Unfair use of “bad character” evidence against rape victims: How unrelated previous disclosures of rape are used to discredit survivors

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What is the problem?

When a victim/survivor reports to the police that they have been raped, previous disclosures of rape and sexual abuse that they have made are being used against them as evidence of their 'bad character', even where these previous experiences are unconnected to the case. This means that if a woman has been raped or sexually assaulted before by a completely different perpetrator, that can be used against her in order to undermine her account.

In a significant number of cases, judges are allowing the defence to cross-examine the survivor about previous unrelated experiences of sexual violence, in front of the jury, on the basis that these previous disclosures show that she has a propensity to lie about sexual assault, despite there being no basis whatsoever to believe that the previous disclosure might be a false allegation. These are events that have no connection at all to the case that is being prosecuted.

This harrowing experience is often sprung on the victim/survivor after the trial has already started, sometimes without any prior warning, when she is already in the witness box. It is deeply distressing for survivors to have past traumatic experiences brought up again, and then the suggestion put to them that they are liars.

This is a defence strategy to present the jury with an unfair or twisted narrative that the survivor is untruthful, when there is actually no evidence of this.

What is the wider context?

Traditionally, society has viewed sexual assault and rape as very rare, and it has been presented as a remarkable coincidence that someone should report this happening to them more than once. It was therefore deemed suspicious that a previous report had been made by the same person.

However, we now know that sexual violence is relatively common, as more and more people are coming forward to disclose their experiences. Particular groups of women and girls are more likely to be targeted and less likely to be believed, for example young women, Black and minoritised women, and disabled women. We now know that it is perfectly plausible for a person to experience more than one incident of sexual violence across their lifetime.

Repeat Victimisation Statistics

More research is needed on re-victimisation of women by different perpetrators, but some available data tells us:

- The National Police Chiefs' Council (NPCC) Strategic Risk Assessment 2023 found 25% of victim/survivors were identified as being repeat victims of VAWG.
- Office for National Statistics (ONS) data shows that 1 in 2 adult survivors of rape have experienced it more than once.
- Office for National Statistics (ONS) data shows that almost a third (31%) of adults abused as children experience sexual assault in later life.
- In response to a Rape Crisis Tyneside and Northumberland survey, 87.5% survivors stated they had experienced sexual violence on more than one occassion; this increased to 94% for disabled respondents.
- Research by Hohl and Stanko (2015) found that in a sample of 587 police rape cases, 16% of victim/survivors had previously reported rape.

Why is this happening?

In these cases the defence has to make an application to the judge for permission to include this material in the trial, under s.100 of the Criminal Justice Act 2003, which relates to witnesses or victim/survivors' 'bad character'. Bad character evidence is usually evidence from other events unconnected to the current case that shows the witness or victim/survivor to be untruthful, such as previous convictions for dishonesty offences.

Judges are dealing with such applications very inconsistently. Some are refused and others granted, including in cases where there is no basis to believe that the previous disclosure might be a false allegation.

What are the wider implications?

We often see that because judges allow this sort of questioning, police officers and prosecutors pre-emptively obtain survivors' records relating to other incidents of sexual violence that are entirely unconnected with the case that is being investigated or prosecuted. This information may then be shared with the defence. It is not uncommon for requests to be made for medical or employment records, or other third party materials, relating to other disclosures that are not related to the case. This is incredibly intrusive for survivors, who are already having to endure

very intimate questioning on the case they have reported, and now feel that they themselves are on trial, with their previous traumatic history opened up to close scrutiny.

We also see cases where the police or CPS decide not to charge a case because the victim/survivor has previously disclosed sexual violence and this is treated as undermining her credibility.

What information is being used by the defence?

Defence advocates are presenting various scenarios as indications that previous disclosures or allegations of sexual violence by a survivor are false, such as where the survivor:

- Did not report the previous incident to the police
- Reported to the police but withdrew support for the case
- Reported to the police, but the case was closed by the police with no action taken, or the CPS who declined to charge the perpetrator

However, we know that:

- Many survivors choose not to report to the police. The ONS estimates that fewer than 1 in 6 victim/survivors of rape report to the police.
- Currently less than 6% of the 70,000 rapes reported to the police per year result in a charge. Cases are closed by the CPS for a range of reasons. The most common is that there is not enough evidence. Insufficient evidence is not an indication of a false allegation.
- Many survivors report to the police and then decide not to go through with the stress of an increasingly lengthy criminal case. Government data shows that between October 2023 and September 2024:
    - 59% of police investigations into adult rape were closed because the victim/survivor withdrew their support for police action.
    - 20% of adult rape cases were stopped after the defendant had been charged, again because the victim/survivor no longer supported a prosecution.
- The Crime and Policing Bill 2025 is proposing mandatory reporting for childhood sexual abuse, which will result in a great many more previous disclosures going on record, disclosures which the victim/survivor may not wish to pursue through the criminal justice system. This will only serve to make the problem worse.

What is the solution?

Judges need clearer guidelines defining the basis for believing that a past allegation may be false, so that s.100 Criminal Justice Act 2003 is properly and consistently applied. Only legislative change can bring in appropriate standards across the board. Some senior legal experts believe that the current wording of s.100 is ambiguous. We propose that legislation should set out clearly the degree of evidence that is required to meet the high threshold of "substantive probative value" which s.100 requires for evidence to be admitted as 'bad character' evidence.

The Court of Appeal has applied the following test and we believe that this is the correct approach, but it needs to be applied consistently:

The defence must have a 'proper evidential basis' for asserting that the previous disclosure was false. This has been described in various legal decisions as "'less than a strong factual foundation for concluding that the previous complaint was false", and that "there must be some material from which it could properly be concluded that it was false".

Therefore there is no onus on the defence to prove that the previous report was false, but there must be something to suggest this, not merely that the previous report did not result in a conviction.

An amendment to s.100 should state that there must be a proper evidential basis to assert that the previous disclosure was false and thereby give rise to 'substantial probative value'. Guidance should also clarify that the following facts relating to previous unrelated disclosures of sexual violence do not of themselves provide this evidential basis:

- That the victim/survivor did not report the incident to the police
- That the victim/survivor did not support a prosecution following a report
- That the police or CPS closed the case without charge
- That the case was prosecuted and the accused acquitted (in this situation the jury could have concluded that he was probably guilty, but they could not be sure, so the criminal standard was not reached)

To ensure that previous disclosures and reports to the police aren't used to undermine survivors, measures must also be introduced to ensure there is not wholesale access to and disclosure of records and reports of sexual violence incidents which are unrelated to the case being investigated.

Clear guidance should be provided to the police and CPS that there must be some basis to believe that a previous disclosure might be false, before it can become a reasonable line of enquiry or meet the test for disclosure to the defence.

Would a legislative amendment impact on a defendant's fair trial rights?

Fair trial rights will not be affected. Our intention is simply to ensure that the existing law is always correctly applied.

There is no proposal to change the threshold that is already set out in s.100 Criminal Justice Act 2003. It is a question of refining the existing legislation so as to provide more clarity and specificity to the judiciary.

Conclusion

It is deeply unfair for victim/survivors to be treated as liars simply because they have disclosed a previous sexual assault. It is re-traumatising for them to be forced to explain previous incidents and to be made to feel that they are the ones under investigation. It is also not evidentially valid, because having disclosed a previous experience of sexual violence does not tell us anything about whether the current report is true.

Case Studies

AP's story

AP was subjected to indecent exposure by a stranger in a public place, which she reported to the police. He was charged but in the run-up to the trial she was told by the police that the CPS had decided to drop the case and to 'offer no evidence'. This was based on information that was said to undermine her credibility.

The CPS relied on several matters including a previous report that she had made to

the police about a number of rapes by a friend, which were not connected to the indecent exposure incident in any way. AP had said in her Victim Impact Statement (VIS) that she was particularly affected by the indecent exposure because she had experienced sexual offending in the past. The CPS will have become aware of the previous case from the VIS and had access to the previous police report. The CPS deemed the fact that AP had previously reported sexual offences to be potential 'bad character evidence' against her, as indicating that she is a person who makes false allegations.

The previous case involving the friend had been closed by the police on the basis that the accused might be able to show that he reasonably believed that AP was consenting, but there was no suggestion that AP's account of what happened was untrue, or that she was a person who was not credible or reliable. The police wrote to her on the previous case saying that "*a decision not to bring about a prosecution does not mean that you are not a victim of crime or that we do not believe your evidence. It just sadly means we do not believe there is a realistic prospect of conviction which must be beyond reasonable doubt*".

AP lodged a Victim's Right to Review for the indecent exposure case and the outcome letter from the reviewer stated that the previous matter should not have been taken into consideration:

"I do disagree, however, with the apparent assessment by the reviewing lawyer that your previous allegations of sexual assault against other person[s] were undermining of the prosecution case, although they would have been disclosed to the defence as having the potential to assist the defence case. I agree with your ISVA's comments that the previous sexual allegations were wholly unrelated to this case, in both type and suspect involved; therefore, any attempt by the defence to make reference to these previous sexual allegations in our criminal proceedings, would have been strongly resisted by the prosecution; and, I anticipate, successfully excluded from the trial evidence. I am sorry that reference was made to these previous sexual allegations as being one of the reasons for ending this case as that was inappropriate."

Because the case had already been dropped by the CPS offering no evidence, it was not possible to re-open the charge of indecent exposure.

DR's story

DR reported domestic abuse and sexual offences to the police by her former partner, with whom she was in a relationship for six months. He was charged with assault and rape.

Whilst she was still in a relationship with him, DR had a drunken night out with a work colleague at the end of which the colleague made inappropriate and unacceptable sexual demands. DR told her partner about this and said that she was going to have to tell work about it. She told her employer about the incident because she wanted to avoid any potential contact with the colleague. They no longer worked at the same site, but there was a risk they could attend the same training events, and she wanted the employer to know, so that this could be prevented. She did not ask the employer to investigate the incident, which had taken place outside of work, and she did not want to report it to the police.

In the lead-up to the trial, the defence team asked for disclosure of all of DR's employment records. Some of these were relevant to the case, because the defendant had attended her workplace uninvited after he was first arrested by the police and she had asked her employer to put in place safeguarding measures. However, the defence also wanted disclosure of records relating to the incident involving the work colleague, which had no connection at all to the case being prosecuted.

DR was told by the CPS that if she did not consent to disclosure of "any other sexual allegations recorded in DR's records, as requested by defence" then the judge was likely to subpoena the notes, so she felt she had no choice but to consent. Her ISVA then contacted the CPS to say that DR had no objection to disclosure of information relating to the defendant, but that she did not believe that the information about an unconnected person was a reasonable line of enquiry. The CPS said that the court had made an order and that they had to obtain the full employment records. The employer provided the full records. DR does not know which parts of the records have been provided to the defence.

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