

ARTICLE

THE MYTH OF THE “IDEAL VICTIM”: COMBATTING MISCONCEPTIONS OF EXPECTED DemeanOUR IN SEXUAL ASSAULT SURVIVORS

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ABSTRACT

When a sexual assault survivor testifies in court, it is highly likely that their demeanour will be impacted by the trauma they suffered. Despite an array of research on how trauma can affect demeanour, legal professionals and juries often have misconceptions about how a sexual assault survivor “should” behave on the stand. As the standard of proof in criminal law is incredibly high, and often only the survivor and the accused have firsthand knowledge of what happened, the outcome of the case can hinge on the survivor’s credibility. If a misconception about demeanour impacts the assessment of their credibility, the accused may be wrongfully acquitted. This paper explores the research on trauma and demeanour and explains why it is critical that the legal profession appreciates its importance. The paper looks at many available yet underused options within the Canadian criminal justice system to mitigate the effects of trauma on demeanour and support survivors, and argues that their increased use would benefit survivors while maintaining the presumption of innocence that lies at the heart of a criminal trial.

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TABLE OF CONTENTS

INTRODUCTION	5
I. TRAUMA, Demeanour, AND CREDIBILITY IN SEXUAL ASSAULT SURVIVORS...7	
A. SYMPTOMS OF TRAUMA IN SEXUAL ASSAULT SURVIVORS	7
B. THE IMPACT OF TRAUMA SYMPTOMS ON Demeanour AND CREDIBILITY.....	8
C. TRAUMA AND CREDIBILITY IN THE COURTROOM.....	9
II. MITIGATING THE EFFECTS OF TRAUMA ON CREDIBILITY.....	10
A. WHAT CAN JUDGES DO?.....	11
I. JUDICIAL TRAINING.....	12
II. JURY INSTRUCTIONS.....	12
B. WHAT CAN LAWYERS DO?	13
I. PREPARING FOR TRIAL.....	14
II. ACCOMMODATIONS AVAILABLE DURING TRIAL	15
III. WHAT ABOUT TRIAL FAIRNESS AND THE PRESUMPTION OF INNOCENCE?.....	16
CONCLUSION	17

INTRODUCTION

One in three women in Canada will be sexually assaulted in her lifetime.¹ However, only one in ten sexual assaults in police-reported data resulted in a conviction—roughly half the conviction rate of physical assault.² Despite the prevalence of this crime, lawyers and judges hold many misconceptions about sexual assault and in doing so, contribute to the low conviction rate. Justice McLachlin (as she then was) stated in *R v Seaboyer* that “the woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies.”³ The *Criminal Code* now prohibits some long-standing myths and allows Crown counsel or judges to intervene if they are used, but the myth of the “ideal victim” persists.⁴

Generally, the ideal victim is characterized as a well-dressed, middle-class, virginal white woman who is sexually assaulted by a stranger.⁵ This characterization necessarily excludes sex workers and intimate partners, even though over half of sexual assault survivors know the perpetrator.⁶ Also excluded are marginalized individuals, despite factors such as Indigeneity, homelessness, or diverse sexual identities and orientations increasing the risk of sexual assault.⁷ This myth encompasses all stages of a sexual assault, from the survivor’s behaviour before and during the assault to their demeanour during a police statement or while giving testimony. However, this paper focusses on the specific concept of the ideal victim in the courtroom.⁸

1 “Quick Facts” (last visited 25 July 2021), online: *Sexual Violence: support and prevention* <www.uottawa.ca/sexual-violence-support-and-prevention/quick-facts> [perma.cc/MZ38-EZM2].

Sexual assault can be a difficult subject to engage with. Should readers wish to access support at any point during their engagement with this paper, they can visit the Ending Violence Canada website for a list of resources, see “Sexual Assault Centres, Crisis Lines, and Support Services” (last visited 29 July 2021), online: *Ending Violence Association of Canada* <endingviolencecanada.org/sexual-assault-centres-crisis-lines-and-support-services/> [perma.cc/RFX6-246S].

2 Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 October 2017).

3 [1991] 2 SCR 577, 1993 CarswellBC 512 at para 146 [*Seaboyer*].

4 *Criminal Code*, RSC 1985, c C-46, s 276.

5 The terms ‘real’, ‘genuine’ or ‘expected victim’ or ‘good witness’ are also used throughout sexual assault literature to convey the same meaning. See Janice Du Mont, Karen-Lee Miller & Terri L Myhr, “Role of Real Rape and Real Victim Stereotypes” (2003) 9:4 *Violence Against Women* 466 at 470; Melanie Randall, “Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming” (2010) 22:2 *Canadian J Women & L* 397 at 407.

6 Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017) at 13.

7 *Ibid* at 8.

8 While people of all ages and genders survive sexual assaults, women are disproportionately represented among survivors. Additionally, the mythology surrounding sexual assault centres around expectations for women’s behaviour. This paper focusses on misconceptions and experiences common to adult women survivors, but all the accommodations discussed benefit sexual assault survivors of any age or gender, therefore gender-neutral language is used throughout.

In a courtroom setting, the ideal victim describes a survivor who displays enough emotion to indicate they have experienced trauma, but still maintains a professional and composed manner when addressing the court. They can provide consistent answers on cross-examination regardless of the tactics used by defence counsel. They will cry when recounting particularly painful memories, but they will not be overly emotional or nervous.⁹ However, a survivor's demeanour¹⁰ may not align with the ideal victim stereotype, and this dissonance may have a resulting impact on the assessment of their credibility.¹¹

Sexual assault trials are commonly “two-witness cases,” meaning that the narratives of the survivor and the accused are the only admissible accounts of the incident. These two versions of events often directly contradict one another and there are rarely other witnesses to support the survivor's version of events.¹² In order to navigate discrepancies between the two narratives, judges and juries may look for subtle clues in body language to determine whether a survivor is telling the truth. The limitations of demeanour evidence have been acknowledged by the judiciary, and reliance on demeanour often does more harm than good.¹³ Yet, a small seed of doubt in the mind of the trier of fact can be all it takes to necessitate an acquittal. Because of the requirement to prove guilt beyond a reasonable doubt before convicting the accused, any damage to a survivor's credibility in a sexual assault trial can have a magnified effect on the outcome of the case.

The ideal victim myth is not a new concept—this terminology has been in use for over 30 years.¹⁴ Although neither the myth itself, the research on trauma, nor the courtroom accommodations available to mitigate the ideal victim myth are new, case law and survivor accounts show trauma research is rarely considered and testimonial accommodations are often unused. As many sexual assault cases hinge on credibility, judges and lawyers who practice in this area are responsible for staying abreast of knowledge on this topic. As legal professionals, we have an ethical responsibility to further our understanding on these topics

9 Lisa Frohmann, “Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections” (1991) 38:2 *Social Problems* 213 at 213; Regina A Schuller et al, “Judgements of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes” (2010) 13:4 *New Crim L Review: An Int & Interdisciplinary J* 759 at 770.

10 Bryan A Gardner, ed, *Black’s Law Dictionary*, (St. Paul, MN: Thompson Reuters, 2019) sub verbo “demeanor”: Outward appearance or behaviour, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.

11 Lori Haskell & Melanie Randall, “The Impact of Trauma on Adult Sexual Assault Victims” (2019) at 8, online (pdf): *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf> [perma.cc/4BNF-NMUB].

12 See e.g. Louise Dickson, “Judge must decide whether woman consented to bondage during sex”, *Times Colonist* (25 July 2021), online: <timescolonist.com> [perma.cc/ALK2-Z2K4].

13 See generally Hamish Stewart et al, *Evidence: A Canadian Casebook*, 5th ed (Toronto: Emond Montgomery Publications, 2020) at 377 (many case authorities are referenced within this section).

14 See e.g. Beth Gorham, “Looking for the ideal victim: ‘virginal, vice-free’ women get better police treatment in sex-assault cases, Nfld. study says”, *Kitchener - Waterloo Record* (19 September 1991) D1.

and look for ways to mitigate their effects until the myth of the ideal victim is forever gone from the courtroom.¹⁵

This paper explores how a sexual assault can cause trauma, and how the resulting trauma symptoms can impact demeanour. Part I discusses how overreliance on demeanour can impact credibility and contribute to wrongful acquittals. Part II examines what options—such as legal training, jury instructions, and testimonial accommodations—are currently available to help lawyers and triers of fact combat the effects of the ideal victim myth, and argues for their increased use. Part III considers the impact of these options on the presumption of innocence, and explains how many of these options also safeguard the accused’s right to a fair trial.

I. TRAUMA, Demeanour, AND CREDIBILITY IN SEXUAL ASSAULT SURVIVORS

Any event that is deeply distressing and leaves a sense of horror, helplessness, serious harm, or threat thereof is classified as traumatic, and sexual assault certainly fits this bill.¹⁶ Heartbreaking survivor accounts tell of nightmares, depression, and suicidal thoughts.¹⁷

Our brain works hard to protect us in the aftermath of trauma, but this protection often comes at the expense of emotional regulation. While remaining emotionally numb and expressionless may cushion a survivor from recalling the details of an event that was mentally and likely physically painful, they do little to help them achieve the demeanour expected of an ideal victim.¹⁸

A. Symptoms of Trauma in Sexual Assault Survivors

The trauma of a sexual assault can have a serious and lasting impact on the brain. Specifically, a traumatic experience can permanently alter the prefrontal cortex, the amygdala, and the hippocampus.¹⁹ The prefrontal cortex, responsible for rational thought and impulse

15 The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2019, ch 3.1-1 (a competent lawyer is defined as one that continues to build their legal skills through professional development, and adapts to changes in the techniques and practices of the profession) [*Model Code*]; Canadian Judicial Council, *Ethical Principles for Judges*, (Ottawa: Canadian Judicial Council, 2021) (it is recommended that judges “maintain and enhance their knowledge, skills, and *sensitivity to social context*” at 27 (emphasis added)) [*Ethical Principles*].

16 Department of Health and Human Services, “Coping with a Traumatic Event” (last visited 29 June 2021), online (pdf): *Centers for Disease Control and Prevention* <www.cdc.gov/masstrauma/factsheets/public/coping.pdf> [perma.cc/8THK-CZS7].

17 See generally SurvivorStoriesMod, “Various Posts” (April-May 2020), online (blog): <www.survivorstoriesproject.com/blog> [perma.cc/T4T4-TUX3] (this blog recounts sexual assault survivor experiences in their own words).

18 Cortney A Franklin et al, “Police Perceptions of Crime Victim Behaviors: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors’ Trauma Responses” (2020) 66:8 *Crime & Delinquency* 1055.

19 James Hopper & David Lisak, “Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories”, *Time* (9 December 2014), online: <time.com/3625414/rape-trauma-brain-memory/> [perma.cc/7TXU-4YJS].

control, can become unresponsive during states of high stress. When the prefrontal cortex stops responding, the amygdala, or the brain's "fear centre," takes over, and affects how the hippocampus, or "memory centre," encodes the experience. These changes are designed to protect the survivor from the traumatic experience, effectively cushioning their brain from the exertion of processing the trauma.

While changes to the brain due to trauma can be temporary, they can also linger well after the initial trauma has passed, resulting in a variety of physical manifestations, including:

- Mood swings and irritability;
- Numbness or emotional detachment from anything that requires emotional reactions;
- Depersonalization (feeling as if you are watching yourself);
- Difficulty concentrating;
- Difficulty expressing oneself; and
- Withdrawal and apathy.²⁰

Any or all these trauma symptoms may be present when a survivor recounts their traumatic experience or faces the stress of giving testimony.²¹ Mental health issues, addictions, or other life stressors can further exacerbate these symptoms.

B. The Impact of Trauma Symptoms on Demeanour and Credibility

The symptoms of trauma can appear consistently throughout trial, or only intermittently. Many survivors use detachment, withdrawal, or emotional numbing as a coping strategy while testifying.²² Addressing the court, especially during cross-examination, can be uncomfortable and distressing, and mentally detaching oneself from the re-telling of the experience is a common way for the brain to protect itself. While these coping strategies may be helpful in making the experience less painful for the survivor, they may seriously weaken the case against the accused due to their effect on demeanour and therefore credibility.

Survivors displaying trauma symptoms during testimony do not conform to the ideal victim stereotype: consistent, professional, composed demeanour with timely displays of tearful or upset behaviour. Survivors' credibility can be harmed by a lack of emotion or sudden changes in demeanour during testimony, as emotionless or inconsistent testimony is generally

20 Center for Substance Abuse Treatment (US), "Trauma-Informed Care in Behavioral Health Services" (2014) at 62, online (pdf): *National Center for Biotechnology Information* <ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf> [perma.cc/L8AD-WTCH].

21 See e.g. Canada, Department of Justice, *A Survey of Survivors of Sexual Violence in Three Canadian Cities*, by Melissa Lindsay, Catalogue No J2-403/2014E-PDF (Ottawa: Department of Justice, 2014).

22 Schuller et al, *supra* note 9 at 769.

perceived as less credible.²³ In some cases, the symptoms of trauma can even be interpreted as signs of deceit or dishonesty.²⁴ If a judge or jury is concerned that a survivor may be dishonest, their view of the survivor's credibility is often damaged beyond repair.

Despite the extent of trauma research describing the potential for inconsistent emotional responses after a traumatic event, survivors commonly feel they were not believed throughout their interactions with the justice system.²⁵ Many survivors even feel that their negative experience at trial re-traumatized them.²⁶ While the presumption of innocence is paramount to a criminal trial, the legal system must keep pace with research showing the impact of trauma on demeanour and the resulting impact on credibility.

C. Trauma and Credibility in the Courtroom

As Justice L'Heureux-Dubé states, "the most injurious myth is that women and children are not credible in this area of criminal law."²⁷ Again, this is not a novel issue. Throughout history, men have described women as deceptive, whether it be accounts from the late Middle Ages of women as liars by nature, or a 1970s detective writing that women were "notorious" for fabricating complaints.²⁸ The pervasiveness of this belief was eventually recognized by the Supreme Court of Canada in *R v Seaboyer*,²⁹ although its contribution to unreliable appraisals of demeanour evidence had likely already led to many wrongful acquittals in Canadian sexual assault cases. For survivors, "[t]he ability to successfully convey their description of the incident and its impact is often critical to the successful prosecution of the case."³⁰

23 See generally Marc A Klippenstine & Regina A Schuller, "Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim over Time" (2012) 1 Psychology Crime & L 79 (consistent emotional responses throughout trial positively corresponded with assessments of credibility, as did tearful or upset reactions to a lesser degree). See also Schuller, *supra* note 9 at 767; Louise Ellison & Vanessa E Munro, "Jury deliberation and complainant credibility in rape trials" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law International and Comparative Perspectives*, 1st ed (New York: Routledge-Cavendish, 2010) at 281.

24 *Cf* Franklin et al, *supra* note 18 at 1060 (this article is specific to police perceptions of survivors, but findings are generally consistent with studies of mock jurors).

25 Katherine Lorenz, Anne Kirkner & Sarah E Ullman, "Qualitative Study of Sexual Assault Survivors' Post-Assault Legal System Experiences" (2019) 20:30 J Trauma Dissociation 263 at 264.

26 *Ibid.*

27 Claire L'Heureux-Dubé, "Still Punished for Being Female in Sexual Assault" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, legal practice, and women's activism* (University of Ottawa Press, 2012) at 3.

28 Jan Jordan, "Beyond Belief? Police, rape and women's credibility" (2004) 4:1 Crim Justice 29 at 30.

29 *Seaboyer*, *supra* note 3.

30 Allyson Clarke, "In the Eyes of the Law: Survivor Experiences and Image Construction Within Sexual Assault Cases" (2014) at 14, online (pdf): *University of Toronto* <tspace.library.utoronto.ca/bitstream/1807/68431/1/Clarke_Allyson_K_201411_PhD_thesis.pdf> [perma.cc/YH6S-4ZE2].

At the heart of evidence law lies a balance between the probative value³¹ and the prejudicial effect³² of a piece of evidence. If the prejudicial effect exceeds the probative value, the trial judge can exclude an otherwise admissible piece of evidence.³³ This is typically done when the evidence would be used to make an impermissible inference.

In sexual assault cases, demeanour has little probative value and a highly prejudicial effect.³⁴ A judge or jury's expectation of how a survivor should display emotion while giving testimony can negatively impact their judgement of the case.³⁵ Body language and facial expressions can be unpredictable and misleading when affected by trauma. For example, conduct that comes across as uncertain or insincere can actually indicate nervousness or shyness.³⁶ In mock jury trials, jurors have erroneously characterized the complainant as "cold," "calculating," or a "good actor" if they were expressionless while testifying.³⁷ While the prejudicial effect of demeanour evidence may not be so great as to render it inadmissible, such evidence should be considered with great caution.

While examining the weight given to demeanour evidence is an important task, there are two serious limitations to doing so. Firstly, judges do not always provide written reasons in sexual assault cases, and when they do, they do not always explain the role of demeanour in their assessment of survivor credibility.³⁸ Secondly, juries never have to give reasons, and can even be charged with an offence if they disclose any information not disclosed in open court.³⁹ Information for this paper was sourced from written reasons and mock jury studies, but there may well be overreliance on demeanour within judgements that will never be made public.

II. MITIGATING THE EFFECTS OF TRAUMA ON CREDIBILITY

Lawyers have a responsibility to behave honourably and with integrity when interacting with clients, the public, and other members of the profession.⁴⁰ Judges are also encouraged to conduct themselves with integrity and foster the public's confidence in the justice system.⁴¹ These standards suggest that those accessing the Canadian justice system should not be

31 Stewart et al, *supra* note 13 ("the trial judge's estimate of how important the evidence, used for a legitimate purpose, is likely to be in the jury's reasoning" at 93).

32 *Ibid* ("the trial judge's estimate of how likely it is that the jury, even if properly instructed, will use the evidence for an improper purpose or as the trial judge's estimate of the detrimental effect of the evidence on other aspects of the trial process" at 93).

33 *Ibid* at 92.

34 See especially *R v G(G)*, 99 OAC 44 (ONCA), 1997 CarswellOnt 1886 at para 14.

35 Klippenstine & Schuller, *supra* note 23 at 82.

36 CED 4th (online), *Evidence*, "Credibility: Demeanour" (VI.2) at §324.

37 Ellison & Munro, *supra* note 23 at 284.

38 See generally Bill C-3, *An Act to amend the Judges Act and the Criminal Code*, 2nd sess, 43rd Parl, 2020, cl 3(a) (assented to 6 May 2021), SC 2021, c 8 (the passing of Bill C-3 on 6 May 2021 now requires judges to either enter their reasons in the record or provide them in writing in sexual assault cases, but many historical sexual assault cases lack reasons).

39 Halsbury's Laws of Canada (online), *Trial Procedure*, "Jury Trials: Evidentiary Issues" (VIII.5(3)) at HC2-361 "Disclosure of jury proceedings" (2020 Reissue).

40 *Model Code*, *supra* note 15, ch 2.1-1.

41 *Ethical Principles*, *supra* note 15 at 18.

traumatized by their experience. However, renowned trauma expert Judith Herman states that “if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.”⁴²

The Canadian justice system offers many opportunities, both before and during trial, to support survivors and compensate for involuntary physical or emotional responses resulting from trauma. These options, which include training for legal professionals, jury instructions, and testimonial accommodations, can all be provided in a way that maintains fairness to the accused. Unfortunately, case law and survivor accounts show that these opportunities to mitigate trauma responses are often unused. If the legal profession aims to better support sexual assault survivors and to reduce wrongful acquittals, then lawyers and judges should ensure that they are up to date on trauma research and its impact on their roles in the courtroom.

A. What Can Judges Do?

Some judges are already cautious with the weight they put on demeanour evidence. This caution both protects the presumption of innocence of the accused by preventing the complainant’s credibility from being unfairly bolstered,⁴³ and appreciates the potential for a survivor’s demeanour to be affected by trauma.⁴⁴ Unfortunately, caution is not always exercised. Many decisions are overturned on appeal when the trial judge has improperly relied on demeanour evidence without considering the effects of trauma on the survivor or the importance of trial fairness to the accused.⁴⁵

One recent example of an appellate court overturning a trial judge’s impermissible reliance on stereotypical reasoning in a sexual assault trial comes from the Court of Appeal of Newfoundland and Labrador in *R v DR*.⁴⁶ In this case, the appellate court held that the trial judge’s misconceptions about how a sexual assault survivor should act impacted his assessment of the survivor’s credibility. Relying on established reasoning from the Supreme Court of Canada, White J.A. held that “[r]eliance on stereotypes about how victims of sexual assault are expected to act in the assessment of a complainant’s credibility is an error of law.”⁴⁷

While a judge’s written reasons can be reviewed for errors such as overreliance on demeanour evidence, jurors are not permitted to discuss their reasons for reaching a verdict. Therefore, it is difficult to determine how often and to what extent judges instruct juries that there is no “typical” demeanour for a sexual assault survivor to display. Further judicial training and consistent jury instructions regarding trauma symptoms can reduce improper inferences about credibility based on a survivor’s demeanour during testimony.

42 Judith Herman, “Justice from the Victim’s Perspective” (2005) 11:5 *Violence Against Women* 571 at 574.

43 *R v Loonfoot*, 2014 ONSC 3240 at para 42; see also *R v Duffney*, 2011 NLTD 124 at para 30.

44 *R v L(R)*, 2013 ONSC 4003 at para 90; see also *R v M(R)*, 2007 CarswellOnt 9513 (ONCJ) at para 64; see also *R v Nanka-Bruce*, 2006 CarswellOnt 1139 (ONSC) at para 18.

45 *R v Rhayel*, 2015 ONCA 377 at para 93; see also *R v G(G)*, *supra* note 34 at para 14.

46 2022 NCLA 2.

47 *Ibid* at para 17, citing *R v ARJD*, 2018 SCC 6 at para 2.

i. Judicial Training

Bill C-3, which mandates training in sexual assault law for judges, became law in May 2021. The bill specifies that judicial training seminars should be developed in consultation with groups considered appropriate by the Canadian Judicial Council. While this bill lacks a provision to ensure current judges receive the same education as new judges, it is still a step in the right direction. There is great opportunity to develop training seminars in consultation with trauma specialists that focus on the effects of trauma on demeanour, and how judges can incorporate trauma-informed practice into the trial process.

Specifically, this training should focus on the effects of trauma on the brain and how the resulting neural changes can translate to behaviours that impact demeanour during testimony. When a trier of fact is educated on the impact of trauma symptoms on demeanour, behaviours such as nervousness on the stand can be attributed to trauma as opposed to evidence of deceit.⁴⁸ Training should also examine how the judge can make the survivor feel comfortable in the courtroom without compromising trial fairness. Showing compassion in ensuring the survivor's immediate needs are met, such as providing tissues, water, or breaks during cross-examination, does not show bias.⁴⁹ A judge trained in the effect of trauma on demeanour will also be better able to appreciate the necessity for comprehensive jury instructions and will be more likely to account for trauma when assessing credibility in their own judgements.

ii. Jury Instructions

Despite many people's confidence that they can identify when someone is lying, the average person is generally unable to reliably determine dishonesty based on demeanour.⁵⁰ As a result, there is serious danger that a juror's overconfidence in their ability to interpret demeanour evidence could affect the trial outcome.⁵¹ Because of this risk, judges should ensure that juries do not place too much weight on demeanour in their analysis and decision.

The National Judicial Institute has produced a set of model jury instructions that provide standardized language for judges to use when instructing juries before and during trial.⁵² There are a variety of instructions relevant to sexual assault cases, which include reminders to the jury that there are no typical victims of sexual assault, not to be influenced by sympathy or prejudice, and to keep an open mind. However, one set of model instructions is specific to demeanour:

What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and

48 Jordan, *supra* note 28 at 52.

49 Elaine Craig, *Putting Trials on Trial* (Montreal: McGill-Queen's University Press, 2018) at 176.

50 Danielle Andrewartha, "Lie Detection in Litigation: Science or Prejudice?" (2008) 15:1 *Psychiatry, Psychology & L* 88 at 91.

51 Schuller et al, *supra* note 9 at 760.

52 Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions", online: *National Judicial Institute* <nji-inm.ca/index.cfm/publications/model-jury-instructions/> [perma.cc/EM8A-JJTP] [Model Jury Instructions].

appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.⁵³

Judges are encouraged to use their discretion regarding the exact wording of these instructions, but it is critical that the fallibility of demeanour is relayed to juries in sexual assault cases. While these instructions do not specify how trauma may affect demeanour, a judge who has received training in this area would be able to choose appropriate wording to caution juries of the potential for trauma to alter demeanour.

Instructions such as the above have proven to be effective. Jurors who received education or instructions on the potential for external circumstances in the survivor's life to impact their demeanour made fewer references to their demeanour when reaching a verdict.⁵⁴ Well-informed jurors were also more likely to offer thoughts as to what could account for unexpected aspects of a survivor's demeanour drawing from information they had been given throughout the trial.⁵⁵

While instructions on unreliability of demeanour in assessing credibility are helpful, they are not mandatory. All the model instructions authored by the National Judicial Institute are templates for judges that may or may not be followed.⁵⁶ Judges will pick and choose the instructions they provide and adapt them to each case. If judges were to consistently use the above instructions as a template in two-witness cases, juries would be more open-minded to the range of behaviours a survivor may exhibit while giving their testimony.

B. What Can Lawyers Do?

Survivor complaints about both Crown and defence counsel are regrettably common in Canada.⁵⁷ While many of these complaints centre around the conduct of defence counsel, this paper focusses on the options available to Crown counsel that will support survivors before and during trial and assist in mitigating the effects of trauma on demeanour, as defence counsel's primary responsibility is to the accused. Though responsibility lies with judges to ensure that demeanour is not over-relied on, judges and jurors are only human, and it is inevitable that they may make an inappropriate inference from demeanour. Therefore, Crown counsel should do their best to prepare a survivor for trial and ensure to request testimonial accommodations that would help them be comfortable on the stand. The more prepared and supported a survivor feels at trial, the better they will regulate their emotions while on the stand, reducing the impact of trauma on their demeanour.⁵⁸

53 *Ibid.*, 4.11.

54 Ellison & Munro, *supra* note 23 at 287

55 *Ibid.*

56 Model Jury Instructions, *supra* note 52.

57 See e.g. Alana Prochuk, "We are Here: Women's Experiences of the Barriers to Reporting Sexual Assault" (2018) at 37, online (pdf): *West Coast LEAF* <<https://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf>> [perma.cc/28DZ-A99L].

58 Amanda Konradi, "Understanding Rape Survivors' Preparations for Court: Accounting for the Influence of Legal Knowledge, Cultural Stereotypes, Personal Efficacy, and Prosecutor Contact" (1996) 2:1 *Violence Against Women* 25 at 33; Clarke, *supra* note 30 at 14.

i. Preparing for Trial

Trauma symptoms may be exacerbated when a survivor feels unprepared and anxious while testifying. Despite this, survivors report dissatisfaction with the level of support and preparation provided before trial, with two-thirds surveyed in one study reporting a lack of confidence in the court process.⁵⁹ Specifically, concerns have been raised about the availability of Crown counsel to answer questions about the trial process, the status of the case, and the lack of information regarding available resources for survivors.⁶⁰

In some provinces, Crown counsel policy manuals address the importance of informing a witness about the trial process and providing regular updates about the case. For example, Nova Scotia stresses the importance of minimizing stress and trauma to survivors, keeping the survivor informed, and explaining the court process and associated timelines.⁶¹ While it is important that this preparation does not cross the line into coaching the survivor on how to act or what to say at trial, providing the survivor with an overview of what to expect in terms of procedure and timelines can help them emotionally prepare for the experience. To mitigate any concerns that these conversations may constitute witness coaching, Nova Scotia's policy manual also requires a third party to be present during interviews with sexual assault survivors.⁶²

Having a consistent point of contact within the justice system who can explain the trial process and ensure the survivor is supported within the courtroom can streamline the process for survivors. Ontario has navigated concerns about lack of information by providing free legal representation to sexual assault survivors.⁶³ This program provides up to four hours of free legal advice but does not include representation in court. While independent legal advice is likely of great assistance to survivors, having more contact with Crown counsel before and during trial may be equally, if not more, beneficial. Although Crown counsel does not represent sexual assault survivors, it is still in the best interests of the Crown's case to ensure a survivor is as prepared as possible to take the stand, as comprehensive preparation allows survivors to find strategies to manage their emotions while on the stand.⁶⁴

Reducing the number of people to whom a survivor must recount their story also reduces the impact of trauma. British Columbia's Crown counsel policy manual addresses this, suggesting that the same prosecutor, ideally with specialized training in sexual assault files, should handle the case from start to finish whenever possible.⁶⁵ While this is set out as a best practice, it is

59 Lindsay, *supra* note 21 at 7.

60 See e.g. *ibid* at 25.

61 Nova Scotia, Public Prosecution Service, *Sexual Offences - Practice Note*, (Practice Note), (Halifax: Public Prosecution Services, 29 February 2008).

62 Nova Scotia, Public Prosecution Service, *Interviewing Witnesses (Other than Experts or the Police)*, (Practice Note), (Halifax: Public Prosecution Services, 20 January 2006).

63 "Independent legal advice for sexual assault victims" (last modified 15 July 2021), online: Ontario <www.ontario.ca/page/independent-legal-advice-sexual-assault-victims> [perma.cc/6WU3-JNET].

64 Clarke, *supra* note 30 at 14.

65 British Columbia, Prosecution Service, *Sexual Offences Against Adults*, (Crown Counsel Policy Manual) (Victoria: Prosecution Services, 15 January 2021) at 3.

not mandatory, and likely not always possible in smaller cities. Requiring that a specialized Crown counsel take on sexual assault files consistently would help survivors feel supported within the justice system.

Crown counsel should also recognize that the survivor needs support outside of the justice system. Even if a survivor feels educated about the trial process, prepared for the discomfort of cross-examination, and has a positive relationship with the Crown assigned to their case, the experience can still bring up the trauma of the sexual assault. Moreover, the often aggressive strategies of the defence counsel might expose the survivor to new traumas. Taking the time to discuss support systems with the survivor and provide resources can go a long way to help them navigate the trial process. Ideally, Crown counsel should inquire about the existing supports in a survivor's life, and provide them with information for a counsellor, sexual assault centre, or victims' services as needed, as these services are beyond the scope of what Crown counsel can offer. Not only can these services provide the survivor with more information about the justice system and much-needed emotional support, they can also help with longer-term needs or goals such as regaining a feeling of control over one's life.⁶⁶

ii. Accommodations Available During Trial

The *Criminal Code* provides many avenues to make the trial process more comfortable for a survivor. However, Crown counsel must apply to the judge to make use of these accommodations. If any of the options available within section 486 of the *Criminal Code* would be of assistance, Crown counsel should discuss these with the survivor, with the caveat that all are subject to the judge's approval.⁶⁷

Crown may apply for the survivor to have a chosen support person close by while they testify.⁶⁸ While this person cannot intervene in the survivor's testimony or during cross-examination, their presence can be calming for the survivor and help prevent withdrawal or dissociation. The survivor may also be able to testify outside the courtroom, or behind a screen or other device.⁶⁹ Ensuring that the survivor does not have to see the accused while testifying can be incredibly helpful in preventing trauma symptoms from arising, as being exposed to something, or someone, that serves as a reminder of a traumatic experience can cause a strong emotional reaction such as a surge of panic.⁷⁰ A screen can be set up in such a way that the survivor is unable to see the accused, but the court can still observe the survivor, reducing a judge or jury's concerns over being unable to assess demeanor.⁷¹

66 Nicole Westmarland & Sue Alderson, "The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counseling" (2013) 28:17 J of Interpersonal Violence 3265.

67 See generally *Criminal Code*, *supra* note 4, s 486 (several subsections offer accommodation options).

68 *Ibid*, s 486.1(2)

69 *Ibid*, s 486.2(2).

70 Center for Substance Abuse Treatment (US), *supra* note 20 at 68.

71 See e.g. Louise Ellison & Vanessa E Munro, "A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials" (2014) 23:1 Social & Legal Studies 3 at 7 (this study set up a mock courtroom in such a way that the judge and jury could still see the complainant, but the accused could not).

In cases where the accused is self-represented, counsel can be appointed to conduct the cross-examination.⁷² This serves the dual purpose of avoiding re-traumatization of the survivor and promoting efficiency and fairness of the trial. Qualified legal counsel are not only less likely to be triggering to the survivor, but also better able to conduct the cross-examination in a way that adequately tests a survivor's credibility without relying on harmful myths, such as that of the ideal victim.

Finally, a specially trained dog may be present to support the survivor during testimony. This was first done in British Columbia in 2016, where Intervention K-9 Caber supported a child witness through several days of testimony in a sexual assault trial by lying quietly at her feet.⁷³ This accommodation is likely not always practical as courtroom dogs require specialized training, and some survivors may not be comfortable with dogs. However, in cases where it is feasible, a dog can provide great comfort to a survivor, and keep them grounded and present during their testimony.

III. WHAT ABOUT TRIAL FAIRNESS AND THE PRESUMPTION OF INNOCENCE?

The presumption of innocence lies at the heart of criminal law. In a criminal trial, the Crown bears the highest standard of proof possible in law: proof beyond a reasonable doubt. The trier of fact must be almost certain that the accused is guilty and unable to find any other plausible explanation for the facts before they convict. In sexual assault cases especially, there is good reason that the burden is so high. A sexual assault conviction can be life-altering, with a minimum sentence of at least six months and likely long-term consequences for employment and relationship prospects.⁷⁴ Any education or accommodation can and should keep trial fairness paramount.

All options discussed in this paper can be implemented while maintaining the presumption of innocence. Education for judges on the effects of trauma and the resulting dangers of overreliance on demeanour can benefit both the survivor and the accused. While this paper raises concerns about overreliance on demeanour harming the credibility of the survivor, there are many cases where overreliance on demeanour has impacted trial fairness at the expense of the accused.⁷⁵ When judges understand how easily a trauma can affect a survivor's demeanour, they can better appreciate that there is no ideal victim and that a survivor's emotions on the stand should not strengthen or weaken their testimony.

A well-educated judge will also ensure juries receive proper instructions regarding trial fairness. Model jury instructions recommend a thorough explanation of the presumption of

72 *Criminal Code*, *supra* note 4, s 486.3(2).

73 See generally *ibid*, s 486.7 (The judge can make any order if they are of the opinion it is necessary to protect the security of the witness); "Update on Canine Assisted Intervention Dogs in BC Courts" (9 August 2016), online: *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/enews/enews-09-08-2016> [perma.cc/MVT8-W6CQ].

74 *Criminal Code*, *supra* note 4, s 271.

75 See e.g. *R v Amaya*, 2010 ABCA 398 at para 17.

innocence and the definition of “beyond a reasonable doubt.”⁷⁶ Additionally, mock jurors who received instruction on the potential for trauma to impact a survivor’s demeanour found these instructions helpful, but did not perceive them as vouching for the complainant’s credibility.⁷⁷ The instructions developed by the Canadian Judicial Council are designed to maintain trial fairness and avoid creating bias in jurors’ minds.

Preparing a survivor for trial can also benefit the accused. If the survivor understands the legal process and is emotionally prepared for trial, the trial will be more fair and efficient. The judge will not have to slow down the trial to explain procedure to the survivor, only to find out they were never adequately prepared for court in the first place.⁷⁸ A well-prepared survivor allows defense counsel to perform a thorough and effective cross-examination and allows the judge to focus on applying the law to the facts of the case.

Finally, all *Criminal Code* provisions discussed above are employed at the discretion of the trial judge, and only if they do not impact trial fairness. Testifying out of view of the accused does not violate the accused’s *Charter* rights to a fair trial and to be presumed innocent until proven guilty.⁷⁹ Appointing counsel for cross-examination of the survivor when the accused is self-represented requires evidence that cross-examination by the accused will prevent a full and candid account from the survivor.⁸⁰ Both of the former, as well as use of a support person or animal, are only to be used if necessary and only if in the opinion of the trial judge they support the proper administration of justice. A judge would decide whether to approve an application for accommodation by balancing the impact on the presumption of innocence with the impact of trauma on the survivor’s testimony.

CONCLUSION

There have been many positive changes in sexual assault law in Canada in the last few decades, such as the criminalisation of marital rape, the prohibition of reliance on the twin myths, and the removal of a requirement for recent complaint.⁸¹ However, survivors still often feel the justice system does more harm than good.⁸² The low conviction rate in sexual assault cases directly conflicts with the prevalence of this crime in Canada, meaning that many wrongful acquittals still occur. Judicial education, jury instructions, adequate trial preparation for survivors, and applications for in-court accommodations are all achievable within the current structure of the justice system to combat wrongful acquittals stemming from myths about the ideal victim. Yet, there is still much work to be done.

76 Model Jury Instructions, *supra* note 52, 5.1.

77 Ellison & Munro, *supra* note 23 at 291

78 See e.g. Craig, *supra* note 49 at 152.

79 *R v S(J)*, 2008 BCCA 401 at para 11, aff’d 2010 SCC 1 (the accused could not prove use of a screen did not impair cross-examination, impact the presumption of innocence, or impact the burden of proof).

80 *R v Tehrankari*, 246 CCC (3d) 70 (ONSC), 2008 CarswellOnt 8750 at para 19 (evidence from reliable sources with intimate knowledge of the witness to satisfy the court on a balance of probabilities must be provided).

81 Kwong-leung Tang, “Rape Law Reform in Canada: The Success and Limits of Legislation” (1998) 42:3 Intl J Offender Therapy & Comparative Criminology 258 at 260.

82 Lorenz, Kirkner & Ullman, *supra* note 25.

This paper focusses on what can be done to navigate the impact of trauma on demeanour in the courtroom, but many sexual assault cases never make it to court. There are several potential explanations for this attrition: charges are not approved by Crown counsel, police do not recommend charges, or survivors do not report to police in the first place. However, further research would be beneficial to clarify where most attrition occurs. There are likely larger-scale changes required to the Canadian justice system to make the reporting process more inviting to survivors and ensure any bias from police, lawyers, or the judiciary does not impact a survivor's case.

While people of all genders can be affected by sexual assault, at the root of this issue is gender inequality. In the words of Justice Cory, “[s]exual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be seen from the statistics which demonstrate that 99 % of the offenders in sexual assault cases are men and 90 % of the victims are women.”⁸³ Ultimately, a major societal change is needed to reduce gender-based inequality in Canada.

In the interim, the training, jury instructions, and accommodations recommended in this paper provide several methods to ensure that trauma does not unduly impact a survivor's demeanour and that a judge or jury weighs demeanour evidence appropriately. Judges and lawyers have a responsibility to the public to maintain the presumption of innocence of the accused, but they also have a responsibility to ensure justice is done in cases of rights violations. As legal practitioners in a country with distressingly high rates of sexual assault, judges and lawyers are responsible for staying up to date on trauma research, sexual assault law, and strategies for trauma-informed practice.

The unfortunate reality is sexual assault is a crime that almost every lawyer and judge will encounter at some point in their career, either in a criminal or civil context. As legal professionals, we must be prepared to treat survivors with the understanding and compassion we would wish to see directed at our loved ones. We likely all have survivors in our lives who have not yet shared their stories and are quietly observing the treatment of those whose cases do proceed to trial.

83 *R v Osolin*, [1993] 4 SCR 595, 1993 CarswellBC 512 at para 33.