and a complainant and a complainant may consequently feel less inclined to depart from her original statement in his or her presence.

8.6.3. Summary

The two groups of Dutch practitioners clearly had very different views on the need to improve the treatment of rape complainants at pre-trial hearings. The examining magistrates advocating no change and the lawyers recommending a series of reforms.

The reforms recommended by the Dutch lawyers such as training for examining magistrates and lawyers and the introduction of legal representation for rape complainants, are recommendations that have been made by researchers in England and Wales. In Chapter seven it was argued that training would have a minimal impact on the treatment of rape complainants in court in England and Wales. It was argued that although the attitudes of key criminal justice professionals played a role in the secondary victimisation of rape complainants, the trial process itself played a major part and therefore changing attitudes would not significantly improve the treatment of rape complainants. It is submitted, that within the framework of Dutch criminal proceedings, training aimed at raising the awareness of criminal justice professional to the reality of rape, may go some way to improve the treatment of rape complainants in the Netherlands.

8.7. Discussion

The limited Dutch literature supported by interviews with Dutch practitioners suggest both important similarities and marked differences in the treatment of rape complainants in England and Wales and the Netherlands. In both countries it would appear that women find the 'appropriateness' or propriety of their behaviour before, during and after an alleged rape questioned. For example, women are called to account for their 'risky' or imprudent behaviour. They are asked to explain why they were out alone at night or why they accepted a lift from a stranger. It was agreed however by both groups of practitioners interviewed that a complainant's sexual character and her 'respectability' generally no longer played an important role in rape cases in the Netherlands. This is in marked contrast to the experience of rape complainants in England and Wales, where women continue to be subjected to a demeaning character assassinations based upon their sexual history and lifestyles. In this section possible explanations for both these differences and similarities are explored.

8.7.1. Cultural Differences

A possible explanation for the reported lack of importance attached to sexual history evidence and the 'respectability' of complainants in rape cases in the Netherlands may lie in Dutch culture. When asked why the sexual character of rape complainants was not generally explored at pre-trial hearings a number of practitioners cited the liberal attitude of Dutch society towards sexual conduct. Nijboer supports this view;

> "There are no obstacles when presenting the victim's prior sexual conduct. One should consider this against the background of a society that does not have a lot of trouble with rather "liberal" sexual behaviour in general."[815]

One examining magistrate explained that the women's movement in the Netherlands had altered common perceptions about rape. All the examining magistrates interviewed appeared eager to demonstrate that they belonged to a generation who no longer ascribed to sexist and old fashioned assumptions about women and rape. Tolerance of most lifestyles within Dutch society was also cited by a number of interviewees as the reason why the personal lives of complainants were generally not explored in rape cases.

8.7.2. Judge vs. Jury

A further possible explanation offered by the examining magistrates interviewed for the lack of importance attached to sexual history evidence was the absence of a jury in Dutch criminal trials. A number of practitioners expressed the belief that jurors were far more likely to be influenced for example, by sexual history evidence than career judges. Defence lawyers are aware, it was claimed, that trial judges are not impressed by such evidence and consequently do not seek to introduce it. The claim that trial judges are less likely to be swayed by sexual history evidence would undoubtedly be rejected by researchers who have reported how trial judges allow such evidence to be routinely introduced in rape trials in England and Wales. In addition, it has been claimed that rape complainants in England and Wales have suffered cross-examination similar to that endured in court at committal proceedings which are held before a magistrate and not a jury. The Runciman Royal Commission on Criminal Justice expressed concern for the treatment of complainants at committal proceedings in its Report.[816] One rape victim interviewed for a Victim Support study, described her experience of committal proceedings;

> "Nothing till the day I die can be worse than the committal hearing- it was worse than the crime. When I was being questioned the defendant began to talk as well. There was no control. The CPS did nothing. They sat and let me and my life be ripped to pieces for hours and hours."

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[815] Nijboer, J.F., (1995), *op cit* at 123

As stated in Chapter six, given the absence of research into jury decision making in rape trials, it is impossible to draw conclusions as to the role played by the jury system in the treatment of rape complainants in England and Wales.

8.7.3. Contest vs. Inquiry

The possibility that explanations may also lie in the divergent structure, and evidentiary safeguards of English and Dutch criminal procedure is discussed in this section.

In Chapter six, it was argued that the degrading treatment of rape complainants during cross-examination may, in part, be attributed to the form in which evidence is presented in adversarial proceedings; courtroom stories. The adversarial trial is structured as a contest. Evidence is presented in the form of conflicting stories told by advocates in court. The role of the advocates is to construct and present polarised versions of events. As discussed in Chapter four, the adversarial trial process requires black and white interpretations of the evidence. The role of the defence lawyer is to provide a rival interpretation of events to that presented by the prosecutor. As stated in Chapter six, the story told by the defence will necessarily include an alternative portrayal of the complainant; a disparaging portrayal. It is the role of the defence lawyer in the adversarial trial is to vilify the victim. In constructing his portrait of the complainant the defence barrister is largely free to examine a complainant's private life and to dig up incidents from her past. The complainant's sexual history and lifestyle simply become part of the defence's story. As discussed in Chapter six, victims of sexual violence are particularly vulnerable in this storytelling arena. In rape cases defence barristers have a wealth of cultural myths and stereotypes upon which to draw. The presentation of evidence in the form of competing stories allows defence advocates to present the court with a demeaning and humiliating portrayal of the

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[816] Home Office, *Royal Commission on Criminal Justice Report*, (1993, London:HMSO), at para. 24

complainant. It also means that the character of complainants will always play a major role in criminal trials.

In the Netherlands, criminal proceedings are structured not as a contest waged in court but rather as an official inquiry. Evidence is presented not in the form of courtroom stories constructed and told by advocates but in the form of written statements contained in the dossier. In the Netherlands the advocates are not charged with the presentation of evidence, they are not storytellers; it is the dossier that tells the story. The defence lawyer is not charged with presenting a rival interpretation of events. More importantly, the defence lawyer is not charged with presenting a disparaging, one-sided portrayal of the complainant. The defence lawyer is therefore not compelled to examine a complainant's general character, to explore her private life for facts which may be used to support a such a portrait. This does not mean that defence lawyers in the Netherlands will not question a complainant about her private life in order to cast doubt upon her evidence but only that the defence lawyer in the Netherlands is not compelled to do so.

An insistence upon direct oral evidence is a defining characteristic of the adversarial process. Oral testimony in court is believed to be a superior form of evidence. As discussed in Chapter one, one reason for this is the assumption that the demeanour of a witness in court provides valuable clues as to the sincerity of the witness. In adversarial proceedings great significance is attached to the oral performance of witnesses in court. In fact, the complainant, defendant, witnesses, the trial judge and the advocates are all performers in the adversarial trial with the jury their audience. Knowing that a flustered, disconcerted witness is likely to appear less credible to a jury, defence barristers employ an array of tactics during cross-examination designed to undermine the oral performance of a complainant in court. As discussed in Chapter six, defence advocates in adversarial proceedings have much to gain from embarrassing, confusing and intimidating a complainant. In England and Wales, complainants are asked degrading and humiliating questions that are aimed not at introducing factual evidence but at shaking their performance.

In the Netherlands, live testimony in court is replaced by written evidence. The observation of witness demeanour is not accorded much importance within the Dutch fact-finding process. Witnesses are generally questioned pre-trial, back-stage. In the Netherlands great faith is placed in the ability of trial judges to evaluate evidence and in most criminal cases the trial judges will reach a verdict having never seen the complainant.

> "The Dutch system relies on the skill and competence of the professional judge to decide on the basis of cold files."[817]

Rape complainants in the Netherlands are not required to perform. Consequently, defence lawyers have little to gain by asking questions designed simply to embarrass, intimidate or antagonise a complainant. Within Dutch criminal proceedings witnesses are not set up as targets to be shot down by opposing advocates. Complainants in the Netherlands are the focus of an inquiry not a battle played out on stage. The weapons of adversary advocacy are therefore not adopted by Dutch defence lawyers.

In Chapter six it was argued that the ruthlessness of cross-examination is, in part, attributable to the combativeness and competitiveness of the adversarial trial. It was claimed that advocates are required to be belligerent in their cross-examination of witnesses and to be indifferent to the impact of cross-examination upon a vulnerable complainant. Cross-examination is wielded as a weapon in the battle between advocates and opposing witnesses. The adversarial trial is also a competitive arena. An environment in which advocates will attempt to push the boundaries during their questioning of complainants, to do all they can 'get away with'. Dutch criminal proceedings lack both the combativeness and competitiveness of adversarial proceedings. Dutch proceedings are structured as an inquiry and not a conflict. In place of confrontation and partisanship, Dutch criminal procedure relies upon co-operation and relationships of trust between officials. It would be inappropriate to

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[817] Beijer, A., Cobley, C., Klip, A., "Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice", in (eds) Harding, C., Fennell, P., Jorg, N., Swart, B., *Criminal Justice in Europe A Comparative Study*, (1995, Oxford:Clarendon Press), at 299

refer to any stage of Dutch criminal proceedings as a fight or a battle or to advocates as gladiators or combatants. In the context of Dutch criminal procedure it is also inappropriate to speak in terms of 'winners' and 'losers'. The attendant pressures of the adversarial contest or conflict which compel defence advocates to mount ruthless and aggressive attacks upon vulnerable complainants are therefore not a feature of Dutch criminal proceedings.

8.7.4. Cultural Myths

The limited Dutch literature, supported by interviews with Dutch practitioners, suggest that, as in England and Wales, attention often focuses on the behaviour of the complainant in rape cases in the Netherlands. It would appear that the concept of the 'ideal rape' which prescribes the 'appropriate' behaviour of women before, during and after rape plays an important role in rape cases in the Netherlands and so too a number of the myths which surround rape. As in England and Wales, the complainant in the Netherlands may find her conduct before an alleged rape scrutinised. As stated above, she may be asked why she invited an acquaintance into her home or why she was out alone at night. Such questioning, it is submitted, draws upon the pervasive myth that women are ultimately to blame for rape and the myth that women either provoke rape through their inappropriate conduct or through failing to avoid rape by taking evasive action. Responsibility for rape is effectively shifted to women. Until responsibility for rape is shifted to men, it is submitted, the 'culpability' of the victim of sexual violence will continue to play a central role in rape cases irrespective of the legal system in question.

In the ideal rape the victim is expected to resist vigorously and sustain physical injuries. She is also expected to report an attack immediately. Despite the evidence that there is no typical response to rape, defence lawyers in both England and Wales and the Netherlands continue to use this stereotype to cast doubt upon women's stories. Women continue to be judged by a standard infused with erroneous assumptions and rape mythology.

The pervasive myth that women lie about rape also appears to inform defence questioning in the Netherlands. As in England and Wales, complainants are asked whether their allegation is motivated by jealousy, spite or fantasy. Again, women are judged on the basis of out-moded assumptions.

It is clear that the treatment of rape complainants in the Netherlands is, in part, shaped by the cultural myths and stereotypes which surround rape. The prevalence of rape myths, *mythen over verkrachting*, within Dutch culture was identified by Doomen writing in 1978.[818] Among the myths cited by Doomen were the myth that women enjoy and fantasise about rape and the myth that rapists are psychologically abnormal and sexually disturbed.[819] It is submitted that the pervasiveness of rape mythology explains, in part, similarities in the treatment of rape complainants in England and Wales and the Netherlands.

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[818] Doomen, J., *Heb je soms aanleiding gegeven: handleiding voor slachtoffers van verkracting bij de confrontie met politie en justitie*,(1978) See also Davelaar-van Tongeren, V., 'Verkrachting: Strafrechter, wat moet je ermee?' in (eds) Davelaar-van Tongeren, V., Keijzeren, N., *Strafrecht in Perspectief*, (1980, Arnhem:Gouda Quint)

[819] *ibid* at 10

8.8. Conclusion

Interviews with Dutch practitioners provided support for the claims made by Van Driem that rape complainants are subjected to improper and irrelevant questioning at pre-trial hearings and that the protection afforded rape complainants is often inadequate. The interviews also provided a valuable insight into how the examination of rape complainants had altered in recent years. Namely, through the claims that rape complainants are generally no longer questioned about their sexual history or their lifestyle. In addition, the interviews provided a broader insight into the role played by examining magistrates at pre-trial hearings and the decisive role they play in the treatment of complainants in the Netherlands.

It is clear that a shift towards inquisitorial style proceedings would not necessarily result in rape complainants being treated with respect and sensitivity. Such a shift would not necessarily mark an end to rape complainants being asked irrelevant and improper questions or herald the greater protection of rape complainants during examination by defence lawyers. This is because the treatment of rape complainants in any legal system will, in part, be determined by the attitudes and beliefs of the criminal justice professionals they encounter and shaped by the myths and social prejudice which surround rape. A primary aim of this study is to demonstrate that the adversarial trial process plays a major role in the secondary victimisation of rape complainants in England and Wales and because of this, the extent to which the treatment of rape complainants may be improved is severely limited. This study argues that the fair and just treatment of rape complainants in England and Wales can not be achieved without far-reaching structural reform. It is submitted that the Dutch trial process does not in itself represent an obstacle to the decent treatment of victims of rape. Therefore, initiatives aimed at challenging rape myths and encouraging criminal justice professionals to exercise greater sensitivity in their handling of rape

cases could have a real and significant impact on the treatment of rape complainants in the Netherlands.

Conclusion

As a comparative study of rape trials in adversarial and inquisitorial criminal justice systems this study has had a number of specific aims. One aim of this study was to establish the role played by the adversarial process in the secondary victimisation of rape complainants in court in England and Wales. The adversarial criminal trial process is structured as a contest in which the prosecution bears the burden of proof. The focus is upon the trial where evidence is presented before an unprepared fact-finder. Proceedings are dominated by the parties with the trial judge performing the role of umpire. The presentation of evidence is organised around storytelling. The court is largely confined to the evidence presented by the parties. There is little evidence that the adversarial process, its underlying assumptions and its implications, have been thoroughly examined. The implications for complainants in criminal proceedings have certainly not been fully explored. This study has focused upon its implications for one category of complainant, the complainant in a rape trial. A common assumption contained in much of the literature on rape trials is that complainants is rape cases are treated differently from complainants of non-sexual offences. It is assumed, for example, that the types of questions routinely put to rape complainants during cross-examination would be considered unacceptable in other trial contexts. Consequently, attention has focused heavily upon those factors which separate rape trials from other criminal trials. These include the cultural myths which continue to surround rape, the emphasis in rape trials upon the issue of consent and the introduction of sexual history evidence. This narrow focus has led to a flawed understanding of the treatment of rape complainants in court and has allowed the criminal trial process itself to escape examination and escape criticism. This study has sought to fill a gap in the analysis of rape trials by examining the role played the adversarial process in the secondary victimisation of rape complainants in court.

This study has identified and examined the assumptions which inform and shape the adversarial criminal trial process and explored their meaning for complainants in rape cases. This study concludes that the adversarial process plays a major role in

secondary victimisation or 'judicial rape' of rape complainants in court. Much of the distress caused rape complainants stems from the insistence upon direct oral evidence in criminal proceedings. Compelled to give evidence in court, complainants are forced to confront their alleged attackers, to relive their ordeal in public in the imposing surroundings of the courtroom. The inability of complainants to tell their stories in their own words is attributable largely to the presentation of evidence in criminal trials in the form of competing stories told by advocates. In adversarial proceedings lay stories are subject to a distinct filtering process and the narrative freedom of witnesses is severely curtailed. The treatment of complainants during cross-examination is also firmly rooted in the structure and function of the adversarial criminal trial. Cross-examination was identified in this study as a device used to denigrate, intimidate and confuse complainants. This study also concludes that the lack of protection afforded rape complainants in court may, in part, be explained in terms of the structural constraints which operate upon trial judges and prosecuting counsel in criminal trials.

A second aim of this study was to challenge key assumptions of the adversarial fact-finding process. The adversarial system is very much a taken for granted institution. Its claims are rarely countered and its underlying assumptions rarely challenged. This study has argued that the experiences of rape complainants in court raise serious questions about the value of key evidentiary safeguards of the adversarial trial process. In particular, this study challenged the assumptions which underlie the insistence upon direct oral evidence in criminal proceedings. In England and Wales, rape complainants are compelled to give evidence in the presence of their alleged assailants and in public despite the absence of any evidence to support the assumption that the presence of a defendant and an audience promotes truthful testimony and in the face of evidence that giving evidence in such a stressful environment may have a deleterious impact upon the fullness and accuracy of testimony. Faith in demeanour evidence persists despite mounting psychological research which strongly suggests that evidence of non-verbal behaviour is at best unreliable. The insistence upon direct oral evidence is however largely attributable to the fact that such evidence may be tested by cross-examination. Cross-examination continues to be viewed a vital safeguard of the adversarial trial process despite research on suggestibility which

indicates that leading questions, the mainstay of cross-examination, may be truth distorting and the fact that it is a device used as much to prevent truths emerging as to expose them. This study concludes that the traditional justifications for requiring rape complainants to give evidence in court are, on examination, unconvincing.

A third aim of this research was to demonstrate the inability of the adversarial trial process to accommodate the basic needs and interests of vulnerable complainants. This study focused upon a rape complainant's need to be protected from unnecessary distress and anxiety, to be able to describe freely what happened to her, and to be treated with sensitivity and respect throughout criminal proceedings. The limited protection that can be offered vulnerable complainants within the context of adversarial criminal proceedings has been highlighted in this study. Significantly, rape complainants may not be spared the ordeal of a courtroom appearance. The assumptions which underlie the adversarial fact-finding process dictate that rape complainants confront their alleged attackers in court, give evidence in a hostile and intimidating arena and relate information of a sexually explicit nature in public. Were measures introduced to allow rape complainants to give evidence via a TV-link or even give video-recorded evidence, the benefits of such measures would be limited as complainants would still be subjected to live cross-examination, arguably the most traumatic aspect of criminal proceedings.

This study has also sought to demonstrate that the reconstruction of evidence into competing courtroom stories and the exclusionary character of the law of evidence mean that complainants' stories may not be told in adversarial criminal trials. The advocate may not grant a complainant free rein without risking the introduction of unsolicited, damaging information or the introduction of inadmissible evidence. Lay stories may simply not be accommodated within the adversarial criminal trial.

This study claims that the degradation and humiliation of rape complainants in court is a structural consequence of the adversarial process. As such, this study argues that little may be done to improve the treatment of rape complainants during cross-examination. This study concludes that there is an irreconcilable conflict between the use of cross-examination as a mechanism for testing evidence and the decent treatment of complainants. A common theme in the literature on rape trials is that

defence barristers act improperly in rape trials and single rape complainants out for special treatment. This study challenges this assumption claiming that defence advocates are often only doing what the adversarial process demands or compels them to do and that the strategies employed by defence barristers during the cross-examination of rape complainants are the stock-in-trade tactics of adversary advocacy. Once this fact is recognised it becomes clear that measures aimed at sensitising defence lawyers, for example, to the effects of rape would have a necessarily limited impact. This study also argues that the introduction of legal representation for rape complainants would not necessarily improve the treatment of rape complainants during cross-examination. The injection of a victim advocate into the trial process would alter neither the role nor nature of cross-examination nor be likely to influence the performances of defence barristers, prosecution barristers or trial judges.

Within the context of adversarial criminal proceedings any modification to trial procedure to lessen the ordeal of rape complainants would be seen as either a direct threat to the rights of defendants or to the reliability of evidence. There is an irreconcilable conflict between the interests of vulnerable complainants and the basic assumptions of the adversarial fact-finding process. This study therefore concludes that solutions to the plight of rape complainants must be sought outside the structural constraints of the adversarial process.

In the search for an alternative procedure this study examined rape trials in the Netherlands. This research was based upon a consolidated analysis of Dutch literature supported by original interviews with Dutch practitioners. An aim of this research was to provide a fuller exposition of the experiences of complainants in adversarial and inquisitorial criminal justice systems than contained in existing comparative literature. Complainants, their position and treatment, are rarely the focus of comparative research. As a result, fundamental differences between adversarial and inquisitorial criminal proceedings have been either neglected or their implications for complainants never fully explored. By examining such features as the nature of advocacy, the role of storytelling and the law of evidence this study has sought to provide a broader

insight into the treatment of rape complainants in England and Wales and the Netherlands.

This study has also sought to establish whether the Dutch trial process holds any significant advantages for complainants in rape cases. A number of advantages were identified. First and foremost, the reliance upon written evidence in Dutch criminal trials and the general tolerance of hearsay evidence means that rape complainants are, as a general rule, kept out of court. Dutch trial procedure does not require that complainants give evidence in public, confront their alleged assailants or be subjected to live cross-examination. If called to give evidence at trial, the Dutch trial process allows rape complainants to give evidence via a TV-link.

This study also addressed the ability of rape complainants to tell their stories in Dutch criminal proceedings. It was argued that the process of case construction in the Netherlands is subject to fewer structural constraints and that the need to control witness testimony is greatly reduced. This study concludes that lay stories could be accommodated within the Dutch trial process. Rape complainants could be allowed greater narrative freedom. Any obstacles to granting complainants this freedom were identified as attitudinal rather than structural.

The research of rape trials in the Netherlands also aimed to establish whether a shift towards inquisitorial style proceedings would mark an end to the degrading and insensitive questioning of complainants in rape cases. The treatment of rape complainants in criminal proceedings is determined not only by structural factors. The attitudes of examining-magistrates were identified in this study as a decisive factor in the level of protection afforded rape complainants at pre-trial hearings in the Netherlands. The pervasiveness of rape mythology was also used to explain similarities in the questioning of rape complainants in England and Wales and the Netherlands. Structural reform alone therefore would not necessarily ensure that rape complainants were handled with sensitivity and respect. It would however, this study concludes, broaden the scope for improvement.

In recent years positive steps have been taken to improve the treatment of victims of crime within the criminal justice system of England and Wales. The *Victim's Charter*

1990, published by the Home Office, claimed to set out for the first time the legitimate rights and expectations of victims of crime. The Charter states;

> "They deserve to be treated with both sympathy and respect."[820]

> "Many victims of crime suffer severely. Their subsequent unavoidable involvement with the criminal justice system may add to that trauma. It is essential that every possible step is taken to minimise the upset and even hardship which may be caused."[821]

It is difficult to reconcile the concern expressed in the *Victim's Charter 1990* with the continuing degradation and humiliation of rape complainants in court. The criminal justice system is failing victims of rape in its treatment of complainants. Complainants, this study argues, have a right to equality of concern and respect. This study therefore calls for the reconceptualisation of a fair trial. The concept, it is submitted, should reflect not only the rights of defendants but also recognise and respect the interests and needs of complainants. As Helen Reeves, director of Victim Support has stated;

> "The defendants have rights of course, but you can't have a fair trial if the witness can't cope with the way the trial is conducted."[822]

A fair trial process would seek to strike an appropriate balance between the interests of defendants and complainants. The adversarial trial process clearly fails to achieve this balance. Our commitment to the adversarial process demands that we ignore the high price it exacts from vulnerable complainants. It demands that we overlook mounting evidence of its short-comings. This study concludes that we should question this commitment and explore whether a better system, a fairer system could be devised.

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820 Home Office, *Victim's Charter: A Statement of the Rights of Victims of Crime*, (1990, London:HMSO), at 8

821 *ibid*

822 *The Guardian* September 7 1996

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