



Special Measures in Rape Trials: Exploring the Impact of Screens, Live Links and Video-Recorded Evidence on Mock Juror Deliberation

In England and Wales, in accordance with the adversarial principle of orality, witnesses in criminal proceedings are generally required to give evidence 'live' in open court. It is, nevertheless, now widely accepted that this obligation can place onerous demands on witnesses and militates against receipt of the best evidence potentially available in some cases. For victims of rape, the process of testifying can be a particularly harrowing ordeal, given the intimate nature of the offence and the consequent need to recount explicit sexual details in a public arena in the presence of an alleged assailant. Indeed, some rape complainants have described their experiences in court as being tantamount to a 'second assault' (Lees, 1996; Victim Support, 1996). The special measures provisions of the Youth Justice and Criminal Evidence Act 1999 were introduced to ameliorate this situation by granting adult sexual offence complainants (and other eligible adult witnesses) the use of alternative – more 'witness friendly' – trial arrangements, in situations where courts are satisfied that this would maximise the quality of a witness's testimony. Previously reserved for child witnesses, these modifying measures include the use of live television links to allow a witness to give evidence from a room remote from the main courtroom in a comparatively informal, relaxed environment (while remaining visible and audible to those present in the courtroom), the admission of video recordings of pre-trial witness interviews in place of examination-in-chief at trial, and – where witnesses give evidence in the courtroom – the erection of temporary screens around the witness box to shield witnesses from the potentially intimidating gaze of the defendant.

Previous research has identified a high level of appreciation of the protection afforded by these alternative trial arrangements amongst victims and witnesses (Hamlyn et al, 2004). At the same time, however, substantial concerns have been raised regarding their potential undue influence on the proof process, and on juror decision-making in

particular. Critics have, for example, worried that the use of special measures by adult sexual offence complainants may unfairly prejudice the defence or imbue a complainant's testimony with an undeserved level of credibility (Temkin, 2000). Meanwhile, others have feared that the absence of the complainant in the courtroom, and the mediating effect of the video link, may create a distance between her and the jury, which will make it less likely that her account will incite sympathy and/or be believed (Payne, 2009a). Concerns have also been expressed regarding the extent to which the use of video-recorded police statements as evidence-in-chief places complainants at a disadvantage, since officers are engaged at that stage in an investigatory process, receiving and pursuing fresh information as the account unfolds. This means that these accounts lack the kind of logical, sequential narrative that can be imposed by advocates who take the complainant through her testimony in the courtroom. It was in the light of these latter concerns, and evidence suggesting that many video-recorded statements are of poor visual quality and exhibit inadequate police interviewing techniques, that Baroness Stern concluded in her recent review of rape prosecutions in England and Wales that their use could indeed pose a 'big hindrance' to justice (Stern, 2010, Payne, 2009b).

The potential impact of special protective measures on juror decision-making is clearly, therefore, both a significant consideration in terms of ensuring justice in individual cases and a source of substantial debate amongst commentators and practitioners. Despite this, at least in the context of cases involving adult rape complainants, it has received scant empirical investigation (cf. Taylor and Joudo, 2005). To bridge this knowledge gap, this ESRC funded project (RES-000-22-4277) investigated the influence of three special measures upon juror perceptions and evaluation of adult rape testimony: (1) live-links; (2) video recorded evidence-in-chief followed by live-link cross-examination; and (3) protective screens.

Summary of Key Findings

- Use of special measures had no consistent impact upon juror evaluation of rape testimony
- Jurors' responses furnished no clear or consistent evidence of reduced emotional impact when video-mediated testimony was used, relative to evidence delivered 'live and in the flesh'
- Mode of presentation did not substantially impact upon jurors' perceptions of credibility
- Mode of presentation did not substantially impact upon jurors' perceptions of trial fairness

Method

Since the Contempt of Court Act 1981 prohibits research with 'real jurors', a simulation was undertaken. 4 different mini rape trials were scripted and re-enacted by professional actors and barristers in front of an audience of mock jurors. Across these, key facts and role-playing personnel remained constant while independent procedural variables relating to the mode of evidence presentation were manipulated. In the first trial, the complainant gave evidence by means of a live TV link, appearing in court on a 50 inch plasma screen (head and upper body). In the second, the complainant gave her evidence in the courtroom from behind an opaque partition which shielded her from the defendant but allowed her to be observed by the judge, legal representatives and the jury. In the third trial, a video recording of the complainant's pre-trial interview with the police replaced her examination-in-chief, and cross-examination was conducted via a live TV link with the complainant once again appearing in court on a 50 inch plasma screen. The researchers recorded this video at a police interview suite, using the same equipment that would be used in a real

case, with questions being asked by an experienced rape investigator (sound quality and picture resolution were comparable for the live-link and video conditions). This interview covered the same substantive points as the examination-in-chief but, in an effort to replicate the less structured way in which the account would be likely to unfold at this early stage, additional repetition and delays were included and some of the narration was adjusted to render it less logically sequential. In the process of this scripting, the authors observed a number of training videos of police officers conducting such interviews with mock complainants, in order to incorporate what were identified to us as examples of good practice, in conjunction with the Achieving Best Evidence guidelines. In each of these three trials, the judge directed the jury that it was now commonplace for special measures to be utilised in rape cases and that they should not allow their use to prejudice them in any way against the defendant. In the fourth trial, the complainant testified from the witness box in court, without the use of special measures.

Basic Mock Trial Scenario

The complainant and defendant had been in an eight month relationship, which ended approximately two months before the alleged offence took place. The defendant called at the complainant's home (which they previously shared) to collect some possessions. He and the complainant enjoyed a glass of wine and some coffee as they chatted. A few hours later, as the defendant made to leave, the two kissed. It was the Crown's case that the defendant then tried to initiate sexual intercourse with the complainant, touching her on the breast and thigh, and that the complainant made it clear that she did not consent to this by telling the defendant to stop and pushing away his hands. The Crown alleged that the defendant ignored these protestations and went on to rape the complainant. When the defendant was questioned by the police, he admitted that he had had sexual intercourse with the complainant, but maintained that all contact was consensual, and this was the approach taken by the defence. A forensic examiner testified that the complainant had suffered bruises and scratches of a sort that were consistent with the application of considerable force, but that – as was not uncommon – she had sustained no internal bruising. He advised that while intercourse had occurred between the parties, the evidence available following his examination of the complainant was neither consistent nor inconsistent with rape.

Each trial reconstruction lasted approximately 75 minutes and was observed simultaneously by between 38 and 42 participants from the local community (recruited by a market research company). Having observed the simulation, jurors were streamed into five different juries to reach a unanimous, or failing that, majority, verdict. These deliberations, which lasted up to 90 minutes, were recorded and subsequently transcribed, coded and analysed. Prior to embarking on deliberations, jurors were given a short questionnaire and asked to answer a few preliminary questions regarding their views as to the complainant's consent, the defendant's belief in her

consent and their initial verdict preference. At the close of deliberations, a more extensive questionnaire was issued, which asked participants questions about their perceptions of the complainant, the defendant and their respective accounts. Participants were also asked at this stage to give their views in regard to the deliberative process, the group verdict, and the relevance of the evidential variables under analysis. By adopting this dual approach, the researchers were able to triangulate analysis of jurors' responses to questionnaires with the findings that arose from the deliberations, mitigating some of the limitations associated with each method alone.

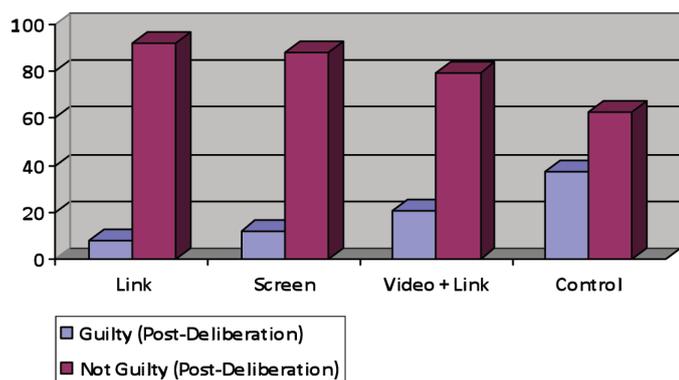
Outline of Key Findings

Verdict Outcome, and Its Limitations as an Indicator of Impact

While the verdicts reached by participants in this study are important, it would be unwise to rely upon them as the only, or even most important, index of the influence of special measures use. There are, after all, a wide variety of factors that can frame individual and collective verdict outcomes. The fact that, as outlined in the table below, juries who observed exactly the same trial reconstruction reached different conclusions testifies to this need for caution. To the extent that verdict outcome does provide a useful indicator, however, our findings failed to establish any clear or consistent pattern in relation to juror responses to the divergent trial stimuli. The vast majority of verdicts were either unanimous or majority not guilty, but there was some variation across the different trial conditions in relation to final verdicts.

	Unanimous Not Guilty	Majority Not Guilty	Unanimous Guilty	Majority Guilty	Hung Jury
Live Link (Trials A-E)	3	2			
Screen (Trials F-J)	3	1			1
Video plus link (Trials L-O)	3	1	1		
Control (Trials P-T)	2	1	1	1	

Of the three guilty verdicts returned, therefore, one occurred in the video/link condition and the other two in the control condition. On first sight, this might suggest that there was something significantly different about the approach taken by jurors in the control condition where no special measures were used. This would seem to be supported, moreover, by the fact that, at the level of individual post-deliberation verdict preferences, there were more guilty votes cast in the control condition (37%, $n=15/40$) than in any of the other trial conditions (screen 12%, $n=5/43$; link 8%, $n=3/39$; video/link 21%, $n=8/38$)



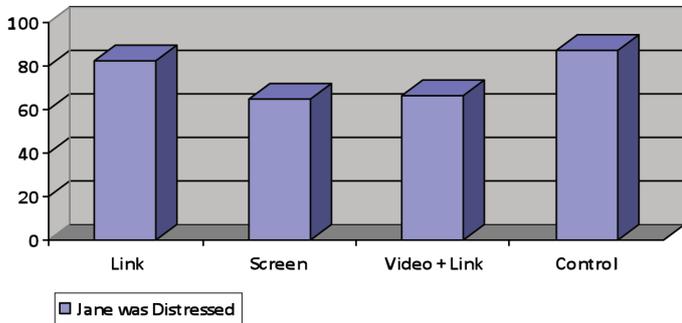
A closer inspection of the data indicates, however, that this difference had little to do with the divergent means of testimony delivery. Indeed, it seems to correlate more strongly to the fact that individuals in the control juries (particularly Juries P and Q, which returned guilty verdicts) were more inclined from the outset to accept that victims of sexual violence do not always engage in physical resistance and to see the injuries sustained by the complainant as sufficient corroboration for the alleged assault. This suggestion that the voting preferences of jurors often had more to do with prior expectations regarding 'appropriate' responses to rape and 'normal' socio-sexual behaviour than they did with the mode by which the complainant's testimony was delivered is supported, moreover, by the fact that our jurors' post-deliberation verdicts failed to support a clear and consistent preference for in-court testimony over video-mediated evidence. Thus, whilst the highest number of individual guilty votes was cast in the control condition and the lowest number in the link trial, a higher percentage of guilty votes was cast in the video+ condition than in the condition where the complainant was physically present in court giving live evidence, albeit shielded from the defendant by the use of an opaque screen.

Cumulatively, this presents a rather mixed picture regarding the impact of presentation mode on verdict outcome. This is not altogether surprising in a context in which verdict outcome alone offers a limited indicator of influence, and myriad other variables can play a part in its framing. It is necessary, therefore, to delve further into the substantive content of the deliberations to explore more subtle signs of influence.

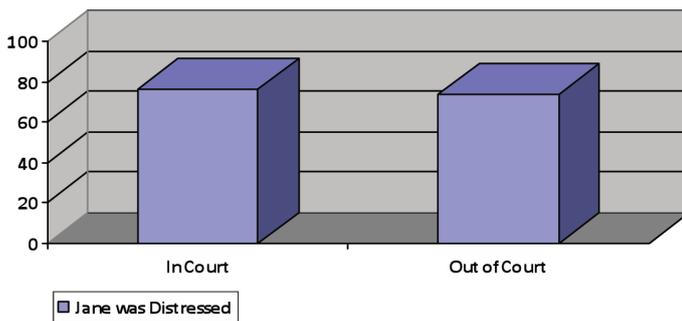
Reducing the Emotional Impact of Testimony

Our findings provide little support for the suggestion that the emotional impact of testimony will be reduced when a witness appears on a screen, translating into a loss of juror empathy. Across all of the deliberations, there were only a handful of exchanges which raised concerns of this sort and it is not clear that these had any real bearing on jurors' approach to other aspects of the deliberation, or indeed to their verdict. The majority of participants made no reference to the live-link or to the use of video-recorded evidence during deliberations (in these juries, discussion of special measures never exceeded 4 minutes in duration). Moreover, when asked in post-verdict questionnaires to reflect on specific questions about the complainants' emotional state, there was no clear evidence to suggest that the mode of delivery had an impact. As illustrated in the chart below, when asked whether they considered that the complainant was distressed whilst giving her testimony, the highest positive response was generated in the control

condition where no special measures were used (87% n = 35/40), but rates remained comparatively high in the other trial conditions (82% n = 32/39 with the live-link, 65% n= 28/43 with the screen and 66% n = 25/38 with video testimony followed by the live-link).

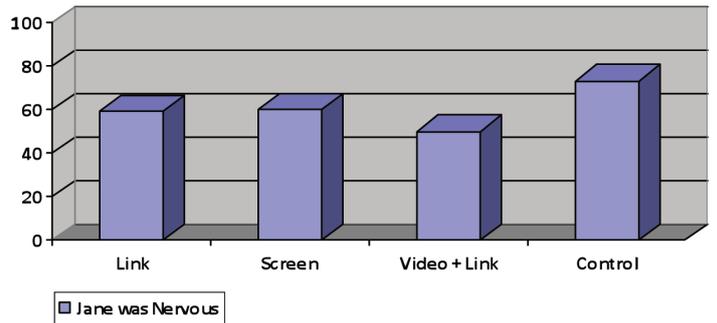


Importantly, this suggests that the use of special measures did not significantly preclude jurors from appreciating the emotional difficulties which the complainant was experiencing at the time of recounting her testimony. Certainly, these responses furnish no clear or consistent evidence of reduced emotional impact when video-mediated testimony was presented relative to evidence delivered ‘live and in the flesh’, a point made clear when we combine responses to reflect the in court / out of court split in our trial conditions. Indeed, as illustrated below, when responses for the screen and control conditions are combined, the positive response rate reaches 76% (n = 63/83), while the combined response rate for the live-link and video evidence plus live-link trials is only marginally lower at 74% (n = 57/77).

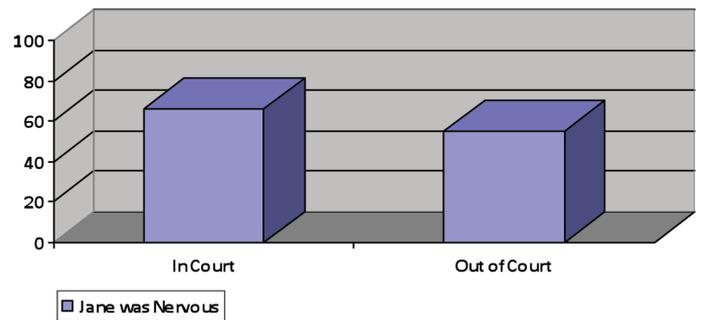


A similar position emerges in relation to participants’ responses regarding whether they considered that the complainant was nervous whilst giving her testimony. Here, once again, the control condition yielded the highest positive response, with 73% (n = 29/40) of jurors either agreeing or strongly agreeing that the complainant was nervous. As with distress, however, responses were relatively high in the remaining conditions (60% n = 26/43 with the screen, 59% n = 23/39 with the live-link, and 50% n = 19/38 with the video testimony followed by the live-link), indicating

that jurors’ ability to acknowledge and respond to the emotionality of the complainant were not substantially diminished by the use of special measures.



Again, when responses for the screen and control conditions on the one hand, and the live-link and video evidence conditions on the other, are combined to create an in court / out of court split, the margin of divergence reduces further. While 66% (n= 55/83) of jurors agreed that the complainant was nervous giving testimony in court, 55% (n = 42/77) felt that she was nervous even in the out of court environment.

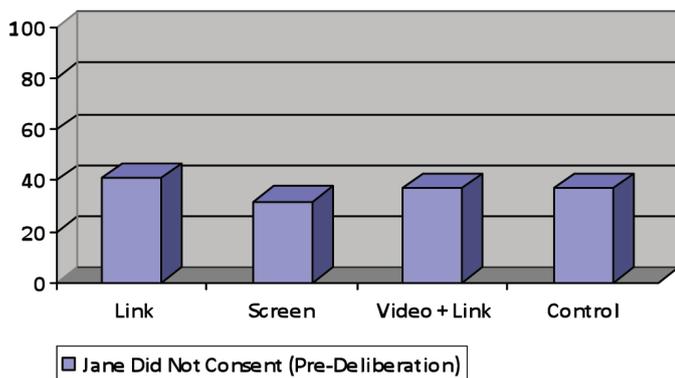


Impacting upon Assessments of Credibility

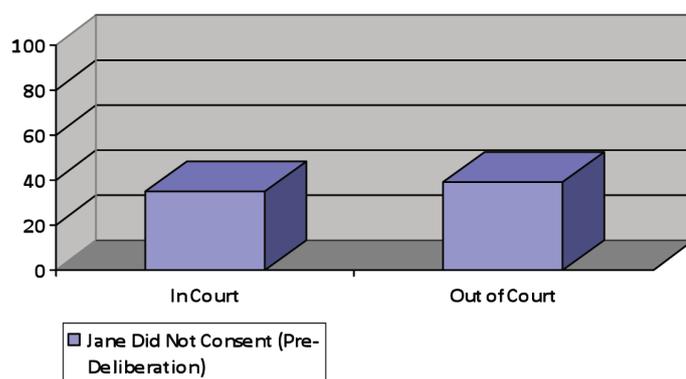
Some commentators have suggested that video transmission or the use of other forms of special measures may imbue witness testimony with undeserved credibility, whilst others have argued, to the contrary, that the removal of a witness from the courtroom may undermine her perceived reliability or trustworthiness in the eyes of jurors. Once again, we found very little evidence in support of either of these perspectives, with the overall sense being that the mode of delivery of the complainant’s testimony had minimal impact in terms of jurors’ assessments of its credibility. This is not to say that there were not occasional jurors who expressed views which could be seen to support these concerns, but the direction of those comments – which were themselves much in the minority – was variable, suggesting that the special measures could work in favour of the complainant as much as they could work against her.

These findings are supported, moreover, by the responses provided in the pre-deliberation

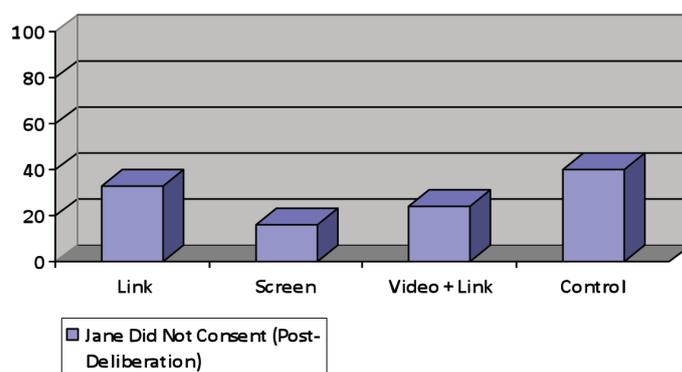
questionnaire where jurors were asked whether they gave credence to the complainant's claim that sexual intercourse took place without her consent, and there was no clear correlation to the existence of differing modes of evidence delivery. Here, as illustrated below, 41% (n = 16/39) of jurors in the live-link condition indicated that they believed the complainant, compared to 37% (n = 15/40) of jurors in the control condition, 37% (n = 14/38) in the video evidence and live-link condition, and 32% (n = 14/43) in the screen condition.



When these responses are configured to reflect the in / out of court split, we still find no clear evidence of a link between juror perceptions of the complainant's veracity on the issue of consent and presentation mode. While 35% (n = 29/83) of jurors indicated belief in the complainant's account when she testified in court, the positive response rate rose slightly to 39% (n = 30/77) for the out of court conditions.



By the time of the post-deliberation questionnaires, when participants were again asked for their views regarding the complainant's credibility, it is true that there was somewhat of a shift in perspectives across the different conditions. Thus, as illustrated below, participants in the control condition were now most convinced of the complainant's veracity (40% n = 16/40, compared to 33% n = 13/39 with the live-link, 24% n = 9/38 with video recorded evidence plus the live-link and 16% n = 7/43 with the screen).

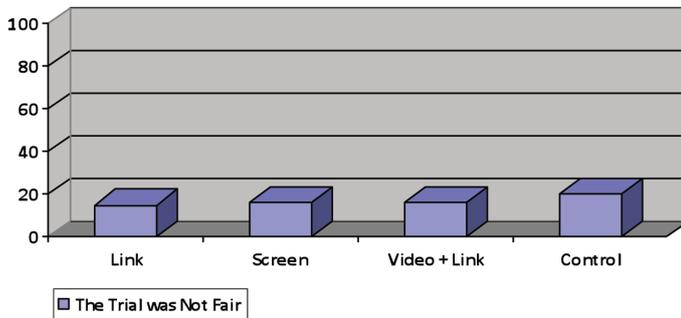


Although, on the surface, this might be thought to suggest a negative correlation between special measures use and perceived credibility, a deeper analysis of the content of the deliberations reveals that these credibility assessments correlate more strongly with jurors' beliefs about injury and resistance than the means by which testimony was presented. Thus, in the live-link, screen and video/link conditions, where belief in the complainant's perceived veracity dropped post-deliberation, a key factor influencing this swing appeared to have been the frequently forceful assertions of peers that a genuine victim of rape would have fought back more aggressively than the complainant, sustaining (and inflicting) thereby a higher level of bodily injury. By contrast, in the control condition, it was apparent that this line of argument failed to gain the same amount of ground. To this extent, we believe that – in line with the observations above regarding the use of verdict outcome as an exclusive indicator - simply reading off and extrapolating from these post-deliberation questionnaires in isolation would be highly misleading, and that the tone of deliberations, coupled with participants' pre-deliberation responses on credibility, provide a more accurate picture reflecting the lack of clear influence associated with special measures.

Fairness for / to the Defendant

A further source of concern raised by commentators is that, notwithstanding countermanning judicial direction, the use of special measures may prejudice the defence, either by suggesting to the jury that the witness cannot face being in the same room as, and needs to be protected from, the defendant, or more generally by creating an imbalance in the procedures by which competing accounts are provided. Our findings provide little evidence to suggest that this was a significant factor in framing the approach taken by our jurors to their deliberative task. The risk that the use of special measures may be adversely prejudicial to the defendant was only explicitly raised by jurors in three trials – all of which involved the use of a live-link - and in each instance the suggestion was quickly challenged by other jurors.

The majority of participants answered affirmatively when asked, in post-deliberation questionnaires, if the trial they had observed had been fair, and negatively when asked if the defendant had been disadvantaged by the way in which the trial had been conducted. Moreover, when jurors did register concerns, no clear pattern emerged from the responses to suggest a direct association with presentation mode. As illustrated below, participants in the control condition, where no special measures were used, were in fact most likely to answer negatively when asked if the trial was fair (20% n=8/40), closely followed by jurors who had observed the other three conditions - 16% (n=7/43) with the screen, 16% (n=6/38) with the video-recorded testimony followed by live-link, and 15% (n=6/39) with the live-link.

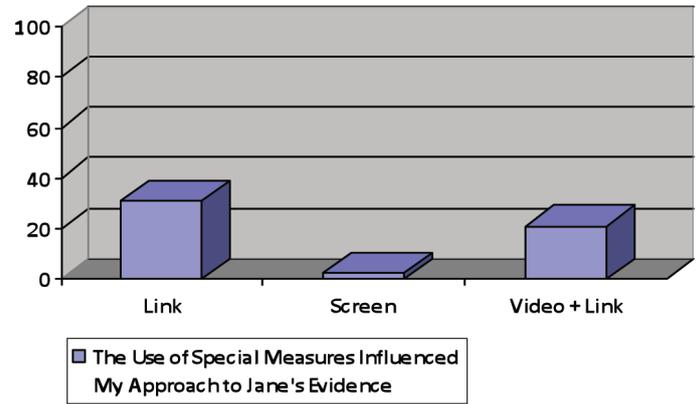


Looking to the written comments by which participants supplemented their responses on the issue of fairness in the post-deliberation questionnaires, it was apparent, moreover, that the primary source of consternation for this minority of jurors was the sufficiency – or rather the perceived insufficiency – of evidence adduced in the trial rather than the complainant’s use of special measures. Several jurors complained that they had not been presented with “enough evidence” in court while one lamented the particular absence of “character witness testimony” and another the comparatively “weak” performance of the defendant’s barrister. Only one participant in this study explained a negative assessment on fairness by reference to the mode of delivery – in this instance, referring to the use of the live-link and stating that the trial “was biased in favour of the victim by allowing her to ‘hide’ behind a TV screen”.

Jurors’ Perception of Influence

The limited influence of special measures upon jurors in the present study is further evidenced by their responses to post-deliberation questionnaires in which they were specifically directed to reflect on the relevance, or otherwise, of mode of evidence delivery to their deliberations and ultimate verdicts. A minority of participants did report at this stage that they had given some consideration to the presentation mode.

Indeed, while only 2% (n = 1/43) reported that they were influenced by the use of the screen (which corresponds to the fact that this was never raised explicitly by jurors during deliberations), 21% (n = 8/38) reported that they were influenced by the use of the video testimony and live-link together, and 31% (n = 12/39) reported that they were influenced by the use of the live-link.



This reflects a higher level of influence than it was possible to identify from the jury deliberations. On the one hand, this could be attributable to the fact that participants harboured this influence but left it unarticulated in the discussions. This may account for some measure of the differential, but given the otherwise frank and full nature of the deliberations and the fact that, where the influence of special measures was raised, it was never a prominent feature of discussion, we would suggest that a more credible explanation lies instead in the fact that, having been asked specifically to reflect on this one factor in isolation, its significance was inflated, consciously or otherwise, by participants. This reading is supported by social science methodology literature which cautions against the impact of presentational bias and isolated forms of questioning. Moreover, certain comments from our participants in the questionnaires also support this hypothesis – as one put it, for example, it was only after being prompted on this issue that it “did make me think you could perceive this as going against him (the defendant).”

Methodological Note & Future Research Directions

The methods used in this research offer an improvement upon those used in many previous mock studies. The researchers took advice on the scripting throughout from barristers, prosecutors and other experts familiar with the realities of rape trials. In addition, the real-time re-enactment represents a significantly more detailed and engaging stimulus than the vignettes or video extracts that are often used in simulation research (and a particularly appropriate one in a context in which the aim of the research is specifically to test the impact of video-mediated forms of testimony delivery). That said, there are a number of limitations, which have to be borne in mind. For one thing, the participants knew that they were taking part in an experimental study and that, therefore, their decision-making would have no consequences for a real defendant. In addition, the trial reconstruction was obviously streamlined in terms of its duration and the levels of evidence that were presented. The periods of delay and disruption that typify criminal court proceedings were absent, jury size was reduced to an average of eight members, and the time for jury deliberation was limited to 90 minutes. These factors do mean that it would be inappropriate to make uncritical or automatic extrapolations to the real jury room, but equally, it is important also not to over-state the significance of these limitations, particularly bearing in mind the present inability to conduct research into deliberations with ‘real’ jurors in England and Wales. There was ample evidence in the present study of jurors taking their role seriously despite its mock nature, commenting on the consequences of their verdict for the parties involved and remarking at the close of deliberations on the stress the process had caused them. Research on the relevance of jury size is contested, and there are some indications that ‘real’ jurors may not have needed much longer to deliberate. Moreover, the alternative methods that have been used to study juries, including the use of shadow groups, suffer from similar shortcomings in terms of lack of deliberative verisimilitude without offering the advantage of being able to isolate and manipulate variables for internal cross-comparison.

Beyond this, it is important to bear in mind that, in the trials where the live-link was involved, a large, 50 inch plasma screen was used, ensuring that the image of the complainant was clearly visible to all jurors. This is not always the case in ‘real courtrooms’ where smaller screens may be used or screens may be located at a distance that impairs jurors’ visibility. This, in turn, may adversely impact jurors’ assessments of her testimony in ways that were not evidenced in the present study. Likewise, in the video evidence condition, as noted above, we scripted the police interview based on a model of good practice. This means that the adverse impact of its use upon jurors’ deliberations may have been less pronounced than could be the case in the kinds of cases about which Baroness Stern and others have raised concerns, in which interviews lack clarity or are unduly repetitive, and the video tapes are poorly edited so as to be either overlong or disjointed.

While we believe that our choice to adopt this model for the scripting and delivery of the video evidence was appropriate, given the aims and limits of our study, future research on the divergent impact of better and poorer quality interviews and videos may be useful.

When considering the transferability of these findings to real life trials, one also has to take account of the effects of special measures use on the ability of sexual offence complainants to provide detailed, coherent and ultimately persuasive testimony. In our study – in order to isolate the presentation mode - testimony content was held constant in the live-link, screen and control conditions, whilst jurors in the video/link condition heard the complainant give essentially the same account with some added repetition and non-sequential (re)ordering to reflect the less structured way in which narratives commonly emerge in video interviews. In actual trials, a key potential benefit of utilising screens and video technology is that they offer protection from court-related stressors and thereby help complainants give better quality evidence, whilst video interviews have the added advantage of preserving a witness’s account made more contemporaneous to the time of the events in question rather than at trial when she may have greater difficulty with accurate recall. If these potential benefits are realised in practice, ensuring an improvement in the forensic quality of complainant testimony, one might reasonably anticipate a more appreciable positive association between special measures use in rape trials and perceived complainant credibility – though, again, further empirical research is needed to explore this. In addition, it is important to bear in mind that, whilst the complainant in this study exhibited a relatively constant level of emotional distress whilst giving her testimony across the different trials, in reality, it is possible that complainants who use a screen or video-link may appear less distraught, or that a complainant who gives a police interview in the immediate aftermath of the event will be more visibly distressed, than those who do not use special measures. The researchers’ previous work has confirmed that the emotional demeanour of the complainant can, and does, influence jurors’ perceptions of credibility – but the diversity of emotional reactions that survivors of rape will exhibit renders this another variable that can only be examined in conjunction with the use of special measures through further detailed and dedicated empirical research.

Finally, it should be recalled that this study – in concluding that there was a limited and by no means coherent influence upon juror deliberations as a result of the use of special measures – has focussed exclusively upon adult (female) complainants in rape cases. Though these findings may be of relevance in other contexts, there are, no doubt, a range of other factors and expectations that might influence jurors differently in cases involving child complainants, and it may be that the preoccupation with resistance and sexual miscommunication, which jurors appear to exhibit in adult rape cases, sidelined the significance of the mode of evidence delivery in ways that may not hold in relation to other cases.

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