Abstract:
The existence of rape myths in the social consciousness and their potential to affect juror deliberations in rape trials is well-documented. Thus, it is increasingly likely that trial judges will wish to seek to counteract the negative effects of these myths when directing the jury in rape trials. For trial judges who wish to do this, there is a real challenge in seeking to educate jurors whilst at the same time providing a balanced direction. This article addresses ways in which Irish trial judges may be assisted so as to enable them to warn the jury of the erroneous nature of prevailing stereotypes about sexual offences without unfairly prejudicing the defendant’s case.

Introduction
Summing up in any criminal trial is challenging. The judge faces a difficult task in seeking to explain legal intricacies to the jury in a way in which they understand. Even the explanation of the beyond reasonable doubt standard can be problematic. In a rape trial, the task of a trial judge is even more difficult. The nature of sexual offences means that the evidence itself is often difficult to summarise without prejudice. For example, a trial judge may be obliged to draw attention to the fact that the evidence of the complainant is largely uncorroborated and that it is largely the complainant’s word against the defendant’s. The slightest slippage in language here or clumsy phrasing could serve to undermine the complainant’s version of events. However, over and above these problems, an emerging issue is that of rape myths and their potential impact on juror deliberations. It is well-accepted now that stereotypical attitudes about rape can prejudice jury deliberations. For example, leading scholar on sexual offences, Tom O’Malley opens his seminal text on sexual offences with

1 BCL LLM PhD, Lecturer in Law, University of Limerick. This article is based upon a paper which was presented by the author at the North South Criminology Conference at University College Cork on June 20, 2013. The author would like to thank Professor Shane Kilcommins and Dr. Mary Donnelly, Law Department, University College Cork for comments on earlier drafts of the material contained in this article. The views expressed, as well as any errors contained within, remain the sole responsibility of the author.

2 The trial judge has a discretion to give a corroboration warning in a rape trial: section 7 of the Criminal Law (Rape) Amendment Act 1990.
the statement that ‘the study of sexual offences is in many ways a study of social values.’

Trial judges who wish to try to off-set the negative effects of such attitudes when summing up for the jury face a challenge if they are going to try to do this fairly without unduly interfering with, or further prejudicing, the jurors’ deliberations.

This article addresses the obstacles which trial judges may face in this area. The problem which exists regarding societal attitudes to rape and how they affect juror decision-making will be discussed. The potential difficulties for trial judges who may wish to tackle these attitudes when summing-up for the jury will then be assessed. This is done with reference to the English case of R v D which demonstrates the dangerous territory a judge may find him/herself in when trying to educate jurors about the reality of sexual violence in an ad hoc or unguided manner. The article concludes by outlining a method of guiding judges on how to sum up effectively without prejudicing the jurors.

The Problem: Societal Attitudes and their Effects on Juror Decision-Making

Empirical research on attitudes to sexual violence is somewhat limited. The two primary available studies in this jurisdiction are the SAVI Report and a study conducted by the Irish Examiner newspaper in 2008. SAVI involved anonymous telephone interviews with 3,000 randomly selected adults from the general population in Ireland. Although the primary aim of this study was to estimate the prevalence of various forms of sexual violence amongst Irish women and men, there was also some assessment of public perceptions and beliefs about sexual violence. In the Irish Examiner study, 1,002 adults were questioned about their attitudes and beliefs about rape.

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4 [2008] EWCA Crim 2557.
There is some evidence that members of the public are aware of the realities of rape and are sympathetic towards rape complainants. In SAVI, 84.6 per cent of women and 85.6 per cent of men agreed that a raped woman was usually an innocent victim. In addition, 81.8 per cent of women and 82.9 per cent of men agreed that most rapes are carried out by someone known to the victim. Finally, 93 per cent of women and 92 per cent of men believed that date rape was just as serious as rape by a stranger. However, there is also evidence of a level of rape myth acceptance. For example, in SAVI, 37.9 per cent of women and 42.3 per cent of men thought that allegations of rape are often false. Given that the research indicates that false allegations of rape are rare occurrences, this belief would appear to be out of step with reality. Stereotypes about ‘real victims’ also appear to hold some influence in the Irish consciousness. The Irish Examiner study revealed that 23 per cent of respondents believed that a woman was partially or totally responsible for being raped if she previously had had many sexual partners. There also appears to be a tendency to trivialise the rape of a sexually experienced complainant. In SAVI, 18.3 per cent of women and 23.8 per cent of men believed that sexually experienced people are less traumatised by rape.

Victim behaviour at the time of the alleged incident also appears to affect perceptions as to whether a sexual offence has occurred. In the Irish Examiner study, 33 per cent of respondents felt that a woman who had consumed alcohol or taken illicit drugs is partially responsible if she is raped. 8 per cent thought that she is totally at fault. 37 per cent of respondents in the Irish Examiner study felt that flirting extensively with the defendant made a woman in some way responsible for any subsequent attack. A victim’s mode of dress at the time of the incident also attracts attention. In SAVI, 29 per cent of respondents thought

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that women who wear short skirts or tight tops are inviting rape.\textsuperscript{15} Similarly, in the \textit{Irish Examiner} study, 26 per cent of respondents felt that a woman who was raped while wearing sexy or revealing clothing was in some way responsible for rape.\textsuperscript{16} Thus, it seems that there is a societal readiness to blame victims for being raped or sexually assaulted if they have not adhered to certain standards of behaviour.

Consequently, although the findings of \textit{SAVI} suggest that there is a level of understanding of the reality of sexual violence in Ireland, the report also reveals a degree of rape myth acceptance that is mirrored by the \textit{Irish Examiner} study. While further research in this area is necessary in order to ascertain more precisely the level of adherence to rape myths which exists in Irish society, it appears safe to conclude that there is a proportion of society which subscribes to stereotypical thinking about sexual offences. Indeed, Ellison and Munro suggest that the level of rape myth acceptance in a society may be even higher than attitude surveys suggest.\textsuperscript{17} In their view:

\begin{quote}
“Participants who respond to questionnaires may be well-versed in the socially “appropriate” attitudes to be voiced at this abstract level, and so may present a progressive profile to the researcher than they in fact endorse.”\textsuperscript{18}
\end{quote}

Consequently, it is necessary to be alive to the fact that attitude surveys may not reveal the full extent of rape myth acceptance in Irish society. If these attitudes exist in society, it is likely that juries in rape trials will contain jurors who are influenced by stereotypical thinking about rape. It is not difficult to imagine how such attitudes might prejudice their deliberations.

\textsuperscript{16} Ryan, “Rape: Our Blame Culture”, \textit{Irish Examiner}, March 26, 2008.
\textsuperscript{17} Ellison and Munro are writing about English attitude surveys. However, there is no reason to believe that their comments are not equally applicable in an Irish context.
Effect of Societal Attitudes on Juror Deliberations

Since research with real juries is prohibited in Ireland\(^\text{19}\), the only way of gathering information on jury deliberations is through mock jury research. In a mock jury study, the participants are asked to put themselves in the role of jurors and to make judgements about hypothetical cases which are presented to them in various forms. A number of these mock jury studies have been carried out in England.\(^\text{20}\) These studies have shown that jurors are significantly affected by societal context when deliberating in rape trials.

A study conducted by Temkin & Krahé showed that 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.\(^\text{21}\) A study carried out by Ellison and Munro also strongly suggested that claims of non-consensual sex that are not accompanied by evidence of physical force and attendant resistance are significantly less likely to be accredited as rape by jurors.\(^\text{22}\) Jurors have also been found to be critical of complainants who were intoxicated at the time of an alleged incident of non-consensual sexual activity. A study by Finch and Munro found that women who consume alcohol in the presence of a male drinker will be perceived to be more sexually available than a non-drinking counter-part. Even in situations in which the complainant’s intoxication was not wholly voluntary (i.e. where her drink was spiked with additional alcohol or the defendant coerced her into drinking greater quantities than she intended) the complainant was frequently viewed as being partially responsible.\(^\text{23}\)

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\(^{19}\)Research on the deliberations of juries is prohibited under both international and domestic law. The European Court of Human Rights has held that jury deliberations should be secret: *Gregory v United Kingdom* (1997) 25 EHRR 577, para. 44. At a domestic level, in *O’Callaghan v Attorney General*, O’Flaherty J stated that the deliberations of a jury should always be regarded as completely confidential: [1993] 2 IR 17 at 26.


\(^{23}\)Finch and Munro, “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants” (2007) 16 Social & Legal Studies 591 at 599. These results mirror the findings of an earlier pilot study by the same researchers: Finch and Munro, “Juror
It is necessary that mock jury research be commissioned in Ireland in order to shed further light on the extent to which jury deliberations in Irish rape trials are influenced by societal context. Such research would provide an insight into the influence which societal context has upon Irish jurors’ deliberations in rape trials. However, in the absence of such research, we must rely on the information which is currently available to us. This research indicates both the existence of rape myth acceptance in Irish society and the potential for such stereotypical attitudes to impact upon juror deliberations in rape trials.

The Potential Dangers for Trial Judges who seek to ‘Educate’ Jurors about the Reality of Sexual Violence

The need for caution in the phrasing of judicial directions was demonstrated in the case of *R v D*. The case involved a series of rapes within a relationship. The final incident of rape occurred on the 13th of January 2006. On that evening, a separate incident in the household resulted in the police being called. While the police were in the house, the complainant did not complain about sexual assault or rape. Rather, she complained on the 15th of January when a policeman came to take her statement about the separate incident which had occurred on the evening of the 13th. Part of the defence case had been that the delayed complaint was evidence of fabrication by the complainant and she was cross-examined as to why she had not complained when the police were in the house on the 13th. Her response was that she would not have been comfortable making her complaint at that time when there were so many police officers present. She testified that she had felt ashamed of what had happened and it was only when she was speaking with the policeman on an individual basis on the 15th that she felt able to make her complaint.

In summing up for the jury, the trial judge sought to explain to them why a complainant in this complainant’s situation might not complain immediately. He began by stressing the

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24 [2008] EWCA Crim 2557.

25 [2008] EWCA Crim 2557, para. 4.
difference between rape and other criminal offences such as a burglary or an assault. He also sought to stress the particular difficulties which a complainant might face in relation to reporting when the defendant is someone s/he had been in a relationship with. In order to provide context for the appeal, it is worth quoting at some length from the trial judge’s direction to the jury:

“Very often, women who are raped within relationships feel ashamed of what’s happened. They themselves feel the shame. Although they have nothing to be ashamed about, because they are the victim, that’s the reaction. …They are often too traumatised or embarrassed to tell anyone what’s going on, and a very serious aspect of the offence in those circumstances is that a woman feels trapped. She is, after all, in her own home, very often simply too ashamed and embarrassed to tell anyone that the person she has brought into her home to share her life, to be with her children, is now raping her. She won’t tell her neighbours, friends, even very close friends or children, still less the police, because of those factors…”

“So it’s against that background that you may wish to consider the question: why D didn’t complain about being raped when it started. …Bear in mind how you would feel if you were in her situation about suddenly saying: ‘Oh, by the way, I’ve been raped’. This is where you use your commonsense and your experience of life in determining that question, because it’s frequently said when women don’t complain about rape: ‘well it’s not true, because if it had been true they would have been straight down to the police station hammering on the door, saying “I’ve been raped”.’ But you may think it doesn’t work like that particularly if it’s rape by someone you have loved, as D says, still care about, to an extent, in your home, where your children are living.”

The defendant was convicted of rape. He appealed his conviction on the basis that the trial judge’s direction to the jury was “seriously unfair”. The Court of Appeal commented that a judge “is entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning”. However, Latham LJ stressed that any comment made must be “uncontroversial”. The problem with this trial judge’s direction was that his comments

26 [2008] EWCA Crim 2557, para. 5.
27 [2008] EWCA Crim 2557, para. 5.
29 [2008] EWCA Crim 2557, para. 11.
30 [2008] EWCA Crim 2557, para. 11.
lacked balance and the direction was not appropriately measured. Fortunately, the conviction here was allowed to stand as the defence case was fully and fairly put to the jury in every other respect.\textsuperscript{31} However, the case is a demonstration of the need for caution on the part of trial judges who are attempting to offset prejudicial thinking by way of jury directions. If appeals are to be avoided, it is very important that the wording of these directions is measured. Commenting on this case, Kibble has stated that if myths and stereotypes are to be articulated and confronted, it is important that they are articulated and confronted with precision. Otherwise, the old myths will simply be replaced by new myths.\textsuperscript{32} To illustrate his point, Kibble uses the myth that women cry rape when they regret having sex or want revenge. As Kibble points out, a bald statement that a woman would never cry rape as a result of regret or in order to exact revenge would be equally untrue.\textsuperscript{33} For a judge to make such a statement would merely serve to create a counter-myth to replace the original myth. Such an outcome would be undesirable and merely shift the unfairness from complainants to defendants. Thus, it is very important that jury directions are carefully worded and sufficiently nuanced to avoid the creation of further bias in jurors.

\textbf{Providing Support for Judges when Summing-Up}

Given the potential for trial judges to err when seeking to off-set the effects of rape myth acceptance on juror deliberations, it is necessary to support them in their endeavours and minimise the risk of prejudice. Of course, there are a number of legislative measures which could aid trial judges when directing the jury. For example, the introduction of a legislative definition of consent could help with explaining what is necessary for a valid consent to sexual activity. Similarly, increased guidance on the appropriate use of corroboration warnings could direct judges on when it is appropriate to give such warnings and the form which these warnings should take. A full discussion of legislative measures such as these is beyond the scope of this article. Rather, the discussion here will focus on extra-legal measures which might aid trial judges when directing the jury, namely the introduction of model jury directions and judicial training.

\textsuperscript{31} [2008] EWCA Crim 2557, para. 13.
The English approach to the provision of model jury directions for use in sexual offence trials provides an excellent template which should be followed in Ireland. In the wake of the enactment of the Sexual Offences Act 2003, the Judicial Studies Board in England issued some guidance for judges as regards appropriate directions to be given regarding consent in sexual offence cases. As part of its function, this Board publishes bench books and specimen directions which trial judges may use in order to direct juries on the performance of their duties.\(^{34}\) The *Crown Court Bench Book*, published by the Judicial Studies Board in March 2010\(^ {35}\), provides guidance for judges when directing the jury and contains a chapter on sexual offence cases.\(^ {36}\) The Bench Book does not provide for specimen directions per se. Rather, it provides model directions which show trial judges how to guide juries but at the same time allow for trial judges to tailor the directions as they see fit in order to suit the case at hand.\(^ {37}\) The Bench Book provides guidance for judges who need to direct jurors in relation to the danger of assumptions based on stereotypical attitudes; allegations of historical sexual abuse; evidence of child witnesses and; consent, capacity and voluntary intoxication.

In relation to the guidance which the Bench Book provides for judges on how to alert the jury to the danger of stereotypical assumptions, it is observed that stereotypes about appropriate victim behaviour or ‘real rape’ do not accord with judges’ experience.\(^ {38}\) The Bench Book acknowledges that increasingly where a judge feels that such stereotypes may affect the jury’s deliberations in a case, s/he may take the decision to caution the jury regarding the dangers of relying on unwarranted assumptions.\(^ {39}\) In this respect, the Bench Book recommends that the giving of such a warning should be discussed with counsel for the prosecution and the defence prior to the closing speeches and stresses the need for judges to ensure that they do not stray from the commonplace to the controversial and, thus, appear to

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\(^{34}\) The Judicial Studies Board was replaced by the Judicial Council in April 2011.


\(^{37}\) The Judicial Studies Board has expressed a desire to move away from standard directions and to instead emphasise the responsibility of each individual judge, in each individual case, to craft decisions appropriate to that case: Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (Judicial Studies Board, 2010), p. v.


be endorsing arguments for one side at the expense of the other. Thus, comments should be general and balanced and should not tend to support or prejudice either the complainant or the defendant. While the Bench Book does not set out any precise format which a judge must use if s/he wishes to warn the jury of the danger of relying on assumptions, it does provide nine ‘illustrations’ which in essence amount to sample directions which judges may adapt for use in relevant cases.

Examples of the illustrations provided for in the Bench Book include guidance on: the avoidance of assumptions when the complainant and defendant are known to one another; the effect of trauma and demeanour in evidence; late reporting; absence of force or the threat of force and; the avoidance of assumptions which are based on what is perceived to be inappropriate victim behaviour. In order to demonstrate the format of these illustrations, it is worth citing in full the general illustration regarding the avoidance of judgements based on stereotypes:

“It would be understandable if one or more of you came to this trial with assumptions as to what constitutes rape, what kind of person may be a victim of rape, what kind of person may be a rapist, or what a person who is being, or who has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgement strictly on the evidence you have heard from the witnesses.”

Guidance such as this offers a useful means for judges to warn the jury about the danger of assumptions without being controversial or biased. The direction alerts the jury to the fact that assumptions may affect their deliberations whilst avoiding prejudice in the form of suggestion of alternative “correct” assumptions which should guide their reasoning. For example, the direction does not attempt to educate juries about the “reality” of sexual offence

cases (e.g. that they are more likely to be committed by individuals who are known to the complainant or that the alcohol is a common feature of these cases).

The English approach to the creation of jury directions provides a valuable model for the creation of similar directions in an Irish context. Although there is no equivalent of the *Crown Court Bench Book* in Ireland, it should be possible to create a publication along these lines for use in sexual offence trials. The most appropriate body which should be tasked with the role of developing such a publication would seem to be the Judicial Studies Committee of the interim Judicial Council. If such a bench book were introduced, Irish trial judges would be provided with ample guidance as to how to direct juries so that they are less inclined to rely on stereotypical attitudes about sexual offences and that they fully understand what is necessary for a legally valid consent to sexual activity. However, by permitting trial judges to tailor the illustrations and guidance to suit the individual case before them, trial judges would be permitted to use their discretion so that warnings were given in the format which is most appropriate for the case at hand. At the same time, trial judges would be sufficiently guided so as to avoid cases like *R v D* where trial judges would stray from issuing guidance to juries and instead make controversial statements which run the risk of creating counter-stereotypes. Thus, the overall effect of the jury directions proposed here is that juries would receive the optimum and most appropriate guidance, allowing them to make more dispassionate and enlightened assessments regarding the defendant’s guilt.

Of course, all of the foregoing will be bolstered by judicial training, which would educate judges on how best to instruct jurors. Admittedly, at present the availability of judicial training in Ireland is limited, largely due to budgetary concerns. Currently governed by the Judicial Studies Committee of the interim Judicial Council it appears that such training is limited to an annual one-day conference and attendance at other general conferences. However, hopefully once the Judicial Council is places on a permanent statutory footing, such training should be more straightforward to implement and more funding may be made

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42 The lack of available funding for judicial education and training is cited on the Association of Judges of Ireland website: [http://www.aji.ie/supports/judicial_education](http://www.aji.ie/supports/judicial_education) (last accessed: August 20, 213).
44 The Judicial Council Bill 2010 has yet to be implemented into law.
available and appropriate training to bolster the judicial directions recommended here will be possible.

Conclusion

As with any other actor in the criminal justice system, trial judges are not infallible. We cannot expect them to blindly guide jurors in an area as difficult and controversial as sexual offences. The law must support them in their task of getting directions right and ensuring that jurors are not prejudiced by RMA but likewise are not prejudiced by an inappropriate comment which goes too far in the opposite direction and risks contravening the fair trial rights of defendants. The judicial directions proposed here provide a suitable compromise. Trial judges are aided in their task of guiding the jury but at the same time they retain sufficient freedom to tailor the directions as they see fit, thereby minimising any intrusion upon judicial discretion. Consequently, the bench book proposed here is a worthwhile initiative either as a stand-alone measure or as part of a wider reform of sexual offences law more generally.45

45 Minister Alan Shatter has recently announced that the Department of Justice has been engaging in a review of Irish sexual offences law (http://www.inis.gov.ie/en/JELR/Pages/SP12000300; last accessed: 20th August 2013) and the Taoiseach has promised that a sexual offences Bill will be published this year (http://www.kildarestreet.com/debates/?id=2013-05-28a.309&s=sexual+offences#g349; last accessed: 20th August 2013).