

CONSENT IN IRISH RAPE LAW: RULES, REALITIES AND REFORM

Abstract: This paper considers the current rules on consent in Irish rape law and examines the realities of their operation in practice. This discussion is informed in part by the author's empirical research with legal professionals and court accompaniment workers who work within Irish rape trials who shared their views on the current law as part of the Realities of Rape Trials in Ireland: Perspectives from Practice research project. Having examined the operation of the current law in this area, the paper offers recommendations for both legislative and non-legislative interventions which may contribute to a better understanding of consent in Irish rape trials.

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Introduction

The introduction of a statutory definition of consent into Irish sexual offences law in 2017 was an important step in modernising and clarifying the law in this area. For the first time, the legislature issued a clear, positive statement of what is required for a legally valid consent to sexual activity. However, while the introduction of a statutory definition of consent is an important milestone in the development of Irish sexual offences law, it is very much a first step in ensuring that consent is properly understood by juries in rape trials.

This paper considers the current rules on consent in Irish sexual offences law and examines the realities of their operation in practice. This discussion is informed in part by the author's empirical research with legal professionals and court accompaniment workers who work within Irish rape trials who shared their views on the current law as part of the *Realities of Rape Trials in Ireland: Perspectives from Practice* research project (hereafter referred to as the *Realities of Rape Trials* project).¹ The discussion of the realities of the operation of the definition of consent is also informed by an analysis of the literature on the impact of societal attitudes on jurors' deliberations in rape trials.

Having examined the practical challenges encountered in ensuring that the new definition of consent is properly understood and applied by jurors, the paper concludes with some recommendations for both legislative and non-legislative interventions which may contribute to a better understanding of consent in Irish rape trials.

Consent: The Current Rules

Section 2(1) of the Criminal Law (Rape) Act 1981 defines rape as 'sexual intercourse with a woman who at the time of the intercourse does not consent to it'.² To prove that a rape occurred, the prosecution must show that: (1) there was sexual intercourse; (2) it was non-consensual and, (3) the defendant had the requisite *mens rea* regarding consent.³ Prior to the

¹ Susan Leahy, *Realities of Rape Trials in Ireland: Perspectives from Practice*, (Dublin Rape Crisis Centre 2021) <<https://www.drcc.ie/assets/files/pdf/leahyrealitiesreport.pdf>> accessed 02 March 2023. This project was funded by the Irish Research Council's New Foundations Scheme. The research was conducted in partnership with Dublin Rape Crisis Centre.

² The definition of rape in section 2 is gender specific, that is, it punishes only the rape of a woman by a man.

³ That is, that the defendant knew that the complainant was not consenting or was reckless as to whether or not she was consenting or that he did not hold an honest belief that the complainant was consenting: Criminal Law (Rape) Act 1981, section 2. The *mens rea* for rape is not discussed here and would require specific attention in its own right, particularly given ongoing efforts to reform this aspect of the law: see the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022; Law Reform Commission, *Report on Knowledge and Belief Concerning Consent in Rape Law* (LRC 122–2019).

introduction of a statutory definition of consent in Irish sexual offences law, guidance on what constituted a valid consent to sexual activity was primarily derived from case law. The only legislative guidance on consent was section 9 of the Criminal Law (Rape) (Amendment) Act 1990 which stated that: ‘in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission on the part of that person to offer resistance to the act does not of itself constitute consent to the act.’

The purpose of this provision was to clarify that there was no resistance requirement in Irish sexual offences law.⁴ Apart from section 9, prior to the 2017 reforms, common law guidance on consent provided that consent to sexual activity may be vitiated by force, fear of adverse consequences,⁵ fraud as to the nature of the act,⁶ or the identity of one’s partner,⁷ or incapacity⁸ (eg through sleep,⁹ unconsciousness or intoxication¹⁰).¹¹ Further, in *The People (DPP) v C*,¹² Murray J defined consent as: ‘voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.’¹³

Section 48 of the Criminal Law (Sexual Offences) Act 2017 introduced the following definition of consent into section 9 of the of the Criminal Law (Rape)(Amendment) Act 1990:

- (1) A person consents to a sexual act¹⁴ if he or she freely and voluntarily agrees to engage in that act.
- (2) A person does not consent to a sexual act if—
 - (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,
 - (b) he or she is asleep or unconscious,
 - (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,

⁴ However, in practice, as discussed below, a failure to offer resistance is still something that is likely to be taken into account by a jury as evidence from which consent could be inferred: Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill and MacMillan 2015) 323.

⁵ *R v Olugboja* [1982] QB 320.

⁶ *R v Flattery* (1877) 2 QB 410; *R v Williams* (1923) 1 KB 340.

⁷ *People (DPP) v C* [2001] 3 IR 345.

⁸ Capacity to consent requires that an individual be over the legal age of consent (17 years) and have the requisite mental capacity to consent. Where individuals lack capacity to consent due to age or limited decision-making capacity, sexual activity with them is prohibited.

⁹ *R v Mayers* (1872) 12 Cox CC 311; *R v Larter & Castleton* [1995] *Criminal Law Review* 75.

¹⁰ *R v Lang* (1976) 62 Cr App R 50.

¹¹ It is important to note that this common law guidance prevails, despite the introduction of statutory guidance in the 2017 Act.

¹² *People (DPP) v C* [2001] 3 IR 345.

¹³ *ibid* 360.

¹⁴ This is defined as: (a) an act consisting of sexual intercourse or buggery; (b) an act described in s 3(1) or s 4(1) of the 1990 Act (ie aggravated sexual assault or rape under s 4), or; (c) an act which if done without consent would constitute a sexual assault: s 9(6) (as amended).

- (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act¹⁵,
- (e) he or she is mistaken as to the nature and purpose of the act,
- (f) he or she is mistaken as to the identity of any other person involved in the act,
- (g) he or she is being unlawfully detained at the time at which the act takes place,
- (h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.

This definition became operative on 27th March 2017.¹⁶ The two-tiered approach to defining consent mirrors the approach adopted in other common law jurisdictions,¹⁷ providing a clear statement of what constitutes a legally valid consent to sexual activity, along with a list of circumstances where consent will be deemed to be absent. The latter largely replicates the guidance at common law focusing on traditional understandings of force, fraud, fear and lack of capacity due to sleep or intoxication but there are some welcome clarifications and notable extensions of the pre-existing rules.¹⁸ For instance, section 9(2)(a) provides that force or the threat thereof which is directed towards a third party vitiates consent. The understanding of fraud is also extended beyond fraud as to the identity of the other party or the nature of the act to include fraud as to the purpose of the act (section 9(2)(e)). An example of a situation where the latter would apply is where ‘an individual consents to what would otherwise be a non-consensual sexual touching because s/he has been led to believe it is a necessary medical procedure’.¹⁹ Finally, section 9(2)(g) makes clear that an individual cannot consent to sexual activity when s/he is being unlawfully detained and 9(2)(h) clarifies that consent may only be validly provided by the parties to the act (ie that consent expressed by a third party is not valid).

A significant feature of the definition of consent in the first tier is that the focus on ‘free agreement’ may be seen as introducing the idea of ‘communicative sexuality’ into Irish law, that is, a requirement of mutuality in sexual encounters which is evidenced by effective communication. Positively stating what is required for a valid consent to sexual activity (ie freedom, capacity and choice) should in theory assist the prosecution in proving that consent to sexual activity was absent. This is because the definition focuses jurors on identifying that the elements of a valid consent (ie free agreement) are present, rather than requiring jurors to look for signs of non-consent (eg force, fraud or lack of capacity). However, as will be outlined in the discussion in the next section, the realities of how consent is understood and applied in practice mean that the introduction of a legislative definition of consent on its own is not enough to significantly impact jurors’ deliberations on consent in rape trials.

¹⁵ Examples of individuals who might be affected by this provision are those suffering from conditions such as cerebral palsy or the effects of the stroke and who thus may experience difficulties in expressing themselves.

¹⁶ Criminal Law (Sexual Offences) Act 2017 (Commencement) Order 2017 (S.I. No. 112 of 2017), art. 2.

¹⁷ For example: England and Wales (ss 74, 75 and 76 of the Sexual Offences Act 2003); Northern Ireland (sections 3, 9 and 10 of the Sexual Offences (Northern Ireland) Order 2008); Scotland (ss 12-15 of the Sexual Offences (Scotland) Act 2009); Canada (ss 265(3) and 273.1 of the Canadian Criminal Code) and the Australian state of Victoria (section 36 of the Crimes Act 1958).

¹⁸ Law Reform Commission (n 3), para 2.10.

¹⁹ Susan Leahy, ‘Sexual Offences Law in Ireland: Countering Gendered Stereotypes in Adjudications of Consent in Rape Trials’ in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019) 11. An example of this may be seen in *R v Tabassum* [2000] 2 Cr App R 328. In that case, the defendant falsely represented himself as a breast cancer specialist and in this context women consented to him examining their breasts. All of the women testified that if they had known that he was not a specialist, they would not have consented to the examinations. The defendant was found guilty of indecent assault.

Ongoing Challenges: Exploring the Realities of the Operation of the Current Law

Some practical insights on the definition of consent may be found in empirical research conducted for the *Realities of Rape Trials* project. This research involved interviews with 16 legal professionals²⁰ and 12 court accompaniment workers²¹ who work within Irish rape trials about their views on how the current law on sexual offences is operating.²² Participants were asked for their perspective on whether the statutory definition of consent was having, or was likely to have, an impact on the operation of rape trials. At the time of interview (July to September 2019), the legal professionals had not encountered the definition in operation. Nevertheless, in general, the legal professionals interviewed were ambivalent about the definition's likely impact on trials.

'I don't think so, not hugely, because it is what it is. There is more words to be used in explaining it to a jury, but I think people have an idea in their own heads as to what is involved in consent. So they could listen to the words, but I don't know that the expanded definition will make a huge difference.'
(LP3)

'Personally, I don't think it moves the matter forwards or backwards enormously.'
(LP4)

'So what impact will it have? I'm not too sure that it will have an enormous impact except I suppose that it just emphasises that there isn't a grey area on those particular things. So, it's not I think that it extends anything. I think it just makes it a little bit crisper.'
(LP11)

Given the ways in which the second tier of the definition of consent largely aligns with the pre-existing common law rules, the views of the legal professionals on the limitations of the introduction of a definition of consent are to some extent understandable. However, their perspective arguably overlooks the potential for an imaginative and progressive interpretation and application of the legislative definition which, in focusing on the requirement for 'free agreement', could assist jurors in more progressive deliberations about consent. As noted above, the positive orientation of the new definition, especially the focus on 'free agreement' and its implied requirement of effective sexual communication, should encourage jurors to more closely evaluate the relevant incident to look for the presence of the elements of a valid consent to sexual activity. This contrasts with the position under the common law rules which was more focused on the factors which vitiated consent, thereby allowing for more shallow analyses of the evidence which were oriented around identifying the presence of a vitiating factor such as force, fear or fraud.

Like the legal professionals, the court accompaniment workers interviewed also commented that, at the time of interview, it was too early to see the impact of the statutory definition of consent on trials. However, in contrast to the legal professionals, many of the court

²⁰ The legal professionals included barristers and representatives from the Office of the Director of Public Prosecutions.

²¹ Court accompaniment workers were recruited from Dublin Rape Crisis Centre and Victim Support at Court.

²² Questions focused on issues such as the functioning of the legislative definition of consent and whether it has had a positive impact on the operation of trials and relevant issues relating to the rules of evidence (eg the extent to which sexual experience evidence and complainant's counselling records are introduced in trials). Participants were also asked for their perspectives on potential future reforms: Leahy (n 1) 6.

accompaniment workers were keen to emphasise the importance of social understandings of consent, beyond the legal definition. In this regard, they highlighted that more work is needed to ensure that consent is more readily understood in society.

‘I think there are a lot more issues surrounding consent than just the legal definition and I don’t think that just by defining consent, that automatically that’s meaning that all jurors...that you will fully understand or overcome their own biases surrounding that area as well. ... it’s a very small part of the overall reforms that need to be enacted...’ (AW1)

‘...people that I accompany have a great sense of what consent is to them. Maybe not the actual lawful definition of it but what consent is and their kind of take on it is.’ (AW2)

The comments of the accompaniment workers highlight how societal attitudes about rape and sexual consent will continue to influence jurors, regardless of the introduction of a legislative definition. Broader interventions are required to ensure that consent and the complexities of sexual violence are fully understood by jurors. As noted Patricia Smyth J (County Court Judge in Northern Ireland), ‘regardless of the nuances of the definition [of consent], powerful arguments based on myth masquerading as common sense are likely to prevail in this area unless more is done to educate and inform juries’.²³ As discussed below, research supports the contention that, in jury deliberations in rape trials, social understandings of consent can be just as influential as legal definitions.

The Social Realities of Consent: The Impact of Societal Attitudes on Jurors’ Deliberations in Rape Trials

The potential impact of stereotypical or prejudicial attitudes about rape and rape victims on juror deliberations has been widely documented in academic literature, which highlights the impact of ‘rape myths’ on the operation of rape law.²⁴ As this author has previously noted:

Commentators like Estrich [suggest] that the problem with rape law [is] “not the wording of statutes per se but rather our understanding of them...how a judge interprets and directs a jury, the ‘common sense’ understandings of rape against which a juror will assess a rape allegation’.²⁵ Unfortunately, these “common sense” understandings are often imbued with misperceptions about rape and rape victims.²⁶

Simply put, rape myths may be defined as ‘common prejudicial attitudes about rape’.²⁷ Perhaps the most frequently referenced rape myth is the ‘real rape’ stereotype. This

²³ Judge Patricia Smyth, ‘Sexual offence trials: The practical challenges for a judge tasked to deliver justice’ in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge 2021) 73.

²⁴ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Fawcett Books 1987); Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press 1987); Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Open University Press 1997); Sue Lees, *Carnal Knowledge: Rape on Trial* (2nd edn, The Women’s Press 2002); Joan McGregor, *Is it Rape? On Acquaintance Rape and Taking Women’s Consent Seriously* (Ashgate 2005); Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford University Press 2002).

²⁵ Susan Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press 1987) 4.

²⁶ Susan Leahy (n 19) 4.

²⁷ Nina Burrowes, *Responding to the challenge of rape myths in court. A guide for prosecutors* (nbresearch 2013) 5. For a detailed discussion of the potential influence of rape myths on the operation of Irish sexual offences law, see: Susan Leahy, ‘Bad

stereotype suggests that a genuine rape allegation involves ‘a sudden surprise attack by an unknown, often armed, sexual deviant’ and ‘occurs in an isolated, but public, location and the victim sustains serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack’.²⁸ Available research on Irish attitudes to rape demonstrate some evidence of the ‘real rape’ stereotype in Irish society. A 2016 Eurobarometer survey of 1,002 Irish participants²⁹ found that 24% of those surveyed agreed that women are more likely to be raped by a stranger than someone they know.³⁰ Statistics on sexual violence demonstrate that the ‘real rape’ stereotype is quite at odds with the reality of rape cases, which typically are committed by persons known to the victim, in private locations and generally do not entail the infliction of serious injury other than the harm of the non-consensual sexual activity itself (ie ‘injuries similar to grievous bodily harm, such as broken bones, open wounds, injury resulting in permanent disability or visible disfigurement’).³¹

Recent statistics from Dublin Rape Crisis Centre show that of the clients who availed of their services in 2021, the offender was a stranger in 16% of cases of adult rape or sexual assault.³² Similar statistics may be seen in the *Rape and Justice in Ireland (RAJII)* study.³³ A national survey of 100 victims for that study found that 34% had been raped by a stranger.³⁴ Analyses of files from the Office of the Director of Public Prosecutions (DPP) and Central Criminal Court found, respectively, that the defendant was identified as a stranger in 10.9%³⁵ and 17.58%³⁶ of cases. This study also found that rape is more likely to occur in private rather than public locations. The survey of victims found that the ‘majority of rapes occurred indoors’, with approximately one third occurring in the victim’s home.³⁷ The analysis of DPP files found that ‘[r]ape was most likely to occur in the complainant’s own home (30.1%) followed by the suspect’s home (22.4%) or in another private setting³⁸ (16.5%)’.³⁹ In the Central Criminal Court cases studied, the location was recorded as a ‘public place’ in 22.65% of incidents.⁴⁰ Finally, the *RAJII* findings demonstrate that the level of injury sustained in Irish rape cases does not correlate with societal expectations of ‘real rape’. While 71% of the victims surveyed reported that the offender used physical force against them,⁴¹ in the majority of cases (44%), the injuries sustained were classified as ‘minor’ (eg bruises, cuts, scratches).⁴² Severe injuries

Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland’ (2014) 14(1) *Irish Journal of Applied Social Studies*, Article 3, <<https://arrow.tudublin.ie/ijass/vol14/iss1/3>> accessed 9 March 2023.

²⁸ Estrich (n 25) 6

²⁹ European Commission, *Special Eurobarometer 449 Report: Gender-Based Violence* (European Commission 2016). The study involved surveying EU citizens in the 28 Member States of the EU; 1002 Irish adults were surveyed.

³⁰ *ibid* 57.

³¹ Genevieve F. Waterhouse, Ali Reynolds and Vincent Egan, ‘Myths and legends: The reality of rape offences reported to a UK police force’ (2016) 8(1) *The European Journal of Psychology Applied to Legal Context* 1, 3.

³² This figure is based upon 289 clients who commenced therapy with Dublin Rape Crisis Centre in 2021: Dublin Rape Crisis Centre, *Statistics Supplement 2021* (Dublin Rape Crisis Centre 2022) 17.

³³ This large-scale study on attrition involved three strands of research, which focused on the primary attrition points for rape cases: (1) the victim’s decision to report to the Gardaí; (2) the decision to prosecute; (3) the trial: Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009).

³⁴ *ibid* 133.

³⁵ A quantitative analysis of materials received from the Office of the Director of Public Prosecutions analysed 597 reported rapes received by the Office from the beginning of 2001 to the end of 2004: *ibid* 220.

³⁶ The researchers reviewed 173 rape case files received by the Central Criminal Court between 2000 and 2005 and analysed 35 trial transcripts: *ibid* 269.

³⁷ *ibid* 132.

³⁸ For example, a hotel room or a friend’s home.

³⁹ *ibid* 220.

⁴⁰ *ibid* 270. The most frequently cited locations were the defendant’s residence (19.89%) and complainant’s residence (19.89%): *ibid*.

⁴¹ *ibid* 135.

⁴² *ibid* 137. No injuries were reported in 37% of cases.

(eg loss of consciousness, broken bones or internal injuries) were reported in 15% of cases.⁴³ Similarly, in the Central Criminal Court files reviewed, while 70% of complainants about whom medical reports were prepared reported sustaining physical injuries,⁴⁴ [o]nly a small minority of complainants reported serious injuries such as broken bones,⁴⁵ strangulation marks,⁴⁶ and knife wounds⁴⁷.⁴⁸ Based on the foregoing statistics, it would seem fair to say that ‘the typical rape in Ireland is quite unlike the “real rape” stereotype’.⁴⁹

Another common stereotype which persists in relation to rape is that of the ‘real victim’. This contributes to creating an expectation that genuine complainants should have certain characteristics (eg be ‘consistent, rational and self-disciplined’)⁵⁰ and/or should have behaved ‘appropriately’ at the time of the alleged incident (eg not have engaged in what might be perceived as ‘risky’ behaviour such as drinking alcohol to excess or taking illegal drugs). ‘Real victims’ are also generally expected to have complained promptly, with any delay in doing so often being associated with a perceived lack of veracity. Research on Irish attitudes to sexual violence display some evidence of the ‘real victim’ stereotype in Irish society. In the 2016 Eurobarometer survey, 11% of respondents believed that if someone is intoxicated (as a result of the consumption of alcohol or drugs), that may make having sexual intercourse with them without consent justified.⁵¹ Nine per cent believed that voluntarily going home with someone or wearing provocative or sexy clothing could justify non-consensual sexual activity.⁵² The reality of rape of course is that there is no such thing as a ‘real’ or ‘ideal’ victim, with individuals responding in a variety of different ways which may be influenced by any number of factors or characteristics individual to that person. Such factors or characteristics might include ‘their individual experiences and personal history, their domestic circumstances, their cultural beliefs, their ability to access support, the type of trauma that they have suffered and whether they perceived a threat to life’.⁵³ Further, beliefs relating to so-called ‘risky’ behaviour essentially equate to victim blaming which has no place in an assessment of a complainant’s credibility.

Despite the erroneous nature of the misperceptions about sexual violence created by rape myths, research with mock juries has shown that stereotypes of ‘real rape’ and the ‘real victim’ can impact on juror decision-making. Although to date there are no Irish mock jury studies, findings from UK studies demonstrate how prejudicial attitudes and stereotypes can surface in juror deliberations on the presence or absence of consent. The most recent, and largest, UK mock jury study was undertaken by Chalmers, Leverick and Munro in Scotland.⁵⁴ This research found ‘considerable evidence of jurors expressing unfounded assumptions

⁴³ *ibid.*

⁴⁴ *ibid.*, 274.

⁴⁵ 3.70%.

⁴⁶ 2.78%.

⁴⁷ 2.78%.

⁴⁸ Hanly, Healy and Scriver (n 33) 274.

⁴⁹ Leahy (n 19) 5.

⁵⁰ Wendy Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19(1) *Feminist Legal Studies* 27, 37.

⁵¹ European Commission (n 29) 64.

⁵² *ibid.*

⁵³ Law Commission, *Review of Evidence in Sexual Offences: A Background Paper* (London 2021) 11 <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/02/Evidence-in-sexual-offences-background-paper.pdf>> accessed 1 March 2023.

⁵⁴ The study ‘involved 64 mock juries, comprising 863 individual participants, viewing a film of a simulated trial (for either rape or assault) and then deliberating’: James Chalmers, Fiona Leverick and Vanessa E. Munro, ‘The Provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials’ (2021) 48(2) *Journal of Law and Society* 1. The discussion here focuses on the findings outlined in an article which focuses on ‘the tone, content, and outcome of discussions specifically within the 32 juries that observed the rape trial’: *ibid.*, 2. These juries comprised of 431 participants: *ibid.*, 7.

regarding how “real” victims typically react during and after a sexual assault’.⁵⁵ In particular, the authors highlight ‘the persistence of the view across the [mock] rape juries that a lack of physical resistance is indicative of consent, and the extent to which [mock] jurors asserted that rape allegations are “easy” to make and frequently unfounded’.⁵⁶ With respect to the expectation of physical resistance and consequent injury to the complainant, the researchers found that ‘[i]n 28 of the 32 juries, the view was expressed that a failure to physically resist an attack may be indicative of consent’.⁵⁷ Further, although the complainant in the mock trial scenario ‘had bruising and scratching to her thighs and upper body’, ‘many jurors suggested that the complainer’s injuries could have been sustained in alternative ways and so were of limited probative value, and/or maintained that they would have expected her to have sustained more serious injuries’.⁵⁸ There is also evidence of the ‘real victim’ stereotype in operation in the mock jury deliberations, particularly with regard to ‘appropriate’ behaviour. For example, ‘[t]he belief that a “real” rape victim would shout for assistance was expressed in half of [the] 32 juries’.⁵⁹ Further, the fact that the complainant in the trial scenario ‘had delayed calling the police – albeit by only 40 minutes – was seen by some jurors as suspicious’⁶⁰, with this being ‘raised as a concern in 13 of the 32 juries’.⁶¹ Finally, ‘[t]he suggestion that false allegations of rape are common arose in 19 of the 32 juries (59 per cent) often linked to a suggestion that the complainer’s allegation could have been fabricated’.⁶² The findings in this study echo those of previous mock jury research conducted in England and Wales which also found evidence of rape myths influencing deliberations in mock juries.⁶³ For example, mock jury research conducted by Ellison and Munro found that participants ‘exhibited a strong and, in many cases, unshakeable expectation that a genuine victim of rape would engage in vigorous physical resistance against her attacker, and that, as a result, there would be corroborative evidence of injury on the body of either the complainant or defendant, or both’.⁶⁴ Research by Ellison and Munro has also highlighted mock jurors’ negative reactions towards what is perceived to be a delay in reporting. A three-day delay presented in the trial scenario in one of their studies ‘proved to be a significant stumbling block for many of the jurors, who were quick to state that it had, in their view, seriously weakened the prosecution case’.⁶⁵ Finally, mock jury research in England and Wales has also shown that participants perceived evidence and approached their deliberations

⁵⁵ *ibid* 2.

⁵⁶ *ibid* 2.

⁵⁷ *ibid* 11.

⁵⁸ *ibid* 11.

⁵⁹ *ibid* 15.

⁶⁰ *ibid* 18.

⁶¹ *ibid* 18.

⁶² *ibid* 20.

⁶³ See: Emily Finch and Vanessa E. Munro, ‘Breaking boundaries? Sexual consent in the Jury Room’ (2006) 26(3) *Legal Studies* 303; Emily Finch and Vanessa E. Munro, ‘The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants’ (2007) 16(4) *Social and Legal Studies* 591; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude?* (Hart Publishing 2008); Louise Ellison and Vanessa E. Munro, ‘Turning Mirrors in Windows? Assessing the impact of (mock) juror education in rape trials’ (2009) 49(3) *British Journal of Criminology* 363; Louise Ellison and Vanessa E. Munro, ‘Reacting to Rape: exploring mock jurors’ assessments of complainant credibility’ (2009) 49(2) *British Journal of Criminology* 202; Louise Ellison and Vanessa E. Munro, ‘A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Juror Study’ (2010) 13(4) *New Criminal Law Review* 781; Louise Ellison and Vanessa E. Munro, ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *International Journal of Evidence and Proof* 299.

⁶⁴ Louise Ellison and Vanessa E. Munro, ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *International Journal of Evidence and Proof* 299, 315.

⁶⁵ Louise Ellison and Vanessa E. Munro, ‘Reacting to Rape: exploring mock jurors’ assessments of complainant credibility’ (2009) 49(2) *British Journal of Criminology* 202, 209.

differently where the defendant was someone previously known to the complainant, as opposed to a stranger.⁶⁶

The foregoing research clearly indicates that understandings of consent in rape trials are influenced and shaped by much more than legal rules and definitions. This raises problems for the prosecution when seeking to prove that consent was absent as jurors are not responding to the evidence dispassionately. Instead, legal rules such as the definition of consent are interpreted and applied against a complex backdrop of societal beliefs and attitudes about what a genuine allegation of rape or a 'real victim' of rape should look like. The new definition of consent has the potential to ameliorate the influence of such beliefs and attitudes by clearly identifying what is required for a legally valid consent to sexual activity (first tier) and setting out situations where consent will definitively be absent (second tier). However, as the mock jury research detailed here demonstrates, rape myth acceptance can exert a significant influence on jurors' deliberations and the expectations about 'real rape' and 'real victims' will colour how jurors interpret and apply legal provisions. Consequently, the introduction of a statutory definition of consent in itself is not enough to yield practical changes in the operation of Irish rape trials. Further reforms are necessary to bolster the current legislative guidance on consent and to directly tackle the potential negative impacts of stereotypical attitudes upon jurors' deliberations in these cases.

Reform: Legislative and Non-Legislative Proposals for Change

While legislative clarification can serve to prompt a deeper understanding of consent, jurors require explicit instruction and education to ensure that carefully drafted legislative guidance is applied appropriately and progressively in practice. For this reason, the reforms proposed here focus on both legislative and non-legislative interventions in the form, respectively, of further strengthening the legislative definition of consent and introducing judicial directions which instruct jurors on consent and the avoidance of reliance on stereotypical or prejudicial beliefs about rape in their deliberations.

Legislative Reform: Strengthening the Definition of Consent

Although legislative reform in itself is not sufficient to ensure that consent is readily and dispassionately understood by jurors, the current definition could be strengthened in order to better reflect the realities of rape and tackle the influence of the rape myths outlined above. This could be effectively achieved by adding to the list of situations where consent will be deemed to be absent. Admittedly, the list of situations included in section 9(2) is non-exhaustive, thereby allowing situations other than those listed to be deemed to vitiate consent. However, given the conservative development of the rules relating to consent to date, to expedite development of the law, legislative intervention would seem sensible.

Arguably the most obvious starting point for such expansion is the guidance on force or threats thereof. Currently, section 9(2)(a) provides that a person does not consent to a sexual act if:

⁶⁶ For example, Temkin and Krahé found that mock jurors were more convinced that a defendant should be held liable and blamed the complainant less in stranger rapes than in rapes by acquaintances, and in particular, rapes by ex-partners: Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude?* (Hart Publishing 2008) 48. See also: Louise Ellison and Vanessa E. Munro (n 64) 299.

he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person.

While this guidance is beneficial, it largely replicates the pre-existing common law guidance (save for the inclusion of reference to the application or threatened application of force to third parties). Thus, ‘the legislature did not stray far from the traditional, indeed stereotypical, understandings of force which are found within the common law’.⁶⁷ The statutory guidance should go further and seek ‘to provide a broader understanding of sexual coercion, thereby acknowledging that there are a number of threats other than those of force which can obviate sexual choice’.⁶⁸ Examples might include threats to: abduct or detain a third party;⁶⁹ expose a secret that could be highly damaging to the complainant’s interests;⁷⁰ or withdraw financial support where the complainant is wholly dependent on the defendant for survival.^{71, 72} Explicit recognition of what may be defined as non-violent coercion in Irish sexual offences law is timely considering the recent introduction of an offence of coercive control in the Domestic Violence Act 2018.⁷³ This has resulted in a somewhat ‘incongruous situation where coercive and controlling behaviour is recognised in the context of domestic abuse but its role in vitiating consent in the context of sexual offences law remains difficult to prove within a criminal trial’.⁷⁴ Thus, it is recommended that the second tier of the definition of consent in section 9(2) is extended to provide that a person does not consent to a sexual act if: ‘he or she submits to the act because of a threat or fear of serious detriment such as intimidation or coercive or psychological oppression to himself or herself or to others’.

This wording is adapted from a recommendation by Sir John Gillen in his review of the law on sexual offences in Northern Ireland, where he proposed that similar guidance be included in the definition of consent in the Sexual Offences (Northern Ireland) Order 2008.⁷⁵ In Gillen’s view, such expansion of the statutory guidance on consent ‘expressly recognise[s]’ contexts of ‘severe poverty, familial or intimate abuse, economic oppression or other forms of abuse of circumstances’ where a complainant might give an ‘apparent’, as opposed to a genuine consent to sexual activity.⁷⁶ In doing so, ‘it would challenge on a statutory level [the] limited understanding of rape that relies on “real rape” stereotypes’.⁷⁷ The inclusion of a provision along the lines proposed here would thus make a welcome addition to the second tier of the definition of consent in section 9(2) of the 2017 Act.

⁶⁷ Leahy (n 19) 12.

⁶⁸ Leahy (n 1) 14

⁶⁹ Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 101

⁷⁰ *ibid.*

⁷¹ Susan Leahy, ‘Reform of Irish Rape Law: The Need for a Legislative Definition of Consent’ (2014) 43(3) *Common Law World Review* 231, 254.

⁷² Leahy (n 19) 12.

⁷³ The offence of coercive control is provided for in section 39 of the 2018 Act. Section 39(1) states that: ‘A person commits an offence where he or she knowingly and persistently engages in behaviour that: (a) is controlling or coercive, (b) has a serious effect on a relevant person, and; (c) a reasonable person would consider likely to have a serious effect on a relevant person’. A person’s behaviour has a serious effect on a person if it causes that person: (a) to fear that violence will be used against him or her, or; (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities: s 39(2).

⁷⁴ Susan Leahy, ‘Effectively Recognising and Punishing Sexual Coercion: Proposals for Reform’ in Hannah Bows and Jonathan Herring (eds), *Rough Sex’ and the Criminal Law* (Emerald 2022).

⁷⁵ John Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland: Part 2* (Department of Justice 2019) <<https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>> accessed 2 March 2023.

⁷⁶ *ibid.* 375.

⁷⁷ *ibid.* 369.

Extra Legal Measures: Developing Model Judicial Directions for Irish Rape Trials

Judicial directions are an excellent mechanism to guide jurors on the meaning of consent and advise them on the realities of rape, thereby minimising the potential for reliance on prejudicial stereotypes about rape in juror deliberations. Calibrating such instructions can be difficult as a judge needs to ensure that any direction given is appropriately neutral and does not impinge on defendants' fair trial rights.

Participants in the *Realities of Rape Trials* project were asked for their views on whether Irish judges could benefit from assistance in directing jurors in rape trials. To inform their responses, participants were presented with an excerpt from the English *Crown Court Compendium* which includes guidance for judges when directing juries on issues such as consent and on the avoidance of reliance on stereotypes in deliberations.⁷⁸ The extract provided is outlined below:

Avoiding Assumptions about rape:⁷⁹

It would be understandable if some of you came to this trial with assumptions about rape. You may have ideas about what kind of person is a victim of rape or what kind of person is a rapist. You may also have ideas about what a person will do or say when they are raped. But it is important that you dismiss these ideas when you decide this case.

From experience we know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people. And people who are raped react in a variety of different ways. So you must put aside any assumptions you have about rape. All of you on this jury must make your judgment based only on the evidence you hear from the witnesses and the law as I explain that to you.

The majority of the legal professionals interviewed agreed that the introduction of guidance similar to the *Crown Court Compendium* would be useful in Ireland. However, some legal professionals did express reservations about the suitability of the introduction of this type of guidance. For example, LP4 indicated that sample directions would not make too much practical difference as judges already give instructions on these issues where this is appropriate: 'The judge will tell them in every case that they're not entitled to speculate but equally as importantly...you don't bring your sympathy, you don't bring your emotion, you don't bring your prejudice to play or to bear in any of the decisions that are about to be made.'

LP14 raised the point that there may be a danger in introducing such sample directions as they may introduce prejudicial lines of thinking to jurors where they did not have those ideas to begin with: 'I think probably in relation to the perception it would be very beneficial. But

⁷⁸ *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College 2022).

⁷⁹ It should be noted that the *Crown Court Compendium* has been updated since these interviews took place. The extract provided here is updated and worded slightly differently in the current version. The version presented in the research is included here as the views of participants are based upon that wording. For the updated version of the *Crown Court Compendium*, see: <<https://www.judiciary.uk/guidance-and-resources/crown-court-compendium/>> accessed 3 March 2023.

then I don't know, then it could be a double-edged sword, because if they didn't have those perceptions to begin with and now you are planting the seed.'

Two of the legal professionals emphasised the importance of carefully wording such guidance in order to avoid any potential prejudice to defendants.⁸⁰ For example, LP16 recommended that: 'The terms of such a direction would have to be couched carefully in an explanation of the presumption of innocence lest it be misread by a jury as giving a subliminal message such as "he doesn't look like a stereotypical rapist but he is a rapist".' One means of neutralising the risk of prejudice which might attach to the provision of such guidance by the judge is for prosecution counsel to provide instructions on issues like consent and the avoidance of reliance on stereotypical attitudes in deliberations. The potential for prosecution counsel to provide the direction was mentioned by LP6 and LP9. Finally, four of the legal professionals highlighted that any guidance must be sufficiently flexible so that judges retain discretion to tailor it to suit the circumstances of individual cases.⁸¹ These practitioners emphasised that such guidance should not be 'prescriptive' or a 'script' (LP12) or 'too formulated' (LP15).

Participants were also asked when the proposed judicial directions should be given in a trial: at the beginning; at the end, or; at both the beginning and the end. There were differing views on this. Six of the 15 legal professionals who felt that guidance similar to the *Crown Court Compendium* would be useful in Ireland were of the view that such guidance should be given at the end of the trial.⁸² Concerns were raised that the provision of such guidance at the start of a trial may potentially be prejudicial or encroach upon the rights of the defendant. For example, LP13 questioned whether giving guidance like this at the start of the trial may 'risk loading it against the defence'. Significantly, the legal practitioners who recommended that such guidance be offered at the end of the trial did so on the basis that such instruction would be most helpful when jurors had heard the evidence in the case. For example, LP13 questioned whether providing guidance on rape myths and consent at the start of the trial could be helpful when jurors are not yet appraised of the facts of the case: '...if you talk about consent and these nebulous concepts at the start of the trials, then you have nothing practical to hang them on.' Similarly, LP3 spoke of the importance of such guidance being 'tailored to the evidence' at the end of the trial and LP5 noted that providing the guidance at the end means that jurors 'can apply it to what they have heard'.

Four of the legal professionals⁸³ recommended that such guidance be given at the beginning of the trial, with a further three⁸⁴ suggesting that such guidance could be given at both the beginning and the end.⁸⁵ Those who recommended that it should be given at the beginning of the trial spoke of the importance of clarifying issues for jurors from the start of the trial. This is articulated well by LP4 who commented that 'there's no harm in inputting information before the process begins lest somebody have to self-correct later on'. It was also suggested that such guidance might fit well within the general instructions which are already given to jurors at the start of trials (LP9). Those who recommended that such guidance be given at both the beginning and the end all emphasised the specific importance

⁸⁰ LP9; LP16.

⁸¹ LP1; LP12; LP13; LP15.

⁸² LP3; LP5; LP6; LP13; LP14; LP16.

⁸³ LP9; LP2; LP1; LP4.

⁸⁴ LP7; LP8; LP10.

⁸⁵ Two of the legal professionals in favour of the adoption of guidance similar to the *Crown Court Compendium* did not provide an opinion on when the direction should be given.

of having such guidance at the start but that revisiting it at the end would be helpful. This is articulated well by LP8:

...it would be no harm to reiterate it [at the end of the trial] because sometimes people look absolutely terrified when they sit in the jury box. ...it is a fairly intimidating scenario if you're not used to it... . So I would think probably to repeat it. ...What harm in repeating it again to reiterate it. It could be three weeks later, you know?

All of the accompaniment workers interviewed agreed that guidance similar to the *Crown Court Compendium* should be introduced in Ireland. The majority of these participants (8) recommended that this guidance should be given at the beginning and the end of the trial.⁸⁶ Notably, accompaniment workers were particularly keen to emphasise the importance of such guidance at the beginning of trials.

'I think at the beginning, I would say at the end as well. But definitely the beginning so that they...otherwise their minds will be set I think. If the trial goes through, because they have so much in here when the trial is over, they are trying to absorb so much that it may be a little bit too late. They can be reminded of it at the end, but definitely start off with it.' (AW4)

'I certainly think that in the beginning because I mean are [we] going to ask people to question their beliefs at the beginning of a trial or are we going to shoehorn [it] in at the end? Are we saying look, this is a sexual violence case and that brings with it an awful lot of issues and perhaps you've never thought about what a rape victim looks like? But they don't behave a certain way. They don't look a certain way.' (AW9)

The accompaniment workers who recommended that such guidance be provided at the beginning and at the end highlighted the amount of information jurors are required to retain and the length of trials. For these reasons, re-iterating the guidance or reminding jurors about it at the end of the trial was seen to be important: '...a trial can go on for the guts of two weeks, well 10 days sometimes. It's a long time to be listening intently and to have something, a reminder of what you heard at the beginning at the end, may be useful.' (AW6)

Overall, the views of the respondents here indicate broad support for the introduction of guidance similar to the *Crown Court Compendium* in Ireland. The likely benefits of such guidance are clear, providing nuanced templates for guiding jurors which judges can easily adapt to suit the facts of individual cases. Importantly, the fact that such directions are not mandatory and may be altered as individual judges see fit obviates any possibility of interference with judicial independence. Thus, it is recommended that guidance similar to the *Crown Court Compendium* should be introduced in Ireland.

⁸⁶ AW3; AW4; AW6; AW7; AW8; AW10; AW11; AW12. The remaining four accompaniment workers felt that such guidance should be given at the beginning of the trial: AW1; AW2; AW5; AW9.

Proposals for Formulating Model Judicial Directions for Rape Trials in Ireland

It is proposed that the Judicial Council could take responsibility for the creation of an Irish version of the *Crown Court Compendium*.⁸⁷ Drafting effective guidance appropriate to this jurisdiction would require consultation with experts, practitioners and stakeholders in the area. The drafting process should also be informed by authoritative research on societal attitudes towards sexual violence and how this might impact jury deliberations. Trialling draft guidance on members of the public via mock jury research or focus groups would also be advisable to make sure that it is readily understood and conveys the intended message to potential jurors appropriately and efficiently.

Once drafted, it will be necessary to decide when the newly created judicial directions should be provided to jurors, that is, whether guidance should be given at the beginning or end of the trial, or, potentially, at both the beginning and the end. As outlined above, the participants in the *Realities of Rape Trials* project had differing views on this and outlined clearly the advantages and disadvantages of each option. Assessing the responses of the participants in the study, it seems that the best approach is to allow for such directions to be given at both the beginning and the end of the trial, with trial judges determining (in consultation with prosecution and defence counsel) what is appropriate in individual cases. For example, the point made by some of the legal professionals that the provision of guidance may be prejudicial to defendants' fair trial rights is a very valid one. However, this is unlikely to occur where jurors are instructed only on the meaning of consent and/or the avoidance of assumptions as they hear and deliberate on the evidence. This would also address the concerns raised by some legal professionals regarding the need for specific guidance to be linked to the facts of the case (eg on specific assumptions such as those relating to intoxication or delay). This can naturally only be done at the end of the trial when all of the evidence has been produced. Thus, it would seem that a suitable approach would be to allow guidance to be given at both the beginning and the end of the trial, with generalised guidance being provided at the beginning and individualised guidance relating to the specific facts of the case being provided at the end. This would address the concern raised by the majority of the accompaniment workers that, due to the length of trials, jurors can benefit from guidance at both stages. Consequently, it is recommended that trial judges should utilise the proposed model directions on the premise that such instruction could be offered meaningfully at both the beginning and end of trials.

Conclusion

The introduction of a legislative definition of consent in 2017 was undoubtedly a significant, and long overdue, development of Irish sexual offences law. However, while positively defining consent represents an important statement of principle, further interventions are required if the principle of this reform is to have a practical impact on how consent is understood and applied in practice in Irish rape trials. The findings of the *Realities of Rape Trials* project and UK mock jury research show that the reality of the operation of the law in this area involves much more than a straightforward application of legal rules. Rather, the law is interpreted and applied against a complex backdrop of social understandings and, often, misunderstandings about rape and rape victims. The reforms proposed here seek to

⁸⁷ In England and Wales, the *Crown Court Compendium* is produced by the Judicial College and is written by senior members of the judiciary and academics: Law Commission (n 53) 13.

bolster the definition of consent, providing greater detail on how the definition should be applied in practice and actively seeking to inform jurors about the realities of sexual violence. The proposed extension of the definition itself would use the law to directly tackle the continuing influence of the ‘real rape’ stereotype on adjudications of consent. More broadly, the introduction of judicial directions such as those provided in the *Crown Court Compendium* would assist judges in directing jurors on the complexities of consent and the realities of sexual violence. Both proposals would ideally be supported by training for judges and legal professionals, particularly on how to make the most effective use of judicial directions within trials. While both proposals would require further investment and effort at both legislative and policy levels, they are necessary prerequisites⁸⁸ to ensure that the promise of the statutorily defining consent generates real changes in how consent is understood and applied in Irish rape trials.

⁸⁸ There are, of course, other reforms which are necessary in this area. An obvious reform which is clearly relevant to the discussion here is reformulation of the honest belief defence, which has been reviewed by the Law Reform Commission: *Report: Knowledge Or Belief Concerning Consent In Rape Law* (LRC 122–2019). Reform of the rules of evidence to control the potential for irrelevant and prejudicial information which might contribute to victim-blaming to be inappropriately admitted in trials is also pertinent. A discussion of these potential reforms is outside the scope of this piece but issues such as the admissibility of sexual experience evidence and disclosure of counselling records have been considered in the *Realities of Rape Trials* report.