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**The Jury is an Inappropriate Decision-
making Body in Rape Trials in Scotland:
Not Guilty, Not Proven, Guilty?**

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Submitted in fulfilment of the requirements for the
Degree of LL.M. (by Research)

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Abstract

This thesis reviews the influence of prejudicial social attitudes on jury decision-making in rape trials, and considers whether the verdict in rape cases should continue to be determined by a jury in Scotland. Rape law reform is recognised internationally as having had limited impact to date, in terms of either improving the low conviction rates for rape or reducing the systematic re-victimisation of adult female complainers. This issue is discussed within the context of negative social attitudes about rape and rape victims, and the contribution of these to the gap between law and practice in rape cases. The potential influence of different types of prejudicial social attitudes on juror decision-making in rape trials is considered in depth, including the extent to which these may negatively impact on the outcome of trials. The likely interaction between juror attitudes and the Sexual Offences (Scotland) Act 2009 means that the influence of prejudicial attitudes in the jury may largely nullify the progressive intentions of this legislation. Potential measures to counter these negative social attitudes about rape are considered. However, it is argued that the deliberative process is an inadequate safeguard against prejudicial decision-making and that other measures, such as juror education, may be of limited efficacy. This thesis concludes that lay participation should be removed from the decision-making process in rape trials and replaced by a specialised judge based system. This outcome would be in line with the institutional responsibility of the criminal justice system to ensure the objective delivery of the law in practice, and that the cost to the complainer of pursuing justice is not re-victimisation.

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Declaration

I declare that this thesis is my own work, and has not been plagiarised. Where information or ideas are obtained from any source, this source is acknowledged in the footnotes.

List of Abbreviations

ACPOS:	Association of Chief Police Officers in Scotland
COPFS:	Crown Office and Procurator Fiscal Service
CP(S)A 1995:	Criminal Procedure (Scotland) Act 1995
ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights
NZLC:	New Zealand Law Commission
RCS:	Rape Crisis Scotland
SLC:	Scottish Law Commission
SOA 2003:	Sexual Offences Act 2003
SO(PE)(S)A 2002:	Sexual Offences (Procedure and Evidence) (Scotland) Act 2002
SO(S)A 2009:	Sexual Offences (Scotland) Act 2009
VW(S)A 2004:	Vulnerable Witnesses (Scotland) Act 2004

Introduction

This thesis reviews the evidence available on the influence of prejudicial social attitudes on jury decision-making in rape trials, and considers whether the verdict in rape cases should continue to be determined by a jury in Scotland. As elsewhere, in Scotland rape is recognised as a form of gender-based violence,¹ and the focus of this thesis is upon adult female rape by a male perpetrator.

To date, the narrative of rape law and policy reform, transcending jurisdictional boundaries, is characterised as a simultaneous story of ‘success’ and ‘failure’.² The changes exhibit an imbalanced ratio of progressive reform effort to achievement in practice, whether in terms of improving low conviction rates³ or reducing the systematic re-victimisation experienced by complainers during the legal process.⁴ Internationally, as in Scotland, the legal response to rape remains fraught with difficulty.

A major issue in rape cases internationally is high attrition, which describes ‘the process whereby criminal cases “fail” at some point between the commission of the crime and the securing of a conviction’.⁵ In Scotland, attrition in rape cases is recognised as occurring at six defined points.⁶ The first five stages span from prior to reporting to the police, through to the police and prosecutorial investigative and decision-making stages. The sixth and final point of attrition is ‘on consideration of the evidence by the jury at the conclusion of a trial’.⁷ Although not the point of attrition at which the statistical majority of rape cases ‘fail’,⁸ this final point is critical to both understanding and redressing the current ‘justice gap’ for rape victims. The jury acts as the bridge between the law in theory and in practice through administering its application, thereby exerting a significant influence upon the success of law reform. Furthermore, the return of the verdict impacts not only upon the

¹ S Brindley and M Burman, ‘Meeting the challenge? Responding to rape in Scotland’ in N Westmarland and G Ganjoli (eds), *International Approaches to Rape* (2012) 147; L McMillan, ‘Gender, Crime and Criminal Justice in Scotland’ in H Croall, G Mooney and M Munro (eds), *Criminal Justice in Scotland* (2010) 90

² For an overview and variety of national perspectives see C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2011) Intro. and Pt.3; Westmarland and Ganjoli (n 1)

³ See eg. H Reece, ‘Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?’ (2013) 33(3) *OJLS* 445 at 451

⁴ See eg. Burman and Brindley (n 1) at 156-159. The ‘complainer’ is the Scots law term for victim witness, whereas the term ‘complainant’ is used in other jurisdictions. For jurisdictional consistency both terms are used in this thesis, however where discussing multiple jurisdictions or issues in the abstract, the term ‘complainer’ is preferred. The term victim is also used more generally, and acknowledges that an individual can be the victim of rape even though no official complaint is made or prosecution brought – for elaboration, see Crown Office and Procurator Fiscal Service (‘COPFS’), *Review of the Investigation and Prosecution of Sexual Offences* (2006) at para 1.9

⁵ COPFS (n 4) at para 2.40

⁶ *Ibid* at para 2.45

⁷ *Ibid*

⁸ See M Burman, L Lovett and L Kelly, ‘Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries: Scotland Country Report’ (2009)

individual case but, given the inescapable circularity of the legal response to rape, upon the reporting and progression of future cases.

Internationally, juries are more likely to acquit than convict following a rape trial,⁹ and in Scotland, recent statistics continue to show that a jury can be as much as twice as likely to acquit than convict on a charge of rape.¹⁰ The normative role of the jury is to deliver an impartial verdict by reconciling contradictory evidence at trial within the decision criteria defined in the law. However, prolonged concerns have been raised in Scotland and elsewhere that negative social attitudes towards rape and rape victims – often labelled ‘rape myths’ – amongst jurors, can unduly influence the outcome of rape trials and result in lower conviction rates than objectively indicated by the evidence.¹¹

One recent definition describes rape myths as ‘descriptive or prescriptive beliefs about rape (i.e. about its causes, context, consequences, perpetrators, victims and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women’.¹² Whilst the secrecy of deliberations remains a fundamental feature of the jury decision-making apparatus,¹³ the results of many investigations using a range of methodologies continue to implicate the particular sensitivity of rape trials to legally irrelevant or inadmissible factors, and a jury decision-making standard infused with rape mythology, thereby preventing the return of an impartial verdict.

Reforms to improve rape law and policy have been high on the agenda in Scotland, and a portrait of this evolving legal landscape is outlined in chapter 1. The limited impact of the reforms is discussed within the context of negative or prejudicial social attitudes about rape and rape victims, and the contribution of these to the dissonance between law and practice in rape cases.

⁹ L Kelly, J Lovett and L Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (2005) at 71-72; W Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Laws’ (2011) 19(1) *Fem LS* 27 at 32

¹⁰ COPFS (n 4) at para 2.13; COPFS, *Conviction Rates for Rape Charges in Scotland Charges Reported: 1 April 2008 to 31 March 2009*, <[http://www.copfs.gov.uk/sites/default/files/Conviction rates in rape cases 2008-09 - final.doc](http://www.copfs.gov.uk/sites/default/files/Conviction%20rates%20in%20rape%20cases%202008-09%20-%20final.doc)> accessed 30 December 2012

¹¹ Amongst others see COPFS (n 4); S Cowan ‘All Change or Business as Usual? Reforming the Law of Rape in Scotland’ in McGlynn and Munro, *Rethinking Rape Law* (n 2) 154, Brindley and Burman (n 1); J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008)

¹² G Bohner and others, ‘Rape myth acceptance: Cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator’ in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) 17 at 19

¹³ In both Scotland, and England and Wales, it is contempt for anyone to obtain, disclose, or solicit any particulars of the deliberations in the jury rooms under the Contempt of Court Act 1981 s.8(1)

The potential influence of different types of prejudicial social attitudes on juror decision-making in rape trials, and the extent to which these may negatively impact upon the outcome, is considered in detail in chapter 2. The likely interaction between juror attitudes and the Sexual Offences (Scotland) Act 2009 ('SO(S)A 2009') is also examined, particularly the extent to which prejudicial attitudes in the jury may ultimately undermine the intentions of this progressive legislation.

Possible measures to diminish the legal impact of these negative social attitudes amongst jurors are considered in chapter 3. The extent to which the deliberative process is an inadequate safeguard against biased decision-making is examined and the limited efficacy of other measures, such as juror education, is also discussed.

Despite the consensus amongst the Scottish Government, Crown Office and Procurator Fiscal Service ('COPFS') and victim agencies that negative social attitudes are a key cause of the jury's 'apparent reluctance' to convict in rape trials,¹⁴ to date no direct consideration has been given to the intrinsic appropriateness of the jury as a decision-making forum in rape trials in Scotland.¹⁵ Accordingly, the question of what normatively makes a decision-making body appropriate in rape trials is critically reviewed in chapter 4, and the logic and legitimacy of continued lay participation in decision-making at trial is questioned. Framed against the institutional responsibility of the criminal justice system to ensure the objective delivery of the law, and to ensure that the cost of pursuing justice to the complainer is not re-victimisation, this thesis puts forward the case for a specialised judge based decision-making process in rape trials in Scotland.

¹⁴ COPFS (n 4) at para 2.28; Scottish Government, *Sexual Offences (Scotland) Bill: Policy Memorandum* (2008) at paras 15-16; Brindley and Burman (no 1) at 162

¹⁵ For brief and generic discussion see The Scottish Government, *The Modern Scottish Jury In Criminal Trials* (2008). For critical commentary see P Duff, 'The Modern Scottish Jury in Criminal Trials' (2009) 13 *Edin LR* 320. For specific discussion in context of sexual offending see New Zealand Law Commission ('NZLC') *Juries in Criminal Trials Part One: A Discussion Paper* (NZLC PP32, 1998)

1. Recent Rape Law Reform in Scotland

Scotland has experienced extensive reform to both the substantive law of rape and associated rules of evidence and procedure over the last three decades, with a particular increase in measures since devolution in 1999. These progressive changes are outlined and their limited success is discussed within the context of negative social attitudes about rape and rape victims. Four categories of these prejudicial attitudes are identified, prior to detailed consideration in the following chapter of their potential influence on jury decision-making.

1.1 Reform Context

1.1(a) Recent Reforms at Trial in Scotland

The impetus behind recent rape law reforms has included the increasing problematisation of high attrition and low conviction rates, together with concerns over the traditional operation of a very narrow definition of rape in Scots law and the treatment of complainers.¹

By 2001, many anachronistic and discriminatory features of Scotland's restrictive definition of rape had been removed, largely through judicial innovation. Notable changes included ending the requirement for active resistance on the part of the female,² the marital rape exemption³ and the requirement for force.⁴ This later development simultaneously ended the inequitable exclusion of intercourse with a woman who was in a state of extreme intoxication, where incapacitated by her own hand or that of a third party, from being classified as rape.⁵

This series of reforms to the traditional definition of rape reached a peak with the enactment of the SO(S)A 2009. This Act, underpinned by commitment to the fundamental

¹ See eg. COPFS, *Review of the Investigation and Prosecution of Sexual Offences* (2006); Scottish Government, *Sexual Offences (Scotland) Bill: Policy Memorandum* (2008); Scottish Law Commission ('SLC'), *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, 2007)

² *Barbour v HMA* 1982 SCCR 195

³ *HMA v Stallard* 1989 SCCR 248; for prior decisions partially removing the exemption see *HMA v Duffy* 1982 SCCR 182; *HMA v Paxton* 1984 SCCR 311

⁴ *Lord Advocate's Reference No. 1 of 2001*, 2002 SCCR 435

⁵ For discussion see PR Ferguson, 'Corroboration and Sexual Assault in Scots Law' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (2000) 149 at 149-151

principle of respect for individual sexual autonomy,⁶ firmly cemented Scotland's doctrinal conversion to a response to rape where liability is grounded in the existence of a lack of consent. Rape is now statutorily defined as the intentional or reckless penetration, with the accused's penis, of a victim's vagina, anus or mouth, without the victim's consent and without any reasonable belief that the victim has consented.⁷

With this reconstruction of the syntax of the substantive definition of rape, rape is no longer a gendered crime restricted to female victimisation and vaginal penetration, while consent is recast within a more advanced and instructive framework. The consent standard, now defined as 'free agreement', is re-conceptualised within an active rather than passive model.⁸

Simultaneously, seeking to objectify the law, the requirement that the accused's belief in consent must be reasonable, supplants the previous position whereby Scots law had accepted that an accused's honest belief that a complainer had consented was enough to exclude liability for rape, even if the belief was unreasonable in the circumstances.⁹ That the complainer consents only if she agrees freely is reinforced by the requirement that, when determining whether or not the accused's belief is reasonable, consideration be given to any particular steps he has taken to ascertain whether she is consenting.¹⁰ Consent provisions are further buttressed by the enumeration of a number of factual circumstances, which are in themselves constitutive of a lack of consent.¹¹

Further developments in the evidential and procedural arena strengthen the substantive focus on consent as a feature of sexual autonomy at trial. Since 2002, cross-examination of the complainer by the accused personally has also been disallowed.¹² Further, Scotland's first 'rape shield' legislation was superseded by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 ('SO(PE)(S) 2002') s.274, which broadened the scope of prohibited evidence, from the more limited focus on sexual history and sexual character evidence under its predecessor, to more general character evidence.¹³ Notably trial judges, when exercising their 'structured discretion' under s.275 to admit otherwise prohibited

⁶ SLC (n 1) at para 1.25; see J Gardner and S Shute, 'The Wrongness of Rape' in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 193

⁷ SO(S)A 2009 s.1(1)

⁸ SLC (n 1) at paras 2.23-2.25

⁹ *Jamieson v HM Advocate* 1994 JC 88

¹⁰ SO(S)A 2009 s.16

¹¹ SO(S)A 2009 s.13(2)(a)-(f)

¹² Now contained in Criminal Procedure (Scotland) Act 1995 ('CP(S)A 1995') s.288C

¹³ For discussion see P Duff, 'The Scottish 'rape shield': as good as it gets?' (2011) 15(2) *Edin LR* 218-242

evidence,¹⁴ are now statutorily required to ensure the ‘appropriate protection of the complainer’s dignity and privacy’.¹⁵

In addition, as a result of victim orientated policies of general application to all criminal cases, the complainer may now be eligible to give their testimony through ‘special measures’ available for vulnerable witnesses.¹⁶ Where available, these supplement existing measures including clearing the court in trials on indictment for a sexual offence.¹⁷

These substantive and evidential reforms have been further complemented by wider improvements in pre-trial case handling, including Scottish Government funding of specialist victim services and changes to the way sexual offences are investigated and prosecuted.¹⁸ These developments represent a shift towards an increasingly specialised and collaborative response to sexual offending.

1.1(b) Limitations of Reform

These reforms in Scotland have broadly mirrored developments in other jurisdictions. In Scotland, as internationally, the recurrent theme has been that the ‘successes’ of reform, through the progressive transformation of substantive rape law, evidential rules and policy, have often been neutralised at the level of practice.¹⁹ As commentators identify, ‘if any area of the law illustrates the limitations of a law reform process it has to be sexual assault’.²⁰

While some reforms in Scotland are relatively recent in comparison to many other jurisdictions, international doubts over the ability of law reform to make a significant

¹⁴ *Ibid* at 226

¹⁵ Now contained in CP(S)A 1995 S.275(1)(c) and s.275(2)(b)(i) respectively

¹⁶ Vulnerable Witnesses (Scotland) Act 2004 (‘VW(S)A 2004’) s.1 and s.18, inserting CP(S)A1995 s.271 and s.271H respectively; for text and commentary see L Sharp and ML Ross, *The Vulnerable Witnesses (Scotland) Act 2004* (2008)

¹⁷ CP(S)A 1995 s.92(3)

¹⁸ For discussion see S Brindley and M Burman, ‘Meeting the challenge? Responding to rape in Scotland’ in N Westmarland and G Ganjoli (eds), *International Approaches to Rape* (2012) 147 at 155-162. As a result of parallel internal reviews of procedures, policy and practice, see Association of Chief Police Officers in Scotland (‘ACPOS’) *Scottish Investigators’ Guide to Serious Sexual Offences* (2008) and COPFS (n 1). The COPFS implemented 50 recommendations by June 2009

¹⁹ Amongst others see C McGlynn, ‘Feminist activism and rape law reform in England and Wales: a Sisyphean struggle?’ in C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2011) 139; S Cowan, ‘All Change or Business as Usual? Reforming the Law of Rape in Scotland’ in McGlynn and Munro (n 19) 154; LH Schafran and J Weinberger, ‘Impressive progress alongside persistent problems’: rape law, policy and practice in the United States’ in Westmarland and Ganjoli (n 18) 193; RA Fenton, ‘Rape in Italian law: towards the recognition of sexual autonomy’ in McGlynn and Munro (n 19) 183

²⁰ R Graycar and J Morgan, ‘Law Reform: What’s in it for Women?’ (2005) 23 *WYAJ* 393 at 410

difference in practice,²¹ are reflected in Cowan's prediction that, even in post-reform Scotland, it will remain 'business as usual'.²²

1.1(c) Conviction Rates

Persistently low conviction rates for rape are often deployed as a measure of the limited effectiveness of the criminal justice response to rape.²³ Thus, internationally the limitations of extensive reforms are typically presented in terms of their perceived inability to increase rape conviction rates.²⁴

The emergent pattern over the last decades, both internationally and in Scotland, has been that the number of reported rapes has increased dramatically, but has not been accompanied by an equivalent rise in prosecutions and convictions.²⁵ This increase in the reporting of rape has therefore precipitated a diminishing conviction rate as a proportion of offences reported, from around 20% in 1977 to around 3% in Scotland, and a 'justice gap' at its widest.²⁶ In Scotland, even with the continuous rise in recorded reports of rape,²⁷ for example, currently less than a quarter of rapes disclosed to Rape Crisis Scotland ('RCS') are subsequently reported to the police.²⁸ The indication that the increase in reported rapes results from an improved response to rape, is also diluted by the fact that the increase is partly attributable to the redistribution of sub-categories of sexual offences as rape, resulting from the widening definition of rape.

The conviction rate for rape at trial in Scotland has remained relatively static over the last three decades²⁹ and continues to be approximately 26-33% of those rape charges indicted

²¹ See generally McGlynn and Munro (n 19) at Pt. 3

²² Cowan (n 19) at 154-166

²³ For commentary see W Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Laws' (2011) 19(1) *Fem LS* 27 at 27-31

²⁴ *Ibid.* See eg. I Seidman & S Vickers, 'The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform' (2005) 38 *SUL Rev* 467-492 at 467-468

²⁵ M Burman, L Lovett and L Kelly, 'Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries: Scotland Country Report' (2009) at 3-5. More recent statistics for the years to 2010 for the numbers of cases reported, prosecuted and convicted in Scotland continue to follow the same pattern – COPFS, *Conviction Rates for Rape Charges in Scotland Charges Reported: 1 April 2008 to 31 March 2009*, <[http://www.copfs.gov.uk/sites/default/files/Conviction rates in rape cases 2008-09 - final.doc](http://www.copfs.gov.uk/sites/default/files/Conviction%20rates%20in%20rape%20cases%202008-09%20-%20final.doc)> accessed 30 December 2012

²⁶ Burman, Lovett and Kelly (n 25) at 4; L Kelly, J Lovett and L Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (2005) at 89; J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) at 10

²⁷ For recent data see Scottish Government, *Recorded Crime in Scotland, 2012-13* (2013) <<http://www.scotland.gov.uk/Resource/0042/00425429.pdf>> Accessed 30th July 2013 at 31

²⁸ Rape Crisis Scotland ('RCS'), *Rape Crisis Scotland Annual Report 2012* <<http://www.rapecrisisscotland.org.uk/workspace/uploads/files/annualreport12.pdf>> accessed 30 July 2013 at 17

²⁹ Burman, Lovett and Kelly (n 25) at 5

at trial.³⁰ As Scotland has experienced substantive law reform later than most countries, the conviction statistics reported predate the implementation of the SO(S)A 2009. It may therefore be easy to use the later reform as an explanatory factor in the low conviction rate, and to anticipate future improvement. Indeed, initial reports stated a conviction rate of 62% for rape under the SO(S)A 2009.³¹ However, the implication that the conviction rate has increased under the new legislation is likely to be misleading, given it was derived from only thirteen concluded prosecutions and it might reasonably be suggested that these were the strongest cases.³²

Indeed, the less optimistic picture painted by international comparison legitimises such cynicism. For example, England has experienced similar evidential reforms and the enactment of the Sexual Offences Act 2003 ('SOA 2003'), yet all the measures combined have achieved disappointing results in terms of improving low convictions rates.³³ Similarly, a comparative study of the USA, Australia, Canada, Scotland and England, found that where countries have initiated legal reform earlier, this does not consistently correspond to that country exhibiting higher overall conviction rates than countries that have initiated reform at a later stage.³⁴

In Scotland, as elsewhere, the conviction rate at trial remains an issue on the basis that rape charges exhibit the lowest conviction rate amongst comparable sexual and non-sexual offences against the person by significant margins.³⁵ Equally, it has been suggested in England, that even if attrition and conviction rates for other offences were on a par, the salient point is that 'when we look at the ratio of reform effort to reform achievement in relation to convictions, rape has indeed fared badly'.³⁶ The fact that rape conviction rates have declined or remained static, despite the range of reforms, has been dubbed an international paradox.³⁷

³⁰ COPFS (n 1) at para 2.13; COPFS (n 25) at 4. This does not include where the accused is found guilty or has pled guilty to an alternative sexual charge, adding between a further 1-9%

³¹ See COPFS, 'Lord Advocate announces 62% Rape Conviction Rate under new Sex Offences Legislation' (2 December 2011) <<http://www.crownoffice.gov.uk/media-site/media-releases/203-lord-advocate-announces-62-rape-conviction-rate-under-new-sex-offences-legislation>> accessed 30 July 2013

³² Indeed, it is probable that simple cases and cases where the accused plead guilty were the first cases to be concluded under the new legislation

³³ J Temkin, 'And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom' (2010) 13(4) *New Crim L Rev* 710 at 712; H Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *OJLS* 445 at 451

³⁴ K Daly and B Bouhours, 'Rape and attrition in the legal process: A comparative analysis of five countries' (2010) 39(1) *Crime and Justice* 565 at 579

³⁵ In Scotland see L McMillan, 'Gender, Crime and Criminal Justice in Scotland' in H Croall, G Mooney and M Munro (eds), *Criminal Justice in Scotland* (2010) 90 at 102-103; for England see Temkin and Krahé (n 26) at 19-21

³⁶ Reece (n 33) at 451

³⁷ Kelly, Lovett and Regan (n 26) at 30

1.1(d) Re-victimisation

Conviction rates provide a powerful context through which to understand the impetus behind legal developments and the limitations of reforms to date. That said, too confined a focus on conviction rates as a measure of effectiveness of criminal justice processes, or as a sole criterion by which to designate the reform process a success or failure, is difficult. Conviction rates provide only one dimensional quantitative data, and even then are difficult to compare given the inherent variability in methodologies and recording practices both between and within jurisdictions.

The dominance of conviction rates in socio-legal discourses on rape internationally³⁸ is increasingly problematised within a growing recognition of the need to look beyond to associated measures, such as qualitative and victim-centered outcomes.³⁹

Internationally, the treatment of rape complainers and the trauma of participating in the justice system has been widely condemned, and many complainer oriented procedural reforms introduced.⁴⁰ Yet, across international research considering the ratio of law reform effort to achievement from the complainer's perspective, the uninterrupted finding remains that assuming the role of complainer results in a 'second' or 'courtroom rape'.⁴¹ In the 1980s research into the prosecution of sexual offences in Scotland documented that complainers felt 'on trial as much as the accused'.⁴² This problem remains acute even after over two decades of reform.⁴³ The qualitative information available highlights a 'startling "disconnect"' between legislative and policy ambition and reality,⁴⁴ and 'the courtroom remains a site of secondary victimisation'.⁴⁵

³⁸ For discussion see Larcombe (n 23) at 29

³⁹ Amongst others see Larcombe (n 23); C Stern, *The Stern Review: An Independent review into how rape complaints are handled by public authorities in England and Wales* (2010); F Raitt, 'Independent legal representation for complainers in sexual offence trials: research report for Rape Crisis Scotland' (2010) <<http://www.rapecrisisscotland.org.uk/workspace/publications/IndLegalRepReport-2010.pdf>> accessed 29 July 2013

⁴⁰ J Jordan, 'Silencing rape, silencing women' in JM Brown and S Walklate (eds), *Handbook of Sexual Violence* (2011) 253 at 265-269

⁴¹ *Ibid*; Z Adler, *Rape on Trial* (1987)

⁴² G Chambers and A Millar, 'Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim?' in A Worrall and P Carlen (eds) *Gender, Crime and Justice* (1987) 58

⁴³ SLC (n 1) at paras 2.13 and 6.24; M Burman, 'Evidencing Sexual Assault: Women in the witness box' (2009) 56(4) *Probation Journal* 1

⁴⁴ Raitt (n 39) at para 1.07; see also M Burman and others, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007)

⁴⁵ Brindley and Burman (n 18) at 159

1.2 Social Attitudes

A major factor increasingly identified as fundamental in the failure to make progress in either improving convictions rates or reducing the re-victimisation of complainers, is the influence of negative or prejudicial social attitudes in this area of law.⁴⁶

There exists a broad consensus that negative social attitudes towards rape and rape victims continue to contribute to the disjuncture between the theory and praxis of ‘reform’.⁴⁷ Irrespective of shortcomings in the law and policy changes and their implementation, social attitudes continue to pose a determinative ‘real world’ obstacle to the success of reform.⁴⁸ Legal doctrine and policy is reliant on human agency for execution, and as Reece summarises:

The suggestion that judicial interpretation has undermined progressive legislation amounts to a complaint about judges’ attitudes; a concern with the vagueness of legislation comes down to worries about jurors’ attitudes; and criticism of failures in implementation and enforcement equates to dismay at the attitudes of criminal justice system agents.⁴⁹

Indeed, varying the orthodox explanation that the unique difficulty in securing rape convictions is posed by a deficit of extrinsic evidence, the emerging argument is that, ‘it is not necessarily the *lack* of evidence that matters but the *attitude* towards the evidence that matters’.⁵⁰ Within this re-conceptualisation, the concern is that juries, representative of popular prejudice, continue to essentially nullify the legislature’s ostensible prohibition of all non-consensual sexual intercourse, thus operating as a limiting factor in the success of law reform internationally.⁵¹

Negative social attitudes exist at individual and societal level, and are reproduced at institutional level to the extent that they are held by agents throughout the justice system.⁵² These attitudes can mean complainers of rape continue to experience secondary

⁴⁶ Amongst others see Temkin and Krahé (n 26); COPFS (n 1); Cowan (n 19); Jordan (n 40)

⁴⁷ See eg. Temkin and Krahé (n 26); N Westmarland, ‘Still little justice for rape victim survivors: the void between policy and practice in England and Wales’ in Westmarland and Ganjoli (n 18) 79; Schafran and Weinberger (n 19)

⁴⁸ See eg. Burman (n 43); Cowan (n 19); Westmarland (n 47); McGlynn (n 19)

⁴⁹ Reece (n 33) at 452

⁵⁰ Temkin and Krahé (n 26) at 209

⁵¹ See eg. D Dripps, ‘After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault’ (2008) 41 *Akron L Rev* 957

⁵² MW Stewart, SA Dobbin and SI Gatowski, ‘“Real Rapes” and “Real Victims”’: The Shared Reliance on Common Cultural Definitions of Rape’ (1996) 4(2) *Fem LS* 159 at 162; Temkin and Krahé (n 26) at 171-172

victimisation through individual and institutional responses to their complaint, which disqualify their experience as rape victims and exacerbate their trauma.

Social attitudes are recognised as a key cause of the high attrition in rape cases, and identified as contributing to attrition where victims do not report⁵³ and at police and prosecutorial decision-making stages.⁵⁴

Whilst ‘rape myths’ are recognised as a problem ubiquitous to the legal process surrounding allegations of rape, the purpose of this thesis is to investigate specifically the role of negative or prejudicial social attitudes where attrition occurs ‘on consideration of the evidence by the jury at the conclusion of a trial’. In anticipation of this examination, these attitudes are described here in terms of four categories.

1.2(a) ‘Women Cry Rape’ Myths

This frequently identified category of rape myths, that ‘women cry rape’, includes views which express a general disbelief in claims of rape,⁵⁵ and as a corollary a belief in the high frequency of false allegations. This may signify a belief that women fabricate entire allegations, or lie about specific incidences that were actually consensual.

The prevalence of the apparent mistrust of or scepticism towards rape allegations is illustrated, for example, by the results of attitudinal surveys in the UK and Ireland which indicate between 18-45% of the public express a belief either that accusations of rape are ‘often false’, or that the ‘majority’ of claims of rape are ‘probably not true’, or ‘false’.⁵⁶ Whilst there may be both limitations to the robustness of the findings from these types of abstract attitudinal surveys and methodological difficulties in establishing the actual rate of false allegations,⁵⁷ the results contrast with data indicating that only 4% of rape reports are

⁵³ Social attitudes can prevent women’s self-identification as victims of rape - see A Myhill and J Allen, *Rape and Sexual Assault of Women: The Extent and Nature of the Problem* (2002) at 53; or deter victims from reporting see COPFS (n 1) at para 2.8; L Regan and L Kelly, *Rape: Still a Forgotten Issue* (2003) at 8.

⁵⁴ For a summary see Temkin and Krahé (n 26) at 38-41; Kelly and others (n 26); SJ Lea, U Lanvers and S Shaw, ‘Attrition in rape cases. Developing a profile and identifying relevant factors’ (2003) 43(3) *BJ Crim* 583; Stewart, Dobbin and Gatowski (n 52); for research specifically in Scotland see G Chambers and A Millar, *Investigating Sexual Assault* (1983)

⁵⁵ G Bohner and others, ‘Rape myth acceptance: Cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator’ in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) 17 at 19

⁵⁶ H McGee and others, ‘Rape and Child Sexual Abuse What Beliefs Persist About Motives, Perpetrators, and Survivors?’ (2011) 26(17) *J Interpers Violence* 3580; Opinion Matters, *Wake Up to Rape Research Summary Report (prepared for The Havens (Sexual Assault Referral Centres))* (2010); C Withey, ‘Rape and Sexual Assault Education: Where is the law?’ (2010) 13(4) *New Crim L Rev* 802 respectively

⁵⁷ Abstract attitudinal surveys are open to the subjective interpretation of terminology such as ‘often’ or ‘false’ see eg. Reece (n 33) at 459-461

designated as ‘false’ in Scotland.⁵⁸ Similarly, two research studies of attrition patterns across Europe have indicated that there is no evidence that the scale of false reporting in rape cases is higher than for other crimes.⁵⁹

The persistence of the disparity between public attitudes about the extent of false allegations of rape and the actual levels, has meant that, as Norfolk surmises, ‘[f]or no other offence is there so much controversy about the level of false allegations’.⁶⁰

Yet beliefs in high levels of false allegations can be juxtaposed against the reality of a ‘culture of silence’ surrounding instances of rape.⁶¹ Internationally, women more typically minimise their experiences of coercive sexual intercourse and most rapes are never reported.⁶² In Scotland, this paradox is captured in the finding that 41% of a cross section of the public agreed that more men are being falsely accused of rape now than ever before, despite the fact that 54% felt that more rapes go unreported now than ever before.⁶³

1.2(b) ‘Real Rape’ Myths

Another frequently identified category of rape myths is based upon a belief in ‘real rape’. ‘Real rape’ depicts ‘an attack by a stranger on an unsuspecting victim in an outdoor location, involving the use or threat of force by the assailant and active physical resistance by the victim’, whereby the victim promptly reports the incident to the police and is visibly emotional and upset about the experience.⁶⁴ This rape myth can represent a descriptive belief that ‘real rape’ is the norm, a prescriptive belief in what constitutes a genuine rape allegation or a belief in gradation in the seriousness of rape.⁶⁵

As a descriptive belief, the ‘real rape’ construct is irreconcilable with the available factual information regarding the circumstantial profile of rape cases in both Scotland and internationally.⁶⁶ For example, in Scotland the overwhelming majority of rapes are

⁵⁸ Burman, Lovett and Kelly (n 25) at 9

⁵⁹ See L Kelly, ‘The (in) credible words of women: false allegations in European rape research’ (2010) 16(12) *Violence Against Women* 1345

⁶⁰ GA Norfolk, ‘Leda and the Swan—And other myths about rape’ (2011) 18(5) *J Forensic Leg Med* 225 at 231

⁶¹ Westmarland (n 47) at 95; Jordan (n 40) at 259-262

⁶² Jordan (n 40) at 259-260

⁶³ B Cameron and L Murphy, *Campaign Evaluation Report Rape Crisis Scotland “This is not an invitation to Rape Me”: Research Report* (2008) at 13

⁶⁴ Temkin and Krahé (n 36) at 31. For the origins of the term, see S Estrich, *Real Rape* (1987)

⁶⁵ Amongst others see Temkin and Krahé (n 26) at 31-33; B Krahé and A Berger, ‘A Social-Cognitive Perspective on Attrition Rates in Sexual Assault Cases’ in ME Oswald, S Bieneck and J Hupfeld-Heinemann (eds), *Social Psychology of Punishment and Crime* (2009) 335

⁶⁶ Burman, Lovett and Kelly (n 25) at 6, D Lievore, *Non-reporting and hidden recording of sexual assault: An international literature review* (2003)

perpetrated by an acquaintance, occur in an indoor private space and do not result in the victim sustaining physical injury.⁶⁷

As a prescriptive belief, real rape influences an individual's subjective definition of 'what rape looks like'. For example, a recent survey documented that 10% of respondents 'do not believe it is rape when a man makes their partner have sex when they don't want to'.⁶⁸ Furthermore across various studies, the suspicion with which acquaintance or partner rapes are viewed is reflected in study participants' decreased certainty that a rape has occurred.⁶⁹ Another study documented that 30-45% of respondents 'did not know that rape occurs even though a women does not fight back or say "no"'.⁷⁰

The prescriptive manifestation of the 'real rape' belief is viewed as particularly problematic, as it results in the creation of a template standard against which the credibility of claims of rape are judged at societal and institutional level.⁷¹ This reflects a misstatement of law and is also at odds with empirical reality. One illustration of this is that, as a conscious or unconscious coping mechanism, many rape victims do not show visible signs of emotional distress post-assault. An acutely calm emotional demeanor, or 'emotional numbing', is one of the defining exhibits of Post Traumatic Stress Disorder, which is frequently experienced by rape victims.⁷²

The 'real rape' myth can also represent a belief in a gradation within rape. Evidence suggests a general perception that rapes conforming with the paradigm are more serious than other rapes.⁷³ For example, even where an assault by an acquaintance may be accepted as constituting rape, individuals may perceive acquaintance rape as less serious than stranger rape, and estimate a less important trauma for victims.⁷⁴ Legally there is no gradation within rape, and this belief is empirically counterfactual. All victims of rape are

⁶⁷ Burman, Lovett and Kelly (n 25) at 6; COPFS (n 1) at para 2.30

⁶⁸ Opinion Matters (n 56) at 8

⁶⁹ B Krahé, J Temkin and S Bieneck, 'Schema-driven information processing in judgments about rape' (2007) 21(5) *Applied Cognitive Psychology* 601; GT Viki, D Abrams and B Masser, 'Evaluating Stranger and Acquaintance Rape' (2004) 28(3) *Law and Human Behavior* 295

⁷⁰ Withey (n 56) at 813

⁷¹ Temkin and Krahé (n 26) at 31-33

⁷² EB Foa and BO Rothbaum, *Treating the Trauma of Rape: Cognitive-behavioral Therapy for PTSD* (2001); J Petrak and B Hedge, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (2002)

⁷³ S Bieneck and B Krahé, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is there a Double Standard?' (2011) 25 *J Interpers Violence* 1785 at 1786

⁷⁴ S Ben-David and O Schneider, 'Rape perceptions, gender role attitudes, and victim-perpetrator acquaintance' (2005) 53(5-6) *Sex Roles* 385; B Frese, M Moya and JL Megías, 'Social Perception of Rape How Rape Myth Acceptance Modulates the Influence of Situational Factors' (2004) 19(2) *J Interpers Violence* 143; A Clarke, J Moran-Ellis and J Sleney, *Attitudes to Date Rape and Relationship Rape: A Qualitative Study* (2002)

equally vulnerable to the development of trauma symptoms,⁷⁵ with some clinical experience documenting that women raped by non-strangers experience a more difficult psychological recovery.⁷⁶

1.2(c) Victim Precipitation Myths

This identified category of rape myths, includes beliefs which assign a precipitatory role to the victim for their victimisation, perceiving the woman as responsible and/or blameworthy for her victimisation.⁷⁷ As commentators describe, ‘there is probably no other criminal offence that is as intimately related to broader social attitudes and evaluations of the victim’s conduct as sexual assault’.⁷⁸ Gender-role and sexist attitudes are regarded as attitudinal antecedents of responsibility and blame attributions.⁷⁹ Behaviours identified as increasing attributions of responsibility or blame to the victim are consistently indicated to be behaviours which might be regarded as exceeding female gender-role expectations.⁸⁰

Recent research conducted with a cross section of the Scottish public documented that, whilst a contingent of the participants agreed that women are never to blame for being raped, the majority considered a victim to have ‘increased her risk of rape’ through, for example, her behavior or dress and a further 23% outwardly subscribed to the premise that woman are ‘asking for it’ by behaving in certain ways.⁸¹ These core ‘blamers’ existed across the sample and were not distinct to age group or gender.⁸²

Similarly, for example, an Amnesty International survey found that significant proportions of the public – varying between over a fifth and over a third – believed that women were ‘totally’ or ‘partially’ responsible for their sexual victimisation in numerous circumstances. These included where the woman has been drinking, is wearing revealing clothing, is alone and walking in a dangerous or deserted area, has failed to clearly say ‘no’, has behaved in a

⁷⁵ MP Koss, ‘Rape: Scope, impact, interventions, and public policy response’ (1993) 48(10) *American Psychologist* 1062 at 1064

⁷⁶ SI Bowie and others, ‘Blitz Rape and Confidence Rape: Implications for Clinical Intervention’ (1990) 64 *American Journal of Psychotherapy* 180 at 184-185; G Gidycz and MP Koss, ‘The Effects of Acquaintance Rape on the Female Victim’ in A Parrot and L Bechhofer (eds), *Acquaintance Rape: The Hidden Crime* (1991) 270

⁷⁷ G Bohner and others (n 55) at 19

⁷⁸ Temkin and Krahe (n 26) at 33

⁷⁹ Frese, Moya and Megias (n 74) at 156

⁸⁰ For a number of reviews of the evidence to this effect, see Temkin and Krahe (n 26) at 41-48; A Grubb and E Turner, ‘Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming’ (2012) 17(5) *Aggression and Violent Behavior* 443; P Pollard, ‘Judgments about victims and attackers in depicted rapes: a review’ (1992) 31 *Brit J Soc Psychol* 307

⁸¹ Cameron and Murphy (n 63) at 11

⁸² *Ibid*

flirtatious manner or has a reputation for having had multiple sexual partners.⁸³ These findings have been largely replicated in the subsequent Wake Up to Rape Report⁸⁴ and in Scotland, a survey carried out by TNS.⁸⁵ The former of these disclosed that nearly two thirds of respondents attribute responsibility for the rape to a victim who has drunk excessively or to ‘blackout’, with this escalating to nearly three quarters where the victim has performed another sexual act with the perpetrator.⁸⁶

Across all three surveys, the use of ‘responsible’ may indicate that either respondents meant that the victim was to blame, with research supporting that in practice people use the concepts of blame and responsibility interchangeably,⁸⁷ or that the victim was causally implicated in the rape, essentially she had ‘increased her risk of rape’.⁸⁸

An emerging body of research specifically documents this later type of belief as representing a more subtle subscription to victim precipitation myths than explicit victim blaming, and a more covert expression of negative attitudes toward rape victims.⁸⁹ Thus:

Although those rape myths that blatantly blame girls and women for rape have become less acceptable, many of the underlying beliefs that the girls and women did something to contribute to the assault and that it is not completely the perpetrator’s fault still exist but in more covert expressions.⁹⁰

A belief in victim precipitation signifies distorted views of the antecedents of rape,⁹¹ and is unethical given ‘it is the perpetrator who decides to commit a sexual assault regardless of the victim’s behavior and the responsibility must remain with them’.⁹²

1.2(d) Consent Myths

The final category of rape myths described here, ‘consent myths’, can be closely related to the victim precipitation myths discussed above, but focus on a notion of implied consent

⁸³ ICM, *Sexual Assault Research Summary Report (prepared for Amnesty International)* (2005)

⁸⁴ Opinion Matters (n 56)

⁸⁵ TNS System Three, *Findings from the Wave 10 Post-campaign Evaluation of the Domestic Abuse Campaign 2006/07* (2007)

⁸⁶ Opinion Matters (n 56) at 9

⁸⁷ See C Cameron and W Stritzke, ‘Alcohol and Acquaintance Rape in Australia: Testing the Presupposition Model of Attributions of Responsibility and Blame’ (2003) 33(5) *J App Soc Psychol* 983

⁸⁸ Reece (n 33) at 469

⁸⁹ KM Edwards and others, ‘Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change’ (2011) 65(11-12) *Sex Roles* 761 at 769; S McMahon, ‘Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students’ (2011) 59(1) *Journal of American College Health* 3 at 4-5

⁹⁰ McMahon (n 89) at 5

⁹¹ Bohner and others (n 55) at 18

⁹² J Lovett and MAH Horvath, ‘Alcohol and drugs in rape and sexual assault’ in Horvath and Brown (n 55) 125 at 155

and socio-sexual conventions; or ‘playing the rules of the game’.⁹³ The nature of the distinction means that some participants in public survey results may have been equating ‘responsible’ with a form of consent based in social conventions. This includes beliefs that certain behaviors, such as a victim’s attire or shared alcohol consumption, are indicative of implied consent to sexual intercourse thereafter.⁹⁴

Even if certain social behaviours may be perceived as conventions for consent to sexual intercourse in certain contexts,⁹⁵ the Scottish Law Commission (‘SLC’) has made the case that:

[S]erious questions arise whether there are in fact conventions of this type which are accepted and understood by all the parties whose actings are to be interpreted by them. In the absence of such shared acceptances of the conventions, any inference that a person is playing by the rules of the conventions cannot be drawn. Indeed there are good reasons to suppose that some of these conventions reflect a one-sided, partial view of sexuality.⁹⁶

1.3 Assessing Social Attitudes

The types of opinion surveys cited in describing the categories of rape myths, are good indicators of the prejudicial social attitudes held by some individuals in the population towards rape and rape victims. This often leads to these survey results being used as evidence of why juries may be ‘reluctant to convict’ in rape cases, on the basis that it is reasonable to believe that identified social attitudes in the population will be replicated amongst jurors as a microcosm of society.⁹⁷ However, there are a range of limitations to attitudinal survey results that weaken this conclusion.

On one hand, these surveys may fail to capture the full prevalence of beliefs, with researchers acknowledging that individuals may be aware increasingly of the socially ‘appropriate’ or politically correct attitudes.⁹⁸ Consequently, ‘the absence of an

⁹³ SLC (n 1) at para 2.8

⁹⁴ See eg. RA Schuller and A Wall, ‘Sexual Assault and Defendant/Victim Intoxication: Jurors’ Perceptions of Guilt’ (2000) 30(2) *J Appl Soc Psychol* 253; A Abbey and R Hamish, ‘Perceptions of Sexual Intent: The Role of Gender, Alcohol Consumption and Rape Supportive Attitudes’ (1995) 32 *Sex Roles* 297; SLC (n 1) at para 2.9

⁹⁵ See Reece (n 33) at 462-466

⁹⁶ SLC (n 1) at para 2.9

⁹⁷ See eg. COPFS (n 1) at para 2.28-2.36

⁹⁸ L Ellison and VE 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(4) *New Crim L Rev* 781; H Gerger and others, ‘The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English’ (2007) 33(5) *Aggressive Behavior* 422 at 424; Edwards and others (n 89) at 769

individual's self reported endorsement of a belief does not necessarily mean that that the person does not implicitly hold that belief or that the individual's behaviour is not influenced by such cultural beliefs.'⁹⁹

However, more importantly, there are significant limitations to the extent to which these surveys are instructive within the context of the jury. There exists a complex interaction between an individual's attitudes in the abstract situation of a survey and the specific details of a court case, along with the relevant legal tests, burdens of proof and the jury's deliberative process.¹⁰⁰ The difficulty is in ascertaining whether and how the attributions of responsibility and/or blame implicit in rape myths might negatively impact upon the jurors' verdict, when knowing what individuals meant can be obscured by the lack of context in attitudinal surveys and of course, when the respondents are not being asked to determine a verdict in a specific case. However, it has been found that in some circumstances, when charged with determining the guilt of the defendant beyond reasonable doubt in a specific case, the wider attitudes held by individuals can amplify 'to be harsher on the complainant and more sympathetic toward the defendant than their responses to rape myth acceptance surveys may suggest'.¹⁰¹

A key problem is that the secrecy of jury deliberations essentially precludes obtaining evidence of the influence of social attitudes amongst jurors in individual rape cases.¹⁰² However, there is a wealth of experimental research literature which shows that negative social attitudes are a powerful force in rape trials. The finding that the rape-related attitudes held by jurors impacts upon case-based decision-making is almost fully supported by the available research literature, including that conducted in the UK.¹⁰³ Indeed, it is considered that juror judgments in rape trials continue to be influenced more by the attitudes, beliefs and biases about rape which they hold prior to entering the courtroom, than by the objective facts presented.¹⁰⁴

⁹⁹ Edwards and others (n 89) at 769

¹⁰⁰ Ellison and Munro (n 98) at 799

¹⁰¹ *Ibid* at 793

¹⁰² E Finch and VE Munro, 'Breaking boundaries? Sexual consent in the jury room' (2006) 26(3) *LS* 303 at 309; C McGlynn and VE Munro 'Rethinking Rape Law: An Introduction' in McGlynn and Munro (n 19) 1 at 13

¹⁰³ For a review of the literature see C Cunliffe and others, 'Do rape myths affect juror decision making? A systematic review of the literature.' (A BPP University College School of Health/Professional Development Working Paper, November 2012) < http://www.bpp.com/carbon-content-1.0-SNAPSHOT/resources/ECMDocument?contentName=Rape_myths_Dec_2012> Accessed 30 July 2013

¹⁰⁴ N Taylor and J Joudo, *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (2005); N Taylor, *Juror attitudes and biases in sexual assault cases* (2007); Ellison and Munro (n 97); for older studies demonstrating that juror adherence to rape myths correlated more strongly with a verdict than the objective evidence about the case see G LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989); HS Field, 'Juror background characteristics and attitudes toward rape' (1978) 2(2) *Law and Human Behavior* 73; HS Feild and LB Bienen, *Jurors and Rape: A Study in Psychology and Law* (1980)

This potential influence of the different types of prejudicial social attitudes identified in this chapter on juror decision-making in rape trials, and the extent to which these may negatively impact upon the outcome, is examined in chapter 2.

2. The Influence of Juror Attitudes in Rape Trials

The potential influence of social attitudes upon juror decision-making in rape trials, and the extent to which these may negatively impact upon the outcome, is examined in this chapter. The decision-making context of rape trials is explored through a discussion of the potential effect of juror attitudes upon conviction rates, in addition to concerns over jurors' understanding and attentiveness to the law and assessments of complainer credibility. This is followed by an analysis of the deleterious impact of the four different types of prejudicial social attitudes identified in chapter 1 upon juror decision-making. A key issue identified is the extent to which juror attitudes are likely to undermine the progressive intent of the SO(S)A 2009.

Whilst there is concern that the scope of juror secrecy precludes obtaining definitive evidence of the malign impact of negative social attitudes in individual rape trials,¹ an expanding body of experimental research literature, in particular that conducted with mock jurors, provides invaluable insight and removes the jury's immunity from criticism.

2.1 Decision-Making Context

2.1(a) Potential Effect on Conviction Rates

The international consensus is that juries are more likely to acquit than convict following a rape trial.² Similarly, in Scotland, despite the fact that prosecution is only pursued where there is sufficient evidence to substantiate the indictment for rape, recent data from 2006-2009 shows that the jury is more likely to acquit than convict upon a charge of rape.³ The jury continue to return a verdict of guilty in approximately 20% of cases indicted for rape.⁴ This mirrors earlier findings in 2002-2003, where only 19% of adult rape charges

¹ See eg. E Finch and VE Munro, 'Breaking boundaries? Sexual consent in the jury room' (2006) 26(3) *LS* 303 at 309. For criticism of the principle of juror confidentiality as too absolutist in preventing research into how juries conduct themselves – see PR Ferguson, 'The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety' (2006) 10(3) *International Journal of Evidence and Proof* 180 at 210. Although for the view that jury secrecy is less of an impediment to research than commonly assumed, see C Thomas, *Are Juries Fair?* (2010) at 1

² L Kelly, J Lovett and L Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (2005) at 71-72; W Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Laws' (2011) 19(1) *Fem LS* 27 at 32

³ Through the combination of the Not Guilty and Not Proven verdicts

⁴ COPFS, *Conviction Rates for Rape Charges in Scotland Charges Reported: 1 April 2008 to 31 March 2009*, <[http://www.copfs.gov.uk/sites/default/files/Conviction rates in rape cases 2008-09 - final.doc](http://www.copfs.gov.uk/sites/default/files/Conviction%20rates%20in%20rape%20cases%202008-09%20-%20final.doc)> accessed 30 December 2012

prosecuted resulted in the jury returning a Guilty verdict,⁵ a figure of under half of the acquittals delivered.⁶

The inclusion of a Not Proven verdict within the Scottish jury's unique tripartite of verdicts, has been viewed as particularly problematic within the rape context on the basis that it is most commonly returned in rape and sexual assault cases.⁷ However, other jurisdictions, which operate the more conventional Not Guilty/Guilty binary, still exhibit similarly high acquittal rates at trial. Furthermore, as will be discussed both internationally and in Scotland, analyses of conviction patterns have demonstrated that those cases which do result in conviction are more likely to reflect stereotypes of rape.⁸

Recent research in England documented a jury conviction rate of 54% in rape cases involving female complainants that progressed to trial.⁹ Therefore, the authors stated that, contrary to a previous assessment, juries actually convict more often than they acquit in rape cases. Notably, the results were specifically presented as a challenge to previous research attributing the juries' failure to convict in rape cases to juror bias against female complainants.¹⁰ Yet, this average figure includes cases where the female complainant was a child, which both raises different issues and in isolation exhibits a higher conviction rate. In cases where the complainant was a female aged over sixteen, the conviction rate was actually 47%.¹¹ Thus, the finding that juries acquit more often than convict is re-established and notably, amongst the study's six designated sub-categories of complainants, cases where the complainant was a female aged over sixteen had the lowest conviction rate.¹²

A further qualification of ostensibly high conviction rates may be attributable to the prosecution sieving out cases in which juror attitudes would make a reasonable prospect of

⁵ COPFS, *Review of the Investigation and Prosecution of Sexual Offences* (2006) at para 2.13. It was found that 26% of adult rape cases prosecuted during the period analysed resulted in a conviction for rape, however this includes the 7% of cases prosecuted where the accused pled guilty to the charge of rape, giving the 19% figure.

⁶ 23% other non-conviction; 9% conviction for an alternate charge; 7% pled guilty to charge of rape - COPFS (n 5) at para 2.13

⁷ For data to this effect see Scottish Government, *Criminal Proceedings in Scottish Courts 2007-08* (2009); RCS, *Rape Crisis Scotland welcomes plans to drop the requirement for corroboration* (June 2013) <<http://www.rapecrisisscotland.org.uk/workspace/uploads/files/corroborationstatement.pdf>> accessed 30 July 2013

⁸ For Scotland see M Burman, L Lovett and L Kelly, 'Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries: Scotland Country Report' (2009); see also Kelly, Lovett and Regan (n 2)

⁹ Thomas (n 1) at 31

¹⁰ *Ibid* at 32

¹¹ *Ibid*

¹² *Ibid*

conviction unlikely.¹³ For example, prosecutorial perception of juror prejudice may lead to cases discrepant to ‘what rape looks like’ (that do not match the ‘real rape’ profile or have a ‘real victim’) being abandoned.¹⁴ Thus whilst jury attitudes are identified as a significant factor in low conviction rates, through direct acquittals, they may also influence conviction rates through ‘downstream’ decision-making by both police and prosecutors.¹⁵

Juror attitudes can simultaneously inform defence analysis of the likely trial process and counsel’s advice to plead guilty, which is primarily based on counsel’s assessment of the likelihood of conviction, encompassing their implicit understanding of the likely reception of evidence at trial.¹⁶ Cross-jurisdictional research has indicated that jury acquittal rates in rape cases are higher, but guilty plea rates are lower for sexual assaults than other crimes.¹⁷ This implies correlativity between these two elements in contributing to the overall low conviction rates for rape.

This position is largely mirrored in Scotland. Recent statistics show that 8% of rape charges indicted resulted in a plea of guilty to rape in 2006-07, 12% in 2007-08 and 11% in 2008-09.¹⁸ These figures are significantly lower than High Court averages, where statistics show that 59% of cases were settled by a guilty plea in 2007-2008 and 55% in 2008-2009.¹⁹

Whilst it is axiomatic that an accused must not be criticised for exercising their right to a trial, it is suggested in Scotland, as elsewhere, that there is a continuing reciprocity between high jury acquittal rates and fewer guilty pleas. The high acquittal rates across jurisdictions would even seem to provide a statistical incentive for those factually guilty to ‘take their chances’ with a jury as opposed to pleading guilty,²⁰ and in Scotland those indicted for rape can be as much as twice as likely be acquitted than convicted.²¹

¹³ L Kelly and VE Munro, ‘A vicious cycle? Attrition and conviction patterns in reported rape cases in England and Wales’ in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) 281; Kelly, Lovett and Regan (n 2) at 67 and 80

¹⁴ Kelly and Munro (n 13) at 292-295; Larcombe (n 2)

¹⁵ JM Brown, C Hamilton and D O’Neill, ‘Characteristics associated with rape attrition and the role played by scepticism or legal rationality by investigators and prosecutors’ (2007) 13(4) *Psychology, Crime & Law* 355; D Lievore, *Prosecutorial decisions in adult sexual assault cases* (2005)

¹⁶ K Mack and SR Anleu, ‘Resolution without Trial, Evidence Law and the Construction of the Sexual Assault Victim’ in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (2000) 127 at 136-138

¹⁷ *Ibid* at 132; Temkin J and Krahe B, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) at 21

¹⁸ An additional 3% in 2006-07 and 2007/8 and 1% in 2008/09 pled guilty to an alternative sexual offence, see COPFS (n 4)

¹⁹ COPFS, *Case Processing Last 5 Years*, <<http://www.crownoffice.gov.uk/About/corporate-info/Caseproclast5>> accessed 30 December 2012

²⁰ For Australia see Larcombe (n 2) at 32; for England see Temkin and Krahe (n 17) at 21

²¹ Statistically speaking it was twice as likely in both the COPFS sample year and also in 2006-2007

2.1(b) Legal Understanding and Attention to the Law

In rape trials in Scotland, at the close of evidence, the judge charges the jury, instructing the jury upon the law and explaining the relevancy of the evidence to the legal ingredients of the charge against the accused.²² Within this context, a key concern is juror competency, in particular the extent to which the jury may fail to understand, or be attentive to, the relevant sexual offences law.

The extent to which jurors encounter great difficulty in understanding and applying judicial instructions is the recurrent exposé of jury research literature.²³ Recent research in England conducted with real jurors documented low levels of individual juror comprehension of judicial directions, with 31% of jurors fully understanding the legal instructions in the terms used by the judge.²⁴ An extrapolation of this finding to the Scottish context suggests that, on average, no more than five of the fifteen jurors are likely to fully understand judicial directions. Although the study showed measures, such as, written instructions can increase individual comprehension by approximately 17%,²⁵ even adopting this strategy in Scotland could still mean only an average of seven of fifteen jurors in Scotland might fully comprehend the law.

The above study did not extend to an examination of the effect of deliberative process upon juror comprehension of judicial direction and legal questions. However, other research demonstrates this is of limited effectiveness in improving comprehension, indicating that not only individual jurors but juries as a whole, have difficulty in understanding the content of judicial instruction.²⁶

Misunderstanding of the law is problematic as it encourages jurors to revert to their existing views and knowledge of the law, which is likely to be incorrect.²⁷ Furthermore, research indicates that jurors arrive at trial with set mental representations or ‘prototypes’ of the offence in question, which can often contain legally inaccurate information.²⁸ Yet

²² For specimen directions see Judicial Studies Committee for Scotland, *Jury Manual: some notes for the guidance of the judiciary* (rev edn 2013) at ch. 48 and 60H

²³ See P Darbyshire, A Maughan and A Stewart, ‘What can the English legal system learn from jury research published up to 2001?’ (2002)

²⁴ Thomas (n 1) at 36

²⁵ *Ibid* at 39

²⁶ VG Rose and JR Ogloff, ‘Evaluating the comprehensibility of jury instructions: A method and an example’ (2001) 25(4) *Law and Human Behavior* 409; VG Rose and JR Ogloff, ‘The Comprehension of Judicial Instructions’ in N Brewer and K Williams (eds), *Psychology and Law: An Empirical Perspective* (2005) 407

²⁷ Darbyshire, Maughan and Stewart (n 23) at 127

²⁸ VL Smith, ‘Prototypes in the courtroom: Lay representations of legal concepts’ (1991) 61(6) *Journal of Personality and Social Psychology* 857

mock jurors are more likely to convict a defendant the closer the case is to the prototype of the offence, and reliance on prototypes can be resistant to change even with judicial instruction.²⁹

Jurors' use of this 'representativeness' bias, coupled with the prevalence of rape myths, can mean that evidence is not scrutinised properly in a rape trial.³⁰ The 'real rape' stereotype is regarded as the prototypical representation of the offence of rape that jurors are likely to hold.³¹ The significance of the real rape myth as operating determinatively in verdicts is discussed fully below, however research conducted with mock jurors shows that some jurors vote for acquittal partly because of 'discrepancies between the trial depiction of events and their own (erroneous) understanding of what rape is.'³²

The general findings above raise concerns about how the SO(S)A 2009 may be understood and applied by jurors. These concerns are borne out by mock juror research under counterpart legislation in England, and a perception amongst barristers that although, for example, a new statutory definition of consent may help promote consistency in judicial direction, this does not necessarily translate into consistency in jury decision-making.³³

In addition to the high extent of misunderstanding of the law which has been found amongst mock jurors operating under the relevant sexual offences legislation, there is also considerable concern about the extent to which mock juries generally fail to 'engage in a systematic or sustained way with the legal tests' and devote little time to discussing such tests.³⁴ One study showed that as many as 77% of mock juries did not engage in an extended discussion of the judge's summing up on the law.³⁵

In a context where the Scottish, like the English, legislation is intended to provide a more rigorous structure for jury deliberation and to limit specifically the potential impact of negative social attitudes amongst jurors, it is seriously alarming that approximately 15% of mock juries have been found to reach a verdict in a rape trial without 'any discursive

²⁹ *Ibid*

³⁰ J Finn, E McDonald and Y Tinsley, 'Identifying and Qualifying the Decision-Maker: the Case for Specialisation' in E McDonald and Y Tinsley (eds), *From Real Rape to Real Justice: Prosecuting Rape in New Zealand* (2011) 221 at 232

³¹ Temkin and Krahe (n 17) at 70

³² L Ellison and VE Munro, 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial' (2010) 30(1) *LS* 74 at 96

³³ A Carline and C Gunby, "'How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003' (2011) 32(3) *Liverpool LR* 237 at 241

³⁴ Ellison and Munro (n 32) at 94

³⁵ *Ibid*

reference to, or examination of, the law to be applied'.³⁶ Against this decision-making context, it is suggested that there is already cause for scepticism over juror interaction with the SO(S)A 2009 in practice.

2.1(c) The Complainer 'on trial'

A significant part of the decision-making context in rape trials is the focus upon the complainant. Rape trials frequently lack extrinsic evidence. Simultaneously, the facts that the accused cannot be compelled to give evidence, and the complainant is likely to be questioned in far more detail than the accused, has always undercut any notion that a rape trial consists of 'his word against hers'.³⁷

Consequently, complainant credibility is a key influence upon jurors' decisions as to the guilt or innocence of the accused. Research confirms that higher perceptions of complainant credibility are positively associated with stronger mock juror beliefs in perpetrator guilt.³⁸ However, it also confirms that the judgment of the credibility of the complainant is more likely to be based on mock jurors' pre-existing personal prejudices and attitudes about how a 'real' victim of rape would behave, than the content of the testimony.³⁹ A belief in guilt in a *specific* case is positively correlated with more positive and less stereotypical attitudes towards rape victims *in general*, whilst more positive attitudes towards the *specific* accused are associated with less favourable attitudes towards rape victims *in general*.⁴⁰

At trial, the exploitation of negative or misinformed social attitudes to undermine complainant credibility can be a key element in defence strategies.⁴¹ Internationally, and in Scotland, defence strategy includes, for example, the derogation of the complainant's character and behaviour,⁴² the exploitation of stereotypes,⁴³ including portraying the normal behaviour of women as 'unusual' or inconsistent with a 'genuine' complaint of

³⁶ *Ibid*. Emphasis added.

³⁷ B Brown, M Burman and L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (1993) at 70

³⁸ N Taylor and J Joudo, *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (2005)

³⁹ *Ibid* at 59-60

⁴⁰ *Ibid* at 34

⁴¹ SLC, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, 2007) at para 2.11; J Temkin "And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) *New Crim L Rev* 710 at 719

⁴² B Brown, M Burman and L Jamieson, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1992) at 73

⁴³ J Temkin, 'Prosecuting and defending rape: Perspectives from the bar' (2000) 27(2) *J Law & Soc* 219; Temkin and Krahé (n 17) at 129. See also New South Wales Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996)

rape⁴⁴ and suggestions of a complainer's 'blameworthiness'.⁴⁵ Cross-examination of this sort will act as a psychological 'prime' to individual jurors who hold prejudicial attitudes, increasing the likelihood that these attitudes influence their decision-making rather than an objective assessment of the evidence.⁴⁶

The potential scope for prejudicial attitudes to impact upon jury decision-making in Scotland, as elsewhere, is compounded by a number of intertwined factors. This includes the failure of the 'rape shield' measures intended to preclude this risk to meet legislative intent,⁴⁷ the 'bad behaviour' of defence counsel⁴⁸ and the increasing scrutiny and exploitation of a complainer's private, medical and personal records.⁴⁹

In Scotland, seven out of ten rape complainers are questioned on sexual history and character.⁵⁰ The proportion of trials with s.275 applications to introduce evidence otherwise prohibited has increased by almost three and half times under the SO(PE)(S)A 2002, and almost all applications to admit evidence are successful.⁵¹

Although the increase in s.275 applications is partly attributable to the widened definition of character, this definition, of itself, 'plays into the potential archival value of psychiatric, psychological and social work records for attacks on the complainer's character'.⁵² Simultaneously, an increase in defence exploitation of complainers personal and medical records is predicted to result from the recent extension to the prosecutors' duty of disclosure in Scotland.⁵³ Concern has been raised that information acquired from historical psychiatric or psychological records can be disproportionately prejudicial to

⁴⁴ L Ellison, 'Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases' (2005) 9(4) *International Journal of Evidence and Proof* 239 at 248-250; Temkin (n 43); Z Adler, *Rape on Trial* (1987) at 19

⁴⁵ G Chambers and A Millar, 'Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim?' in A Worrall and P Carlen (eds) *Gender, Crime and Justice* (1987) 58; Temkin and Krahe (n 17) at 134; see also Kelly and Munro (n 13)

⁴⁶ Temkin and Krahe (n 17) at 178; see also SLC (n 41) at para 2.11, who note that even if the defence does not appeal to negative social attitudes at trial, the jury may well use this sort of reasoning in deciding whether there was consent anyway

⁴⁷ M Burman and others, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (2007); in England see L Kelly, J Temkin and S Griffiths, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (2006)

⁴⁸ Temkin (n 43); Temkin and Krahe (n 17) at 129.

⁴⁹ Larcombe (n 2) at 38; W Larcombe, 'The 'Ideal' Victim v Successful Rape Complainers: Not What You Might Expect' (2002) 10(2) *Fem LS* 131 at 136

⁵⁰ Burman and others (n 47) at 2

⁵¹ *Ibid.* Although partial refusals, amendments and restrictions on questioning mean that a significant proportion of applications are modified by the court

⁵² F Raitt, 'Independent legal representation for complainers in sexual offence trials: research report for Rape Crisis Scotland' (2010) <<http://www.rapecrisisscotland.org.uk/workspace/publications/IndLegalRepReport-2010.pdf>> accessed 29 July 2013 at para 7.27

⁵³ See F Raitt, 'Disclosure of records and privacy rights in rape cases' (2011) 15(1) *Edin LR* 33

complainers, because it allows the general public, and therefore juror, ignorance of mental disorders to be fused with rape myths and stereotypes.⁵⁴

In Scotland, restricted evidence also continues to be introduced at trial without prior application.⁵⁵ In cases where inadmissible information is adduced at trial, the judge is unlikely to be able to correct this once the evidence is in front of the jury. There is strong evidence that this would not preclude any deleterious impact with a recent meta-analysis incorporating forty-eight studies, revealing that jurors are affected by the contents of inadmissible evidence even when expressly instructed by the judge to ignore it.⁵⁶ Additionally, any contested evidence eventually ruled admissible accentuates that information and has an even stronger effect on juror verdicts.⁵⁷

Furthermore, research also reveals that there is an earnest insistence amongst mock jurors about their *need* for information about, for example, a complainant's sexual past.⁵⁸ Where jurors believe that the complainant's sexual history will assist them in determining whether she has been raped but such evidence is excluded as inadmissible, jurors will look for subtle cues, from her behaviour at the time of the incident to her behaviour in court.⁵⁹ Research consistently demonstrates that jurors are inclined to 'fill in' evidential gaps with speculation as to the complainant's overall character and credibility.⁶⁰

Against this decision-making context, the new model of consent in Scotland is intended to help divert the jury's attention away from the complainer and redirect it to the accused through the reasonable steps requirement.⁶¹ Yet this provision exists within an isolated doctrinal vacuum, and even then the obvious weakness is that the accused is not required to produce evidence of steps taken to ascertain consent.⁶² Where an accused exercises his right not to give testimony, it will be difficult to conduct the reasonable steps assessment.⁶³ Although some negative inference might be commented upon by the prosecution, or even the judge, this would require to be most delicately crafted so that it does not contradict the

⁵⁴ *Ibid* at 48-49

⁵⁵ Burman and others (n 47) at 5

⁵⁶ N Steblay and others, 'The impact on juror verdicts of judicial instruction to disregard inadmissible evidence: A meta-analysis.' (2006) 30(4) *Law and Human Behavior* 469

⁵⁷ *Ibid*

⁵⁸ E Finch and VE Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants' (2005) 45 *BJ Crim* 25 at 36

⁵⁹ *Ibid*; DD Koski, 'Jury Decisionmaking in Rape Trials: A Review and Empirical Assessment' (2002) 38(1) *Criminal Law Bulletin-Boston* 21

⁶⁰ L Ellison and VE 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(4) *New Crim L Rev* 781

⁶¹ SLC (n 41) at para 3.77

⁶² S Cowan, 'All Change or Business as Usual? Reforming the Law of Rape in Scotland' in McGlynn C and Munro VE (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2011) 154 at 165

⁶³ *Ibid*

accused's presumption of innocence;⁶⁴ an issue upon which the SO(S)A 2009 is silent.⁶⁵ Thus it would appear within the real courtroom context, the jury will continue to scrutinise the complainer and she may firmly remain the one 'on trial'.

2.2 Juror Attitudes

The following sections examine the ways in which the four categories of rape myths identified in chapter 1 impact upon juror decision-making. This analysis highlights the extent to which jurors' rely on these myths as part of the process of weighing up the evidence, thus tainting the partiality of decision-making.

These findings assume increasing significance in light of the recent reform of the substantive law in Scotland. The expanded definition of rape, which reflects 'what *should* ordinarily be considered to be the offence of rape',⁶⁶ is designed to give legal effect to the underlying moral principle of the protection of sexual autonomy.⁶⁷ As will be examined below, a particular concern is the extent to which juror attitudes may undermine the normative force behind the SO(S)A 2009, which seeks to prevent the disqualification of all experiences of non-consensual sexual intercourse from legal classification as rape.

2.2(a) 'Women Cry Rape' Myths

Concern has been raised that the proportion of jurors likely to believe 'women cry rape' myths, means in the first instance that 'a large minority of potential jury members are predisposed to a not-guilty verdict in the case of rape'.⁶⁸ A tentative extrapolation of the wider population surveys discussed in chapter 2 to a Scottish jury, acknowledging the variation in findings, could therefore indicate that possibly at least two, and as many as six, jurors may be predisposed to believing the complaint may be false without even hearing a case.

There are, of course, limits to this sort of uncritical extrapolation. However, beliefs in the high frequency of false rape have been found to be more prevalent in the course of mock

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ Scottish Government, *Sexual Offences (Scotland) Bill: Policy Memorandum* (2008) at para 38. Emphasis added.

⁶⁷ SLC (n 41) at para 1.23

⁶⁸ C Cunliffe and others, 'Do rape myths affect juror decision making? A systematic review of the literature.' (A BPP University College School of Health/Professional Development Working Paper, November 2012) <
http://www.bpp.com/carbon-content-1.0-SNAPSHOT/resources/ECMDocument?contentName=Rape_myths_Dec_2012> Accessed 30 July 2013 at 2

jury deliberations than attitudinal surveys previously completed by mock jurors would indicate.⁶⁹ Indeed, evidence suggests a ‘strong preoccupation within the (mock) jury room on the risk of a fabricated claim’.⁷⁰ Further, within the structural requirements of verdict deliberations, including a standard of proof of guilt beyond reasonable doubt, mock jurors’ wider beliefs have been found to intensify as an obstacle to conviction in the specific case. Mock jurors have been found to justify ‘their preferences for acquittal by insisting that, since false allegations are routinely made, the possibility of fabrication in the present case could not be ruled out’.⁷¹

The reasons advanced by mock jurors as to what might conceivably prompt women to make a false accusation, indicate that the highly gendered ‘Victorian conception of women as “mad, bad, or sad” retains popular currency’.⁷² Mock jurors routinely speculate as to whether the complainant is the ‘sort of woman’ either sufficiently revengeful to fabricate a rape allegation in response to unreciprocated affections, or, given the persistent belief amongst mock jurors that women are more likely to consent to sexual intercourse when intoxicated, likely to retract that consent retrospectively when sober and falsely accuse out of regret.⁷³ Additionally, the suggestion that the complainant might have falsely accused the defendant because she was mentally or emotionally unstable, has been found to have been given ‘serious and sustained’ consideration by jurors in 33% of mock juries.⁷⁴

This evidence indicates that juror decisions in Scotland are likely to be negatively influenced by beliefs in ‘women cry rape’ myths.

2.2(b) ‘Real Rape’ Myths

Where the circumstances of a rape case fail to replicate the ‘real rape’ stereotype jurors may be less disposed to find the complainant credible, may be more likely to construct a ‘story’ in line with an accused’s version of events and be disinclined to convict.⁷⁵ In the following sub-sections, the ‘real rape’ myth is broken down into constitutive variables in demonstrating the extent to which ‘real rape’ continues to substantially influence juror decision-making.

⁶⁹ Ellison and Munro (n 60) at 795

⁷⁰ *Ibid* at 785

⁷¹ *Ibid* at 798

⁷² *Ibid*

⁷³ *Ibid* at 795-798; Kelly and Munro (n 13) at 291-293

⁷⁴ Ellison and Munro (n 60) at 797

⁷⁵ Temkin and Krahé (n 17) at 69; MR Burt and RS Albin, ‘Rape myths, rape definitions, and probability of conviction’ (1981) 11(3) *J App Soc Psychol* 212; S Bieneck and B Krahé, ‘Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is there a Double Standard?’ (2011) 25 *J Interpers Violence* 1785 at 1795

2.2(b)(i) Perpetrator

It has been found that many mock jurors are nowadays ‘willing to accept that many (indeed most) rapes do not involve a “stranger in the bushes”’,⁷⁶ and appear ‘to be receptive to the idea that a woman could be raped by a man that she knew and, moreover, trusted’.⁷⁷ This potential diminution in a descriptive belief in real rape may be mirrored in Scottish society, where research shows that 13% of the public believe rape by a stranger is the norm.⁷⁸

However, in specific cases of acquaintance rape, mock jury research indicates that ‘this recognition has done little to ameliorate reluctance to convict perpetrators, particularly in the absence of signs of physical resistance and/or injury on the part of the complainant’.⁷⁹

Belief in ‘real rape’ as a gradation in rape is emphasised by the fact that where the perpetrator was an acquaintance, although never having been in a sexual relationship with the complainer, some mock jurors imply that stranger rape is more serious and/or traumatic.⁸⁰ This gradation can consequently impact upon the prescriptive demands of real rape amongst mock jurors.

Evidence shows that the claim that a woman might be unable to offer ongoing resistance during an assault due to fear induced paralysis, is typically only accepted by mock jurors where the perpetrator is a stranger.⁸¹ Mock jurors appear to differentiate between stranger and acquaintance rape through estimating a hierarchy of fear, judging that victims of an acquaintance rape would be less fearful.⁸² As a consequence of this gradation, jurors have been found to place more onerous expectations of resistance upon complainants of acquaintance rape.⁸³ Indeed, the research illustrates there is a typical expectation amongst mock jurors that ‘a genuine victim of acquaintance rape would have sustained (or inflicted)

⁷⁶ Ellison and Munro (n 60) at 784

⁷⁷ *Ibid* at 789

⁷⁸ B Cameron and L Murphy, *Campaign Evaluation Report Rape Crisis Scotland “This is not an invitation to Rape Me”: Research Report* (2008) at 13

⁷⁹ Ellison and Munro (n 60) at 800

⁸⁰ For discussion see Kelly and Munro (n 13) at 292

⁸¹ L Ellison and VE Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49(2) *BJ Crim* 202 at 207; Ellison and Munro (n 60) at 790

⁸² Ellison and Munro (n 60) at 790; Ellison and Munro (n 81) at 207

⁸³ Ellison and Munro (n 60) at 790; Ellison and Munro (n 81) at 207

bodily injuries consistent with the application of substantial force and strenuous physical resistance'.⁸⁴

The evidence suggesting the widespread awareness of the reality of acquaintance rape in Scotland, may be contrasted with the studies indicating the scepticism with which acquaintance rapes are likely to be appraised amongst jurors. To any extent that the 'stranger' element, as an isolated variable in the 'real rape' myth, has weakened, it merely accentuates the strength of perceptions of gradation in the seriousness of rape and the force ingredient as discussed more fully below.

2.2(b)(ii) Force and Resistance

Across mock deliberations, juror comments 'testify to the tenacity of the force requirement in the popular understanding of rape'.⁸⁵ It has been found that mock jurors frequently display an 'unshakeable' commitment to the belief that a 'normal' response to sexual attack would be to struggle physically, and routinely advance the complainant's lack of bruising as a rationale for acquittal.⁸⁶ One study documented that the complainant's failure to exhibit signs of physical injury negatively influenced the decisions of an overwhelming 88% of mock jurors.⁸⁷

One study found that only a minority of mock jurors accepted that a woman might not resist an assault as a result of fear induced paralysis, however, frequently in these circumstances expectations of physical injury simply transferred to expectations of internal or genital injury.⁸⁸ This further expectation of detectable genital trauma is even more at odds with empirical reality, given only approximately 1% of rape victims have moderate to severe genital injuries.⁸⁹

Furthermore, the research suggests that mock jurors hold 'unrealistic expectations regarding a woman's capacity to struggle or to inflict defensive injury upon her assailant'.⁹⁰ In a mock trial where the complainant exhibited some bruising and

⁸⁴ Ellison and Munro (n 60) at 790

⁸⁵ Finch and Munro (n 1) at 319; see also Ellison and Munro (n 81) 206-208 and L Ellison and VE Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) *BJ Crim* 363 at 371-373; see also Taylor and Joudo (n 38) at 59

⁸⁶ Ellison and Munro (n 81) at 206

⁸⁷ Ellison and Munro (n 85) at 373

⁸⁸ Ellison and Munro (n 81) at 207

⁸⁹ See eg. H Hampton, 'Care of the woman who has been raped' (1995) 332(4) *New England Journal of Medicine* 234 at 234

⁹⁰ Ellison and Munro (n 81) at 207

scratching, and this was testified by a medical expert to be consistent with the application of considerable physical force, a substantial proportion of the mock jurors expected higher levels of injury to be convinced.⁹¹ Additionally, evidence suggests a strong preoccupation amongst mock jurors with advancing alternate explanations for injuries. In a particular study, a contingent of jurors argued that ‘the possibility could, and should, not be ruled out that the complainant’s bruises were deliberately self-inflicted in order to support her fabricated allegation of rape’.⁹² Although it is difficult to criticise jurors for considering alternative explanations, the inference is that, some mock jurors, to be convinced of the complainants non-consent, may require the complainant ‘(rather unrealistically)... to exhibit injuries that were not only severe, but unambiguously attributable to the deliberate infliction of unwanted violence’.⁹³

Modern studies examining real conviction patterns in England indicate that claims of non-consensual intercourse which are not accompanied by evidence of physical force and attendant resistance are significantly less likely to culminate in a rape conviction.⁹⁴ Similarly in Scotland, convictions are also more likely where the case involves documented injuries.⁹⁵ Given that it would surely be surprising if the presence of such injuries made a conviction less likely in a rape trial, it has been argued that there is danger to conflating high conviction rates with juror belief in the real rape myth, thus confusing the ability of ‘real rape’ to modify the credibility conflict.⁹⁶

However, the evidence amassed strongly supports that the ‘real rape’ myth does negatively and inappropriately govern the credibility conflict. It would appear that jurors continue to regard physical injuries, or at least vaginal injuries, as the *sine qua non* of non-consensual intercourse. This raises concern in Scotland about the extent to which jurors are likely to continue to subscribe to narrow force based subjective definition of rape.

These findings are of particular relevance in light of the anticipated removal of the unique requirement for corroborative evidence as a pre-requisite for prosecution in Scotland. Corroboration has been viewed as a significant impediment to the successful prosecution

⁹¹ *Ibid* at 208

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ J Harris and S Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (1999); Kelly, Lovett and Regan (n 2); Brown, Hamilton and O’Neill (n 15)

⁹⁵ Burman, Lovett and Kelly (n 8) at 9; COPFS (n 5) at para 2.26

⁹⁶ H Reece, ‘Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?’ (2013) 33(3) *OJLS* 445 at 458

of rape partly because physical injuries are uncommon.⁹⁷ Whilst the removal may allow certain complaints where there are no corroborative external injuries documented to proceed to trial, it seems unlikely that this will achieve any material difference in practice, given the extent to which mock juror deliberations affirm the persistency of the force requirement ‘if not to constitute the offence of rape then certainly to act as a necessary corroboration of the complainant’s account.’⁹⁸

2.2(b)(iii) Delayed Reporting

Across various studies expectations regarding the immediate reporting of an incidence of rape continue to form an integral dimension of mock jurors strong conceptions about how a ‘real’ victim of rape would behave post-assault.⁹⁹ Mock jurors often fail to appreciate the complex internal and external factors that may discourage the immediate reporting of a rape,¹⁰⁰ and construe delays in the reporting of a rape to the police as severely weakening the prosecution case and as a rationale for a not guilty verdict.¹⁰¹ One study illustrative of this found that the pure circumstance of a three-day delay in reporting an alleged assault to the police, negatively impacted upon the decisions of 58% of mock jurors.¹⁰²

Expectations of an immediate report can be motivated by juror beliefs in the prevalence of false allegations. For example, an immediate report increases the likelihood that some mock jurors will perceive the complaint as veracious, given a perception that it would take time to fabricate an allegation.¹⁰³

Recent studies confirm that a conviction may be less likely through the pure fact that the complainer has delayed reporting to the police.¹⁰⁴ This raises concern that, despite the fact that immediate reporting within twenty-four hours has not been a pre-requisite for legal redress in Scotland since 1697,¹⁰⁵ it may remain a *de facto* requirement amongst some jurors in Scotland.

⁹⁷ S Brindley, national co-ordinator of RCS, quoted in ‘Corroboration “not panacea for rape victims”, says Kenny MacAskill’ *BBC News Scotland* (Scotland, 4 March 2013) < <http://www.bbc.co.uk/news/uk-scotland-21664871> > accessed 30 July 2013

⁹⁸ Ellison and Munro (n 81) at 206

⁹⁹ *Ibid*, Taylor and Joudo (n 38) at 59; Ellison and Munro (n 85) at 370-371

¹⁰⁰ For discussion see Ellison and Munro (n 81) at 209-210

¹⁰¹ Ellison and Munro (n 81) at 209; Taylor and Joudo (n 38) at 59

¹⁰² Ellison and Munro (n 85) at 371

¹⁰³ Ellison and Munro (n 81) at 209

¹⁰⁴ Ellison and Munro (n 85); Ellison and Munro (n 81); Taylor and Joudo (n 38); see also G LaFree, ‘Variables Affecting Guilty Pleas and Convictions in Rape Cases: Towards a Social Theory of Rape Processing’ (1980) 58(3) *Social Forces* 833

¹⁰⁵ *Captain Charles Douglas* (1697) Maclaurin’s Cases 13, No.12 cited in MGA Christie and TH Jones, *Criminal Law* (5th edn 2012) at 237

2.2(d)(iv) Emotional Demeanour

In reality, rape victims experience disparate emotional effects which can endure until, and beyond, their appearance in court.¹⁰⁶ However, mock jurors typically exhibit a lack of awareness of the psychological responses to being raped.¹⁰⁷ The expectation that a complainant will be visibly upset during her testimony continues to dominate mock jurors' estimations of how a 'real' victim of rape would present. An extensive body of research consistently demonstrates that as a result of these expectations regarding appropriate emotional expression, mock jurors routinely draw negative inferences as to credibility from the complainant's apparent failure to present as more visibly distressed.¹⁰⁸ In particular, a complainant's failure to appear more emotionally upset during her testimony can negatively influence the decisions of approximately 60% of mock jurors;¹⁰⁹ and diminish the likelihood of the return of a guilty verdict.¹¹⁰

Of further significance is the finding that, whilst the absence of complainant distress is destructive to mock juror's perceptions of complainant credibility, rather paradoxically, visible distress is not regarded as corroborative.¹¹¹ The significance of the complainant exhibiting a visibly upset demeanour is bifurcated. Mock jurors either view this as symptomatic of the fact that the complainant is communicating the details of a traumatic event; or more sceptically regard the complainant as managing 'both their emotions and their overall appearance as a means of eliciting sympathy and/or shoring up their credibility'.¹¹²

Neither increased nor decreased emotionality is an indicator of veracity, or the lack of it. Yet, whilst some mock jurors seem all too willing to recognise this as a means to disparage the emotional complainer, they perversely fail to extend this recognition to the unemotional complainer. These findings are highly significant in the Scottish context where it has been found that approximately three-fifths of rape complainers are crying or

¹⁰⁶ E Wessel and others, 'Credibility of the Emotional Witness: A Study of Rates by Court Judges' (2006) 30(2) *Law and Human Behavior* 221

¹⁰⁷ Ellison and Munro (n 81) at 369

¹⁰⁸ *Ibid*; MR Rose, J Nadler and J Clark, 'Appropriately Upset? Emotion Norms and Perceptions of Crime Victims' (2006) 30(2) *Law and Human Behavior* 203; RA Schuller and others, 'Judgments of Sexual Assault: The Impact of complainant emotional demeanor, gender, and victim stereotypes' (2010) 13 *New Crim L Rev* 759; G Kaufmann and others, 'The importance of being earnest: Displayed emotions and witness credibility' (2003) 17(1) *Applied Cognitive Psychology* 21; Wessel and others (n 106); Taylor and Judo (n 38)

¹⁰⁹ Ellison and Munro (n 85) at 369

¹¹⁰ See eg. Ellison and Munro (n 81); Kaufmann and others (n 108); Taylor and Judo (n 38) at 59

¹¹¹ Ellison and Munro (n 81) at 213. This hypothesis was originally posited by S Lees, *Carnal Knowledge: Rape on Trial* (1996) at 119

¹¹² Ellison and Munro (n 81) at 213.

sobbing when giving their oral testimony,¹¹³ indicating that a substantial proportion of complainers are not.

The evidence would suggest that the apparent failure of complainers in Scotland to present as more visibly upset may be exerting a deleterious affect on juror assessments of credibility, and verdicts subsequently delivered, in two fifths of cases.

2.2(c) Consent Myths

Scotland, like England, has witnessed the recasting of consent provisions into a more structured model grounded in agreement about sexual intercourse between parties, and the absence of reasonable belief consent is now an essential component of the substantive definition of rape in both jurisdictions. Both the SO(S)A 2009 and the SOA 2003 envisage an active, rather than passive, model of consent and a co-operative and interactive understanding of sexuality.

In both jurisdictions the self-designated legislative ambition has been to diminish the extent to which the jury might appeal to inappropriate socio-sexual conventions in determining consent, and to minimise reliance on stereotypes of female sexuality.¹¹⁴

2.2(c)(i) Consent and Reasonable Belief

When assessing complainant consent and an accused's reasonable belief in consent, mock jurors rely substantially on their own subjective perceptions of a complainant's earlier positive signals as implying antecedent consent to sexual intercourse.¹¹⁵ Certainly, evidence shows jurors continue to assume consent in the absence of express dissent, and complainants are expected to actively and assertively demonstrate a lack of consent, despite the fact that this is not strictly required under the SOA 2003 or the SO(S)A 2009.¹¹⁶ Even more disconcertingly it has been found that a lack of positive indication of consent, even where accompanied by verbal resistance, is rarely sufficient for mock jurors to hold a defendant guilty of rape.¹¹⁷ Frequently only the presence of force and attendant

¹¹³ See M Burman, 'Evidencing Sexual Assault: Women in the witness box' (2009) 56(4) *Probation Journal* 1

¹¹⁴ SLC (n 41) at para 2.11; Finch and Munro (n 1) at 309

¹¹⁵ See Ellison and Munro (n 60)

¹¹⁶ Carline and Gunby (n 33) at 247-248; Ellison and Munro (n 60) at 791

¹¹⁷ Ellison and Munro (n 60) at 791; Ellison and Munro (n 81) at 206

resistance is sufficient to revoke the determinacy of earlier signals in mock jurors' minds.¹¹⁸

Despite legislative intent, what jurors consider as 'earlier signals' often reflect inappropriate socio-sexual conventions and stereotypes of female sexuality.¹¹⁹ Research shows that mock jurors rely upon 'social conventions which indicate that women who drink or flirt with men, or who take steps to initiate some intimacy, cannot complain when men take this behaviour to imply a willingness to engage in intercourse thereafter.'¹²⁰ Prior behaviours routinely regarded by mock jurors as indirectly implying willingness to engage in sexual intercourse, include inviting a person into one's home, remaining in one another's company for a prolonged period, receiving compliments, sharing a goodnight kiss, and embarking upon tentative body contact such as brushing against one another.¹²¹ In particular, mock jurors frequently emphasise the social significance of shared alcohol consumption as an indicator of consent.¹²² For example, offering a male companion wine, as opposed to a non-alcoholic drink, 'sort of says something'.¹²³ Research with barristers in England also highlights that jurors can consider a very general invitation, for example a complainant's inviting a defendant 'back to the bedroom', 'with other people, sitting on the bed, listening to music', as supporting a reasonable belief in consent.¹²⁴

The generalities of these earlier 'invitations' means that amongst mock jurors, 'while the fact of a previous acquaintanceship *per se* may not be problematic, much of its irrelevance will hang on it being an exclusively distant and platonic one'.¹²⁵ Perhaps of greatest concern is research which found that whilst potential jurors ostensibly accepted that beliefs about consent should be 'reasonable', when given rape scenarios to discuss, the study subjects were inclined to excuse 'honest' mistakes.¹²⁶ In England, barristers view the impact of the reformulated *mens rea* under the SOA 2003 as minimal; and the perception is that it is relatively easy for the defence to establish a reasonable belief.¹²⁷

¹¹⁸ *Ibid*

¹¹⁹ Carline and Gunby (n 33) at 247-249

¹²⁰ Finch and Munro (n 1) at 318

¹²¹ Ellison and Munro (n 60) at 791; see also see also L Ellison and VE Munro, 'Of 'normal sex' and 'real rape': Exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18(3) *Social & Legal Studies* 291

¹²² RA Schuller and A Wall 'Sexual Assault and Defendant/Victim Intoxication: Jurors' Perceptions of Guilt' (2000) 30(2) *J Appl Soc Psychol* 253; A Abbey and R Harnish, 'Perceptions of Sexual Intent: The Role of Gender, Alcohol Consumption and Rape Supportive Attitudes' (1995) 32 *Sex Roles* 297

¹²³ Kelly and Munro (n 13) at 291

¹²⁴ Carline and Gunby (n 33) at 248

¹²⁵ Kelly and Munro (n 13) at 292

¹²⁶ Cowan (n 62) at 163; citing L Stewart, "'It is Rape, But...'" Issues with definition and implications for the Australian legal system' (Unpublished PhD Thesis, University of Edinburgh 2009)

¹²⁷ Carline and Gunby (n 33) at 248

These findings raise concern in Scotland that the jury may be reluctant to give primacy to sexual self-determination, when determining the complainer's consent and accused's reasonable belief in consent. Based on the evidence, it would appear that the jury are likely to undermine consent as an 'active' model, with the virtually exclusive focus of attention being given to the complainer's behaviour prior to the incident. The likely determinacy of these earlier signals is problematic in assessing whether a rape has occurred, as it is consent at the time of intercourse that is the issue. These findings further highlight the extent to which juror attitudes are likely to frustrate the legislative provision explicitly intended to negate implied escalation of consent.¹²⁸ Furthermore, the evidence raises significant questions over the extent to which the jury will follow the law in abandoning the 'honest belief' defence, which has been characterised as a 'rapist's charter'.¹²⁹

2.2(c)(ii) Intoxication and Capacity to Consent

The SO(S)A 2009 dictates that an individual is incapable of consenting to any conduct whilst asleep or unconscious.¹³⁰ Furthermore, where the complainer is located somewhere upon the continuum from sober to unconscious through alcohol consumption, free agreement will automatically be absent where the individual is incapable of consenting to conduct.¹³¹

The matter of when a complainer lacks capacity to consent as a consequence of alcohol consumption is determined by the jury in Scotland.¹³² Similarly in England, the issue of 'capacity' is left to the jury. Yet what emerges from research is that some mock jurors adopt such a minimalist interpretation of 'capacity' to consent as to equate it with mere consciousness.¹³³ This interpretation stands in stark contradiction to the legal position whereby capacity to consent to sexual intercourse may be lost before consciousness. It has been suggested that intoxicated consent is particularly problematic, due to a societal presumption that women are always capable of saying no, irrespective of their degree of intoxication.¹³⁴ Research confirms the common belief amongst mock jurors that as long as a woman is conscious, then their level of intoxication will never be such as to render them

¹²⁸ SO(S)A 2009 s.15(2)

¹²⁹ This term has been used to describe the decision in *DPP v. Morgan* [1976] AC 182 – see J Temkin, *Rape and the Legal Process* (2002) at 119

¹³⁰ SO(S)A 2009 s.14

¹³¹ SO(S)A 2009 s.13(2)

¹³² SLC (n 41) at para 2.63

¹³³ Finch and Munro (n 1) at 314; Finch and Munro (n 58) at 33

¹³⁴ J Lovett and MAH Horvath, 'Alcohol and drugs in rape and sexual assault' in Horvath and Brown (n 13) 125 at 155

incapable of expressing dissent to intercourse.¹³⁵ This expectation appears very deeply embedded, with some mock jurors insisting that even where the complainant was heavily intoxicated, they would expect to find evidence of physical struggle to establish non-consent.¹³⁶

The difficulty is that, 'where the question is one of establishing the degree of intoxication... the credibility of the witness is paramount',¹³⁷ yet there is an important distinction to be drawn between any potential impact which intoxication has on the complainer's evidence and the pure fact of the complainer's intoxication.¹³⁸ The pure circumstance of victim intoxication negatively affects perceptions of victim character and morality¹³⁹ and reduces perceptions of credibility amongst jurors;¹⁴⁰ as well as increasing attributions of victim blame as discussed laterally. Indeed, as Cowan argues 'leaving the issue of capacity to the jury then, is not necessarily the answer to the problem of intoxicated consent'.¹⁴¹

There are significant concerns over the vagaries of intoxicated consent in Scotland as elsewhere, and it has been found that convictions are less likely in Scotland where the complainer is intoxicated.¹⁴² Juror attitudes are particularly significant in this context given incident profiling in Scotland has revealed that 44% of rape complainers have consumed alcohol at the time of the assault and around 6% have consumed drugs, with 45% of those consuming either substance reported to be severely affected at the time.¹⁴³

2.2(d) Victim Precipitation Myths

Juries have been found less likely to convict a defendant of rape if the complainant engaged in non-gender-conforming behaviour, either in terms of their general 'lifestyle' and/or their behaviour preceding the offence.¹⁴⁴ Female victims who violate traditional

¹³⁵ Finch and Munro (n 58) at 33

¹³⁶ Finch and Munro (n 1) at 316

¹³⁷ S Cowan, 'The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex' (2008) 41(4) *Akron L Rev* 899 at 918; see also Rumney PN and Fenton, RA, 'Intoxicated Consent in Rape: *Bree* and Juror Decision-Making' (2008) 71(2) *MLR* 279-290

¹³⁸ COPFS (n 5) at para 2.31

¹³⁹ RM Ross, MD Kretchmar and LA Lawrence, 'Responsibility and Victim Character in a Rape Scenario Manipulating Alcohol and Victim Persona' (2002) 7(2) *Psi Chi Journal of Undergraduate Research* 90; D Richardson and JL Campbell, 'Alcohol and Rape: The effect of alcohol on attributions of blame for rape' (1982) 8 *Personality and Social Psychology Bulletin* 468

¹⁴⁰ AA Wenger and BH Bornstein, 'The Effects of Victim's Substance Use and Relationship Closeness on Mock Jurors' Judgments in an Acquaintance Rape Case' (2006) 54(7-8) *Sex Roles* 547

¹⁴¹ Cowan (n 137) at 912

¹⁴² Burman, Lovett and Kelly (n 8) at 9

¹⁴³ *Ibid* at 5

¹⁴⁴ G LaFree 'Rape and Criminal Justice: The Social Construction of Sexual Assault' (1989)

gender roles are generally attributed more blame than those who do not,¹⁴⁵ and in a rape trial, attributions of blame will often be a reliable indicator of the final verdict.¹⁴⁶ In England, qualitative interviews with judges and barristers reveal a perception that juries are ‘desperately moralistic’ singularly in sexual assault trials.¹⁴⁷ Similarly, barristers are able to identify whole categories of ‘sure fire losers’ cases, for example, where the complainant was intoxicated or where some level of consensual intimacy preceded the rape.¹⁴⁸

As discussed earlier, jurors’ perceptions and expectations of stranger rape and acquaintance rape differ considerably, and greater blame is generally attributed to a complainant by mock jurors when she knows her assailant and estimations of her credibility are reduced.¹⁴⁹ This effect is even more pronounced amongst mock jurors where the relationship has entailed past sexual intercourse.¹⁵⁰ This differentiation may not transfer to other crimes, with one study illustrating that knowledge about a prior relationship between victim and perpetrator increases perceptions of victim blame for rape, but not for robbery.¹⁵¹

It has long been shown that knowledge that a complainer has an active sexual history has a marked negative effect on guilt judgments, substantially reducing the number of participants who would find the defendant guilty.¹⁵² A recent study confirms ongoing reliance on this extra-legal consideration in mock juror decision-making, with jurors speculating as to whether the complainant was the ‘sort of woman’ prone to sexual promiscuity.¹⁵³

2.2(d)(i) Intoxication and Blame

The SO(S)A 2009 is concerned with the complainer’s capacity at the time of the intercourse, to which the cause of the complainer’s intoxication is firmly relegated as

¹⁴⁵ A Grubb and E Turner, ‘Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming (2012) 17(5) *Aggression and Violent Behavior* 443

¹⁴⁶ Burt and Albin (n 75); see also G Fischer, ‘Effects of Drinking by the Victim or Offender in a Simulated Trial of an Acquaintance Rape’ (1995) 77 *Psychological Reports* 579

¹⁴⁷ Temkin and Krahé (n 17) at 134

¹⁴⁸ *Ibid*

¹⁴⁹ RA Schuller and MA Klippenstine, ‘The Impact of Complainant Sexual History Evidence on Jurors’ Decisions: Considerations From a Psychological Perspective’ (2004) 10(3) *Psychology, Public Policy, and Law* 321

¹⁵⁰ RA Schuller and PA Hastings, ‘Complainant sexual history evidence: Its impact on mock jurors’ decisions’ (2002) 25 *Psychology of Women Quarterly* 252

¹⁵¹ Bieneck and Krahé (n 75)

¹⁵² E Borgida and P White, ‘Social perception of rape victims: The impact of legal reform’ (1978) 2 *Law and Human Behavior* 339; MD Pugh, ‘Contributory fault and rape convictions: Loglinear models for blaming the victim’ (1983) 46 *Social Psychology Quarterly* 233; K Cottan, ‘Evidence Regarding the Prior Sexual History of an Alleged Rape Victim: Its Effect on the Perceived Guilt of the Accused’ (1975) 33 *UT Fac L Rev* 165

¹⁵³ Finch and Munro (n 58) at 36

irrelevant.¹⁵⁴ This is salient given that, as noted, in Scotland complainant intoxication is negatively correlated with conviction and a significant proportion of complainants have consumed alcohol.

The new definition was specifically intended to diminish the legal impact of beliefs that intoxicated victims are ‘asking for it’,¹⁵⁵ yet in practice, this may be rather meaningless when it comes to attributions of responsibility and blame. It has been shown that, not only do mock jurors attribute responsibility for sexual intercourse to the complainant when she has consumed alcohol, but strikingly her responsibility remains paramount even in scenarios where the defendant has deliberately taken advantage of her intoxication or deliberately targeted her through spiking her drink with alcohol.¹⁵⁶

There exists a double standard in juror attitudes towards intoxication in rape cases; an asymmetry whereby intoxication tends to increase the female’s perceived responsibility yet lower the male perpetrators perceived responsibility.¹⁵⁷ Similarly, a victim’s intoxication precipitates a derogatory effect upon perceptions of her character,¹⁵⁸ whilst a defendant’s intoxication does not.¹⁵⁹

Alcohol consumption by a woman can be sufficient to absolve the defendant of all responsibility, and legal liability to the complainant.¹⁶⁰ The possible function of alcohol in reducing or absolving defendant perceived responsibility is deeply problematic, and a salient concern given profiling in Scotland shows approximately 35% of suspects have consumed alcohol at the time of the offence.¹⁶¹ This proclivity amongst mock jurors conflicts with the requirement to ignore a defendant’s voluntary intoxication in both England and Scotland.¹⁶² Such non-observance of this fundamental tenet of criminal law is exemplified in one mock juror’s assertion that, ‘he [the defendant] was in a fairly sober state of mind, so you know, he should have been able to judge: if he’d been fairly drunk as well, then I don’t think it would be a question of rape’.¹⁶³

¹⁵⁴ SLC (n 41) at para 2.64

¹⁵⁵ *Ibid* at para 2.62

¹⁵⁶ E Finch and Munro VE, ‘The demon drink and the demonized woman: Socio-sexual stereotypes and responsibility attribution in rape trials involving intoxicants’ (2007) 16(4) *Social & Legal Studies* 591; Finch and Munro (n 58)

¹⁵⁷ Finch and Munro (n 58) at 36; Finch and Munro (n 156); Wenger and Bornstein (n 140); KJ Stormo, AR Lang and WGK Stritzke, ‘Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences’ (1997) 27 *J App Soc Psychol* 279; Richardson and Campbell (n 139); Ross, Kretchmar and Lawrence (n 139)

¹⁵⁸ Richardson and Campbell (n 139)

¹⁵⁹ *Ibid*

¹⁶⁰ Finch and Munro (n 58) at 30; see also Finch and Munro (n 156)

¹⁶¹ Burman, Lovett and Kelly (n 8) at 5

¹⁶² See eg. *Brennan v HMA* 1977 JC 38 at para 46; *Donaldson v Normand* 1997 JC 200 at para 202

¹⁶³ Kelly and Munro (n 13) at 292

Victim intoxication can increase both perceptions of victim responsibility and blame, and reduces both perpetrator responsibility and blame.¹⁶⁴ As noted, there is correlativity between attributions of responsibility and blame, and the later will often be a reliable indicator of final verdict.¹⁶⁵ A recent study shows that where a complainant is intoxicated, jurors both blame the complainant more and are less likely to convict the defendant.¹⁶⁶ Another study reveals that as many of 89% of the mock jurors who attribute some blame to an intoxicated complainant and less than complete blame to the defendant vote not guilty.¹⁶⁷

The problem posed by the pure fact of complainer intoxication, either in relation to consent or culpability, is problematic and could have a negative effect on outcomes in a high number of in Scotland, as well as the rest of the UK.¹⁶⁸

2.3 The Impact of Juror Attitudes on Law Reform

The jury, as a measure of community input to the justice system, is a justification for the institution expounded all over the common law world. However, in the context of a rape trial the jury, as microcosm of ‘the community’, is as much a repository of community prejudice as conscience. In particular, the preceding sections have demonstrated that complainers’ experiences of rape may unjustifiably be invalidated by the justice system because of juror subscription to the four myths identified. In tandem, the problem with juror secrecy is not that it permits juries to disregard community values but rather that it permits juries to apply them in defiance of the law. The evidence assembled suggests that where attrition does occur ‘on consideration of the evidence by the jury at the conclusion of a trial’ in Scotland, negative social attitudes are key to explaining high acquittal rates.

Propounding the ‘community input’ rationale, the New Zealand Law Commission (‘NZLC’) went as far as to suggest that, because there is a continuum between sexual offending and acceptable sexual interaction, the question of where the line is drawn means ‘sexual offending is relevant to the community in a way that some other offences are not’.¹⁶⁹ Yet, there is a deep fallaciousness to such an argument. Diverse community views about what is an ‘invitation’ to, or constitutes ‘acceptable’, sexual interaction are unhelpful

¹⁶⁴ Stormo, Lang and Stritzke (n 157)

¹⁶⁵ Burt and Albin (n 75); Fischer (n 146)

¹⁶⁶ Wenger and Bornstein (n 140)

¹⁶⁷ Fischer (n 146)

¹⁶⁸ For additional data see Kelly, Lovett and Regan (n 2) at 80-81

¹⁶⁹ NZLC, *Juries in Criminal Trials Part One: A Discussion Paper* (NZLAC PP32, 1998) at para 196

where they deviate from, or are irrelevant to, legal requirements.¹⁷⁰ As it has been conceptualised in other jurisdictions, the institution of the jury may therefore create an obstructive dichotomy between ‘elite’ opinions’ creation of laws that promote female autonomy, and ‘popular’ opinions’ control over the consent/non-consent decision at trial.¹⁷¹

The law’s doctrinal conversion to liability for rape based in lack of consent has been identified elsewhere as an exemplar of continued ‘jury nullification’, where the jury continue to neutralise the legislative prohibition of all instances of non-consensual sexual intercourse.¹⁷² Similarly, it is submitted that the jury cannot be relied upon to objectively deliver the law in Scotland, which is likely to lead inadvertently to a divorce of the SO(S)A 2009 in theory and in practice.

The apparent shortcomings of jury decision-making are likely to frustrate the progressive intentions of the SO(S)A 2009. However, the approaches taken to legislative reform in both Scotland and England, particularly the reformulated statutory definitions of consent and *mens rea* requirements, have not been without criticism.¹⁷³ Ultimately these concerns over drafting on both sides of the border can be condensed into, not ill-founded, concerns over juror attitudes. In particular, the drafting of both pieces of legislation has attracted criticism for failing to be sufficiently instructive to juries, and for deploying vague or undefined terms which entertain too much latitude for jurors to import their subjective interpretations and understandings of consent.¹⁷⁴

Yet irrespective of any shortcomings, it cannot be concluded that the problem is with the legislation. Negative social attitudes towards rape and rape myths cannot effectively be redressed by statutory revision of the substantive law or modifying rules of evidence or procedure.¹⁷⁵ Seeking to further define substantive terms may be a difficult task, as mock jury research shows that legislative terms, even where deemed knowable, have an inherently disparate effect amongst mock jurors, with no assurance that all jurors

¹⁷⁰ Finn, McDonald and Tinsley (n 30) at 250

¹⁷¹ D Dripps, ‘Rape, Law and American society’ in C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2011) 224 at 235

¹⁷² *Ibid*; see also D Dripps, ‘After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?’ (2008) 41 *Akron L Rev* 957

¹⁷³ For critical commentary of the SO(S)A 2009 see A Brown, *Sexual Offences (Scotland) Act 2009* (2009) at 37-43

¹⁷⁴ Amongst others see Cowan (n 62) at 164-165; J Temkin and A Ashworth, ‘The Sexual Offences Act 2003:(1) Rape, sexual assaults and the problems of consent’ [2004] *Crim LR* 328; Finch and Munro (n 1); in Scotland ACPOS argued that juries needed more guidance legislative terms – see Justice Committee Official Report 25 (2009) ‘Sexual Offences (Scotland) Bill’. Online. Available at: <www.scottishparliament.uk/s3/committees/justice/inquiries/SexualOffences/index.htm> 1333-5

¹⁷⁵ Rumney and Fenton (n 137) at 289; see also Dripps (n 172) at 971

understand them as the same thing within abstract or specific circumstances.¹⁷⁶ A further hazard of more detailed or technically itemised legislation, is the risk that it may perversely only create inequitable perceptions of categories of complainers.¹⁷⁷ Commenting upon rebuttable presumptions as to lack of consent in England, it has already been noted that, where a presumption applies there may be a perception that the prosecution are:

[D]ependent upon a burden being placed on the defendant in order to win, which potentially reinforces certain myths about “good rape victims” and “real rapes” - “Good victims” do not need the law’s assistance to achieve a conviction; her evidence alone will suffice in convincing the jury as to the guilt of the accused.¹⁷⁸

Furthermore, any attempt to draft legislation impenetrable to bias would likely be rendered futile given the research indicating the extent to which jurors are likely to fail to interact with the relevant sexual offences law, and to make decisions without any reference to the applicable legal test.¹⁷⁹

The intrinsic difficulty is, as Cowan notes in Scotland, ‘these prevailing attitudes make it extremely difficult for a defendant to be brought to, and convicted, at trial, regardless of how well crafted the substantive law is.’¹⁸⁰

There is serious complaint to be had with the jury as a decision-maker in rape trials. If the jury is to give expression to community standards infused by rape mythology and erroneous assumptions, then jury verdicts may be prejudiced and in contravention of the law which is unacceptable. It is therefore important to discuss whether other measures can diminish the potential legal impact of negative social attitudes amongst jurors. Accordingly, the scope to counter juror prejudice is discussed in next chapter.

¹⁷⁶ Finch and Munro (n 1) at 315

¹⁷⁷ Carline and Gunby (n 33) at 245

¹⁷⁸ *Ibid*

¹⁷⁹ See earlier at 2.1(b)

¹⁸⁰ Cowan (n 62) at 166

3. The Scope to Counter the Influence of Prejudicial Attitudes in Jury Decisions in Scotland

The previous chapter demonstrates that where attrition occurs on consideration of the evidence by the jury in a rape case, an acquittal may be a result of the influence of prejudicial social attitudes upon jury decision-making. This chapter therefore discusses different counter measures which might be prescribed to enhance the quality and impartiality of juror decision-making in rape trials. The potential of the collaborative process of deliberation to operate as a safeguard is discussed, in addition to both the need for the wider education of society and the scope for education of jurors within the parameters of the adversarial structure. The chapter finishes by considering other possible avenues, which would depart from the traditional justice model in Scotland.

3.1 Deliberation as a Safeguard

The collective process of deliberation is often regarded as an important safeguard against prejudicial and erroneous decision-making by the jury. Whilst the jury is not externally accountable for their decision,¹ ‘throughout their deliberations jurors remain accountable or answerable to each other and it can be argued that this process of jury deliberation in itself encourages jurors to put aside their individual biases’.² This coincides with a conceptualisation of the jury as an educative institution, which remains a frequently reiterated justification for the jury across the common law world. As the NZLC stated, ‘through juror participation in trials involving allegations of sexual offending, the stereotypical thinking and myths referred to are more likely to be identified, challenged and debunked’.³

A distinct feature of the Scottish jury is that it follows a simple majority verdict rule. Simultaneously, there is no timing requirement upon deliberation in Scotland. This can be contrasted with procedural requirements in other jurisdictions whereby, although the requirement of unanimity may have been relaxed, juries are required to deliberate for minimum periods of time before a weighted majority verdict can be allowed.⁴

¹ For a classic discussion see JD Jackson, ‘Making juries accountable’ (2002) 50(3) *Am J Comp Law* 477

² *Ibid* at 482

³ NZLC, *Juries in Criminal Trials Part One: A Discussion Paper* (NZLC PP32, 1998) at para 196

⁴ For example, two hours in England and Wales, and Ireland and four hours in New Zealand

The simple majority basis for a verdict and lack of timing requirement for this to be reached is likely to reduce the effectiveness of the deliberative process. The High Court of Australia has said of jury verdicts:

A majority verdict... is analogous to an electoral process in that jurors cast their votes relying on their individual convictions... the necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of 'hasty and unjust verdicts.'⁵

However, the reality of a system with a requirement of a weighted majority in a rape trial is that, as has been indicated in England, it may well only require three individual jurors on the jury of twelve who strongly adhere to rape myths to prevent a conviction.⁶ To this extent, the existence of a simple majority in Scotland may help alleviate biases and prejudices, as the role of an individual juror is likely to be less decisive than where a requirement of unanimity or weighted majority exists.⁷

However, significantly detracting from this assessment within the context of a rape trial, is the fact that negative social attitudes are unlikely to be held by only one juror. The role of the individual juror will be accentuated under the Scottish Government's current proposal to increase the number of juror votes required for a conviction from eight to ten of the fifteen jurors empanelled.⁸ The size of the Scottish jury is noticeably larger than more common panels of nine or twelve jurors in other jurisdictions and, of itself, might be presented as a counterbalance against prejudicial views amongst individual jurors.⁹ However, the actual significance of jury size generally is unconfirmed.¹⁰

The extent of change that might occur through the process of collective deliberation is also uncertain.¹¹ Indeed, evidence exists which suggests that the pre-deliberation views of individual jurors are predictive of the final jury decision.¹² This is corroborated by a recent

⁵ *Cheatle v R* (1993) 177 CLR 541 at para 7

⁶ J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) at 178

⁷ P Duff, 'The Scottish Criminal Jury: A Very Peculiar Institution' (1999) 62 *LCP* 173 at 184

⁸ Criminal Justice (Scotland) Bill 2013 s.70(2) (introduced 20 June 2013)

⁹ See Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) at para 7.5

¹⁰ Further most studies have examined the differences were between 6 and 12 member juries, for discussion see M Saks and M Marti 'A meta-analysis of the effects of jury size' (1997) 21 *Law and Human Behaviour* 451

¹¹ J Finn, E McDonald and Y Tinsley, 'Identifying and Qualifying the Decision-Maker: the Case for Specialisation' in E McDonald and Y Tinsley (eds), *From Real Rape to Real Justice: Prosecuting Rape in New Zealand* (2011) 221 at 234

¹² M Sandys and C Dillehay, 'First-ballot votes, pre-deliberation dispositions, and final verdicts in jury trials' (1995) 19(2) *Law and Human Behaviour* 175

simulated rape trial study by Ellison and Munro.¹³ Across the twenty-seven mock juries, with an acquittal rate of approximately 81%, approximately half of the participating jurors ultimately voted in line with their initial preference for acquittal or conviction.¹⁴ Given that 34% of the mock jurors had commenced the deliberations undecided, the share of jurors who having stated an initial verdict preference, changed their position over the deliberations, was 14%.¹⁵

The scope of collective deliberation to act as a ‘check on errors and biases’ may also be limited to ‘where a minority of jurors subscribe to the particular prejudice or bias involved’.¹⁶ This argument must be viewed in the context of the research to the effect that pre-existing attitudes about rape and rape victims affect judgments more than the facts of the given case or the testimony of the complainant.¹⁷ It must simultaneously be acknowledged that the documented prevalence of negative social attitudes within the general community, may both underestimate their prevalence and the extent to which different individual beliefs held by jurors may exert a cumulative effect.¹⁸ Although only a minority of a given population might support a specific belief, research in the USA indicates that the majority of the individuals subscribe to at least one rape myth.¹⁹ Furthermore:

Jurors with a strong belief in rape myths... are likely to express their stereotypical views in the course of the jury’s deliberations, giving them prominence and potential influence on those members who might not otherwise have looked at the case from that point of view. Just as defence counsel may ‘prime’ the stereotypes of those already endorsing them, biased members of the jury may channel the interpretation of the evidence as a whole in a direction that undermines the complainant’s position.²⁰

¹³ L Ellison and VE Munro, ‘Getting to (not) guilty: examining jurors’ deliberative processes in, and beyond, the context of a mock rape trial’ (2010) 30(1) *LS* 74

¹⁴ *Ibid* at 86

¹⁵ *Ibid*

¹⁶ Finn, McDonald and Tinsley (n 11) at 235

¹⁷ See earlier at 1.3

¹⁸ See KM Edwards and others, ‘Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change’ (2011) 65(11-12) *Sex Roles* 761 at 769; for research illustrating that attitudinal surveys may underestimate the extent of negative social amongst mock jurors see L Ellison and VE 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(4) *New Crim L Rev* 781

¹⁹ A Buddie and A Miller, ‘Beyond Rape Myths: A More Complex View of Perceptions of Victims’ (2001) 45 *Sex Roles* 130

²⁰ Temkin and Krahé (n 6) at 178

Thus, in other jurisdictions, it has been concluded that ‘it is likely that in sexual violence cases a majority of individual jurors will believe common myths and stereotypes – and as a rule of thumb, “majority wins”’.²¹

Indeed, in the Ellison and Munro study mentioned above, with an 81% acquittal rate, there was a shift away from a conviction across the majority of the mock juries by the time deliberations had concluded. In addition, those jurors who were initially undecided as to verdict were significantly more likely to vote not guilty in the final poll.²² A further USA study illustrative of the ‘majority rule’ phenomenon, showed that in only 5% of trials did the minority viewpoint, revealed in the first ballot taken, ultimately prevail.²³ Simultaneously, where the minority view does prevail, it is more likely to be favourable to accused. Approximately three quarters of the trials involved an initial minority persuading majorities to shift to acquittal, illustrating that ‘it is easier to raise a reasonable doubt than to eliminate a reasonable doubt’.²⁴ This asymmetrical effect is mirrored at individual mock juror level in the Ellison and Munro study, where ‘a sizable minority of jurors who indicated a guilty verdict at the start of deliberations ultimately voted not guilty... only one juror shifted from a preliminary not guilty position to one of guilty at the close of the deliberation process’.²⁵

In addition, research illustrates that collective deliberation may exacerbate bias, a phenomenon known as ‘group polarisation’.²⁶ This essentially means that decisions made by a group tend to be more extreme than those made by an individual, with the direction of the shift determined by the position initially preferred by the majority of the individuals.²⁷

This indicates that:

[I]f the majority of jurors in a given case are at least mildly accepting of rape myths, such beliefs are more likely to be perceived as socially acceptable and arguments consistent with rape myths more likely to be exchanged in the course of the jury’s deliberations.²⁸

²¹ Finn, McDonald and Tinsley (n 11) at 235

²² Ellison and Munro (n 13) at 83

²³ VP Hans, ‘Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries’ (2007) 82 *Chi-Kent L Rev* 579 at 584

²⁴ *Ibid*

²⁵ Ellison and Munro (n 13) at 83

²⁶ R Brown, *Group processes* (1999); F Robbennolt, ‘Evaluating juries by comparison to judges: A benchmark for judging?’ (2005) 32 *Fla St U L Rev* 469 at 501

²⁷ B Krahé and J Temkin, ‘Addressing the Attitude Problem in Rape Trials: Some Proposals and Methodological Considerations’ in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) 301 at 314

²⁸ *Ibid*

The chances of an acquittal are increased relative to the odds that a single juror would have acquitted the accused.²⁹

Other research, examining the effect of the probability of conviction upon deliberation, further substantiates the suggestion that juries can be more biased than the individual jurors of which they are comprised. It has been found that in cases where the probability of conviction is more finely balanced, this may accentuate the sensitivity of the collective jury to biasing information.³⁰ Within the context of a rape trial, where the evidence is frequently ‘finely balanced’, and it is reasonable to expect that jurors may subscribe to biases arising from rape myths, it has been argued that ‘the collective deliberation process will not assist juries to overcome problems associated with bias in the decision making process’.³¹

Empirical reality illustrates that the effect of deliberation as a mechanism to address prejudicial decision-making is not reliable, but rather contingent upon task, group and group member factors.³² However, in assessing the extent to which deliberation is an effective countermeasure, a reasonable conclusion is that ‘in sexual cases the task is such that reliance on the collective process to address biases and errors in decision-making would be unsound’.³³

The lack of certainty that deliberation is an effective safeguard simultaneously undermines the conceptualisation of the jury as an educative institution. It would appear to place undue weight on the deliberation process as a protective measure, and an unrealistic onus upon individual jurors. Indeed, such a conceptualisation appears to be naively optimistic, in light of the evidence that participating in the collective decision-making process does not necessarily mediate juror bias in a rape trial and may even have an exacerbatory effect.

²⁹ *Ibid*

³⁰ NL Kerr, KE Niedermeier and MF Kaplan, ‘Bias in jurors vs bias in juries: New evidence from the SDS perspective’ (1999) 80(1) *Organizational Behavior and Human Decision Processes* 70; NL Kerr, RJ MacCoun and GP Kramer, ‘Bias in judgment: Comparing individuals and groups’ (1996) 103(4) *Psychological Review* 687

³¹ Finn, McDonald and Tinsley (n 11) at 234

³² *Ibid*

³³ *Ibid*

3.2 Attitudinal Change at Societal Level

Across many jurisdictions, the need for attitudinal change at societal level has been regarded as the necessary precursor to legal change in rape law.³⁴ Indeed, there is a strong consensus in Scotland that improved public awareness and understanding about the reality and nature of sexual offending is the necessary pre-requisite to decreasing attrition.³⁵ The need to diminish the legal impact of these negative societal attitudes, reflected amongst jurors, increasingly informs academic comment, prosecutorial and political discourses. This recognition within political dialogue in Scotland acknowledges that legislative reform must be accompanied by a simultaneous strategic policy effort to address negative social attitudes amongst the public, from which jurors are empanelled.³⁶ Recently, in recognising that removing the requirement for corroboration is not a ‘panacea for rape victims’ and will not of itself ‘solve the problem of Scotland’s low conviction rate for rape’ Scotland’s Justice Secretary again focused on the need to ‘change attitudes’.³⁷

The Scottish Government funded the RCS national campaign entitled ‘This is Not an Invitation to Rape Me’, launched in October 2008, to challenge myths across the four themes of intimacy, dress, relationships and drinking.³⁸ An external evaluation of the campaign found it had been successful in stimulating public debate, with 98% of those interviewed agreeing that the campaign tackled an important issue, and 61% stating that it would prompt them to consider their own attitudes towards rape.³⁹ While this creates optimism for the role of targeted public education campaigns, this is, of course, not the same thing as making a difference to actual cases. As has been acknowledged in other jurisdictions, ‘the goal of a public education campaign is long term, and as such, little short term change to juror deliberations is likely to eventuate’.⁴⁰

³⁴ For a range of national perspectives see C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2011) Intro and Pt.3

³⁵ COPFS, *Review of the Investigation and Prosecution of Sexual Offences* (2006); S Cowan 'All Change or Business as Usual? Reforming the Law of Rape in Scotland' in McGlynn and Munro, *Rethinking Rape Law* (n 34) 154; S Brindley and M Burman, 'Meeting the challenge? Responding to rape in Scotland' in N Westmarland and G Ganjoli (eds), *International Approaches to Rape* (2012) 147

³⁶ See Scottish Government, *Sexual Offences (Scotland) Bill: Policy Memorandum* (2008) at paras 9-27; Brindley and Burman (n 35) at 162-163

³⁷ ‘Corroboration “not panacea for rape victims”, says Kenny MacAskill’ *BBC News Scotland* (Scotland, 4 March 2013) <<http://www.bbc.co.uk/news/uk-scotland-21664871>> accessed 30 July 2013

³⁸ See RCS, *This is not an invitation to rape me campaign* <<http://www.thisisnotaninvitationtorapeme.co.uk/>> accessed 30 July 2013

³⁹ Progressive, *This is not an invitation to rape me: Campaign Evaluation* (2009) <<http://www.rapecrisisScotland.org.uk/workspace/publications/TINAITRM-final-evaluation.pdf>> accessed 30 July 2013 at 19-22

⁴⁰ Finn, McDonald and Tinsley (n 11) at 241

It is self evident that societal enlightenment is the key. However, within this prescription the prognosis of commentators across varying jurisdictions for imminent attitudinal change is bleak.⁴¹ In the USA, Dripps conveys a deep skepticism that ‘popular opinion’ will homogenise with ‘elite opinion’ in the near future, stating ‘it would be a bright eyed optimist indeed who expects a sudden sea-change in popular attitudes’.⁴² Whilst attitudinal change may be viewed as a pre-requisite for legal change, the necessary shift in attitudes will be an incremental and ongoing cultural evolution. Public education is thus a long-term goal, and offering it as a solution can create only the illusion of problem solving in the short term. In lieu of any immediate impact on decision-making in criminal trials, there is a need for more immediate solutions.

3.3 Educating the Jury

Whilst jury education in the long-term may be achieved through educational initiatives designed to target social attitudes at societal level, there is a question of what can be done in the interim to educate jurors in Scotland.⁴³ However, the immediate challenge is that, within the adversarial system, the opportunities for jury education are strictly limited.⁴⁴ Within these parameters, the two educational initiatives that have assumed increasing prominence are the potential role of judicial direction upon ‘rape myths’ and expert evidence. Both strategies have attracted controversy, and this section explores the extent to which these educative measures may help in the immediate courtroom.

3.3(a) Judicial Direction

It has been argued that it should be compulsory in Scotland for judicial charges to include an instruction to jurors to disregard personal prejudices.⁴⁵ Yet, it seems doubtful what this would achieve; and of course, individuals who hold prejudicial views may not recognise they are prejudiced.⁴⁶ Evidence strongly suggests that jurors’ prior beliefs affect their verdicts irrespective of clear instructions to ignore these predispositions.⁴⁷

⁴¹ See eg. J Jordan, ‘Silencing rape, silencing women’ in JM Brown and S Walklate (eds), *Handbook of Sexual Violence* (2011) 253 at 277-279; Finn, McDonald and Tinsley (n 11) at 241; D Dripps, ‘After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault’ (2008) 41 *Akron L Rev* 957

⁴² Dripps (n 41) at 973

⁴³ See eg. COPFS (n 35) at para 8.66

⁴⁴ Temkin and Krahé (n 6) at 165

⁴⁵ PR Ferguson, ‘The criminal jury in England and Scotland: the confidentiality principle and the investigation of impropriety’ (2006) 10(3) *International Journal of Evidence and Proof* 180 at 202-203

⁴⁶ See earlier at 1.3

⁴⁷ PW English and BD Sales, ‘A Ceiling or Consistency Effect for the Comprehension of Jury Instructions’ (1997) 3(2-3) *Psychology, Public Policy, and Law* 381; KA Carlson and JE Russo, ‘Biased interpretation of evidence by mock jurors’ (2001) 7(2) *Journal of Experimental Psychology: Applied* 91

However, there may be scope for extended judicial direction, including more specific instructions targeting ‘rape myths’ relevant to the particular case. Recognition of the pervasiveness of common rape stereotyping means judges in England are now permitted to include, in their summing up to the jury, a warning about approaching the evidence with any pre-formed assumptions. Such instructions may pertain to, for example, avoiding judgments based on stereotypes, avoiding assumptions as to late reporting or where there is an absence of force or threat of force.⁴⁸ The new Crown Court Bench Book,⁴⁹ which sets out a series of illustrative directions that judges can use as templates, provides ‘unequivocal and welcome recognition of the malign impact that stereotypes and myths can have in this area of the law’.⁵⁰ Indeed, it seemed at one point that something similar was on the Scottish political agenda, following the 2011 Scottish National Party Manifesto commitment to introduce judicial directions in sexual offence cases around delayed reporting and a lack of physical resistance.⁵¹ However, to date this strategy has yet to progress beyond that initial statement of intent.⁵²

It would seem that, if a move towards judicial instruction were to gather momentum, then there is a need to be attentive to lessons from south of the border. The English examples are not without their problems; and further consideration does not lend itself to a recommendation of the wholesale transplantation of such specimen directions. A significant criticism leveled against the Crown Court Bench Book illustrations is one of ‘comprehensibility’.⁵³ The complicated syntax, coupled with the use of vocabulary likely to be outwith that of the average juror, may render the directions incomprehensible to the average juror. It is probable that in the absence of clear and understandable instruction concerning rape myths, jurors will default to their existing assumptions.⁵⁴ The implication for Scotland is that judicial directions must be carefully drafted to ensure they are clear and simple and minimise the risk of ambiguity.⁵⁵

⁴⁸ Judicial Studies Board (JSB), *Crown Court Bench Book – Directing the Jury* (2010) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf> Accessed 30th July 2013 at ch.17

⁴⁹ *Ibid*

⁵⁰ J Temkin, ‘“And Always Keep A-Hold of Nurse, For Fear of Finding Something Worse”: Challenging Rape Myths in the Courtroom’ (2010) 13(4) *New Crim L Rev* 710 at 720-721

⁵¹ Scottish National Party (SNP), *Manifesto 2011* <http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf> accessed 30 July 2013 at 19

⁵² Despite the fact that major pieces of criminal justice legislation have been passed during this administration.

⁵³ Temkin (n 50) at 721-724. This criticism sits alongside the research which shows that jurors have difficulty understanding judicial instruction – see earlier at 2.1(b)

⁵⁴ *Ibid* at 723

⁵⁵ *Ibid* at 728 for an example of how a direction upon late reporting might be redrafted to be more comprehensible

However, even if ‘comprehensibility’ issues might be tackled in Scotland through the introduction of more juror friendly judicial instructions, this does not solve the deeper psychological complications. It has been argued that:

There is the risk of *assimilation* – that the judge’s instructions will be distorted by jurors to conform to their own existing attitudes. It is possible that those who adhere strongly to rape myths, who are most in need of being educated, will see their stereotypes reinforced rather than questioned by the direction.⁵⁶

An illustrative example in England for example, intended to warn against prejudicial judgments surrounding a complainant’s demeanor, states ‘[t]hey may display visible signs of having experienced a trauma or they may not’.⁵⁷ The ‘myth’ that a genuine complainant will necessarily exhibit visible signs of trauma is therefore highlighted at the beginning of the sentence, but only countered by the four words ‘or they may not’ at the end of the sentence.⁵⁸ The formulation of this direction may, contrary to intention, ensure that the false belief it highlights becomes more rather than less influential, and facilitate *assimilation*.⁵⁹ This risk of a counteractive effect is exacerbated where the judge is perceived as a highly credible source, which may actually increase acceptance of a false belief.⁶⁰

A further mock jury study by Ellison and Munro provides insight into the potential efficacy of judicial instruction.⁶¹ The study sought to look at the impact of jury education designed to counter myths relating to emotional demeanor, late complaints and failure to resist the assailant. In this study the number of mock jurors who reported that it would have made a difference to their decision if the complainant had reported the alleged assault to the police sooner, was reduced from 58% of jurors in a non-educative condition to 23% where the jurors had received judicial instruction.⁶² Similarly, 60% of mock jurors in the non-educative condition said had the compliant appeared more visibly distressed during her testimony, it would have influenced their decision, compared to 24% who received judicial instruction.⁶³

⁵⁶ *Ibid* at 723

⁵⁷ Quoted in *Ibid* at 726

⁵⁸ *Ibid* at 727

⁵⁹ *Ibid*

⁶⁰ *Ibid* at 726

⁶¹ L Ellison and VE Munro, ‘Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials’ (2009) 49(3) *BJ Crim* 363

⁶² *Ibid* at 371

⁶³ *Ibid* at 369

However, in the study adherence to the myth that rape victims will resist an attack, and incur injury in the process, was much more resolute, and judicial direction was ineffectual against this variable.⁶⁴ 88% of the mock jurors who had received no educative guidance reported that if the complainant had exhibited signs of physical injury after the alleged rape it would have made a difference to their decision, as compared to 80% who had received judicial instruction.⁶⁵

There is also an issue of the relationship between potential efficacy of judicial instructions and the timing of delivery. There is some consensus that the early presentation of educational guidance in a trial is more conducive to mediating preconceptions amongst jurors, which is consistent with story-construction decision-making techniques generally accepted as employed by jurors.⁶⁶ Judicial instructions delivered at the end may come too late to impact upon juror assessments of witness credibility. One study suggests that directions given later in proceedings, by which point jurors' views have likely cemented, have little or no effect on the verdicts delivered.⁶⁷

In the Ellison and Munro study mentioned above, whilst positive outcomes for judicial instruction in regard to two variables of delayed reporting and calm demeanor, an acknowledged limitation was, given the mock trials lasted 75 minutes, 'the impossibility in this mock trial context of replicating the parallel relevant stages in a "real" criminal trial that may last for many days or weeks'.⁶⁸ Indeed, in Scotland the average length of a given High Court trial is five days,⁶⁹ with this protraction providing increased time for jurors' views to have hardened.

Judicial instructions are customarily issued at the close of a trial and in the absence of any information to the contrary, it is reasonable to think that an extension to include directions to target rape myths in Scotland would be so. Yet, relying solely on a judicial direction to 'encapsulate the counterintuitive information sought to be communicated to [the jury] ... may be too little, too late'.⁷⁰ Indeed, this may be increasingly probable given that, at the

⁶⁴ *Ibid* at 372

⁶⁵ *Ibid* at 373

⁶⁶ *Ibid* at 377; E Borgida and N Brekke, 'Expert psychological testimony in rape trials: A social-cognitive analysis' (1988) 55 *J Personality and Soc Psych* 372

⁶⁷ JD Lieberman and J Arndt, 'Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence' (2000) 6(3) *Psychology, Public Policy, and Law* 677

⁶⁸ Ellison and Munro (n 61) at 377

⁶⁹ Scottish Government (n 9) at para 8.3

⁷⁰ I Freckelton, 'The Syndrome Evidence Phenomenon: Time to Move On?' in R Roesch, RR Corrado and R Dempster (eds), *Psychology in the Courts: International Advances in Knowledge* (2001) 155 at 176

close of the trial, the judge will be primarily concerned with directing the jury upon the law and explaining the relevancy of the evidence to the legal ingredients of the charge against the accused, so it may be unlikely that much time will be dedicated to ‘rape myths’.⁷¹ Indeed, in the Ellison and Munro study, modelled upon the English process, the judge’s summing up was brief, allowing the direction upon myths to assume greater prominence than would likely be achieved in a real trial.⁷²

3.3(b) Expert Evidence

A further potential strategy for educating the jury is the use of expert testimony. The purpose of general expert testimony⁷³ is to inform jurors of certain phenomena of which they may not otherwise be alert to.⁷⁴ As Freckelton describes, ‘[i]ts aim is to be “mythdispelling” - educative, directed toward enhancing the understanding of the tribunal of fact and toward removing from the evaluative process a source of error’.⁷⁵ Thus, the provision of social science data is intended to contextualise the post-assault behavior of a complainer which jurors may otherwise perceive as counterintuitive, thus acting as a counterweight to standard discrediting strategies employed by defence counsel.⁷⁶

General expert evidence, whilst the least controversial species of expert evidence,⁷⁷ is not without debate. Previous research has indicated that it may only exert effect upon jurors when delivered early in the proceedings, and also significantly, that expert evidence is ineffectual where not case-specific.⁷⁸ This prompted concern that generic expert testimony premised upon group data would be unlikely to be utilised by jurors unless explicitly connected to the facts of the case at issue.⁷⁹ Yet case-specific evidence may risk the usurpation of the jury’s function, may be accorded unwarranted epistemic authority and have inappropriate ‘spillover effects’ prompting ‘jurors to negatively evaluate evidence supporting the defendant’s version of events’.⁸⁰

⁷¹ Temkin (n 50) at 732

⁷² *Ibid* at 731

⁷³ As distinct from other models of expert evidence that have been deployed in rape cases in other jurisdictions to the admission of syndrome and profile evidence in criminal proceedings – see L Ellison, ‘Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases’ (2005) 9(4) *International Journal of Evidence and Proof* 239

⁷⁴ *Ibid* at 256-257

⁷⁵ I Freckelton, ‘Counterintuitive Evidence’ (1997) 4 *Journal of Law and Medicine* 303.

⁷⁶ Ellison (n 73) at 257-259

⁷⁷ For discussion see *ibid* at 251-260; Ellison and Munro (n 61) at 364-366

⁷⁸ Borgida and Brekke (n 66) at 376

⁷⁹ N Vidmar and RA Schuller, ‘Juries and Expert Evidence: Social Framework Evidence’ (1989) 52 *LCP* 133

⁸⁰ *Ibid* at 142; for discussion see T Ward, ‘Usurping the role of the jury? Expert evidence and witness credibility in English criminal trials’ (2009) 13(2) *International Journal of Evidence and Proof* 83

A further study found that the effect of the expert testimony addressing various rape myths was reversed on cross-examination.⁸¹ That is, mock jurors who heard only the direct examination of the expert were less likely to believe that the sexual intercourse was consensual and were more likely to vote for a guilty verdict. However, this increase in guilty votes was not seen in cases where the expert was exposed to cross-examination by the defence. This finding has been presented as a potential weakness to the efficacy of general expert testimony,⁸² but has simultaneously been used to validate the argument that expert testimony is not unduly prejudicial to the defendant, as it can be effectively countered through cross-examination.⁸³

In contrast to initial research Ellison and Munro recently found non-case specific or ‘generic’ expert testimony to have some influence upon mock juror decision-making in the context of a rape trial. This ‘generic’ approach is to be favoured to the extent it may help jurors not to draw inappropriate inferences, yet the study found no evidence that the expert testimony invaded the domain of the jury by testifying or appearing to testify indirectly for the individual complainant’s veracity.⁸⁴

Ellison and Munro found that the number of mock jurors who reported that their decision would have been affected if the complainant had appeared more visibly distressed during her testimony, was diminished from 60% of jurors in the non-education condition to 35% amongst those exposed to expert testimony.⁸⁵ Similarly, the number of mock jurors who stated affirmatively that it would have made a difference to their deliberations if the complainant had reported the alleged assault to the police sooner, declined from 58% to 28% with the general expert testimony.⁸⁶

However, in line with findings upon judicial instruction noted earlier, the use of expert evidence against the third variable examined paints a much less optimistic picture. The number of mock jurors who reported that it would have influenced their decision if complainant had exhibited signs of physical injury after the alleged sexual assault, was

⁸¹ N Spanos, S Dubreuil and M Gwynn, ‘The Effects of Expert Testimony Concerning Rape on the Verdicts and Beliefs of Mock Jurors’ (1991) 11 *Imagination, Cognition and Personality* 37

⁸² Temkin and Krahé (n 6) at 166

⁸³ KA Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault* (Violence Against Women Online Resources 2005)

<<http://www.mincava.umn.edu/documents/commissioned/svandexpertwitnesses/svandexpertwitnesses.html>> accessed 30th July 2012

⁸⁴ Finch and Munro (n 61) at 379

⁸⁵ *Ibid* at 369

⁸⁶ *Ibid* at 371

88% where the jurors who had received no educative guidance, as compared to 92% who were exposed to expert testimony.⁸⁷

In Scotland, s.5 of the Vulnerable Witnesses (Scotland) Act 2004 ('VW(S)A 2004'), inserting a new s.275C into the Criminal Procedure (Scotland) Act 1995 ('CP(S)A 1995'), was enacted to clarify the admissibility of expert psychological and psychiatric evidence on the impact of sexual victimisation.⁸⁸ S.275C states:

Expert psychological or psychiatric evidence relating to any subsequent behaviour or statement of the complainer is admissible for the purpose of rebutting any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn from the behaviour or statement.

It is important to understand the context in which this provision arose. The provision was intended to supplant the decision in *HM Advocate v Grimmond*,⁸⁹ which had cast doubt on the admissibility of expert evidence to explain the gradual disclosure of abuse by a child complainer. It has been suggested that in many child abuse and sexual abuse cases in the High Court, it is now routine for the jury to hear evidence from a psychologist in order to contextualise any such delay.⁹⁰ However, the current prosecutorial use of s.275C in rape trials where the complainer is an adult female is unclear.

In relation to s.275C, the COPFS recommended 'evidence should be given about reactions demonstrated by samples of the population who have been sexually abused, based on research findings, but not about the reactions of the individual complainer'.⁹¹ The expectation is evidence may relate to 'normal' human behavior, albeit precipitated by 'abnormal' circumstances, such as sexual victimisation.⁹² It has been suggested that the expert need not have examined the complainer, but could base their evidence on academic literature or experimental data about how victims in general behave provided that this is 'relating to' the complainer's behavior.⁹³

Whilst this may bear the hallmarks of 'generic' or non-case specific evidence, the provision is intended only to *rebut evidence already led* which might prompt an

⁸⁷ *Ibid* at 373

⁸⁸ See L Sharp and ML Ross, *The Vulnerable Witnesses (Scotland) Act 2004* (2008) at 55-56

⁸⁹ 2001 SCCR 708

⁹⁰ Author Unknown, 'Psychiatric evidence in the criminal courts' 2009 *SCL* 550

⁹¹ COPFS (n 35) at para 8.78

⁹² L Gillespie, 'Expert Evidence and Credibility' 2005 *SLT (News)* 53 at 53

⁹³ *Ibid* at 55

uninformed adverse inference amongst jurors. The difficulty is that the prosecution must predict what adverse inferences the defence may try to invoke in order to be able to respond, and this could make it likely that the prosecution will obtain a pre-trial psychological or psychiatric report.⁹⁴ This is problematic because a complainer has no control over whether their records are accessed by the prosecution or the subsequent wider circulation of any records.⁹⁵ A complainer can neither require the prosecution to oppose defence application for disclosure, nor influence the intensity of any opposition. Accordingly, this process is viewed as a serious invasion of the complainer's privacy.⁹⁶ Furthermore, 'the use of expert evidence is fraught with difficulties for complainers with much scope to be counter productive', given a report may be likely to end up as defence cannon fodder when seeking to demolish the reliability and credibility of the complainer.⁹⁷

The prosecutorial use of general expert testimony seeks to 'level the evidentiary playing field',⁹⁸ however a further concern voiced about the use of expert evidence is the risk of degeneration into a 'battle of experts'.⁹⁹ Yet, whilst this concern may be unlikely to transpire in Scotland given the inference that s.275C is for exclusive use by the prosecution to rebut any adverse evidence,¹⁰⁰ with no parallel provision made for the defence to adduce expert evidence in rebuttal, this simultaneously could cast doubt over the very fairness of such a provision.¹⁰¹

3.3(c) The Limits of Education

The preceding paragraphs describe some of the complex limitations to educative measures as a means to disabuse jurors of attitudinal biases.

There is some disagreement over the ability of educational guidance in redressing attitudinal biases, thus neutralising the effect of what jurors may perceive as a counterintuitive response in the credibility conflict.¹⁰² Simultaneously, the tendency has been to view expert evidence and judicial instruction as mutually exclusive alternatives;

⁹⁴ F Raitt, 'Independent legal representation for complainers in sexual offence trials: research report for Rape Crisis Scotland' (2010) <<http://www.rapecrisisscotland.org.uk/workspace/publications/IndLegalRepReport-2010.pdf>> accessed 29 July 2013 at para 7.24

⁹⁵ *Ibid* at para 7.24

⁹⁶ *Ibid*

⁹⁷ *Ibid* at para 7.25

⁹⁸ Ellison (n 73) at 257

⁹⁹ Temkin and Krahe (n 6) at 165

¹⁰⁰ Gillespie (n 92) at 54

¹⁰¹ For criticism of the provision as 'one sided' see *ibid*

¹⁰² In defence see Ellison and Munro (n 61) at 379; for more sceptical appraisals see Temkin and Krahe (n 6) at 165-167 and Finn, McDonald and Tinsley (n 11) at 240

yet there is an emerging hypothesis that such educational guidance may be likely to exert the greatest impact when both are deployed in conjunction.¹⁰³

On the basis of the Ellison and Munro study the effect of educational guidance has been regarded as promising in relation to minimising negative inferences as to credibility across two variables, with fewer educated jurors considering the timing of the complainant's report and emotional demeanour at trial to be significant factors.¹⁰⁴ Yet given the study created an environment that was more conducive than a real trial to jurors engaging with, for example judicial instruction, the results have equally been viewed as disappointing.¹⁰⁵ Indeed, there are those who contend that there is insufficient evidence to support that judicial instruction in sexual offences cases would be helpful or effective.¹⁰⁶ Furthermore, positive results on the issue of non-resistance have not been yielded. Despite their educated condition, mock jurors continued to find it difficult to believe the complainant had not 'defended herself', sustained external or internal injuries or traumas, and remained 'baffled' by the lack of corroborative medical evidence.¹⁰⁷ This inability of educative guidance gives rise to two possibilities. That, either there were inadequacies in the scope or wording of the study guidance, which if remedied might exert a more positive impact, or that:

It is possible that expectations of force, injury and resistance are just so deeply engrained within the popular imagination that attempts to disavow jurors of them through education within the rape trial are likely to meet limited success.¹⁰⁸

Yet, irrespective of the debate over the efficacy of educational guidance in correcting misinformation, a core issue remains that attitudes about how a victim of 'real rape' would behave form only one side of the distorted prism of 'rape myths' through which jurors may view the evidence. It may be that the introduction of educative guidance in rape trials represents a 'pragmatic, defensible and efficient means of redressing at least *some* of the unfounded assumptions and attitudinal biases that prevent too many victims of sexual assault from accessing justice'.¹⁰⁹ Yet, this leaves open the question of how to address the remaining angles of prejudice which may result in jurors disqualifying complainants. Myths

¹⁰³ Ellison and Munro (n 61) at 377-378; P Lewis, 'Expert evidence of delay in complaint in childhood sexual abuse prosecutions' (2006) 10(3) *International Journal of Evidence and Proof* 157 at 178-179

¹⁰⁴ Ellison and Munro (n 61) at 374

¹⁰⁵ Temkin (n 50) at 731

¹⁰⁶ See eg. E McDonald and Y Tinsley, 'Evidence Issues' in McDonald and Tinsley (n 11) 279 at 372

¹⁰⁷ Ellison and Munro (n 61) at 373

¹⁰⁸ *Ibid* at 374

¹⁰⁹ *Ibid* at 379. Emphasis added.

surrounding ‘women cry rape’, consent and victim precipitation are deeply problematic yet unlikely to be countered through such means, particularly where the antecedents of these attitudes are moralistic and gendered assumptions.¹¹⁰

3.4 Other Measures

There are other strategies that might be explored. For example, out of the repeated failures of rape shield provisions comes a call for the introduction of independent legal representation for complainers in Scotland,¹¹¹ which could aid in limiting the extent to which the jury have access to prejudicial information. Indeed, the tenability of such an innovation is bolstered by the fact that such an initiative has been accommodated within other Anglo-American common law jurisdictions, such as Ireland, which are adherent to the adversarial tradition.¹¹²

Similarly, the continuation of the ‘unreasoned verdict’ which prevails in both the Scottish and English jurisdictions remains a continued source of debate and criticism generally.¹¹³ Introducing a requirement that juries give reasons in a bid to improve the quality of evidence processing and decision-making in the context of sexual offences has been canvassed, although further research is needed to determine the extent to which this could be beneficial.¹¹⁴ Equally, in Scotland it has been suggested that the presence of a legally qualified assessor in the deliberation room might help prevent jury impropriety.¹¹⁵ Thus:

[t]he assessor would not be permitted to vote on the verdict, nor to give an opinion on the evidence, but would try to ensure that the jury's deliberations focused on consideration of the evidence, and that there was minimum discussion of irrelevant matters or biased opinions.¹¹⁶

However, it is submitted that the need to introduce such measures to try to counteract the adverse impact of social attitudes on jury decision-making in rape trials indicates, as with

¹¹⁰ Temkin and Krahé (n 6) at 166; PN Rumney and RA Fenton, ‘Intoxicated Consent in Rape: *Bree* and Juror Decision-Making’ (2008) 71(2) *MLR* 279 at 290

¹¹¹ For this argument see F Raitt, ‘Independent Legal Representation’ in C McGlynn and VE Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2011) 267; F Raitt, ‘Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings’ [2009] *CLR* 729

¹¹² *Ibid.* For further recognition that this warrants consideration in the Scottish context see P Duff, ‘The Scottish ‘rape shield’: as good as it gets?’ (2011) 15(2) *Edin LR* 218 at 241-242

¹¹³ See Ferguson (n 45); B Erastus-Obilo, *Reason Curve, Jury Competence, and the English Criminal Justice System: The Case for a 21st Century Approach* (2009); Jackson (n 1)

¹¹⁴ Temkin and Krahé (n 6) at 188; for empirical support that this option could reduce the impact of stereotypes see B Krahé, J Temkin and S Bieneck, ‘Schema-driven information processing in judgements about rape’ (2007) 21(5) *Applied Cognitive Psychology* 601

¹¹⁵ Ferguson (n 45) at 205

¹¹⁶ *Ibid*

the inadequacies of the deliberation process and limited scope for educating jurors to achieve this, the need to re-consider the role of the jury itself in these cases. The problem of prejudicial decision-making by jurors in rape trials transcends jurisdictional boundaries and distinct features of a jurisdiction's jury. Accordingly, it is apt to consider whether the peer criminal jury, in its broadest sense, is an appropriate decision-making forum in rape trials at all. Indeed, the jury has come to be viewed as a uniquely challenging aspect of the legal response to rape, particularly because of the limited scope for countering juror attitudes.¹¹⁷

3.5 The Jury on Trial

'Community input' through the institution of jury in a rape trial may allow the pollution of decision-making to the extent that principles of fairness and equity are compromised.¹¹⁸ In particular, this thesis has demonstrated that jurors may compromise their impartial position by infusing rape mythology with their assessments of a rape complaint, to the extent that an acquittal may be based upon grounds other than the accused's factual innocence. To that extent, the jury can undermine the authority of the law, and nullify the criminal law's ostensible prohibition of all non-consensual sexual intercourse.

This 'nullification' is increasingly difficult to reconcile with the baseline responsibility of the justice system to ensure the objective and effective implementation of the law. The impact of the verdict upon the complainer's life can be profound; and consideration must be given to the effect of this form of jury 'nullification' upon the complainer. In situations where the evidence does objectively point towards the guilt of the accused, and the jury still does not convict, the complainer's status is denigrated.¹¹⁹ This is irrespective of conscious disaffection or any intent by the jury to express such denigration, as the effect remains the same as the jury is refusing to condemn the accused's conduct towards the complainer.¹²⁰

Further, whilst a jury's failure to deliver an impartial verdict in an individual case can mean a complainer is re-victimised at the hands of justice system, the impact of that individual verdict transcends the immediate confines of the courtroom to become part of a

¹¹⁷ Finn, McDonald and Tinsley (n 11) at 222

¹¹⁸ *Ibid* at 250; Temkin and Krahe (n 6) at 69

¹¹⁹ Jackson (n 1) at 509

¹²⁰ *Ibid*

more encompassing ‘cycle of blame’ or ‘vicious cycle’.¹²¹ This ‘cycle of blame’ suggests that jurors’ decisions and verdicts are not only influenced by stereotypic beliefs about rape, but that the same rape myths which restrict definitions and limit convictions that have contributed to that verdict in the first place, are in turn strengthened and reinforced by acquittals. Thus, ‘what comes from a jury in a rape case is more than just a conviction or acquittal: the jury decision also contributes to a definition of what constitutes real rape’.¹²² For example, if cases deviating from the ‘real rape’ stereotype are more likely to culminate in acquittal, this verdict bolsters the widely held view that cases less close to the stereotype are not really rape.¹²³

Not only is this troubling in terms of the impact upon individual cases, but if rape myths are self-perpetuating and fulfilling through the institution of jury, this will continue to frustrate legislative action sought to make the law more inclusive of the realities of rape. Indeed, jury attitudes can mean that patterns within criminal justice decision-making, become problematically self-justifying in terms of prosecutorial choices. As such, ‘this cyclical process of prediction and attrition thus effectively reproduces the systematic impunity of certain categories of sexual offender and/or offending’.¹²⁴

An emergent body of commentators internationally view the jury as an inappropriate decision-maker in rape trials.¹²⁵ This conviction arises not out of antipathy to the jury as an institution, but because of the unreliability of the jury within the particular context of rape and sexual offences.¹²⁶ As one commentator describes, abolishing the jury in rape trials is necessary as a ‘direct bypass of popular prejudice’.¹²⁷

Thus, an emerging proposal is that the jury should be replaced by a judge only decision-making process in rape trials.¹²⁸ The potential of this option in Scotland is examined in the following chapter.

¹²¹ HC Sinclair and LE Bourne, ‘Cycle of blame or just world: Effects of legal verdicts on gender patterns in rape-myth acceptance and victim empathy’ (1998) 22(4) *Psychology of Women Quarterly* 575; L Kelly and VE Munro, ‘A vicious cycle? Attrition and conviction patterns in reported rape cases in England and Wales’ in Horvath and Brown (n 27); MAH Horvath and JM Brown, ‘Between a rock and a hard place’ (2010) 23(7) *The Psychologist* 556

¹²² Sinclair and Bourne (n 121) at 577

¹²³ Temkin and Krahé (n 6) at 70-71; Horvath and Brown (n 121) at 558

¹²⁴ Kelly and Munro (n 121) at 295

¹²⁵ Dripps (n 41), Finn and McDonald and Tinsley (n 11); for more cautious support see Krahé and Temkin (n 27) and Temkin and Krahé (n 6)

¹²⁶ See Finn, McDonald and Tinsley (n 11)

¹²⁷ Dripps (n 41) at 977

¹²⁸ Dripps (n 41), Finn and McDonald and Tinsley (n 11); Krahé and Temkin (n 27); Temkin and Krahé (n 6)

4. Re-considering the Role of Juries in Rape Trials in Scotland

This chapter puts forward the case for substituting the jury with an alternative judge based decision-making process in Scotland. It argues that this outcome would be in line with the institutional responsibility of the criminal justice system to ensure the objective delivery of the law in practice, and be more likely to ensure that the cost to the complainer of pursuing justice is not re-victimisation.

4.1 Conceptualising an Appropriate Decision-Maker

The criminal justice system has a baseline institutional responsibility to have an effective law governing rape and ensure its delivery, yet the evidence strongly indicates that the jury is an unreliable, and therefore inappropriate, decision-maker in a rape trial. In considering whether a judge based system should replace the jury, it is necessary to assess the extent to which this would be an appropriate alternative. As a potential reform it must normatively be measured against aims which concentrate on the responsibility of the justice system to respond effectively to rape.

There is a growing recognition that improving the conviction rate is, of itself, not a valid objective of reform or sole signifier of an effective criminal justice response.¹ Rather an increase in the conviction rate of the guilty should stem from the more objective application of the law in practice, thus pursuing a reduction in biased disqualification of complainers and the improved treatment of complainers.² It is submitted that the relevant question is the extent to which the proposed reformed system of judicial decision-making may be more conducive to fulfilling these aims.

4.2 Preliminary Considerations

Prior to further discussion of the appropriateness of a judge based decision-making process in rape trials, it is prudent to anticipate the conceptual and practical difficulties that might arise in response to such a proposal. It is necessary to conciliate potential objections in order to present a judicial based system as a viable possibility.

¹ See earlier at 1.1(d)

² See eg. W Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Laws' (2011) 19(1) *Fem LS* 27

4.2(a) 'Right' to a Jury Trial

A preliminary issue is the procedural legitimacy of substituting the jury with a judge based decision-making process.

In contrast to some other jurisdictions there is no right to a jury trial in Scotland.³ The jury's attendance is a product of prosecutorial choice of solemn procedure, rather than the choice of the accused. The only limitation upon prosecutorial choice of procedure is often the limits of the jurisdiction and sentencing powers of a court. In Scotland, if a case may be heard under either solemn or summary procedure, the accused has no say in the matter. However, certain stipulated offences are excluded from prosecutorial discretion. In particular, rape is triable on indictment exclusively in the High Court under solemn jurisdiction.⁴

Given that solemn procedure dictates the use of a jury, this may then generate confusion leading some to conceptualise this statutory requirement within the language of a 'right'. Indeed, in Scotland, jury trials have been described as the 'unrestricted right of anyone charged under solemn procedure'.⁵ Yet, this conceptualisation of a 'right' is difficult, if not misconceived and misplaced. It is not a right in any conventional sense. It seems axiomatic that, for it to be a right, the corollary would be the right to waive trial by the jury, yet there exists no such option other than where the accused pleads guilty. Any outward appearance of an unrestricted right dissimulates no more than procedural convention.

Provision for the trial of rape cases by a judge, or panel of judges, sitting without a jury could be made by an Act of the Scottish Parliament. It would be competent for the Parliament to legislate to this effect, without engaging in any deep-rooted 'constitutional' debate. Similarly, as the Scottish Government has recently acknowledged, it is 'possible to have a fair trial in serious cases without consideration by a jury'.⁶ Perhaps, within justifying the procedural legitimacy, the most substantial challenge would be creating the appropriate boundaries;⁷ after that it is submitted that other procedural challenges are not logistically unsurmountable.⁸

³ A Hardie, 'The Lockerbie trial' 1998 *SLT (News)* 9

⁴ CP(S)A 1995 s.3(6)

⁵ PW Ferguson, 'The Modern Criminal Jury' 2008 *SLT (News)* 229 at 236

⁶ Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) at 31

⁷ The decision would be with the legislature as to whether the provision should adopt a blanket policy, whereby all rape and serious sexual offences heard on indictment would be heard by judges alone or whether only in cases where, for example, cause could be shown by the prosecution or, in ensuring equality of arms, the defence. Space does not permit full discussion of where the exact parameters of legislations might be set. The difficulty would be where to set

A jury is not necessary to secure a fair trial. Coupled with this, is the recognition that the institution of the jury is as much about the public interest as the interest of the accused. The Scottish Government has alluded to ‘the benefits derived for society as a whole in securing a fair trial by peers’.⁹ But one must readily question within the context of rape trials, the extent to which society is deriving benefit or a ‘fair trial’ from the use of the jury. Unlike the accused, the complainer has no rights under the process.¹⁰ Yet in an age of growing opposition to this orthodoxy, might it be acknowledged that, jurors’ ‘acceptance of rape myths prevents victim’s from receiving a “fair trial” by impartial decision makers’¹¹ and this does not benefit society.

4.2(b) Democratic Legitimacy of the Conviction and Protection of Accused

The retention of the jury might be justified on the view of it as an institution that legitimises the criminal justice system. As has been described, the support given to the notion of trial by jury in Scotland has ‘nothing to do with the effectiveness of jury trial as a means of ascertaining the truth of the prosecution’s allegations and everything to do with the appearance of democratic legitimacy of the conviction’.¹²

One response to this might be to suggest that it is certainly a good thing that support for the jury does not rest on effectiveness in rape trials, as this would be seriously misguided. Awareness of the fact that less than 1% of individuals proceeded against in Scottish courts each year have their cases determined by a jury, is presumably why the argument is restricted to the *appearance* of democratic legitimacy. The argument prevaricates, of course, on the question of the ‘democratic legitimacy’ of the convictions of those convicted out of the remaining 99%.

Yet, where a serious crime is indicted, the use of a jury trial is deeply ingrained within democratic ethos. Accordingly, whilst it has been argued above that the retention of the jury in rape trials cannot be justified on the basis of an accused’s *right*, possible resistance

dividing lines. One possible solution would be to create a rule whereby all charges brought under the SO(S)A 2009 would be tried by judge alone.

⁸ Where non-sexual trials are also included on the indictment it is suggested that this could be accommodated with the existing separation of trials procedure, whereby the defence could be permitted to apply for a separation to allow non-sexual charges on the indictment to be tried before a jury.

⁹ Scottish Government (n 6) at 5

¹⁰ M Mackarel, F Raitt and S Moody, *Briefing Paper on Legal Issues and Witness Protection in Criminal Cases* (Scottish Executive Central Research Unit 2001)

¹¹ M Torrey, ‘When will we be believed-rape myths and the idea of a fair trial in rape prosecutions’ (1990) 24 *UC Davis L Rev* 1013 at 1016

¹² Ferguson (n 5) at 235

takes on a different look when jury trial is framed as a *protection* for the accused.¹³ If a judge was permitted to make a determination, ‘the fairness of such proceedings might be questioned, having regard to the consequences for the accused, of being convicted and sentenced to life imprisonment on the basis of one person’s assessment of the evidence against him or her’.¹⁴

The obvious way to mitigate the concern of one judge deciding the fate of an individual in a rape trial, is to use a panel of judges.¹⁵ However, others might regard this solution as avoiding the real issue, the argument being that ‘serious crimes merit lengthy jail sentences; decisions as to whether guilt is established on these charges should be made by one’s fellow citizens and not by a judge or a panel of judges’.¹⁶ It flows that, whilst under summary jurisdiction determinations of guilt are made by the Justice of the Peace or Sheriff alone, in a High Court rape trial, where the determination may condemn the accused to a lengthy prison sentence, then one judge or a panel should not make the determination.

However, even if the above argument is *prima facie* convincing, it is weakened to the extent it might be considered conceptually misplaced. Indeed:

[S]uch a distinction is artificial as there is no intrinsic difference in deciding a case where the punishment could be six months imprisonment and a case where the punishment is ten years imprisonment. The difference is solely the type of offence, with the concept of guilt staying the same.¹⁷

If judges are deemed competent to make determinations in less serious offences, then surely this extends to more ‘serious’ cases, as the concept of guilt is a constant. Accordingly there is nothing in principle that precludes a judicial determination of innocence or guilt in rape trials. Rather, the salient question is whether, as this chapter discusses, there are reasons that within this context a judge based decision-making system would be more appropriate.

Furthermore, where the argument is concerned with protecting the accused in a rape trial, then a judge based system may serve more legitimately this purpose, as a judge will give reasons for a decision, which will be made public and if those reasons are unsound in law,

¹³ Basically that, in Scotland, the accused is protected by the rule that no sentence in excess of twelve months imprisonment can be imposed without either an admission of guilt (by way of a plea) or a jury trial

¹⁴ Scottish Government (n 6) at 32

¹⁵ A panel of three would ensure that a majority verdict could be delivered - see Scottish Government (n 6) at 32

¹⁶ Ferguson (n 5) at 235

¹⁷ P Fitzpatrick, ‘The British Jury: An Argument for the Reconstruction of the Little Parliament’ [2010] 6 *Cambridge Student Law Review* 1 at 10

that verdict can be set aside upon appeal.¹⁸ This would have the advantage of injecting an element of realism in to criminal appeals which may have been a long time lacking.¹⁹ Indeed, internationally, courts have traditionally afforded utmost deference to jury verdicts.²⁰ Similarly the Scottish High Court is notoriously disinclined to grant appeals on the basis of an ‘unreasonable jury verdict’.²¹ Albeit that the appellate judiciary are constrained in intervening with jury verdicts as a lack of reasons makes any appeal court poorly equipped to review the basis for that verdict, the present extent of that reluctance has been stated to risk compromising the compliancy of Scotland’s current jury verdict system with Article 6 of the European Convention on Human Rights (‘ECHR’).²²

A judicial verdict in reasoned format would appear a ‘legitimate’ verdict, capable of being defended by logic and justification and realistically capable of being appealed, thus offering an accused greater protection. Further, objection can be brought to the themes of ‘protection’ and ‘legitimacy’ of jury verdicts through reference to a study, which explored the perceptions of two-hundred-and-seventy-seven real jurors from twenty-five juries immediately after they heard sexual assault trials.²³ Disconcertingly, some jurors were ‘confused, unclear, uncertain’ as to the verdict that they had just delivered, and in less than a quarter of the trials were all participating jurors even able to correctly state the verdict that had been delivered.²⁴ In contrast to the view of the jury as legitimising the justice system, the jury’s current operation, which essentially permits jurors to convict or acquit against the evidence tendered in a rape trial without reason, deprives the criminal justice system of its virtue.²⁵

4.2(c) Public Support for the Jury

The shared feature across the common law world, to which Scotland comprises no exception, appears to be the significance invested in trial by jury, and the confidence in the criminal justice system which the institution generates.²⁶ Of course, the public perception of the jury is incongruous with the very small actual proportion of cases determined in this manner.

¹⁸ J Law ‘Criminal Jury Trials’ 1967 *SLT (News)* 173 at 174

¹⁹ *Ibid*

²⁰ JD Jackson, ‘Making juries accountable’ (2002) 50(3) *Am J Comp Law* 477 at 488

²¹ See P Duff, ‘The compatibility of jury verdicts with article 6: *Taxquet v Belgium*’ (2011) 15(2) *Edin LR* 246 (CASE COMMENT) at 250

²² *Ibid*

²³ J Cashmore and L Trimboli, ‘Child sexual assault trials: a survey of juror perceptions’ (2006)

²⁴ *Ibid* at 12

²⁵ B Erastus-Obilo, *Reason Curve, Jury Competence, and the English Criminal Justice System: The Case for a 21st Century Approach* (2009) at 61

²⁶ P Duff, ‘The Scottish Criminal Jury: A Very Peculiar Institution’ (1999) 62 *LCP* 173 at 176

A recent comprehensive review of available material upon the community reaction to, and public attitudes toward, the institution of the criminal jury in the UK found attitudes clearly to be positive.²⁷ However, it was concluded that this may be attributable to an abstract attraction to the general notion of ‘community input’, rather than any concrete evidence as to the effectiveness of the jury as decision-maker.²⁸ Yet, as this thesis has argued, it is the very aspect of ‘community input’ that makes the jury unreliable in rape trials.

The viability of removing the jury in rape cases as a means of improving justice is, to some extent, dependent on the opposition with which the proposal would be met. However, there is a legitimate question as to the degree to which high public opinion of the jury should figure in a decision as to whether to remove the jury. As has been noted, albeit in a different context:

[P]ublic opinion itself - even if it can be discovered by reliable research methods - may be founded on incomplete information, misconceptions or the failure to consider certain arguments. To rely on public opinion as the benchmark of public confidence is therefore unwise.²⁹

A salient point is then that, whilst the jury may enjoy high public opinion, there is the countervailing consideration of the low public confidence in the legal response to rape and treatment of complainers.³⁰ Indeed, research indicates that 42% of the Scottish public believe that the legal system automatically takes an unsympathetic view towards rape victims.³¹

A suggestion to remove the jury in rape trials may initially seem liable to provoke public concern. It appears predictable that the public’s intuitive response would be to defend the continued use of the jury, albeit this might be on a relatively uninformed basis. This can be contrasted with the arguably more informed opinions of those directly involved in the reporting and prosecutorial stages of rape allegations in other jurisdictions, where there is increased support for ending the jury’s role in these cases.³² The real question would be,

²⁷ JV Roberts and M Hough, ‘Public Attitudes to the Criminal Jury: A Review of Recent Findings’ (2011) 50(3) *The Howard Journal of Criminal Justice* 247

²⁸ *Ibid* at 259

²⁹ A Ashworth, ‘Exploring the integrity principle in evidence and procedure’ in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 107 at 111

³⁰ See eg. F Raitt, ‘Independent legal representation for complainers in sexual offence trials: research report for Rape Crisis Scotland’ (2010) <<http://www.rapecrisisscotland.org.uk/workspace/publications/IndLegalRepReport-2010.pdf>> accessed 29 July 2013 at para 1.07

³¹ B Cameron and L Murphy, *Campaign Evaluation Report Rape Crisis Scotland “This is not an invitation to Rape Me”*: Research Report (2008) at 13

³² For example, in New Zealand two-thirds of the Crown Solicitors and 90% of police participants expressed the view that juries should not hear sexual violence cases, see E Mossman and others, *Responding to Sexual Violence: Environmental scan of New Zealand Agencies* (2009) at 116

whether, irrespective of the immediate outcry, the decision would prompt the loss of public confidence, or might this be countered by a greater public confidence in the legal response to rape.

4.3 A Judge Based Decision-Making Process

The question now to be addressed is whether trial by a judge based system would be more conducive to the objective administration of the law, thereby reducing the unwarranted disqualification and re-traumatisation of complainers and in turn improving conviction rates.

4.3(a) Reducing Disqualification

Firstly, an appropriate aim to assess a judge based decision-making process against, is whether this would deliver the law more effectively in practice and be more conducive to improving the legal ‘story’ of rape.³³

Dispute thus centers over the role of the jury as ‘fact finder’. The NZLC considered that:

[T]he basic issue in cases involving allegations of sexual offending is whether the defendant or the complainant should be believed. The jury is just as well equipped to determine that matter as a judge or an expert.³⁴

Yet, as this thesis has demonstrated this assertion underestimates the extent to which serious complaint can be had with the jury as fact finder in rape cases. Thus, a determinative question to be asked is whether the proposed alternative of a judge based process would be more empirically likely to reduce the re-victimisation of complainers through minimising the denial of instances of non-consensual sexual intercourse as rape.

In other jurisdictions there appears to be a general expectation that a judge based system, would improve conviction rates because experienced judges would be more likely to make a forensic and dispassionate analysis of the evidence, better positioned to draw appropriate inferences and less likely to be manipulated by defence counsel.³⁵

³³ Larcombe (n 2) at 35

³⁴ NZLC, *Juries in Criminal Trials Part One: A Discussion Paper* (NZLAC PP32, 1998) at para 196

³⁵ See Mossman and others (n 32) at 116; B Krahe and J Temkin, ‘Addressing the Attitude Problem in Rape Trials: Some Proposals and Methodological Considerations’ in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) 301 at 312; in qualitative interviews twenty-one out of twenty-four judges and barristers thought conviction rates would increase with judge only trials, although note that this did not correspond always to the view that the jury should be abolished - see J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) at 179 and ch. 6

However, the hypothesis that judge only trials would be successful in reducing the legal impact of rape stereotypes on the decision-making process has yet to be subjected to much in the way of empirical scrutiny.³⁶ The seminal research supporting the contention that juries are more reluctant to convict than judges in sexual assault cases is the USA study by Kalven and Zeisel.³⁷ The study found that in ‘simple’ rape cases (acquaintance rapes with no aggravating factors) the judges who heard these cases would have convicted as much as seven times more often than the jury.³⁸ In the absence of aggravating circumstances, or if the complainant and assailant were known to each other, the jury essentially refused to convict of rape charges, on the basis that involuntary intercourse under such circumstances did not attract the gravity of rape.³⁹ In the study, the judges also explained the judicial and juror disagreement through allusion to jury perceptions of the ‘contributory fault of the victim’.⁴⁰ Mirroring the apparent acquittal policy endorsed by jurors in acquaintance rape cases, in recent judicial interviews in England, judges cited examples of where judges would have convicted and the jury acquitted in rape trials, and accounted for this on basis that juries are reluctant to convict in cases of relationship rapes or previous intimate relationships.⁴¹

Admittedly, the Kalven and Zeisel study is now over forty-five years old, and suffers from the key methodological deficiency posed by the reliance on the judges’ perceptions of the reasons for their disagreement with the jury.⁴² Thus, the study can, at best ‘provide tentative support for the idea that judge-only trials might reduce the justice gap’.⁴³ There is a lack of more recent research into comparing judge and jury decision-making, including Scotland.⁴⁴ Although there are difficulties inherent to this type of research, a systematic analysis of jury and non-jury trials in rape cases has been viewed as desirable and valuable suggestions for how this research might be pursued have been put forward.⁴⁵ It might even be suggested that Scotland, as a relatively small jurisdiction with a small pool of judges permitted to preside over rape trials may provide a good selection for further research.

³⁶ See B Krahé and J Temkin, ‘Addressing the Attitude Problem in Rape Trials: Some Proposals and Methodological Considerations’ in MAH Horvath and JM Brown (eds), *Rape: Challenging Contemporary Thinking* (2009) 301

³⁷ H Kalven and H Zeisel, *The American Jury* (1966)

³⁸ *Ibid* at 253-254

³⁹ *Ibid* at 250

⁴⁰ *Ibid* at 249-54

⁴¹ J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) at 133

⁴² Krahé and Temkin (n 36) at 313

⁴³ Temkin and Krahé (n 41) at 180

⁴⁴ There is some limited research, which involved a judicial survey of Scottish judges into judicial/juror agreement. Unfortunately this survey only explored the extent to which Scottish judges agree with jury verdicts of guilty. Whilst this survey demonstrates a high degree of concurrence in relation to convictions, the survey’s ambit unfortunately did not extend to evaluating the extent to which Scottish judges agree with jury acquittals – see T Lundmark, ‘“Split verdicts” in Scotland: a judicial survey’ (2010) 14(2) *Edin LR* 225

⁴⁵ Krahé and Temkin (n 36) at 313-14

A difficulty with the proposition to substitute the jury with a judge based system, without robust empirical evidence to support that judges are less likely to deny instances of non-consensual sexual intercourse as rape, is the explicit elitism accompanying the idea. It might be a fallacy to assume that judges are not susceptible to the same invidious prejudices and preconceptions about rape that jurors are, and for some commentators this remains a source of hesitation in fully recommending this approach.⁴⁶ Equally, there is growing recognition that this risk may be countermanded by the role of professional experience and the scope for professional training.⁴⁷ There is existing evidence suggesting that judges who are made aware of the risk that their decisions could be influenced by implicit bias, possess the cognitive skills necessary to avoid that influence.⁴⁸

As discussed earlier, mental representations or ‘prototypes’ held by jurors, in this context the ‘real rape’ paradigm, can mean that jurors do not scrutinise evidence properly. However, a substantial empirical study of judicial decision-making has indicated that judges are less susceptible than other decision-makers’ to the effects of this ‘representativeness’ bias.⁴⁹ Furthermore, from a defence perspective it is thought, on matters of credibility, easier to persuade a jury to entertain doubt as to the defendant’s guilt.⁵⁰ There is evidence suggesting that legal professionals also benefit from their professional experience when judging credibility. A study comparing credibility ratings by court judges with those made by lay people found that, in contrast to lay people, court judges were not affected by the emotional expression displayed by the witness when judging credibility.⁵¹ Furthermore, their votes for a guilty verdict were not influenced by the emotions displayed by the witness.⁵² Thus, there is some current research indicating that experience and training can limit the effect of biases in judicial decision-making.⁵³ Whilst these paint a positive picture, the key point is that there is likely to be more scope and opportunity for judicial training within existing structures, than is ever likely for juror education and training.⁵⁴

⁴⁶ Krahé & Temkin (n 36) at 312

⁴⁷ J Finn, E McDonald and Y Tinsley, ‘Identifying and Qualifying the Decision-Maker: the Case for Specialisation’ in E McDonald and Y Tinsley (eds), *From Real Rape to Real Justice: Prosecuting Rape in New Zealand* (2011) 221 at 264-268; see also submission of S Wallerstein in ‘Making Good Law’ (BBC World Service, 10 March 2013) <<http://www.bbc.co.uk/programmes/p0162r3f>> accessed 30 July 2013

⁴⁸ C Guthrie and others, ‘Does Unconscious Racial Bias Affect Trial Judges?’ (2009) 84(3) *Notre Dame L Rev* 09-11

⁴⁹ C Guthrie, JJ Rachlinski and AJ Wistrich, ‘Inside the judicial mind’ (2000) 86(4) *Cornell L Rev* 777 at 816

⁵⁰ J Jackson and S Doran, ‘The case for jury waiver’ [1997] *Crim LR* 155 at 160; see also Temkin and Krahé (n 41) at ch. 6

⁵¹ E Wessel and others, ‘Credibility of the Emotional Witness: A Study of Rates by Court Judges’ (2006) 30(2) *Law and Human Behavior* 221

⁵² *Ibid*

⁵³ For a discursive summary see Finn, McDonald and Tinsley (n 47) at 241-243

⁵⁴ *Ibid* at 248; Temkin and Krahé (n 41) at 178

Furthermore, even though there may be limited empirical evidence to substantiate the hypothesis that trial by a judge or panel of judges alone would improve the quality of justice, the objectivity of a judicial decision may readily be thought increased by the fact that judges give reasons for their verdicts. The concerns raised in chapter 2 over juror incompetency in understanding or applying the relevant sexual offences law, adds to the case for the decision to be made by legally qualified person or persons.

Similarly, a reasoned judicial decision would promote transparency in a rape trial. A number of European Court of Human Rights ('ECtHR') decisions have referred to the desirability of tribunals of fact giving reasons for decisions,⁵⁵ although the fact that a jury does not give reasons for its decision is not of itself contrary to the ECHR.⁵⁶ Whilst this later position was ostensibly reaffirmed in the recent *Taxquet v Belgium* decision,⁵⁷ commentators have regarded the judgment as containing undercurrents which call into question the continued survival of unreasoned general verdict.⁵⁸ To this extent, it is suggested that a reasoned judicial verdict in a rape trial would be a more appropriate way of satisfying the requirement to give reasons under Article 6 of the ECHR, than expecting a jury to give reasons. Furthermore, the quality of a judicial statement would likely offer a more incisive and logical justification of the verdict to both the accused and the court.⁵⁹

A further way of seeing the position with rape trials is as representing a need for specialisation.⁶⁰ That rape and serious sexual offending poses a unique problem is recognised, and this acknowledgment has already prompted differential and specialised response at many stages of the criminal process. To this extent, an extension of specialisation to the judiciary is complementary, and to question the logic of continued lay participation as part of the legal response to rape, is apt. In England, although the jury makes the determination of guilt or innocence, judges who preside over rape cases are 'rape ticketed', which means they are obligated to attend the serious sexual assault seminars provided by the Judicial Studies Board.⁶¹ Although the Scottish judiciary is held in high esteem, they receive minimal training before they begin presiding over cases.

⁵⁵ See eg. *Murray v UK* 1996 22 EHRR 29

⁵⁶ See eg. *Saric v Denmark* 1992 DR 72

⁵⁷ (2012) 54 EHRR 26

⁵⁸ See Duff (n 21); P Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11(2) *Human Rights Law Review* 213

⁵⁹ See Fitzpatrick (n 17) and SC Thaman, 'Should Criminal Juries Give Reasons for Their Verdicts: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*' (2011) 86 *Chi-Kent L Rev* 613

⁶⁰ For this proposition in New Zealand see Finn, McDonald and Tinsley (n 47) at 258

⁶¹ Temkin and Krahé (n 41) at 191

Studies in other jurisdictions, such as Australia, have revealed some judicial reluctance to create a specialist body of judges, predicated on the argument that the law pertaining to sexual offences is not overly complex, and any judge should be competent, and considered to be competent, to hear sexual offences cases.⁶² It is entirely possible that similar opposition might arise in Scotland. However, such a 'view is open to challenge on the basis that sexual offending is different from other forms of offending and complainants have particular needs to be attended to'.⁶³

It is argued that, even though there is a lack of definitive empirical support, there is tentative support that judges alone may be less likely to limit unjust direct acquittals which disqualify complainers for their failure to conform to rape myth expectations. Most importantly, as Dripps argues in the USA, removing the jury eliminates popular opinion as a check on prosecutorial discretion.⁶⁴ A judge based system might also diminish attrition and reduce disqualification through 'upstream' decision-making by police and prosecutors as to which cases to progress.⁶⁵

4.3(b) Reducing Trauma

Secondly, an aim to assess a judge based decision-making process against, is the extent to which it might reduce re-victimisation through improving the treatment of individual complainers. This forms part of a growing re-conceptualisation of the complainer's peripheral position in the criminal justice process generally, and awareness of the need to redress the processes' subordination of the individual complainer's interests and needs.⁶⁶ This measure of effectiveness assumes increasing significance given little evidence that the position of complainers has improved, despite all the reforms that have been made towards this aim.

Thus, what is appropriate should be measured against the extent to which a reform will help shift the position of the complainer in a rape prosecution from 'harmful' to 'habitable', improve the accessibility of the system to all victims and protect the autonomy and dignity of the individual complainer, by realising their interests as a central rather than

⁶² Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) at para 3.102

⁶³ Finn, McDonald and Tinsley (n 47) at 267

⁶⁴ Dripps D, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault' (2008) 41 *Akron L Rev* 957 at 973

⁶⁵ See earlier at 2.1(a)

⁶⁶ See eg. JL Herman, 'Justice from the victim's perspective' (2005) 11(5) *Violence Against Women* 571; F Raitt (n 30)

marginal concern.⁶⁷ The pivotal question to be asked is whether the proposed alternative may be more empirically likely to minimise re-victimisation through the ‘courtroom rape’.

The NZLC considered that ‘a stronger case can be made for trial by judge alone in sexual cases by reference to the trauma which complainants can experience in giving evidence of an intimate and painful nature before a group of strangers’.⁶⁸ Whilst this is true, the difficulty with this line of reasoning, which conflates the complainant’s trauma in testifying with the jury’s physical presence, is that it too readily lends itself to a solution based in the exploration of alternative ways of giving evidence to alleviate the traumatic nature of the trial.⁶⁹ Where available, the use of special measures do provide the capacity to spare the indignity of giving evidence about personal and intimate matters in the physical presence of the jury, and the accused. Yet, as a solution, it is problematic for two reasons.

Firstly, an answer based on ‘special measures’ is illusory, as there is rarely any consideration given to the dynamics of the use of alternative ways.⁷⁰ It is problematic to the extent that a critical facet of any protective legislation is the approach taken to eligibility for special measures, and it can be unusual for a complainant to be granted special measures on the grounds of trauma alone.⁷¹ In Scotland, the ‘special measures’ available for vulnerable witnesses are not automatically available to rape complainants, and there is as yet no clear evidence their introduction has made a material difference to the ordeal of giving evidence in rape trials in Scotland.⁷² Whilst there is currently a bill to make special measures an explicit right for complainants in sexual offences cases in Scotland,⁷³ experiential comparison with other jurisdictions, where the right of rape complainant has been automatic, discloses a fragmented approach to the identification of adult vulnerable witnesses.⁷⁴ However, as discussed in chapter 2 jurors expect a complainant to be visibly upset, thus a further salient issue is whether these alternative ways of giving evidence could illegitimately affect juror’s *perceptions* of credibility.⁷⁵ If a complainant gives evidence through alternative measures then they may be less nervous and emotional than if giving live testimony in the courtroom in the traditional manner.⁷⁶ This

⁶⁷ Lacombe (n 2) at 39

⁶⁸ NZLC (n 34) at paras 197-198

⁶⁹ Indeed, this was proposed solution of NZLC - see *ibid*

⁷⁰ Finn, McDonald and Tinsley (n 47) at 251

⁷¹ In New Zealand see *ibid*

⁷² P Richards, S Morris and E Richards, *Turning up the Volume: The Vulnerable Witnesses (Scotland) Act 2004* (2008)

⁷³ Victim and Witnesses (Scotland) Bill 2013 s.6 (introduced 6th Feb 2013); Scottish Government, *Victim and Witnesses (Scotland) Bill: Policy Memorandum* (2013) at para 69

⁷⁴ See M Burton, R Evans and A Sanders, *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* (2006) at 34-5

⁷⁵ See E McDonald and Y Tinsley, ‘Evidence Issues’ in McDonald and Tinsley (n 47) 279 at 284

⁷⁶ *Ibid*

may rather perversely present the adult rape complainant who qualifies as a vulnerable witness with a seemingly no-win situation. Paradoxically, through utilising special measures they may risk compromising their own credibility, meaning it could be in the interests of the complainant to endure the more distressing environment of the courtroom. This is consistent with a prosecutorial perception that some juries will be less receptive to witnesses who give their evidence using special measures, and that witnesses who exhibit obvious signs of distress whilst giving evidence in front of the jury may be considered more credible.⁷⁷

The second reason that special measures provide only the illusion of an answer is that, ascribing the 'traumatic' nature of a sexual offence trial to the distress to the complainant by the disclosure of evidence within physical presence of the jury, as the NZLC did, is a rather narrow one-dimensional perception of the hostility of the adjudicative environment. It betrays a relatively superficial estimation of the role of the jury in the creation and exacerbation of the complainant's trauma. It is contended that, instead, the real issue is to extent to which role of the jury precipitates what is perceptibly the deeper nature of the systematic trauma experienced by complainants, through cross-examination and defence exploitation of rape myths.

Thus, in evaluating whether a judge or panel of judges would be an appropriate decision-maker, a more comprehensive and wider view is to focus on the dynamics of the trial. In New Zealand, it has been hypothesised that judge alone trials for serious sexual offending would result in a different type of cross-examination and a more active bench, both of which are factors that could influence the experience of complainants in cases of sexual offending, and reduce the likelihood of re-victimisation.⁷⁸

A judge based system could diminish the 'courtroom rape' because:

It also seems likely that in the absence of a jury, the tone and quality of rape trials would improve substantially as counsel, free from the need to convince juries by fair means or foul, would be less inclined to indulge in some of the excesses which even now characterise rape trials. A strong cross-examination of complainants would still be necessary, but the experience of victims should nonetheless become less painful and traumatic.⁷⁹

⁷⁷ Reid Howie Associates, *Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions* (2002)

⁷⁸ Finn, McDonald and Tinsley (n 47) at 251

⁷⁹ Temkin and Krahé (n 41) at 178-179

This assumes increasing prominence in light of a states' positive obligation to protect physical and moral integrity of any individual, including his or her sexual life, under Article 8 of the ECHR. The complainant as an individual citizen is owed basic human rights under Article 8, even though they are not designated any particular rights as a trial participant under the adversarial system. The subjection of complainants' to invasive and irrelevant questioning relating to sexual history or character evidence has been argued to constitute a breach of this right.⁸⁰ This dissension is present amongst judicial ranks, as Baroness Hale recognised:

A legal system which allows wide-ranging cross-examination about the sexual history of a complainant, clearly aimed at prejudicing the jury against her... might one day be held to be incompatible with the effective deterrence required by Art 8.⁸¹

While the removal of the jury would likely alter the dynamic of cross-examination, this would also simultaneously relieve the judiciary of the perplexities of intervention. If the excesses of cross-examination were curtailed, judges may be left less often to move to prevent or restrict cross-examination. Although, in Scotland, judges are required to ensure the 'appropriate protection of the complainant's dignity and privacy' when exercising their discretion to admit sexual history and character evidence under s.275, it has been argued that the judiciary:

[S]hould adopt a more robust and consistent approach to the questions of specificity and relevance and, further, that there is greater scope for refusing S.275 applications on the basis that the probative value of the evidence is outweighed by the interests of the complainant.⁸²

However, contributing to this judicial inertia is that 'judges are always concerned not to intervene in such a way as to trigger an appeal and lead to the possible quashing of a conviction'.⁸³ A change in the dynamic of cross-examination may alleviate present concern that judges are reticent to intervene, motivated by the impetus of grounds for appeal, if an accused perceives the judge has been biased.⁸⁴

Thus, it would appear that a judge based decision-making apparatus may meet the goals of making the process less painful for complainants, thus helping shift their position in a rape

⁸⁰ RCS, *Rape Crisis Response to the Recommendations of the Scottish Law Commission Report on Rape and Sexual Offences* (2008) <<http://www.rapecrisisscotland.org.uk/documents/RCSconsultationresponseMar083.pdf>> accessed 30 July 2013 at 1-2

⁸¹ *DS v HM ADV* [2007] UKPC 36 at para 95

⁸² P Duff, 'The Scottish 'rape shield': as good as it gets?' (2011) 15(2) *Edin LR* 218-242 at 241

⁸³ Raitt (n 30) at para 7.30

⁸⁴ *Ibid*

prosecution from ‘harmful’ to ‘habitable’; in addition to creating a environment more conducive to protecting the autonomy and dignity of the individual complainer.

There is a need to reduce systematic trauma both to protect individual complainers but also to improve the criminal justice system’s response to rape generally, given the process is inextricably linked and self-perpetuating. The salient point is that if the removal of the jury did serve to lessen the systematic trauma of cross-examination, this would likely exert a positive influence at earlier stages of the process. It may help diminish the chronic under-reporting of rape, given that the fear of cross-examination and attacks on their sexual history and character remains a renowned disincentive to the reporting of rape.⁸⁵ It is also possible that without defence playing to the jury, this could limit the extent of any current any prosecutorial exclusions based upon ‘credible’ complainers who will ‘stand up’ well in front of a jury.⁸⁶ In turn this would promote the accessibility of the justice system to all victims of rape.

4.4 The Way Forward

If a reformed judge based decision-making system were to replace the current jury model in rape trials in Scotland, it would neither be procedurally illegitimate, nor detract from the legitimacy of a conviction. As noted, public support for the jury, even if a rather blind adherence based on abstract attraction, could lead to objection. However, if the public were presented with a cogent argument in support of a judge based decision-making process in rape cases, and paused long enough to remove their rose-tinted spectacles, it is suggested that there may be more support for this option than is conventionally recognised.

As this chapter has sought to demonstrate, there is cause to anticipate that a reformed judge based decision-making system would improve the quality of decision-making in rape trials. It is submitted that a judicial based process is more conducive to the objective administration of the law and reducing the unwarranted disqualification and trauma experienced by complainers. This shift towards a specialised judge based decision-making forum in rape trials would complement the increasing specialisation in the investigative and prosecutorial stages of the legal response to rape. Significantly, to the extent that attrition in rape cases constitutes a vicious cycle, the substitution of the jury may entail the removal of the most problematic link in the chain.

⁸⁵ COPFS, *Review of the Investigation and Prosecution of Sexual Offences* (2006) at para 2.8; RCS (n 80) at 1-2

⁸⁶ For discussion of this goal generally, see Larcombe (n 2) at 39

Conclusion

The purpose of this thesis has been to investigate the potential impact of prejudicial social attitudes on jury decision-making in rape trials in Scotland, and to question whether the jury should continue to determine the verdict.

Scotland, as elsewhere, continues to struggle with high attrition in rape cases. The limited success of rape law and policy reform to date, in terms of improving conviction rates or reducing the re-victimisation experienced by complainers during the legal process, was discussed in chapter 1. This was considered within the context of negative or prejudicial social attitudes about rape and rape victims. The four broad categories of rape myths identified were ‘women cry rape’ myths, ‘real rape’ myths, victim precipitation myths and consent myths.

The potential influence of these four categories of rape myths on jury decision-making was assessed in Chapter 2. There is a clear implication that jurors may ignore or misapply the law, and continue to infuse the rape mythologies identified with decision-making. The evidence strongly suggests that where attrition does occur ‘on consideration of the evidence by the jury at the conclusion of a trial’ in Scotland, negative social attitudes are key to explaining high acquittal rates. It was demonstrated that there has to be major doubt over the jury’s central role as ultimate arbiters of guilt or innocence in rape trials and that the jury certainly cannot be relied upon to objectively deliver the law. In turn, this situation undermines the criminal law’s progressive commitment to sexual autonomy under the SO(S)A 2009.

The scope to counter prejudicial attitudes amongst jurors was considered in Chapter 3. It was found that the collective process of deliberation is not an effective safeguard against the influence of prejudicial attitudes, and further that the conceptualisation of the jury as an educative institution in rape trials is misguided. It was also identified that wider changes in social attitudes constitute a long-term goal rather than an immediate solution. Similarly, the limited efficacy of educational guidance, namely judicial direction and expert evidence, in rape trials was discussed. Neither measure seems likely to address the range of negative social attitudes amongst jurors.

It has been stated that, '[p]eople should realize that juries acquit, it's not the system, the system doesn't fail women: we as a society fail them'.¹ This sentiment surely raises the question of whether, actually, the criminal justice system does *fail* rape victims by continuing to use the jury as the decisive part of the institutional response to rape.

The reporting of rape has increased in Scotland, and despite the challenges in the prosecution of rape cases victims of rape, and other sexual offences, are urged to come forward.² Yet, it is only ethical to encourage victims to report when reporting will ensure that participation in the criminal justice process neither unjustly excludes nor exacerbates the complainers's injury, thereby administering a 'second assault'.³ This is increasingly difficult to reconcile with the evidence that indicates that the retention of the jury means the perpetuation of a criminal justice system that both marginalises and exacerbates the traumatic experiences of significant numbers of rape complainers.

As a result of the findings in chapters 2 and 3, an alternative to the use of jury trials was considered in chapter 4. This examination concluded that the use of a judge based decision-making system in rape trials would be more likely ensure the impartial application of the law, and reduce the unjustified disqualification of complainers. It was also argued that a judge based system would be more conducive to alleviating the systematic trauma experienced by complainers, as it would likely limit the excesses of defence exploitation of negative social attitudes at trial. Without the jury perpetuating the vicious circularity of the legal response to rape, it was argued that such a system would make justice more accessible to all rape victims and diminish exclusionary prosecutorial practices. This recommendation for a specialised judge based decision-making forum in rape trials enhances the ongoing specialisation at other stages of the criminal justice system's response to rape. It is an option that should be examined further in the Scottish context to see how it might operate in practice.

As noted at the outset of this thesis the criminal justice system has a baseline institutional responsibility to ensure the objective implementation of the law in practice and to ensure that the cost to the complainer of seeking justice is not re-victimisation. Against this

¹ Comment of a barrister during interview: J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) at 132

² COPFS, 'Serious sexual offenders are being brought to justice' (7 May 2013) <<http://www.crownoffice.gov.uk/media-site/media-releases/262-serious-sexual-offenders-are-being-brought-to-justice>> accessed 30 July 2013

³ W Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Laws' (2011) 19(1) *Fem LS* 27 at 42; see also JL Herman, 'Justice from the victim's perspective' (2005) 11(5) *Violence Against Women* 571

framework, it is concluded that the jury is *guilty* of being an inappropriate decision-making body in rape trials in Scotland. This conviction arises because of far reaching impact of negative social attitudes amongst jurors in individual cases and their wider contribution to the inescapable circularity of the legal response to rape. It is recommended that there is clear potential for a judge based decision-making process to fulfill this institutional responsibility. In conclusion, lay participation in decision-making at trial should be discontinued, with this review of the jury's role essential to redressing the 'relative impunity'⁴ with which rape occurs in Scotland.

⁴ M Burman, 'Evidencing Sexual Assault: Women in the witness box' (2009) 56(4) *Probation Journal* 1 at 17

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