

The Corroboration Warning in Sexual Offence Trials: Final Vestige of the Historic Suspicion of Sexual Offence Complainants or a Necessary Protection for Defendants?

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Introduction

As a general rule, witnesses in criminal trials are deemed to be fully competent to testify to matters that are within their own knowledge, and the evidence of a lone witness, if believed, is enough to support a finding of guilt. Despite this, in sexual offence trials, a trial judge has discretion to warn the jury of the dangers of convicting a defendant on the basis of the uncorroborated evidence of the complainant. This discretionary corroboration warning is one of the last remaining commonalities between Irish and English sexual offences law. Given the inertia in sexual offences law reform in Ireland, the fact that the discretionary corroboration warning continues to apply is to be expected.¹ However, in light of the overhaul of both the substantive and procedural rules on sexual offences in England in recent times², the lack of attention to the suitability of the discretionary warning in an English context is surprising. A possible explanation for the reluctance to consider the rules on corroboration is that they are seen as a necessary mechanism to protect defendants' rights and, given the discretionary nature of the rules, they are not seen to impinge unduly upon the interests of complainants.

This article will argue that the continued availability of a corroboration warning in sexual offence trials, albeit on a discretionary basis, is problematic and is a potential source of injustice for complainants. Admittedly, in both Ireland and England, there is a lack of

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¹ The Irish rules on consent in sexual offences law have not been substantially reviewed since the reform process which led to the current legislation, that is, the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape) (Amendment) Act 1990. The debates on reform in that period may be seen in the Irish Law Reform Commission's publications which preceded the introduction of the new law: Law Reform Commission, *Consultation Paper on Rape*, (Dublin: Law Reform Commission, 1987) and *Report on Rape and Allied Offences*, (Dublin: Law Reform Commission, 1988).

² The substantive rules have been completely overhauled in the Sexual Offences Act 2003. Applicable rules of evidence such as the regulation of the admissibility of sexual experience evidence and the admissibility of evidence of recent complaint have also been reformed: ss 41-43 of the Youth Justice and Criminal Evidence Act 1999, ss 41-43 and the Criminal Justice Act 2003, s 120, respectively.

research on either the frequency with which such warnings are given or the effect which such a warning might have on juror deliberations. However, even in the absence of such research, from the perspective of complainants, it is possible to identify both practical and principled objections to the current approach to corroboration. Further, it is by no means clear that the current rules are necessary in order to protect defendants' rights. Consequently, it is argued that the law in this area is in need fresh consideration.

The Current Rules on Corroboration in Ireland and England

Prior to legislative intervention in both England and Ireland in the 1990s, the provision of a corroboration warning in sexual offence trials was mandatory. A trial judge was obligated to warn the jury of the dangers of convicting the defendant on the basis of the unsupported testimony of the complainant. The primary justifications for the mandatory warning was the alleged ease with which sexual offence allegations were made, coupled with the difficulties which defendants faced when defending themselves against such an allegation.³ The warning was also closely related to prejudicial fears about the purportedly mendacious nature of female sexual offence complainants.⁴ With the rape law reform efforts in the 1980s and 1990s, concerns about the questionable and discriminatory basis on which the mandatory warning was justified led to the warning being placed on a discretionary basis.⁵ In Ireland, the mandatory corroboration warning was abolished by section 7 of the Criminal Law (Rape) Act 1990, which provided that whether or not a warning was necessary should be left to the discretion of the trial judge.⁶ The English Legislature appeared to go further with section

³ This is exemplified in the now infamous quote from Hale who asserted that rape was an allegation that 'was easily to be made and once made, harder to be proved, and harder to be defended by the party accused, tho never so innocent': Hale, *The History of Pleas of the Crown*, (1778) 635.

⁴ For example, in 1904, Wigmore cautioned that '...the unchaste...mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim': A similar view was expressed by Glanville Williams:

'Many complaints of rape are false... An adolescent girl who consents to intercourse may, to placate her parents, assert that she did not consent; the parents then complain to the police and the girl finds herself compelled to keep to her lie. A girl who feels ashamed about her part in the affair may even convince herself subsequently that she did not really consent. There is also the danger of a false allegation being made out of spite, when the man was in fact a lover who jilted the woman, or for obscure psychological reasons.'

G.L. Williams, *Textbook of Criminal Law*, (London: Stevens, 1978) 196-197. See also G.L. Williams, 'Corroboration- Sexual Cases' [1962] *Criminal Law Review* 662 and Note, 'Corroborating Charges of Rape' (1967) 67 *Columbia Law Review* 1137.

⁵ Law Reform Commission, Report on Rape and Allied Offences, (Dublin: Law Reform Commission, 1988), para 30. Law Commission, *Corroboration of Evidence in Criminal Trials*, (London: HMSO, 1991), para 2.14-2.19.

⁶ Section 7(1) of the 1990 Act provides that:

32(1) of the Criminal Justice and Public Order Act 1994 formally abrogating the mandatory corroboration warning in sexual offence trials and making no mention of retention of the warning on a discretionary basis.⁷ However, In *R v Makanjuola*⁸, section 32(1) was interpreted as allowing for a continuing judicial discretion to give corroboration warnings in appropriate cases. In that case, Lord Taylor CJ was clear that, although the practice surrounding corroboration warnings had changed by virtue of section 32(1), a trial judge does have a discretion to warn the jury if he thinks it necessary.⁹ Consequently, in both Ireland and England, it is now for a trial judge to decide whether or not a corroboration warning is appropriate in any given case. Guidance on when this discretion might be exercised has been provided in the judgment of the English Court of Appeal in *R v Makanjuola*. This judgment was subsequently endorsed and accepted into Irish law in *People (DPP) v JEM*.¹⁰

In *R v Makanjuola*, Lord Taylor CJ held that to continue to give ‘discretionary warnings’ generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. He went on:

Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. *The judge will often consider that no special warning is required at all.*¹¹

‘...where at the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the person in relation to whom the offence is alleged to have been committed and, by reason only of the nature of the charge, there would, but for this section, be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other person, it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning...’

⁷ Section 32(1) provides that:

‘Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is—

(a) an alleged accomplice of the accused, or

(b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed,

is hereby abrogated.’

⁸ *R v Makanjuola; R v Easton* [1995] 3 All ER 730.

⁹ *Ibid* at 731.

¹⁰ [2001] 4 IR 385.

¹¹ [1995] 3 All ER 730 at 732. Emphasis added.

According to Taylor LCJ, where a witness has been shown to be unreliable, the trial judge might consider it necessary to urge caution.¹² In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest that it would be wise to look for some supporting material before acting on an impugned witness's evidence.¹³ He also made clear that there will need to be an evidential basis for suggesting that the evidence of the witness might be unreliable and that an evidential basis does not include mere suggestions by cross-examining counsel.¹⁴ Finally, it was recommended that where it is proposed to give a corroboration warning, the trial judge should discuss this with both prosecution and defence counsel in the absence of the jury.¹⁵

The *Makanjuola* guidelines make it clear that judges should exercise their discretion carefully and that it is not appropriate to continue to give corroboration warnings as a matter of course. However, beyond this, the guidelines are vague and it is unclear to what extent they have influenced the judiciary to take a cautious approach to such warnings. In Ireland, there has been some judicial comment which suggests that the *Makanjuola* guidelines are being taken seriously and that corroboration warnings should only be given where absolutely necessary. In *People (DPP) v Wallace*¹⁶, Keane CJ held that:

The express legislative provision for the abolition of the mandatory warning...must not be circumvented by trial judges simply adopting a prudent or cautious approach of giving the warning in every case where there is no corroboration or where the evidence, might not amount, in the view of the trial judge, to corroboration. That would be to circumvent the clear policy of the legislature and that, of course, we are not entitled to do.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid. at 733.

¹⁵ Ibid.

¹⁶ Unreported, Court of Criminal Appeal, 30th April 2001.

Subsequently, in *People (DPP) v Slavotic*¹⁷, Fennelly J noted that a trial judge should not decide routinely to give a direction under section 7 in every case as to do so would ‘undermine the basis of the statutory charge’.¹⁸

However, it is necessary to consider these judgments in the context of other judicial comments in the wake of the judgment in *People (DPP) v JEM* which tend to suggest a continued attachment to the corroboration warning on behalf of Irish trial judges. In *People (DPP) v O’Connor*¹⁹, the Court of Criminal Appeal approved a warning administered by the trial judge which cautioned jurors of the ‘grave and serious danger of convicting on a charge such as rape on the uncorroborated evidence of the complainant’. This danger was, he said, that it was ‘unsafe and dangerous to convict on the evidence of [the alleged victim] alone’. The trial judge added that the jury were, however, entitled to convict if they were ‘sure that the [alleged victim’s] evidence is true, that she is speaking the truth’.²⁰ Commenting on this warning, Charleton and Byrne have stated that:

That form of warning is not too dissimilar to the old formulation which reminded juries that sexual allegations were easily made and hard to defend against, that it was the universal experience of the courts that false allegations were made and that it was dangerous to convict on the evidence of a witness complaining that they had been sexually attacked unless there was corroboration independently pointing to the commission by the accused of that crime.²¹

Another example of a continued judicial attachment to the giving of corroboration warnings may be found in *obiter* comments in *PL v Buttimer*²², where Geoghegan J stated that:

¹⁷ Unreported, Court of Criminal Appeal, 18th November 2002.

¹⁸ Fennelly J again endorsed this line of reasoning in *People (DPP) v Ferris* when he quoted with approval the statements on corroboration made by Denham J in *JEM* and Keane CJ in *Wallace* and added that ‘the legislature is not only entitled to but has the function under the constitution of evaluating changes in social and cultural circumstances, including sexual mores, and of giving them legislative form where warranted’: [2008] 1 IR 1 at 12.

¹⁹ Unreported, Court of Criminal Appeal, 29th July 2002.

²⁰ *Ibid.*

²¹ P. Charleton & S. Byrne, ‘Sexual Violence: Witnesses and Suspects. A Debating Document’ (2010) 1 *Irish Journal of Legal Studies* 1 at 24-25.

²² [2004] 4 IR 494.

[The] mandatory requirement is now gone but there is still a discretion left in a trial judge and, in my opinion, such a warning should always be given as a matter of discretion in one to one contest.²³

The majority of sexual offence cases are ‘one to one contests’ involving the word of the complainant against the word of the defendant. Certainly, in a case where it is the sexual act itself which is in dispute, there may be evidence outside of the accounts of the complainant and the defendant. For example, medical evidence may prove the fact of sexual intercourse in a rape case and DNA evidence may prove the identity of the attacker. However, with the developments of forensic science rendering it so straightforward to show both the fact of sexual activity and with whom it occurred²⁴, in the majority of sexual offence cases what is disputed is the consensual nature of the activity.²⁵ Inevitably, adjudications of this issue will involve the word of the complainant being pitted squarely against that of the defendant because forensic evidence can show that the act occurred and that the defendant was involved but it cannot generally show that the act was non-consensual.²⁶ Thus, in the typical sexual offence case which centres on the issue of consent, the comments above would tend to suggest that a corroboration warning will more often than not be given. Consequently, it appears that, despite the adoption of the *Makanjuola* guidelines in Ireland, there is still some judicial attachment to the use of corroboration warnings. This tends to suggest that the warnings may be given more frequently than the guidelines would endorse.

In England, there has been less judicial comment on the *Makanjuola* guidelines. However, as Rook and Ward point out, there are a number of cases since *Makanjuola* in which the Court of Appeal has held that a warning should have been given about the evidence of a prosecution

²³ Ibid. at 516.

²⁴ Forensic examinations can uncover traces of semen which are relevant in demonstrating that sexual contact has occurred and can be used to help establish the identity of the perpetrator through DNA profiling: A.R.W. Jackson, & J.M. Jackson, *Forensic Science*, 2nd edn (Essex: Pearson Education Ltd, 2008) 208. Even where semen traces are not present, a defendant may be identified by the presence of other forensic evidence such as, the presence of skin under her nails, or his hair or saliva on her body: A. McColgan, *The Case for Taking the Date Out of Rape*, (Hammersmith: Pandora Press, 1996) 78. For a discussion of the role of scientific evidence such as DNA evidence in the criminal process, see L. Heffernan, *Scientific Evidence: Fingerprints and DNA*, (Dublin: First Law Ltd, 2006).

²⁵ Koski suggests that the advent of DNA testing has reduced the defendant’s options in most cases to an assertion of consent: D.D. Koski, ‘Jury Decision-making in Rape Trials’, (2002) 38 *Criminal Law Bulletin* 21. See also: Temkin, J, *Rape and the Legal Process*, 2nd edn (Oxford: Oxford University Press, 2002) 166.

²⁶ The exception here would be a sexual assault or rape where medical evidence showed high levels of physical injury which is clearly contra-indicative of a consensual sexual encounter.

witness.²⁷ The fear of having a conviction overturned by the Court of Appeal might result in a trial judge erring on the side of caution and giving the warning in order to protect the verdict in a sexual offence trial. However, in the absence of judicial comment to this (or a contrary) effect, it is difficult to substantiate or refute this intuition.

Of course, the optimum method of discerning the level of frequency with which corroboration warnings are used in sexual offence trials would be to conduct empirical research such as case-tracking which would uncover how often such warnings are given and in what circumstances. Unfortunately, no such research has been conducted in either Ireland or England. However, there is some limited empirical data available in both jurisdictions which provides a certain degree of insight into the use of the warning. In Ireland, the results of an analysis of trial transcripts which was conducted for a report on attrition in Irish rape cases, *Rape & Justice in Ireland*²⁸, suggested that corroboration warnings are given only in a minority of cases. However, since the number of trial transcripts²⁹ which were surveyed in that study was quite small, it is not safe to draw definitive conclusions on the basis of this evidence.³⁰ Importantly, this information must be viewed in light of the fact that in many cases trial judges may feel obliged to administer some sort of corroboration warning by reason of the evidence in the case.³¹ Lawyers interviewed for the purposes of a study on attrition in Irish sexual assault cases which was conducted by Leane et al in 2001 outlined the following as situations in which a corroboration warning would typically be given:

- Where the only evidence against the accused is the evidence of the complainant;
- Where there is no physical evidence;
- Where there are very young children involved;
- Where the case is very old;
- Where there is some unusual characteristic involved such as intoxication, mental illness or mental backwardness.³²

²⁷ P. Rook & R.W. Ward, *Rook and Ward on Sexual Offences: Law & Practice*, 4th edn (London: Sweet & Maxwell, 2010), 689. Some examples of such cases cited by Rook and Ward include: *R v Walker* [1996] Crim LR 742; *R v Hopkins*, Unreported, 16th February 1998 (No 97/5836/Y3); *R v Addey*, Unreported, 3rd March 1998 (No 97/5306/Y3); *R v Blasiak* [2010] EWCA Crim 2620.

²⁸ C. Hanly, et al, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape*, (Dublin: The Liffey Press, 2009).

²⁹ Thirty-five transcripts were analysed in this study.

³⁰ See Hanly, above n. 28 at 364.

³¹ J. Healy, *Irish Laws of Evidence*, (Dublin: Thomson Round Hall, 2004) 160.

³² M. Leane, et al, *Attrition in Sexual Assault Offence Cases in Ireland: A Qualitative Analysis*, (Dublin: Department of Justice, Equality and Law Reform, 2001) 93.

Since many sexual offence cases will involve one of the foregoing circumstances, it appears that the giving of the warning will more often than not be justifiable. In addition, the confusion which exists regarding when a corroboration warning is appropriate may result in trial judges erring on the side of caution and giving the warning in order to avoid the possibility of a conviction being overturned on appeal. Evidence of this tendency has been identified by Charleton and Byrne who note that it may be attractive for trial judges to take a ‘prudent and cautious’ approach to corroboration.³³ Thus, they suggest that it may be cautious to warn, whilst trying to ‘avoid the horrible legal complications attendant on corroboration’.³⁴ According to this view, trial judges should issue the warning but seek to couch it in terms which do not unfairly prejudice the complainant by tending to suggest that her testimony is worthy of suspicion.

Available English research also suggests a comparable tendency amongst English judges to err on the side of caution and issue the warning. Research conducted by Temkin and Krahé has suggested that there is evidence that the *Makanjuola* guidelines are effectively ignored and that juries are frequently being told to look for independent support of the complainant’s testimony.³⁵ Temkin and Krahé conducted interviews with judges and barristers which gathered information about rape trials and aspects of the rules of evidence in rape trials.³⁶ One of the judges interviewed in the study stated that in any case where it is one person’s word against another, the jury should be directed to look for supporting evidence.³⁷ Similarly a barrister who participated in the study stated that judges were directing juries to look for independent support in a manner which would not be done in other non-sexual cases.³⁸ Drawing on comments such as these, Temkin and Krahé concluded that ‘the corroboration issue has not disappeared as a result of the Criminal Justice and Public Order Act 1994’.³⁹

³³ Above, n. 21 at 31.

³⁴ *Ibid.*

³⁵ J. Temkin & B. Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude*, (Oxford: Hart Publishing, 2008) 169.

³⁶ Interviews were conducted with seventeen judges and seven barristers: *Ibid.*, at 125-126

³⁷ *Ibid.* at 144.

³⁸ *Ibid.*

³⁹ *Ibid.*

From the foregoing, it would seem that despite legislative intervention and the guidance provided in *R v Makanjuola*, much uncertainty surrounds the use of corroboration warning in sexual offence trials. In the absence of a definitive judicial statement or detailed empirical research, it is not possible to discern how frequently the warning is given. However, the available information tends to suggest that judicial sentiment is still sympathetic towards such warnings, be it as a result of fear of appeal or due to traditional concerns regarding the dangers of the oath-against-oath nature of sexual offence trials.

Similar to the lack of clarity regarding when a corroboration warning should be given, there is uncertainty as to what form the warning should take. The *Makanjuola* guidelines specify that where a judge does decide to give a warning, it will be appropriate to do so as part of the judge's review of the evidence and his/her comments as to how the jury should evaluate it rather than as a set-piece legal direction.⁴⁰ It was also emphasised that where some warning is required, it will be for the judge to decide the strength and terms of the warning.⁴¹ Consequently, it appears that there is some flexibility regarding the formulation of the warning. It is noteworthy that the Irish and English courts have interpreted this aspect of the *Makanjuola* guidelines differently and have adopted varying approaches regarding the appropriate phrasing of corroboration warnings. The Irish approach is more restrictive and requires that 'once a trial judge has elected to give a warning...the necessity remains for that warning to be clear and unmistakable'.⁴² It was also confirmed in *People (DPP) v MK*⁴³ that the trial judge should 'clearly and unequivocally' point out to the jury 'what, if any, of the evidence before them is capable of amounting to corroboration as defined'.⁴⁴ In Ireland, corroboration is defined in the traditional way, with reference to *R v Baskerville*.⁴⁵ Thus, evidence can only corroborate a complainant's account if it is independent of the complainant

⁴⁰ [1995] 3 All ER 730 at 733.

⁴¹ Ibid.

⁴² *People (DPP) v PJ* [2003] 3 IR 550.

⁴³ [2005] IECCA 93.

⁴⁴ [2005] IECCA 93, para. 31

⁴⁵ Reading LCJ defined corroboration as:

...independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.: [1916] 2 KB 658 at 667. In Ireland, this definition of corroboration was confirmed as representing the Irish law in *DPP v Gilligan* [2006] 1 IR 107.

and implicates the defendant in the crime. This definition is quite strict, limiting available corroboration to evidence such as witness testimony or evidence of physical injury, which with the availability of DNA evidence, could be linked to the defendant. However, in recent Irish cases, there has been some relaxation of this strict approach to defining corroboration.⁴⁶ Fennell points to the case of *People (DPP) v Meehan*⁴⁷ as evidence of this more nuanced approach to defining corroboration.⁴⁸ In that case, Kearns J noted that:

In recent years the Courts have shown themselves more prepared, at least in sexual offence cases, to evaluate various evidential facts cumulatively as partial or complete corroboration of a complainant's account, even where the corroborative value of each fact is low.⁴⁹

Thus, trial judges have gained a little more discretion regarding their direction to the jury. The relaxation of the definition of corroboration allows a judge to draw jurors' attention to pieces of evidence (e.g. distress in the aftermath of the incident, DNA evidence of sexual intercourse or evidence of torn clothing or physical injury) which individually may not have met the threshold or being independent of the complainant *and* implicating the defendant in the crime. Although this evidence cannot constitute corroboration on its own, cumulatively a judge can direct the jury that it amounts to at least partial corroboration of the complainant's account. Ultimately, however, while Irish trial judges have freedom as to the form of words they use and, in recent times, the evidence which they identify as potential corroboration, they must still be careful not to stray too far from the requirements of clarity and the underlying restrictions of the traditional definition of corroboration.

In England, the approach to the formulation of corroboration warnings appears more flexible. Lewis points that that in English law 'any reference to supporting material will not...be encumbered by the old common law rules on the meaning of corroboration and the kind of evidence capable of being corroborative'.⁵⁰ Similarly Tapper notes that, in English law, the

⁴⁶ C. Fennell, *The Law of Evidence in Ireland*, 3rd edn (Dublin: Bloomsbury Professional, 2009) 210-211.

⁴⁷ [2006] 3 IR 468.

⁴⁸ Above n. 46 at 211.

⁴⁹ [2006] 3 IR 468 at 493.

⁵⁰ P. Lewis, 'A Comparative Examination of Corroboration and Caution Warnings in Prosecutions of Sexual Offences' [2006] *Criminal Law Review* 889 at 894.

permissible terms of the corroboration warning are quite fluid, the only requirement being that the warning is adapted to the circumstances of the case.⁵¹ However, similar to Irish law, Rook and Ward suggest that where supporting evidence is required the judge must be careful to identify for the jury any that exists.⁵² In this respect, English trial judges appear to have more latitude than their Irish counterparts. In England, the *R v Baskerville* definition of corroboration is not determinative, with jurors simply being told that they need to look for ‘supporting evidence’ in order to corroborate the complainant’s testimony.

Nevertheless, despite the differing terminology, it appears that the notion of ‘supporting evidence’ may not actually encompass a broader category of evidence than the traditional definition of corroboration which is applied in Ireland. This is well illustrated by Keane et al who point out that determining whether a given item of evidence is capable of amounting to supporting evidence is not always easy.⁵³ The authors point to a number of items of evidence such as evidence of distressed condition of the complainant and medical evidence showing that someone had had sexual intercourse with the complainant at a time consistent with her evidence.⁵⁴ Keane et al note that there are ‘compelling reasons to suggest that each of these items, by itself, should not be treated as “supporting material” and the judge should direct the jury accordingly’.⁵⁵ This is precisely because these sorts of evidence do not correspond to the traditional understanding of the types of evidence which are capable of corroborating the complainant’s testimony (i.e. independent of complainant *and* implicating defendant). For example, medical evidence showing that someone had sex with the complainant satisfies the requirement of independence but does not necessarily implicate the defendant (unless of course there is DNA evidence available). Even if it does implicate the defendant, it does not prove the central issue in a rape case, that is, that the complainant did not consent to the sexual encounter. Thus, despite the seeming wider delineation of ‘supporting material’, in reality the types of evidence which may corroborate a complainant’s account are largely the same as in Ireland. Consequently, although the English rules on the form which a corroboration warning should take might on their face appear to be more flexible than the Irish equivalents, in practice, they are largely the same.

⁵¹ C. Tapper, *Cross & Tapper on Evidence*, 11th edn (Oxford: Oxford University Press, 2007) 277.

⁵² Above, n.27 at 691. See *R v B(MT)* [2000] Crim LR 181.

⁵³ A. Keane, et al, *The Modern Law of Evidence*, 8th edn (Oxford: Oxford University Press, 2007) 227.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

Despite the limited stipulations on the formulation of corroboration warning which apply in Irish and English law, trial judges in both jurisdictions have a considerable degree of latitude when phrasing their direction to the jury on this issue. The current rules in both jurisdictions create a potential for warnings to be phrased in a manner which might prejudice the complainant by rousing unwarranted suspicion about her testimony. It is not difficult to imagine how a carelessly phrased warning might be seen by jurors as suggesting that the complainant is in some way untrustworthy, thereby increasing the likelihood that her version of events will be treated with a heightened level of suspicion.

Overall, it is clear that, despite some differences between the Irish and English approaches to corroboration, there is much uncertainty in relation to the corroboration warning in both jurisdictions. As Hartshorne notes, the *Makanjuola* guidelines may be easy to state but the outcome of their application is difficult to predict.⁵⁶ In both Ireland and England, there is uncertainty both as to when a warning should be given and the form which such a warning should take. The lack of a uniform approach is capable of causing injustice for sexual offence complainants. Ultimately, it is fair to say that the corroboration warning is worthy of renewed attention in order to consider whether there is a more appropriate means of regulating this aspect of sexual offence trials. However, before considering the arguments in favour of reform, it is necessary to give some attention to the rationale for the retention of the discretionary warning, that is, the protection of defendants' rights and to consider the impact that these rights might have on any proposed reform.

The Corroboration Warning and Defendant's Rights

Retention of the corroboration warning on a discretionary basis is justified on the basis that it ensures fairness for defendants. The 'oath against oath' nature of sexual offence cases has already been discussed. By their nature, sexual offences occur in private locations where there is unlikely to be eyewitness testimony to verify that the attack occurred and even where forensic and medical evidence is available, this is not sufficient to corroborate the typically disputed issue in these cases, that is, the complainant's consent. In order to offset any

⁵⁶ J. Hartshorne, 'Corroboration and Care warnings after *Makanjuola*' (1998) 2 *International Journal of Evidence and Proof* 1 at 12.

potential disadvantages posed for defendants by the inherent lack of independent support of the complainant's testimony, it is seen that, in some cases at least, protection of defendant from unjust conviction may necessitate cautioning the jury to be wary of relying on the uncorroborated testimony of the complainant. Given the strength of protection which is afforded to defendants' rights by virtue of Article 6 of the European Convention on Human Rights (ECHR) in England and by both the ECHR and Article 38.1 of the Constitution in Ireland⁵⁷, it is vital that defendants' rights are adequately protected in any proposed change to the current rules on corroboration. However, it is by no means certain that the discretionary corroboration warning is necessary to protect defendants' rights in the first place.

Commentators have suggested that there are ample mechanisms in the trial process which serve the purpose of protecting defendants from wrongful conviction, thereby making the corroboration warning superfluous to requirements. Temkin contends that, as is the case with other crimes, the trial process and the cross-examination of the complainant should be sufficient to detect falsehood. In addition, she points out that the closing speech of defence counsel should be adequate without the need for a further warning by the judge.⁵⁸ Even if the judge does wish to comment on the weight of the evidence and the fact that the complainant's testimony is uncorroborated, it is not necessary to have special rules regarding corroboration warnings if this is to be done. In Ireland, the Task Force on Violence against Women has pointed out that in any criminal trial a judge is entitled to comment on the weight of evidence before him/her, provided s/he makes clear that his/her comments are only comments and can be entirely disregarded by the jury if they choose. Thus, should a trial judge wish to comment on the evidence in a sexual offence trial, s/he is entirely free to do so, even in the absence of special rules relating to corroboration.⁵⁹ It would therefore seem that defendants' rights can be protected without provision for judicial discretion to give a corroboration warning.

Indeed, aside from the view that special provision for corroboration warnings in sexual offence trials is not necessary to protect defendants' rights, there is an interesting line of

⁵⁷ Article 38.1 of the Irish Constitution provides that: 'No person shall be tried on any criminal charge save in due course of law'. This provision has been interpreted as encompassing many fair trial rights for defendants including: the right to be presumed innocent (*O'Leary v Attorney General* [1993] 1 IR 102) and the right to cross-examine witnesses (*State (Healy) v Donoghue* [1976] IR 325 at 335).

⁵⁸ J. Temkin, 'Towards a Modern Law of Rape' (1982) *The Modern Law Review* 399 at 417.

⁵⁹ *Report of the Task Force on Violence against Women*, (Dublin; Stationery Office, 1997), para 9.19.

argument that the issuing of such warnings may actually disadvantage defendants. A jury study in the 1970s found that juries were more likely to convict a defendant having been given a full warning than where the warning had not been given.⁶⁰ The suggestion that the corroboration warning might disadvantage defendants is not necessarily surprising. As Roberts and Zuckerman point out, the practical effect of a warning may be to fix in jurors' minds the most damning aspects of the prosecution's case against the defendant and this happens immediately prior to the jury retiring to consider its verdict.⁶¹ In the absence of empirical evidence on the effect of the corroboration warning on jury deliberations, it is difficult to assess the potential for the warning to disadvantage defendants. However, it is certainly a valid theory and adds another layer of complexity to discussions regarding the necessity for discretionary corroboration warnings. Indeed, this theory would suggest that far from impinging on defendants' rights, a more careful approach to the use of such warnings may in fact work to the advantage of defendants.

From the foregoing it seems that while defendants' rights must remain an important checkpoint on any reform in this area, it is not at all clear that the current rules are the only means of protecting these rights. As the discussion here shows, the current law might actually disadvantage defendants. Consequently, it would seem that there is scope to consider the problems which the current rules pose for complainants with a view to devising reforms which will provide greater fairness for complainants whilst at the same time maintaining respect for the rights of defendants.

Principled Objections to the Current Rules on Corroboration

The practical problems which the current approach to corroboration may pose for complainants have been highlighted in the discussion of the law above, that is, the lack of certainty as to when a warning should be given and the form which a warning should take. At present, there is no uniformity in this area. Different judges may exercise their discretion in different ways and whether or not a warning will be given is thus determined more by the

⁶⁰ LSE Jury Project, 'Juries and the Rules of Evidence' [1973] *Criminal Law Review* 208.

⁶¹ P. Roberts & A. Zuckerman, *Criminal Evidence*, 2nd edn, (Oxford: Oxford University Press, 2010) 674. A similar argument is made by McGrath who notes that the trial judge is highlighting particularly cogent evidence against the accused while pointing out potential corroboration to the jury: D. McGrath, 'Two Steps Forward, One Step Back: The Corroboration Warning in Sexual Cases' (1999) 9 *Irish Criminal Law Journal* 22 at 41-42.

‘luck of the judge’ rather than the merits of the case.⁶² Similarly, the lack of guidance on the form which warnings should take creates the potential for the warning to be given in a manner which might prejudice the complainant’s testimony by creating unwarranted levels of suspicion about her credibility.

Of course, as acknowledged already, in the absence of detailed empirical research on the use of corroboration warnings in sexual offence trials, it is difficult to state definitively that the lack of certainty regarding the use of corroboration warnings is contributing to unfair results for complainants. However, even in the absence of verification of the practical problems identified here, a cogent argument for reform may be made on principled grounds, namely the impression of sexual offence complainants which is created by the retention of warning, albeit on a discretionary basis. The primary justification for the abolition of the mandatory corroboration warning was the fact that it singled sexual offence complainants out as a suspect category of witness. As Roberts and Zuckerman comment:

The symbolism of the warning was an affront to justice and a public relations disaster for the law. It implicitly communicated the legitimacy-sapping impression that rape complainants suffered institutionalized discrimination in English criminal proceedings.⁶³

Whilst abolition of the mandatory warning has minimised somewhat the negative effects of the special rules on corroboration which apply in sexual offence trials, it has not obviated the problem of prejudice. Retention of any special rules in this area still means that sexual offence complainants are placed in a separate category to other victims of inter-personal violence. Thus, arguably, sexual offence complainants are still treated as a ‘suspect’ group whose credibility may be open to question. This may appear to be justified on the basis of the sui generis nature of sexual offences which are by their nature ‘oath against oath’ contests where there is little, if any, evidence other than that of the complainant and the defendant. However, this justification is open to question. There are other crimes of inter-personal violence which raise similar issues. For example, consider the distinction which the current

⁶² See Hartshorne, n. 56 at 12.

⁶³ Above n .61 at 673.

law creates between a typical rape case and an assault case in similar circumstances (i.e. defendant assaults complainant in a private location with no witnesses and no evidence other than the physical evidence of assault and the testimony of the complainant and the defendant). Although the issues raised are the same (minimal supporting evidence and the word of a complainant pitted squarely against the word of the defendant), there is special provision for the giving of a corroboration warning in the rape case but not in the assault case.

Of course, the differing treatment of sexual offence cases may be defended on the basis of the increased stigma which attaches to conviction for a sexual offence as opposed to any other criminal offence. However, defendants must be protected from unjust conviction of any criminal offence, not merely the ones which bear particularly onerous connotations. In any event, it is far more likely that the distinction which is drawn between the two types of case is rooted on the historic mistrust of female sexual offence complainants which originally justified the creation of the special rules relating to corroboration. Fortunately, the wholesale distrust of sexual offence complainants which was historically a feature of sexual offence trials has now dissipated. However, the retention of the corroboration warnings serves as a vestige of the historic distinction between a sexual offence complainant and other complainants of crime. In the above juxtaposition of assault and rape allegations, it is clear to see that the complainant in the rape case is formally placed in a separate, arguably 'suspect' category to the complainant in the assault example purely on the basis of the type of charge which is involved.

Aside from any practical ill-effects of sexual offences law, it is also highly important to be aware of the symbolic message which the law in this area has the potential to send. The impact which societal attitudes about rape or 'rape myths' may have on juror deliberations in sexual offence cases is at this stage well-documented.⁶⁴ Amongst the more pernicious of

⁶⁴ See S. Estrich, *Real Rape: How the Legal System Victimized Women Who Say No*, (Cambridge, Massachusetts: Harvard University Press, 1987) and Temkin, & Krahé, above n. 35. Readers are also directed to the various mock jury studies which have been carried out in recent times and demonstrate the impact of rape myth acceptance upon juror deliberations. Examples of such studies include: L. Ellison & V.E. Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) *British Journal of Criminology* 202; E. Finch & V.E. Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16 *Social & Legal*

these myths is that many allegations of sexual assault and rape are untrue.⁶⁵ Arguably, the current rules on corroboration contribute to a perception that sexual offence complainants are a potentially ‘suspect’ category of witness or that their testimony is inherently suspect. Certainly, removal of the mandatory warning has minimised this perception and its ill-effects. However, the continued retention of special rules in this area, even on a discretionary basis, continues to single sexual offence complainants out for special attention and contributes to fears of mendacious sexual offence complainants. In the area of sexual offences where social perception of complainants is so important and contentious, this fact alone creates a strong argument for considering reform.

Options for Reform

As with any legal reform, an important starting point for a reconsideration of the rules on corroboration should involve researching the way in which the current rules are operating in practice. The need for this type of research has been highlighted by Temkin⁶⁶ and Lewis⁶⁷ in England and by the RCNI in Ireland.⁶⁸ Such research should be used to discover both the frequency with which the warning is given and the effect which the warning may have upon juror deliberations. The former could be achieved through a case-tracking exercise. Given the prohibition on research with real jurors in both England and Ireland, the latter would require a mock jury study which could identify the potential for a corroboration warning to affect juror perceptions of the complainant’s testimony. Once completed, this research would provide

Studies 591; L. Ellison, & V.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 Jury Study’ (2010) 13 *New Criminal Law Review* 781.

⁶⁵ The so-called false allegations myth has been shown to retain some prominence in societal attitudes to sexual offences. In Ireland, a survey of 1002 adults regarding their experiences of and attitudes towards sexual violence found that 42.3% of male respondents and 37.9% of female respondents thought that allegations of rape are often false: H. McGee, et al, *The SAVI Report: Sexual Abuse and Victimization in Ireland*, (Dublin: The Liffey Valley Press, 2002) 158. In England, a survey of 1061 adults conducted by the Havens Sexual Assault Referral Centres found that 18% of respondents agreed with the statement that ‘most claims of rape are probably not true’: http://www.thehavens.co.uk/docs/Havens_Wake_Up_To_Rape_Report_Summary.pdf (Last accessed: 23rd February 2013)

⁶⁶ Temkin has called for research on whether trial judges are adhering to the requirement that an evidential basis for unreliability is needed before a corroboration warning may be given: J. Temkin, *Rape and the Legal Process*, 2nd edn (Oxford: Oxford University Press, 2002) 263

⁶⁷ Lewis echoes Temkin’s call for reform: Above, n. 50 at 900.

⁶⁸ The RCNI called for research into the appropriateness and frequency of the corroboration warning: Rape Crisis Network of Ireland, *Agenda for Justice: Toward Ending Injustice for Survivors of Sexual Violence. RCNI Legal Position Paper*, (Galway: Rape Crisis Network of Ireland: 2005) 6.

valuable information on the type of action which might be necessary in order to ensure that the rules in this area are as fair as possible.

It is possible that the research may indicate that the intuition expressed here that the corroboration warning is capable of causing injustice for complainants is unfounded or is rectifiable by intervention short of legislation. For example, it may be thought that all that is required is judicial training or bench book guidance to ensure that trial judges give the warning only when strictly necessary. However, it is tentatively submitted that this is unlikely to be the case. Even if empirical research reveals that the corroboration warning is infrequently given, it is likely that mock jury studies would reveal that where a warning is given (particularly where it is carelessly worded) it will have the potential to impact negatively upon juror assessments of the complainant's testimony. However, even if the practical ill-effects of the current rules were found to be minimal, there is still a very strong case for reform on symbolic grounds. The rule singles sexual offence complainants out for special attention and thus contributes to fears of mendacious sexual offence complainants. As suggested above, this principled objection on its own could justify legislative intervention in this area.

When one considers the corroboration warning in light of the prejudicial message it sends about sexual offence complainants, the instinctive response is to recommend the complete abolition of the warning in sexual offence trials. Indeed this has been recommended by a number of Irish and English commentators and interest groups. In Ireland, the National Women's Council of Ireland⁶⁹ and the Task Force on Violence against Women⁷⁰ as well as commentators such as McGrath⁷¹ and Bacik et al⁷² have called for the abolition of the

⁶⁹ The Council expressed the view that the discretionary power of the trial judge to issue a corroboration warning should be abolished as unnecessary, and as seriously undermining the respect due to a complainant in cases of rape and sexual assault: National Women's Council of Ireland, *Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and other Crimes of Violence against Women and Children*, (Dublin: National Women's Council of Ireland, 1996), para. 51.

⁷⁰ The Task Force stated its view that there are no grounds for considering witnesses in cases of sexual violence to be any more or less reliable than in any other case, and that there is no need for any special rule to apply to judicial comment: *Report of the Task Force on Violence against Women*, (Dublin: Stationery Office, 1997), para. 9.19.

⁷¹ Above, n. 61 at 43.

corroboration warning. In England, Lees has similarly suggested that the corroboration warning should be abolished entirely.⁷³ Temkin has also questioned ‘whether it might have been preferable for Parliament to forbid the use of the corroboration warning altogether rather than leaving the matter to the discretion of the judges’.⁷⁴ However, although outright abolition of the corroboration warning at first glance seems like the perfect and obvious solution to the problems posed in this area, on closer inspection it becomes clear that abolition is far from a straightforward process. In fact, as is explained below, there are various approaches which may be taken to abolition, some of which may produce unintended and undesirable consequences. Thus, care is necessary to ensure that the form of abolition chosen will produce the desired effect of creating practical improvements which advance the rights of complainants, without compromising due process guarantees.

The knee-jerk approach to abolition is to legislatively provide that the use of corroboration warnings in sexual offence trials is forbidden. However, this in itself is not sufficient to prevent trial judges from exercising their discretion to comment on the lack of corroboration in a case where they felt this was necessary. In a bid to protect defendants’ rights, the judiciary may resurrect the corroboration issue, despite an express prohibition on giving a warning. This is because the abolition of warnings does not affect the judge’s ability to comment upon the evidence when directing the jury. Even if a trial judge is prohibited from giving a warning-type direction on corroboration, where a judge feels that there is a lack of corroboration in a case, s/he may exercise his/her discretion to comment on the evidence to draw jurors’ attention to this. In this way, corroboration is introduced as an issue in spite of the formal abolition of corroboration warnings. The potential for this is evident from the Canadian experience of prohibition. Section 274 of the Canadian Criminal Code provides that in a sexual assault trial, ‘no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration’.⁷⁵ However, Temkin notes that although Canadian judges can no longer routinely give

⁷² I. Bacik, et al, *The Legal Process and Victims of Rape: A comparative analysis of the laws and legal procedures relating to rape and their impact upon victims of rape in the fifteen member states of the European Union*, (Dublin: The Dublin Rape Crisis Centre, 1998) 16

⁷³ S. Lees, *Carnal Knowledge: Rape on Trial*, 2nd edn (London: The Women’s Press Ltd, 2002) 269.

⁷⁴ Above, n. 66 at 263.

⁷⁵ It is noteworthy that section 274 applies to other offences as well as sexual assault.

corroboration warnings, they are ‘in no sense inhibited from commenting upon the evidence and assisting the jury as to the weight that they should give it’.⁷⁶

Where a corroboration warning is *de jure* abolished but *de facto* applied by trial judges continuing to comment on the lack of corroboration, the phrasing of such comments as a trial judge may deem appropriate could prejudice the complainant’s testimony. Indeed, the problems attached to the requirement for corroboration warnings would be multiplied since in their absence judicial comment on corroboration would be very difficult to regulate. As Roberts and Zuckerman note, rules which appear clear and settled on their face, but which in practice are frequently circumvented without warning or explanation, produce only the illusion of certainty and predictability.⁷⁷ Thus, a straightforward prohibition of the use of corroboration warnings would represent a retrograde step and would not offer an improvement upon the current legal position.

In order to obviate the potential for trial judges to circumvent any abolition of the warning and to continue to refer to corroboration when directing the jury, a more absolutist approach to abolition of the corroboration warning could be taken. Legislation could expressly provide, in addition to the abolition of the warning, that judges may make absolutely no comment on corroboration in a sexual offence trial. This goes further than the first type of abolition by expressly forbidding not just the warning-type direction which is traditionally associated with corroboration but instead prohibiting a trial judge from making *any* reference to corroboration when directing the jury. In essence, this would forbid a trial judge from using his/her ability to comment on the evidence in order to raise any concerns which s/he has about the amount of corroboration in a case. Such a provision would avoid the shortcomings of abolition on its own. However, it raises two alternative difficulties. First, dictating that trial judges could never comment on the absence of corroboration in a sexual offence trial might be seen to unduly interfere with their discretion to direct the jury in any way they see fit. Thus, such a provision might be seen as a legislative encroachment upon judicial independence which would arguably contravene the rule of law. The second problem with this approach is that it could result in unfairness for defendants who were convicted in the absence of corroboration

⁷⁶ Above, n. 66 at 267.

⁷⁷ Above, n. 61 at 30.

where the jury had not been warned about the potential dangers of such a conviction. This may result in a proliferation of appeals which are not desirable as they generate uncertainty and create doubts about the ability of trial judges to administer justice in sexual offence cases.⁷⁸ This would be an unwelcome outcome for both defendants and complainants alike.

The problems posed by the first two methods of abolition highlight the need for a nuanced approach. In this regard, a viable proposal has been suggested by Irish evidence scholar McGrath who has argued that a prohibition on the provision of corroboration warnings should be in two parts:

The first part would prohibit the trial judge from warning the jury that it was dangerous to convict on the uncorroborated evidence of a sexual complainant or from making any other generalisations about such evidence. The second part would then contain a proviso that this prohibition did not interfere with the discretion of the trial judge to make such comment on the facts as the interests of justice required in the circumstances of the case.⁷⁹

McGrath suggests that a provision like this offers ‘a chance to lay to rest unacceptable and unwarranted generalisations’.⁸⁰ However at the same time, trial judges are allowed ‘adequate scope to discharge their...duty to direct the jury so as to prevent any possible miscarriages of justice’.⁸¹ In this way, the trend for *warnings* is abolished but the right to *comment* is retained and can be guided so as to ensure that it goes no further than is necessary.

This proposal avoids the problems posed by the first two approaches to abolition. While it sends a clear message that the corroboration warning is not to be used, the potential that a trial judge may need to comment on the lack of corroboration to protect defendant’s rights is acknowledged and accommodated in the second stage of the prohibition. This offsets the

⁷⁸ This may also disadvantage complainants. Successful appeals may lead to a general perception that all convictions based solely on the word of the complainant are unsound. The overall effect may be to discourage complainants from taking their cases to court: Scottish Law Commission, *Report on Rape and Other Sexual Offences*, (Edinburgh: The Stationery Office, 2007) 107.

⁷⁹ Above, n. 61 at 45

⁸⁰ Ibid.

⁸¹ Ibid.

problems which may arise where the warning is *de jure* abolished but is *de facto* applied in the form of judicial comment on the evidence. As Roberts and Zuckerman point out, when the role of discretion is candidly acknowledged, the full range of normative considerations influencing judicial decisions must be articulated and justified. This should facilitate appellate scrutiny and lend impetus to the rational development of evidentiary standards and informed debate.⁸² In addition, in contradistinction to the second type of abolition described above, McGrath's proposal avoids both conflict with the rule of law and concerns about defendants' rights. The trial judge is still free to comment on the evidence where this is necessary to ensure fairness for the defendant.

Of course, the formal retention of discretion even in the limited format proposed by McGrath still raises the problem that this element of flexibility will stymie the potential for change as it may be misinterpreted or misapplied by trial judges who will continue to comment on corroboration where this is not necessary. However, it is possible to bolster a provision along these lines to ensure that it is correctly applied. The first method of ensuring the provision achieves practical results is to set out in legislation that judicial comment on the evidence may only be given after the trial judge consults with defence and prosecution counsel. This would essentially place one of the requirements of the *Makanjuola* guidelines on a statutory footing. As stated earlier, the guidelines stipulate that where a question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.⁸³ Such a procedure would fit within sexual offence trials where such *voir dire* procedures are already used in relation to the application for the admission of evidence of the complainant's sexual experience.⁸⁴ This procedural requirement would ensure that the need for comment on corroboration could be discussed fully by both prosecution and defendant and, if it is decided that comment is necessary, its terms could be agreed upon. Complainants

⁸² Above, n.61 at 30.

⁸³ [1995] 3 All ER 730 at 733.

⁸⁴ In English law, section 41 of the Youth Justice and Criminal Evidence Act 1999 provides that evidence of complainant's sexual experience cannot be admitted without leave of the trial judge. The application procedure involves a private hearing before the trial judge where the prosecution and defence counsel may make arguments regarding the admission of sexual experience evidence. The details of this procedure may be found in Part 36 of the Criminal Procedure Rules 2011. In Irish law, section 3 of the Criminal Law (Rape) Act 1981 (as amended) also provides that evidence of the complainant's sexual experience may not be admitted without the leave of the trial judge and a private hearing is also provided for in order to determine the outcome of a defence application for the admission of such evidence:

would be protected against unnecessary or inappropriately worded comment, thereby minimising any potential for prejudice and defendants would have the opportunity to make a case for comment where this is necessary in order to protect their fair trial rights, thereby minimising the potential for appeals.

The second means of supporting a reformed set of rules on corroboration would be the provision of bench book guidance which could provide direction on how best to word any comment on corroboration so as to avoid prejudice to complainants and, indeed, defendants. Currently, in England, there is no specific bench book guidance on the use of corroboration warnings in sexual offence trials. Chapter nine of the *Crown Court Bench Book* deals with corroboration generally and reiterates the guidelines set down in *R v Makanjuola* but trial judges are not provided with any special guidance on how best to approach corroboration in sexual offence trials.⁸⁵ In Ireland, there is no equivalent to the English *Crown Court Bench Book*. Thus, a bench book would need to be specially prepared. However, it is to be hoped that reform of this aspect of the Irish law on sexual offences would take place as part of a larger reform effort in the area and thus the guidance on corroboration could be included within a bench book which is created for general use in sexual offence trials.

The proposed bench book guidance should advise trial judges as to the appropriate use of their discretion to comment so as to minimise the ambiguity which currently surrounds this aspect of the law. The bench book should recommend when comment on corroboration might be appropriate, as well as suggesting appropriate phrasing such comment. The latter would minimise the possibility that trial judges might ‘embroider’⁸⁶ their commentary with prejudicial statements about the risk of false allegations or other rape myths. This guidance will be an important step in ensuring that any judicial comment on the evidence is administered in a manner which does not unfairly prejudice the complainant’s testimony.

⁸⁵ Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (Judicial Studies Board, 2010), chapter 9.

⁸⁶ See Lees, above n. 73 at 111.

The moderate form abolition suggested here represents a viable mechanism for reform of the rules in this area. The first part of the prohibition sends a very clear message that corroboration warnings are no longer a feature of sexual offence trials and, by implication, that sexual offence complainants are not to be treated as a suspect category of witness. At the same time, the second part of the prohibition allows sufficient flexibility for the provision of suitable comment on the evidence if this is necessary to protect the rights of defendants. A trial judge is free to comment on the available evidence in the same way as in any other trial, as long as this does not amount to a warning-type direction which casts doubt upon the complainant's credibility primarily on the basis of the type of crime that is involved. In this way, defendants are still protected but complainants are shielded from prejudice. The success of the provisions will be significantly bolstered by the procedural mechanism of the consultation between judge and counsel and bench book guidance which will ensure that trial judges approach the prohibition in an appropriately balanced manner.

Conclusion

The corroboration warning is almost a forgotten aspect of sexual offences law. Nevertheless, as the discussion here has shown, the uncertain rules in this area are capable of causing problems on both practical and principled levels. For this reason, the law in this area needs to be revisited. At the very least, research on the effects of the current rules is necessary. Ultimately, however, it is likely that reform is required to ensure that the law in this area is no longer capable of prejudicing sexual offence complainants' testimony and classifying them as witnesses whose evidence should be judged with special care. The reform proposed here offers a nuanced means of eradicating the potential prejudice for complainants entailed in the current rules, without compromising the due process guarantees to which defendants are entitled. In this way, any vestige of the historic suspicion of sexual offence complainants is abdicated but defendants are still adequately protected from unjust conviction.