

The practicalities of English and Welsh rape trials: Observations and avenues for improvement

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Abstract

English and Welsh rape trials have long been recognised as problematic, with research highlighting the prevalence of rape myths (Temkin & Krahé, 2008), sexual history evidence (Smith, 2014), and manipulative questioning at trial (Smith & Skinner, 2012). Despite this extensive literature, little attention has been paid to the more practical elements of rape trials, but the limited evidence that does exist suggests these may significantly impact survivors (Payne, 2009). This article therefore draws upon 13 months of court observations to examine how seemingly mundane aspects of rape trials can present substantial barriers to participation. It will argue that 'special measures' can cause delays, some witness facilities are inadequate, and that the public gallery is frequently a site of intimidation. Ultimately, the research highlights simple changes that could increase opportunities for survivor justice; for example ensuring rape survivors use judicial entrances to court.

Keywords:

Rape, trials, victim/survivors, courts, delays, special measures

Introduction

The criminal justice system in England and Wales has been long criticised for its approach to sexual violence; with research highlighting inadequate responses to rape by the police and courts (Brown et al, 2010). Predominantly, this has related to the pervasive use of stereotypes that trivialise or 'justify' rape and undermine survivors (Temkin & Krahé, 2008; Ellison & Munro, 2013); as well as reliance on irrelevant evidence about the survivors' sexual history (Kelly, Temkin & Griffiths, 2006). Similarly, the literature notes that attrition in rape is higher than other crimes, making the search for a rape conviction akin to the search for the Holy Grail (Westmarland, 2015). A conviction is not enough to achieve survivor justice, however, as Sanders & Jones (2007) argue there is potential for secondary victimisation at trial regardless of outcome, often as a result of manipulative cross-examination techniques¹.

Notably, though, relatively little has been discussed about the practicalities of trial and how they could represent a barrier to survivor justice. In one of the rare discussions about trial practicalities, Payne (2009) found that survivors were highly anxious before and during their attendance at court, especially when there were delays. These concerns may partly explain why 'fear of going to court' is the most common reason for survivors withdrawing support for the prosecution, a key aspect of attrition (Lovett et al, 2007). As will be argued later, such practical considerations are not extraneous to survivor justice, but rather are central to enabling the meaningful participation often cited as part of survivors' justice interests (see Daly, 2016). This article will therefore examine the practical elements of rape trials and argue that while there are delays, inadequate facilities, and intimidation in the public gallery; there are also simple solutions to many of these difficulties.

Policy affecting trial practicalities

Part of the attempt to reduce trauma amongst vulnerable and intimidated witnesses, such as rape survivors, was the creation of a *Code of Practice for Victims of Crime* (Ministry of Justice, 2015) and the introduction of 'special measures'. The latest Code of Practice set out the services that survivors of all crimes are entitled to receive. These include information leaflets, a court familiarisation visit, and being able to wait separately from the accused and their family (Ministry of Justice, 2015). It is unclear to what extent these promises are fulfilled, but previous iterations of the Code were criticised as having patchy implementation (Burton et al, 2007; Payne, 2009) and the Victims' Commissioner (2017) has highlighted inaction around the Code's promise to give victims a personal statement. While positive on paper, then, it is difficult to ensure that the Code becomes practice.

The most widely discussed policy affecting trial practicalities is that of special measures for vulnerable and intimidated witnesses, set out in the *Youth Justice and Criminal Evidence Act (YJCEA) 1999*. Internationally, policy to encourage vulnerable and intimidated witnesses being heard at trial has increased since the 1990s, when rhetoric about 'survivor-centred' criminal justice systems became mainstream and converged with emerging human rights discourses (Doak, 2005). In England and Wales, special measures were introduced in the *YJCEA 1999* to improve evidence-giving for witnesses who are vulnerable or intimidated.ⁱⁱ Although not exclusive to rape or sexual assault, the measures are automatically available to complainants in such cases because of the intimidating nature of these crimes (*YJCEA 1999*). The measures include the ability to remove formal legal dress, empty the public gallery, give evidence using a screen or video

link, have an intermediary,ⁱⁱⁱ use pre-recorded police interviews as evidence-in-chief, and pre-record cross-examination (*YJCEA 1999*).

Hamlyn et al's (2004) evaluation of special measures is largely positive; as they reduced survivors' anxiety and enabled many to give evidence where they otherwise would not. In spite of these benefits, research has highlighted some difficulties. For example, the same inappropriate questioning occurs regardless of the mode of evidence-giving (Mulcahy, 2008) and so special measures do not protect against intrusive cross-examination (McDonald & Tinsley, 2011). This has led Burton, Evans & Sanders (2007) to argue that the adversarial focus on winning will lead to traumatic questions regardless of whether or not survivors are physically in court (see also Smith, 2014). Fundamental change is needed, then; but this should not mean short-term changes are ignored; for example Payne (2009) highlights the importance of tackling anxiety caused by the practicalities of court. Therefore while the author does have longer-term recommendations for CJS reform (Smith and Skinner, 2017; Smith, *forthcoming*), this article will focus on the practical aspects of trial and immediate improvements that can be made.

Evaluations have also highlighted several difficulties with how special measures are used. Initially, this was about courts not having the correct facilities (Kebbell, O'Kelly & Gilchrist, 2007; Payne, 2009), but the Home Office (2007) subsequently invested in extending video technology and the Ministry of Justice (2012) further committed to widening use of video facilities at trial. Even where video technology is available, though, critics have noted that visual and acoustic quality can be poor (HMCPST, 2007; Baverstock, 2016). Legal professionals argued that this prevents juries from adequately

assess the survivor's demeanour when giving evidence (McMillan and Thomas, 2009). While this argument relies on a misguided assumption that demeanour is an accurate measure of credibility (Konradi, 2007), it does highlight a potential communication barrier. Similarly, Sanders & Jones (2007) observe that using pre-recorded interviews could limit clear communication because survivors are cross-examined without the prosecution questions to 'warm up'.

The introduction of pre-recorded cross-examination could address this lack of warm up. A 2013 pilot scheme introduced pre-recorded cross-examination for children and adults with significant disabilities across Leeds, Liverpool, and Kingston-Upon-Thames. The scheme's process evaluation suggested a marked improvement in trial efficiency, case management, and relevant cross-examination^{iv} (Baverstock, 2016). This is supported by similar evaluations from Scotland and Southern Australia, where pre-recorded cross-examination has been used since 2004 and 1992 respectively (Henderson, 2013). Despite this, Baverstock (2016) noted that difficulties remained in relation to technical faults with video link technology, delays in cases coming to court, and inadequate witness facilities. Given the overall positivity of the evaluation, pre-trial cross-examination will be extended nationally to vulnerable witnesses in 2017, meaning that rape survivors who are under 16 or have additional needs may be able to access the provision.

The literature on trial practicalities also highlights debate about whether or not video evidence has the same impact on juries as evidence given live in court. This view is common amongst legal professionals and arises from fears that the public are desensitised by television, so watching a survivor on-screen does not feel as immediate (Powell & Wright, 2010; Stern, 2010). Furthermore, lawyers claim that police interviews

lack the narrative thread a prosecution barrister would create at trial, making them less persuasive (McDonald & Tinsley, 2011). Such opinions are often anecdotal, however; and Ellison & Munro (2014) found that changing the mode of evidence delivery had no consistent impact on juror evaluations of rape survivors.^v This is supported by Australian research that suggests conviction rates are unaffected by video evidence (Taylor & Joudo, 2005). Indeed, Westera et al (2015) conducted four studies to examine whether factors associated with video evidence affected mock juror perceptions of witness credibility. They found that the only factor to impact perceived credibility was increasing the number of questions asked, so using video evidence does not appear detrimental in reality.

Finally, the existing literature on trial practicalities highlights the possibility of accidentally seeing the defendant or their family. Burton et al (2007) found that such encounters were the greatest concern for survivors ahead of court, leading the *Code of Practice for Victims* to promise a separate waiting area (Ministry of Justice, 2015). Despite this, some courts have poor witness facilities, meaning that survivors must use the same entrance and toilets as the defendant and their supporters (Payne, 2009; Baverstock, 2016). Indeed, Hamlyn et al (2004) found that 44% of respondents encountered the defendant around court despite having separate waiting rooms, and Smith & Skinner (2012) observed a survivor standing next to her father, the defendant, in a communal smoking area. It may therefore be useful to provide survivors with pagers so they could wait outside the court building until needed to give evidence (Hamlyn et al, 2004); or to extend the pilot scheme of Durham crown court that enables rape survivors to give evidence via video link from a local Sexual Assault Referral Centre instead of court (Willis, 2015). Furthermore, Payne (2009) notes that even old court buildings could be amended to include a separate entrance, and survivors have said this would significantly reduce

their fear of trial (see also Burton et al, 2007). Here, much can be learned from the Specialist Sexual Violence Courts in South Africa, which have been used since 1993 and give significant attention to the layout of witness rooms (Walker & Louw, 2003). Rather than seeing these practicalities as peripheral, Walker & Louw (2003) note that specialist courts are designed to create an informal atmosphere that is less intimidating to survivors. There are several ways to address the difficulties with special measures, then, and it is unclear why these have not been implemented.

Fair trial, justice interests and survivor participation

One potential reason why the difficulties above have not been adequately addressed is fear of impinging on the defendant's right to a fair trial, as this has been central in resistance to greater consideration of survivors at trial (Doak, 2005; Raitt, 2010). A wider discussion of the right to a fair trial is available in Smith (*forthcoming*), but it is worth noting that the European Convention on Human Rights categorises rights as either 'absolute', 'qualified' or 'limited' (Gibson et al, 2002). This means that although some rights, for example restrictions on torture, cannot be compromised under any circumstances; others, like the right to a fair trial, are 'qualified' rights and should be compromised where significant harm to others is likely (Gibson et al, 2002). Powles (2009:328) therefore argues "convention law recognises that the rights of the defendant may sometimes be circumscribed by the need to respect the rights of victims and witnesses". This is because the right to a fair trial does not automatically allow a 'no holds barred' approach to survivor treatment (Doak, 2008; Raitt, 2010). For example, the defendant's right to represent themselves has been banned in sexual violence cases under English and Welsh law; with the European Court of Human Rights ruling that this does not contravene fair trial (Londono, 2007). Significantly, many commentators also argue

that survivors' and defendants' rights are not a 'zero sum' game (Hall, 2009). Where tensions do exist between these interests, Gerry (2009) notes that it is not as problematic as suggested, and can simply be addressed through balanced consideration. The right to a fair trial cannot therefore be a tool with which to immediately disregard any extension of survivors' rights at trial.^{vi}

Indeed, human rights do not only exist once someone is accused of a crime. International organisations such as the UN General Assembly (1985) and Council of Europe^{vii} (2012) have recognised that survivors and witnesses are also entitled to a level of respect and protection in court, in particular having a right to 'proper assistance' in the CJS process. This has clear implications for practicalities at trial, especially special measures that are focused on providing the assistance needed for vulnerable and intimidated witnesses to give their best evidence. Indeed, a Northern Ireland Law Commission (2011: 3) review of vulnerable witnesses concluded that procedural justice requires ensuring the disadvantaged can access trial. As part of the review, Honourable Mr Justice Bernard McClosky noted that:

"The simple rationale [for special measures] is that litigation should be determined following the court's consideration of all relevant and admissible evidence, presented in the most satisfactory, coherent and intelligible manner possible... The furtherance of the interests of justice must entail the creation of conditions – fair, balanced and proportionate – under which parties and witnesses have the opportunity to give their best evidence."

It is clear, then, that procedural justice requires trial practicalities be arranged so as to put witnesses at ease when giving evidence.

The need for careful consideration of trial practicalities can also be justified through an analysis of survivors' justice interests. While survivors were largely absent from criminal justice debate in the past, Wolhuter, Olly and Denham (2009) argue that increasing human rights discourses and the politicisation of crime led to survivors gaining recognition. For example, Doak (2008) notes that the interests of survivors are now considered in policy debate about criminal justice, with public discourse acknowledging that survivors are key stakeholders in the CJS. Political rhetoric therefore frequently mentions 'victims at the heart of criminal justice' and there is a Victims' Commissioner to encourage their consideration in policy (Rock, 2014).

Despite this recognition, there is ongoing debate about whether the CJS can and will provide survivor justice. Indeed, Daly (2016) theorizes that survivor justice involves a shifting set of needs that span meaningful participation, validation, vindication, and offender accountability. Similarly, McGlynn, Downes and Westmarland (2017) note that survivors want a sense of voice through active participation in the decisions and directions of justice procedures. Daly (2016) and McGlynn et al (2017) therefore argue that conventional justice mechanisms like the CJS are unlikely to meet survivors' needs in isolation, highlighting that they have long felt marginalised in the trial process (see also Konradi, 2007). Although improving trial practicalities alone cannot address this foundational exclusion from the CJS (see Smith 2014 for more on the underlying barriers to survivor justice), they can at least increase participation by allowing survivor witnesses to more easily fulfil their evidential role. While Daly (2016) and McGlynn et al's (2017) arguments, alongside the restorative justice movement, highlight that survivor justice must go beyond giving evidence in court; it is also therefore important to

recognise that being heard at trial remains significant for many survivors. Indeed, Herman (2010) found that while some survivors prioritised a sense of voice and restoration, others perceived justice as involving the CJS and so it is important to improve the practical experience of trial while simultaneously critiquing this as insufficient in isolation.

Improving trial practicalities, especially special measures, can therefore advance at least one element of survivor justice by better enabling survivors to be heard and increasing the likelihood that offenders are held to account. As Konradi (2007) and Payne (2009) have highlighted that trial practicalities cause significant anxiety, it is therefore clear that improving the pragmatic aspects of court can indeed contribute to survivor justice. Indeed, Hall (2009) has argued that having 'practical centrality' is one way to consider survivors 'at the heart of the CJS'. By practical centrality, Hall (2009) refers to the notion of arranging court around survivors' needs, for example reducing the time involved in waiting for trial and ensuring that court buildings are comfortable and safe. The findings below suggest that the current system is far from achieving Hall's (2009) practical centrality, but that simple changes would move it closer to a reality. Such improvements to survivor access of the CJS, while not enough in isolation, must therefore be considered if political rhetoric about advancing survivor justice is to be taken seriously.

Methodology

In light of the above literature, this study observed the practicalities of trial. This is because the existing literature has tended to focus on interview or survey methodologies; but court observations enable wider examination of trial processes (Foster, 2006). Court

observations were undertaken for ten months in 2012, with a three-month pilot in 2010. It is illegal for the public to digitally record trials in England and Wales, so speedwriting was used to make trial transcripts before the data was analysed using Fairclough's (2010) critical discourse analysis, which focuses on interdiscursivity, power relations and assumptions in speech. All of the data set out below was noted while the court was open to the public, primarily while the court was in session or during the short breaks in proceedings. While most of the data was in the form of a court transcript, some took the form of fieldwork notes where the researcher summarised significant non-verbal events and reflected on their role in the data collection process.

The time intensive nature of observations, as well as the detailed data produced, meant that a relatively small sample was most appropriate to ensure the trials were analysed in sufficient depth (Curtis et al, 2000). The sample therefore consisted of eighteen adult rape and sexual assault trials, with an additional ten in the pilot study. This represented almost all of the known cases in that court at the time and produced a large amount of data: 60-100 pages of typed transcript per trial. The sample was chosen using a combination of purposeful and opportunity sampling, for example the court was selected because it had recently won awards for witness treatment which suggested it was a centre of good practice. The trials themselves were sampled opportunistically, with the researcher attending court and asking for the next adult rape or sexual assault trial to start that day. The observed cases were varied; with some featuring multiple perpetrators or complainants, a range of mental health difficulties, and a mixture of domestic violence contexts and 'stranger' rapes.^{viii} Despite this variety, special measures were used in all except two cases where the survivor gave evidence.

Delays, accidental encounters and problematic public galleries

Key themes to emerge from the observations were that special measures can cause delays, witness facilities are insufficient, and intimidation is not always prevented. While special measures represent an improvement for survivors of rape and sexual assault, the rest of this article will therefore argue that more must be done to address problematic trial practicalities.

Delays related to special measures

Special measures caused delays in all but two cases using them; with an average of 75 minutes special measures' related delay per trial. In T11, the failure to adequately provide these measures even caused the case to be postponed because the CPS did not book an intermediary and sign language interpreter for long enough to gather evidence from the survivor, who was deaf and had severe learning difficulties. The case was therefore delayed until all specialists were next available; but when requesting an update two years later, the trial had not yet occurred and since then there has been no information available.

Overwhelmingly, the special measures' related delays were caused by technical faults in the facilities for video links and pre-recorded DVD evidence. These measures became notorious for delays:

“This must come as no surprise; these problems come in pretty much every trial that uses them.” (Prosecution, T6).

The difficulties that arose included sound problems (T1), the DVD skipping (T10) and the witness room DVD player failing (T15). Indeed, the technology was considered so unreliable that the two defence barristers in T10 noted they always experienced delays when using video special measures. This was reflected in the data: all twelve uses of video evidence featured problems, although only eight of these caused delays of over an hour.

As well as decreasing court efficiency, delays because of special measures were perceived as problematic for survivors. For example, the T9 defence barrister noted that “if designing something to upset the witness, you couldn’t do a better job”. It is therefore positive that court personnel attempted to alleviate the delays by campaigning for investment in new technology, swapping courtrooms when technical faults occurred, and allowing survivors to watch their pre-recorded DVD separately. For example, the court received £250,000 for new video facilities after one judge made “a terrible fuss” about needing investment to “avoid some of the delays we’ve experienced in the last few months” (Judge, T1). This money did not solve the delays, though, and when discussing the new facilities, one Clerk (T10) noted: “I haven’t had one of those work yet, I have to say... the synchronisation [with the witness room] has been a problem”. It was widely perceived that these continuing faults were because of cheap DVD players. For example, one judge commented that “they pretend that which is bought for £20 is bought for reasons of quality when it isn’t” (Judge, T12). This meant that of the seven cases in which new DVD players were used, three ended up seeking out the old machines instead. One judge even requested the make and model of the old players so that he could purchase one to have in his courtroom (T12). These observations are particularly significant in light of the Ministry of Justice’s (2012) commitment to extend the use of video evidence at court in order to increase efficiency. Indeed, the current research suggests that if not

managed correctly and with sufficient funding for good quality technology, the extension of these efficiency measures could actually result in more delays.

Additionally, delays were reduced by having the survivor watch their pre-recorded DVD evidence separately, rather than via the video link with court. This successfully alleviated delays in six of the ten cases using pre-recorded evidence as it prevented the common problems with synchronisation between the court and witness room. The judge in T1 was initially wary about whether using separate DVD players was allowed:

“[I have spoken to another judge about watching the video separately to [Survivor2] and he sees no problem with it, but I know it’s not necessarily good. Can you consider the law for five minutes]?” (Judge, T1)

He was eventually satisfied that it did not cause any legal difficulties, and another judge later noted that watching the DVD separately “should be standard practice, it seems to me” (T18) because it prevented technical faults and allowed the survivor to watch at their own pace. Given that this is a cost neutral change with the potential to significantly decrease delays, it seems pertinent to ensure all judges in England and Wales are reassured that there are no legal difficulties if the survivor watches their DVD evidence separately. As such, this measure provides significant benefits without any limitations. In addition, having the survivor watch their pre-recorded evidence separately would allow them to pause during difficult moments without disrupting the trial. While this may mean that juries finish the DVD before the survivor, it is unlikely to cause delay because breaks in the trial, for example lunchtimes, are often planned around the end of evidence-in-chief and would give the survivor time to ‘catch up’.

Inadequate witness facilities

Poor video technology was not the only problem with witness facilities. For example, the rooms from which survivors gave video link evidence were perceived as claustrophobic. In T4, the judge noted that “it’s quite a difficult, oppressive room to be in”, while the prosecution barrister described it as “cramped... no window” (T4). This even led one survivor to change her special measures application; saying she would prefer to be cross-examined using screens rather than sit in the witness room, which was “like a cupboard” (Prosecution, T6). The limitations of witness facilities have been noted elsewhere, for example several reports highlight that resources are often inadequate (HMCPST, 2007; MacMillan & Thomas, 2009; Payne, 2009). These observations therefore support existing research and suggest that despite ongoing commitments to better facilities, witness rooms remain substandard. This is especially significant considering the court in question has won awards for witness facilities, making it an example of best practice.

Specialist Sexual Violence Courts could alleviate these difficulties, as evaluations suggest they are effective at adapting court layouts to significantly reduce anxiety amongst survivors (Walker & Louw, 2003). Payne (2009) has argued that improving witness facilities is not too expensive, but it is important to recognise the context of radical budget cuts (Rock, 2014). Indeed, the Ministry of Justice had its budget cut by 34% between 2010 and 2015, so amending courts to address these practicalities could appear extraneous (Wheeler, 2015). When viewed within the framework of survivor participation, however, it is clear that the practicalities of trial are significant and require investment in order to fulfil the ‘victims at the heart of the CJS’ rhetoric of recent years (Doak, 2005).

The observations also highlighted an apparent contradiction in policy; as special measures were available for all survivors^{ix} during the evidence process, but there was no facility to help survivors watch the rest of trial once finished. This was most obvious in T8, where the defendant pleaded guilty on the day of trial and the survivor came to watch her ex-partner formally change his plea. The legal professionals seemed very considerate of her emotions, for example limiting the time she would sit in court with the defendant by asking him not to enter until the Judge was ready (Field notes, T8). Despite this, the survivor became visibly upset as soon as the defendant was present, especially when he initially refused to plead guilty and instead began speaking loudly to her in their first language (Field notes, T8). Ultimately the defendant did plead guilty and was sentenced, but then began calling out to the survivor once more:

“[Defendant] goes to the edge of the dock and shouts at [Survivor] in [first language]. No one says anything- barristers don’t check what he says or seem concerned, but the dock officer eventually takes him to the cells” (Field notes, T8).

This shows that in order to watch the case’s conclusion, the survivor had to be seen and contacted by the defendant. Concern about this possibility also led to the prosecution in T15 persuading the survivor’s family that she should not sit in the public gallery:

“Prosecution asks [Survivor]’s mum and sister to dissuade her from sitting in the public gallery, saying it may be too difficult seeing [Defendant] and could fuel claims that she’s trying to cause trouble” (Field notes, T15).

It was therefore presented as inappropriate for a survivor to sit in the public gallery; ignoring that they are key stakeholders in the trial (see Daly, 2016).

Other stakeholders at risk of intimidation included the survivor's family, who were surrounded by large numbers of defendants' supporters in nine of the eleven full trials. For example, in T1, Survivor1's father sat alone with five of the defendants' friends, repeatedly telling them that he did not want to cause trouble. Similarly, the survivor's parents and sister in T14 sat with eleven of the defendant's friends and family. On another occasion, the Defendant1 (T1) shouted homophobic abuse, such as "don't look at me, you dyke", to the survivor's sister. This highlights how the public gallery can be intimidating for those whose experiences are not usually considered, but who have significant investment in the case. Indeed, the unique stake that friends and family of both parties have in a case is recognised within restorative justice, and 'the right to hear' has become a central part of procedure in this approach (Hudson, 2002). The CJS therefore needs to catch up with more innovative justice mechanisms in providing a way to engage with proceedings in a non-intimidating way.

This is especially true in relation to the survivor and their 'right to hear', which these observations show to be ignored by legal professionals. It was assumed that survivors would not want to see the rest of trial; and where they did, this was interpreted as possible trouble-making (T15), compounding the potential for exclusion noted elsewhere (see Westmarland, 2015). One option to address this is the filming of trial for private viewing by the survivor and their close family.

Filming in courts is controversial because although the principle of open courts is embedded within common law, cameras have been prohibited since the *Criminal Justice Act 1925*. Despite this ban, there has been increasing debate about the potential benefits of filming criminal courts, for example Ho (2015) notes that televised proceedings could increase judicial accountability and educate the public. As courts are already open to the public, fears about impinging on participants' privacy also appear unfounded (Ho, 2015). Regardless, concerns remain about whether televised proceedings would make trials into entertainment (Kennedy, 2013) or distract those involved (Lepofsky, 2009).

Nevertheless, it is possible to justify the filming of court proceedings for the private viewing of the survivor or their family. Judicial decisions are already filmed in the Supreme Court and Court of Appeal, and a pilot scheme is filming (but not broadcasting) sentencing remarks in eight Crown Courts (Ministry of Justice, 2016). There is subsequently a precedent for opening courts to limited television in the interests of open justice. Additionally, potential concerns about influencing the jury (see Lambert, 2013) are not relevant because the media and general public would not access the footage. As with the filming of other courts, the cameras could be strictly limited to show only judges and barristers, avoiding observation of the witnesses, defendant, or jury (Ho, 2015). Indeed, the screening of trial in this limited manner is arguably akin to how survivors already experience the evidence-giving process when using video link. Potentially, these video links could remain on (one way) to allow survivors to watch the remainder of the trial, without that being considered 'filming' of court.

Given the apparent inhospitality of the video link rooms, though, it would be preferable to film courts in a format that could be viewed more comfortably. The exact details will

require input from legal professionals, however it seems useful to at least initiate discussion. The oft-cited Lord Hewitt argued in *R v Sussex Judges* that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”, and it is reasonable that this should extend to survivors. Ultimately, then, it is important to discuss the limited filming of trials for private viewing so the Government can encourage participation and access to justice required by its victim-centred rhetoric (see Hall, 2009).

Screens and intimidation

Finally, the observations revealed that witnesses who gave evidence from behind a screen still faced intimidation when entering court. For example, the defendant often had strong support in the public gallery; and while these supporters were mostly respectful of witnesses, this was not always the case: “A female friend of [Defendant] is laughing at the survivor throughout her difficult cross-examination” (Field notes, T4).

Similarly, the defendant’s friends in T9, who intimidated all prosecution witnesses so much everyone was granted screens, were heard making threats from the public gallery:

“Defendant’s friends tell him ‘we’ll sort [Survivor] out after’. Defence hears, but doesn’t say anything despite there being a contempt of court case about the Defendant’s family intimidating her” (Field notes, T9).

This case was a re-trial because the defendant had shouted at the survivor behind the screen during her original evidence, causing such distress that she became ill and trial was postponed. In another trial, the survivor was left outside the courtroom with the defendant and his family:

“Defendant is sitting outside with family when Survivor is brought up to the courtroom. Witness Service asks if she can sit in court instead of waiting outside. Defence agrees, so both the Survivor and Defendant (and ten family members) enter court. Survivor sits behind a screen and everyone ignores her while she cries. This continues for 10 minutes.” (Field notes, T14)

Indeed, the survivor’s entry into court often held a risk of distress if not carefully managed. Most witnesses who used screens had to walk past the public gallery when entering and exiting court: “Survivor exits, hiding her face from the public gallery and starting to cry” (Field notes, T14). In this trial, the survivor repeatedly went to and from the witness box past eleven defence supporters. In fact, the defendant’s friends and family were present while the survivor entered in seven of the nine cases using screens. Once behind the screen, some survivors were also still able to see, and be seen by, the defendants’ friends and family because the screen only covered half of the public gallery (this was particularly notable in T1). Most judges ignored this, with only the judge in T12 checking which areas of court were visible from the screens before the survivor entered.

On a positive note, three judges did recognise the need to shield intimidated witnesses from the public gallery. One of these judges used the witness corridor to bring the survivor into court without seeing anyone (T1); but the other two judges did not have this facility. Instead, they asked the public gallery to exit court while prosecution witnesses (T9) or the survivor (T12) entered, showing that a separate entrance was not required in order to receive consideration. It may be argued that the mode of entering and exiting court becomes insignificant in light of the difficult questioning that a survivor

experiences once present (Smith, 2014), however the potential impact of an intimidating walk to the witness box should not be underestimated:

Judge: “[We can’t risk an accidental sighting between Survivor and Defendant’s Aunts because it would rattle her and wouldn’t be fair. We want her to give her evidence the best she can, and so we must avoid upsetting distractions]” (T12).

Konradi (2007) notes that survivors are often aware of people in the public gallery and amend their demeanour accordingly, although this was US research and did not explore the impact of public galleries in depth. The present observations therefore provide useful insight; for example the majority of trials using screens did not account for possible intimidation when survivors walked past the public gallery. This is important because the body language of survivors, for example hiding their face or becoming visibly distressed, suggested that such intimidation did occur. Courts should therefore use separate corridors and entrances for witnesses where available, and develop alternative modes of entry where they are not. These alternatives could include using judicial corridors and emptying the public gallery while survivors enter the witness box. Such changes would be cost neutral, since alternative corridors are already present^x; and does not impact on court efficiency since the jury and defendant already leave court while survivors enter. Similarly, the jury would not witness these additional measures because they are not present when the survivor enters court, meaning there is no risk of prejudice. There is already a clear mandate for removing the public gallery, since the *YJCEA 1999* provides for the emptying of court when vulnerable or intimidated witnesses give evidence.

Indeed, rape trials could be conducted in closed court to avoid difficulties with the public gallery. Many countries, such as India, already undertake rape trials in closed courts and the potential benefits require further research. Having said this, removing the public gallery from rape trials would also limit the survivor's access to the trial outside their evidence-giving role. It would additionally limit the extent to which researchers and activists could access courts to observe trial practices and increase accountability. Similarly, it must be recognised that the survivor's and defendant's friends and family have a significant stake in the case and should be able to watch the trial. Ultimately, the notion of closed courts appears a step backwards from the participation and 'right to hear' that is increasingly central to notions of restorative or procedural justice (see Hudson, 2002). It therefore seems best to focus on easing the tensions of the public gallery and enabling intimidated witnesses to access the rest of trial, rather than closing courts and making rape trials even more impenetrable.

Concluding remarks

This research sought to better understand how trial practicalities impact on adult rape and sexual assault trials. The findings show that while existing research highlights the benefits of policies such as special measures (Hamlyn et al, 2004), there are also problems to be addressed. For example, video links and pre-recorded interviews often featured a delay because the technology failed. In addition, witness facilities were recognised as inadequate and using screens did not protect survivors against intimidation from the public gallery. Ultimately, then, the findings suggest that the policies attempting to alleviate trauma at trial may be limited by how they are put into practice.

There are several short-term and cost-neutral recommendations that would significantly improve the practice of using special measures. This does not mean that long-term reform is unnecessary; but rather that it does not negate the potential benefits of more immediate change. For example good practice, such as having the survivor watch their pre-recorded interview separately, should be publicised and judges reassured that there are no legal restrictions on this. In addition, it is important to mainstream the use of separate corridors by which the survivor can enter court, through the use of existing witness or judicial corridors. Finally, the public gallery should be emptied during the survivor's entrance into court, and the possibility of filming trials for the survivor to view privately should be considered.

Such recommendations are not limited to England and Wales, as special measures are used internationally. For example, the practical considerations of protecting the survivor outside of giving evidence are relevant to all jurisdictions, especially those using screens. Ultimately, this research highlights the importance of recognising trial practicalities in order to pursue survivor justice. Without meaningful participation, the CJS cannot claim to honour its 'survivor-centred' rhetoric (Doak, 2008) and there are clear human rights bases for ensuring that special measures work effectively (Council of Europe, 2012; UN, 1985). While more fundamental change is also needed, it is therefore important to recognise the role that trial practicalities have in procedural and survivor justice, as well as enabling witnesses to give the best evidence and encourage 'truth-finding' in court.

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ⁱ Full discussion of these problems is beyond the main scope of this article, especially given the magnitude of the literature; however Westmarland (2015) provides a helpful summary. Smith (*forthcoming*) also sets out the role of rape myths, gendered stereotypes, and adversarial notions of justice at trial.

ⁱⁱ The identification of eligible witnesses is not discussed here because it occurs before trial and all observed witnesses were told they could access measures if desired. As rape survivors are automatically eligible, they have avoided difficulties in access, however Charles' (2012) evaluation of these issues is highly recommended.

ⁱⁱⁱ For child witnesses or those with a learning difficulty that causes difficulty in communicating.

^{iv} Some legal professionals argued there were fewer extraneous lines of enquiry because questions had to be agreed in advance. It is not clear whether this would remain true for adult witnesses without disability, as legal professionals already hone their questioning for the vulnerable witnesses involved here.

^v Although Ellison & Munro used high quality technology and best practice interviewing techniques, so they are not representative of all special measures usage.

^{vi} This is not about dismissing the right to a fair trial, which must be defended in order to provide justice; rather, it is about checking the assumption that it inherently justifies poor treatment of witnesses (see Smith, 2014).

^{vii} It remains unclear how the UK's decision to exit the European Union will affect survivors' rights, but they are strongly rooted in UN principles so it is unlikely to move far from the current understanding, especially given public demand for a more victim-centred CJS.

^{viii} Domestic violence contexts made up the majority of cases. While there are no up-to-date statistics about the proportion of trials featuring partner violence, Lovett et al (2007) note that attrition is lower among domestic violence rapes once reported and so this may be representative of the cases reaching trial.

^{ix} Although two survivors chose not to use them, it was made clear they were available if desired.

^x Where a courtroom does not have witness corridors, there are still judicial ones.