How Effective are Jury Directions in Preventing Jury Bias in Cases Involving Rape?

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Abstract

Juries in England and Wales have been an essential part of the legal system for centuries. They are designed to act as a fair and equal representation of society to allow for an impartial verdict on the guilt of any given individual. However, jury trials have been a growing source of contention in rape trials for many years. This is as a result of a range of factors including the ability of lay people to understand complex legal requirements and tests along with the inherent prejudicial bias of a jury. Given the debate around the issues surrounding the place of juries in rape trials and their suitability, this research will evaluate the effectiveness of juries in such cases and what alternatives could be implemented in their place.

Keywords

Jury bias; Rape trials; Sexual assault

The jury has played an 'essential role in criminal trials for centuries'[1], 'repeatedly', acting as a protector of freedom'.[2] In rape trials it is for the jury to decide the defendants' guilt".[3] The jury also burdens the role of having to 'establish the credibility of witnesses and further evidence put before them', whilst remaining 'unbiased and impartial' throughout.[4] However, the 'continued use' of juries in rape trials is the subject of debate.[5] One of the reasons for this is because, it has been argued that it is difficult for juries in 'controversial trials' (such as rape) to keep their 'objectivity'.[6] Thus, their ability to remain effective has been criticised. In order for the jury to be effective in taking part in the 'decision making process', they are directed.[7] Jury directions are contained in the Crown Court Compendium (CCC); they are 'orders to the jury, which are deemed *necessary* for the fair conduct of the trial, therefore, must be followed'.[8]

Where a defendant is tried for rape, the law is often 'complex' and naturally, juries are likely to come into court with a 'preconceived bias or prejudice' and think in a stereotypical manner, which influences the 'jury deliberation process'.[9] Therefore, it is expected that the trial judge directs the jury as follows: 'experience shows that people react differently to the trauma of a serious sexual assault… there is no classical response; some complain immediately, whilst others feel ashamed and will not complain for a long time; a late complaint does not necessarily mean it is a false complaint'.[10] Such direction evolved as a result of the courts being 'increasingly prepared to acknowledge the need for a direction that deals with 'stereotypical assumptions' about issues, such as 'delay in reporting allegations of sexual crime and distress'.[11] The recent case of *R v Beale* highlights the continued issue of juries

[1] Tom Bingham, *The Rule of Law* (Penguin 2011) 97.

[2] Alfred Denning, *Freedom Under the Law* (The Hamlyn Lectures, Stevens and Sons 1949) 55.

[3] Sexual Offences Act 2003 s (1) (1a-c).

[4] Terence Imgman, *The English Legal Process* (OUP 2011) 232; *R v Caley Knowles* [2006] 1 WLR 3181.

[5] Scott Slorach and Others, Legal Systems and Skills (3rd edn, Oxford University Press 2017) 81.

[6] Ibid.

[7] Martin Hannibal and Lisa Mountford, *Criminal Litigation 2019-2020* (15th edn, OUP 2019) Ch 14; Steve Wilson and Others, *English Legal System* (3rd edn, OUP 2018) 10.

[8] Ibid.

[9] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2020) 359 and Gillian Daly and Rosemary Pattenden, 'Racial Bias and the English Criminal Trial Jury' [2005] 64 CLJ 678.

[10] Maddison Ormerod and Tonking Wait, 'Crown Court Compendium Part 1: Jury and Trial Management and Summing Up' (Judicial College 2018)20-21.

[11] *R v D* [2008] EWCA Crim 2557; *R v Breeze* [2009] EWCA Crim 255 and Ormerod and Wait (n 11) 12-13.

thinking in 'stereotypical' and 'prejudiced' ways in rape trials and the importance of jury direction today.[12] In R v Beale [2019], it was held that the purpose of the advised direction was to 'avoid the possibility that a jury would hold preconceived ideas on what to expect from a genuine complainant of rape… which left uncorrected could lead to illegitimate reasoning'.[13]

The success of the direction and guidance currently given to the jury has had a limited impact on juries thinking in stereotypical ways.[14] The study conducted by Dominic Willmott (an academic specialising in jury decision making), found that jury prejudice and stereotypical thinking does still exist.[15] Despite the study having incorporated the jury direction, it was concluded that: '43%' of jurors chose a pre-deliberation guilty verdict, with this figure rising to 83 % within jurors with personal experiences of sexual victimisation.[16] With nearly half of jurors choosing a pre deliberated verdict, the study suggests that the jury is not wholly effective in disallowing prejudicial and stereotyped thinking to affect their judgment. Consequently, exemplifying how the jury direction does not completely prevent jurors from thinking in a stereotypical and prejudiced manner.

The study conducted by Dominic Willmott, however, can be criticised. The study 'selected people at random from the electoral roll, researchers sent out mock summonses to members of the public… and nine mock juries were assembled, with nine verdicts taken'. As the juror is normally restricted to conduct their jury service at a court located within their local justice area, the study conducted by Dominic Willmott ought to have grouped jurors with others from the same geographical area. This would have enabled the study to be more reflective of what would actually happen in a live trial and allow the study to identify whether the juror's location influenced their decision making/ impact their bias towards the defendant. This is because where a juror lives can impact their social values and what they constitute as acceptable behaviour, which in turn effects whether they believe the case for the defence or prosecution. That said, researchers are not permitted to conduct studies during a real trial,

[12] [2019] EWCA Crim 665.

[13] EWCA Crim 665 33-54.

[14] Leveson, *Criminal Trials: The Human Experience* (Faculty of Laws, University College London, 13 June 2019).

[15] Dominic Willmott and Others, 'Juries in Rape Trials' (2017) 181 JPN 662, 663.

[16] Barrister, '*Half of rape jurors make guilty verdict before deliberation' (*The Barrister Magazine, 12 September 2017) < www.barristermagazine.com/half-of-rape-jurors-make-guilty-verdict-before-deliberation/> accessed 12/04/2020.

and the study conducted by Dominic Willmott has been said to have been 'the nearest that any psychological research has ever got to real-world testing'.[17]

Despite the above submission, the direction regarding the 'corroboration of evidence'[18] in rape trials exemplifies how the CCC has successfully allowed the jury to become increasingly effective, in disallowing preconceived bias and prejudice to affect decisions in rape trials.[19] This is consequential of the CCC being subservient to the Criminal Justice and Public Order Act 1994 (CJPOA).[20] Section 32(1) of the CJPOA decided juries were no longer required to be given the direction that: 'it was dangerous to convict on the evidence of the complainant alone… experience had shown that female complainants had told false stories without reason' at every trial, no matter the circumstances.[21] It can be argued that the direction given to the jury before s.32(1) was implemented, would have brought the myth (that 'women often lie about rape, unless the rape happened in the context of an ambush') to the juries minds.[22] Therefore, suggesting that prior to 1994, the direction limited the jury from being effective, as it is their role to remain free from prejudice and stereotypical thinking, when considering the verdict.

Although suggested that the jury direction limits the jury's ability to be effective, it is submitted jurors with prejudice and 'stereotyped thinking' can be educated to prevent aforesaid issues. To exemplify, the study conducted by Dominic Willmott concluded that '13% of jurors who did have prejudice, did change their decision following discussions with fellow jurors', indicating jurors were able to acknowledge their pre-existing bias and act accordingly.[23] As the study suggests jurors can change 'their decisions following discussions with fellow jurors', it can be argued that: it is the procedure of how a trial by jury is conducted,

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[17] Ibid.

[18] The direction regarding corroboration of evidence gives a warning to the jury about the need for caution in the absence of supporting evidence. Courts and Tribunals Judiciary, 'Crown Court Compendium- updated December 2019' (First published 7 June 2016) p 10-5 < www.judiciary.uk/publications/crown-court-compendium-published/ > accessed 6 April 2020; *R v Makanjuola* [1995] 1 WLR 1348 at p.1351D.

[19] Mike McConville and Geoffrey Wilson, 'The Handbook of The Criminal Justice Process' (OUP 2002) 328.

[20] Courts and Tribunals Judiciary, 'Crown Court Compendium- updated December 2019' (First published 7 June 2016) <www.judiciary.uk/publications/crown-court-compendium-published/> accessed 6 April 2020.

[21] David Wolchover and Anthony Heaton-Armstrong (2010) 174 'Rape Trials' Criminal Law & Justice Weekly 244, 245.

[22] Michael Allen and Ian Edwards, *Criminal Law* (15th edn, OUP 2019) at Ch 11 and Wolchover and Heaton-Armstrong (n 24).

[23] Dominic Willmott and Others, *The English Jury on Trial* (Custodial Review 2018).

that allows jurors with 'prejudice and stereotyped thinking' to decide accordingly.[24] Thus, it is the procedure itself that limits the jury's effect in coming to a decision based on the true 'standard of proof', rather than the judge's direction to the jury.

To ensure that the jury are effective in a rape trial, the previous Director of Public Prosecutions (DPP) suggested reforming the way a trial by jury is conducted. The DPP proposed that juries were educated and given a 'briefing by the judge at the start of the trial' and that this would help overcome 'unconscious bias'.[25] It was proposed that the briefing would be 'similar to that of the Judge's current direction (given at the end)'.[26] The objective would be to condition the jury 'at the start' of the trial, to think in a 'non- prejudicial manner', rather than at the end when it is likely to be too late.[27] Support for such reform alike has been displayed in relation to increasing the efficiency in jury trials. For example, it was recommended that directions should be provided 'before speeches', allowing the advocate to 'tailor their remarks to the law' and thus, 'avoiding repetition of the legal principles'.[28]

It is inferred by the Judicial College, that such a position has been considered and acted upon to a considerable extent and the objective for reform, met. This is evidenced in recent versions of the CCC.[29] The CCC advised that directions should be given 'as and when it may be appropriate, including at the beginning of the trial, if required'.[30] Therefore, the direction of the CCC, appears to be more effective than merely briefing the jury at the beginning. This is due to the involvement of the judges' knowledge and experience. The fact that the judge is likely to know when a 'direction is to be of benefit'[31] to those involved in the trial, means that such guidance can be standardised although each rape case is unique.[32] Therefore, increasing the opportunity for the judge to prevent the jury from thinking in a 'prejudicial and stereotypical manner', as well as ensuring consistency.[33]

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[24] Ibid.

[25] David Barrett, 'Judges should give advice to juries in rape cases, says DPP' (Daily Telegraph, 10 June 2014) 2.

[26] Ibid.

[27] Barrett (n 29).

[28] Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales 2015) 309.

[29] See, Ormerod and Wait (n 11)

[30] Ormerod and Wait (n 11) 20-24.

[31] Ibid 1-13.

[32] *R v Miller* [2010] EWCA Crim 1578 [79]-[80].

[33] Ibid.

Although this shows that the jury is not fully effective, the advice regarding the timing of the direction does increase how effective they are.[34] This is because, the guidance allows the jury (at the earliest opportunity) to recognise that: although stereotyped/ prejudicial thinking may be present, it is their duty to 'supress' such views.[35] For if the jury allow their prejudice to overlook the evidence before them, it may result in an 'inaccurate verdict'.[36] Consequently, leading the trial being 'unjust' and the jury to have been ineffective within their role. Even though the CCC is mere 'guidance', the guidance given in respect of the timing of the jury direction has been enshrined into the judicial practice, as evidenced in the Criminal Procedural Rules.[37] Thus, in theory, maximising the efficiency of the jury being consistent.

Statistics show that there are clear discrepancies between the amount for cases that are 'prosecution worthy' and those cases where the defendant has been convicted.[38] To illustrate, in 2019-2020 (rolling year to date), '32,934 prosecutions' were brought by the CPS.[39] Out of the 32,934 prosecutions that were brought, '5,654' prosecutions were dropped.[40] With 27,294 cases having been put through the criminal procedure (bearing in mind 457 cases were 'administratively finalised'), 1,430 defendants were acquitted whilst 1,871 convicted after a trial.[41] It has been submitted that one of the main reasons for the discrepancies, is that jurors are 'ineffective in tacking rape myths.[42]

A 'myth' in the context of rape, is defined as a 'commonly held belief, idea or explanation that is not true but is that of which arises from people's need to make sense of acts that are senseless, violent or disturbing'.[43] The CPS recently submitted that rape myths 'arise from and

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[34] Allen and Edwards (n 25).

[35] Ibid.

[36] Ibid.

[37] Alisdair Gillespie, Siobhan Weare, '*The English Legal System' (*6th edn OUP 2017) 498, and The Criminal Procedure Rules 2015 SI 2015/1490, r 25.14

[38] Rachel Schraer, 'Why are rape prosecutions falling?', (*BBC News*, 30 January 2020) <www.bbc.co.uk/news/uk-48095118 > accessed 13 March 2020.

[39] Crown Prosecution Service. 'CPS Quarterly Publication: Prosecution Outcomes by Crime Types Management Information' <www.cps.gov.uk/publication/cps-data-summary-quarter-2-2019-2020 > accessed 13 March 2020.

[40] Ibid.

[41] Crown Prosecution Service, 'Rape and Sexual Offences – Social Myths' Ch 21. <www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths> accessed 11 March 2020.

[42] Charles Hymas, 'Juries rape myths challenged amid slump in convictions in trials' (*The Telegraph*, 7 January 2020) <www.telegraph.co.uk/politics/2020/01/07/juries-rape-myths-challenged-amid-slump-convictions-trials/> accessed 20 March 21 March 2020.

[43] Crown Prosecution Service (n 41).

reinforce our prejudices and stereotypes'.[44] The danger of such is that rape myths limit the efficiency of the jury in a rape trial, as they 'lead juries to improperly reject complaints of sexual offending and acquit those, who should be convicted'.[45] With that in mind, a conclusion that juries are not effective, could be taken from the 'assertion that juries acquit more often than they convict in rape cases'.[46]

In the study conducted by the Home Office in 2005, conviction rates were lower than acquittal rates.[47] However, it has been alleged that the assertion of juries acquitting defendants more than convicting in rape trials is now untrue.[48] In the years between 2000-2010, the jury convicted the defendant in '55%' of rape trials.[49] Also, statistics show that between 2014-2015, the conviction rate was '56.90%'.[50] To add, during the years of 2018-2019, '65.7%' of rape trials resulted in a conviction.[51] In comparison to 2014-2015, the conviction rate in 2018-2019 is significantly higher than that between 2014-2015. Therefore, with such an assertion having been disproved, it is suggested that juries are likely to be more effective than previously thought. Nevertheless, the extent to which juries are effective is still evidently limited and the reasons why, broad.

In 2018, it was suggested that society's attitude towards gender roles allow for legal professionals to 'utilise gender to undermine witness's credibility', making jurors more likely to 'accept the rape myth being deployed in trials'.[52] This view is supported by Lees (1996), who observed rape trials in the Old Bailey and argued that both judges as well as legal professionals 'invoke' such myths.[53] Although rape myths maybe invoked, it appears that the

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[44] Ibid.

[45] Brian Leveson, *Criminal Trials: The Human Experience* (University College London 2019) 12; HC Deb, 18 October 1982, vol 29, col 206.

[46] *Leveson* (n 50) 13.

[47] Elizabeth Kelly, Jo Lovett and Others, 'A Gap or Chasm? Attrition in Reported Rape Cases', (Home Office Research Study 293 2005) 1.

[48] Leveson (n 45).

[49] Cheryl Thomas, *Are Juries Fair* (Ministry of Justice 2010) V.

[50]Crown Prosecution Service, 'Rape_Table_3_Prosecution_Outcomes_0809_1415' <www.cps.gov.uk/underlying-data/cps-rape-prosecution-outcomes-2008-2015> accessed 13 March 2020.

[51] Crown Prosecution Service, 'CPS Quarterly Publication: Prosecution Outcomes by Crime Types Management Information' <www.cps.gov.uk/publication/cps-data-summary-quarter-2-2019-2020 > accessed 13 March 2020.

[52] Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan US 2018) 129.

[53] Olivia Smith and Tina Skinner, *'How rape myths are used and challenged in rape and sexual assault trials'*, (2017) SLS 26, 441.

juries tend to believe in the less obvious myths' surround rape, rather than those which are obvious. To exemplify, it has been submitted that there is a presumption that victims "ask for it" by wearing provocative clothing.[54] Recently, it was suggested that the 'jury should reflect on the underwear worn by the victim'.[55] This is because it was stated by the defence counsel to the jury 'You have to look at the way she was dressed. She was wearing a thong with a lace front'.[56] Stating such to the jury, reinstates the view that individuals think society (and the jury) would believe that what the victim was wearing, automatically reflected consent.

Contradictory to the presumption regarding provocative clothing, a survey found that very few jurors believed that a woman 'who wears provocative clothing' or goes out 'alone at night puts herself in a position to be raped'.[57] With less jurors believing in such a myth, it is implied that juries are more effective than originally thought, despite the influence of counsel. Following the rape trial in Ireland, the '#thisisnotconsent' campaign, which often included pictures of womens underwear 'trended in the UK and further afield'.[58] With 'thousands of women' having took part in the campaign, it is evidenced that there is support for the lack of belief in the myth that women, who wear provocative clothing are 'asking for it' and that there is a change in social attitudes towards rape.[59] However, the less obvious rape myths are 'still present' amongst jurors.[60] For example, it is submitted that jurors still insisted that they were 'unsure' of the fact that most rape victims are raped by a 'known person'.[61] Thus, supporting the belief that ' it isn't likely to be rape, if the accused was known to the victim',

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[54] Dame Vera Baird and Baroness Newlove, 'Why Disclosure Must Put Victims First!', (Police and Crime Commissioner, 25 July 2018) <www.northumbria-pcc.gov.uk/article-dame-vera-baird-baroness-newlove-disclosure-must-put-victims-first/?__cf_chl_jschl_tk_> accessed 13 March 2020.

[55] Maya Oppenheim, 'Protest held after teenage girl's underwear considered as evidence against her in rape trial',*(Independent,* 13 November 2018) < www.independent.co.uk/news/world/europe/cork-rape-trial-protest-rally-teenage-girl-underwear-evidence-criminal-court-a8631361.html> accessed 14 March 2018.

[56] Liam Heylin, 'Irish outcry over teenager's underwear used in rape trial', (*BBC News*, 14 November 2018) < www.bbc.co.uk/news/world-europe-46207304> accessed 13 March 2020.

[57] YouGov, *End Violence Against Women End Violence Against Women Coalition Survey Results* (YouGov 2018).

[58] Jack Aitchison, 'Why are women tweeting #ThisIsNotConsent - the hashtag and pictures of underwear explained' (*The Daily Record*, 15 November 2018) < www.dailyrecord.co.uk/news/scottish-news/women-tweeting-thisisnotconsent-hashtag-pictures-13595120> accessed 13 March 2020.

[59] Harriet Sherwood**, '**Thong protest in Belfast raises concerns over rape trials' (*The Guardian*, 15 November 2018) <www.theguardian.com/uk-news/2018/nov/15/thong-protest-in-belfast-raises-concerns-over-trials> accessed 13 March 2020.

[60] Leveson (n 45).

[61] Ibid 13-14.

even though it has been proven that in most rape cases 'the perpetrator was known to the victim'.[62] It is, therefore, evidenced that jurors are largely 'out of touch' with the facts surrounding rape.[63] If the jury cannot comprehend the facts and are not knowledgeable of the situation women face, then it is unlikely they will be able to view evidence from an objective and unbiased viewpoint.

With regards to reform, it has been submitted that the jury is 'removed from rape trials' and should be replaced by a 'judge or by a judge and two lay people'.[64] The proposition was held to improve the 'transparency of the process'.[65] This is because, the jury are 'not permitted to disclose their reasoning for their decision', unless in circumstances stated in s. 20E and s. 20F of the Juries Act 1974. [66] Therefore, the jury can potentially base their decision on prejudicial thoughts and the court may not be aware.[67] However, a judge hearing a trial would be required to give the ratio decidendi thus, their decision would need to be unprejudiced or their 'professional integrity would be questioned'.[68] With a judge having been trained prior to taking up their role, they are taught how to remain 'impartial' and thus, are 'more likely' to resist rape myths, when compared to the jury.[69] However, the proposal to replace the jury with a judge alone has said to be 'no more effective' than a trial by jury, due to the judiciary still facing similar 'difficulties with stereotypes'.[70]

Despite the adverse impact of removing a jury, legislation has provided for situations where a jury will be 'removed' from trials where the defendant is charged with rape.[71] For example, the Criminal Justice Act 2003 permits a jury to be removed when the jury is deemed to be

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[62] Zoe Peterson and Charlene Muehlenhard, 'Was It Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labelling Their Own Experiences', (2004) 51 Research Gate 132 and Ministry of Justice, Home Office and Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' (Office for National Statistics 2013) 6.

[63] Allen and Edwards (n 25), 426.

[64] HC Deb 21 November 2018, vol 649, col 345-346; Crime and Courts Act 2013 c. 22.

[65] Alec Samuels, 'Trials on Indictment without a Jury' (2004) JCL 68, 125.

[66] Juries Act 1974, s.20D.

[67] Samuels (n 71).

[68] Ibid.

[69] Richard Jackson, 'Jury Trial To-day' (Cambridge University Press 1938) 367-378.

[70] Rebecca McEwen and Others, 'Differential or Deferential to Media? The Effect of Prejudicial Publicity on Judge or Jury' (2018) 22 IJEP 124.

[71] Louis Blom-Cooper, *Unreasoned Verdict: The Jury's Out* (Bloomsbury Professional 2019) 2.

inefficient in (or potentially) being impartial and without prejudice, due to having (or having been) tampered with.[72] The case of R v McManaman [2016] exemplifies the extent to which s.44 is implemented and how a judge alone can be more effective in 'rape trials', than a jury.[73] In McManaman, the Court of Appeal permitted the rape trial to be heard by the judge alone. This was due to the court holding that the fact a third party had sent a 'Facebook request to one of the jurors', suggested that the impartiality of the jury was compromised.[74]

The court, when making the decision on whether permission for the jury to be removed and heard by a judge alone should be granted, was only concerned with the reasoning behind the 'purpose of the Criminal Justice Act 2003, which was to protect the 'integrity of a jury', not that the defendant 'instigated the tampering of the jury'. Consequently, permission for removal of the jury was granted.[75] With permission for the jury to have been removed granted, the case of *R v McManaman* emphasises that the benefit of having a trial heard solely by a judge, which is that the issue of 'jury tampering and impartiality' is removed.[76] The fact that the 'judge must give leave' for the jury to be dismissed and the trial to be heard by the judge alone, it is evident that the extent of the reform is not full.[77]

Furthermore, the case of J, S, M v R [2010] shows that the courts value the jury 'significantly' by holding the threshold for allowing a trial by judge alone to a high standard.[78] To exemplify, the Court of Appeal stated that where a 'serious criminal offence has been committed, the jury could only be removed as a 'last resort' and when the court is '*sure*' the statutory requirements have been met'.[79] Although the court stated there was a 'real and present danger of jury tampering', the provisions needed to protect the jury would not cause unreasonable intrusion into the lives of the jurors'.[80] Furthermore, it was stated that the provisions would not involve a constant police presence in or near their homes, or police

[72] Criminal Justice Act 2003, s.44, s.46.
[73] [2016] EWCA Crim 3.
[74] Ibid.
[75] [2016] EWCA Crim 3 [22].
[76] Liz Campbell and Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, OUP 2019) 11.
[77] Criminal Justice Act 2003 s 44(2).
[78] EWCA Crim 1755 and *Campbell* (n 76) 358- 360.
[79] Ibid 8.
[80] Ibid.

protection at all times'.[81] Thus, the 'bar has been set high, in terms of detriment to the jury' for the jury to be dismissed in a 'complex case'.[82]

Overall, the law has shown willingness to move away from using juries in complicated cases. However, the continued use of juries in trials involving 'complex fraud and rape' is evident of the fact that the courts are 'not willing to abolish trial by jury'.[83] Thus, demonstrating jurors are highly valued.[84]Alternatively, the Chair of the Criminal Bar Association has argued that trial by jury should 'not be abandoned'; with the jury bringing 'objectivity' to trials', the solution to the problems surrounding rape myths is to 'educate' jurors.[85] It has been suggested that the education of jurors could consist of the jury partaking in an 'exercise based on rape myths and reactions to trauma', as well as the 'issues of consent'.[86] It is further submitted that this provision would 'serve to reinforce the clear judicial directions jurors receive', leading the jury to competently and fairly trying an allegation of rape'.[87]

Improving education is an approach widely supported by MP's. MP's compared the English criminal procedure to that of Scotland, concluding England should 'mirror' Scotland's procedure, in a bid to allow the jury to be more 'effective' within their role.[88] In Scotland, prosecutors are permitted to 'call expert evidence at trial'.[89] The calling of an expert witness enables jurors to 'understand typical psychological responses' to rape, and deterrers them from forming stereotypes and acting on such views.[90] Consequently, this would facilitate the

[81] Ibid.

[82] Campbell (n 75).

[83] Robert Verkaik, 'Abolition of jury trials *'is an attack on justice'* (*Independent*, 22 June 2005). <www.independent.co.uk/news/uk/crime/abolition-of-jury-trials-is-attack-on-justice-496121.html> accessed 20 May 2020.

[84] Ibid.

[85] Jonathan Ames, 'Lawyer calls for juries in rape trials to be ditched', (*The Times*, 8 October 2019) <https://www.thetimes.co.uk/article/axe-juries-biased-against-rape-victims-says-solicitor-wfmwk2t93> accessed 20 May 2020.

[86] Joanna Hardy, 'Judging the jury: Why rape trials can still be in safe hands' (*The Law Society Gazette,* 11 December 2018) <www.lawgazette.co.uk/commentary-and-opinion/judging-the-jury-why-rape-trials-can-still-be-in-safe-hands/5068627.article> accessed 20 May 2020.

[87] Ibid.

[88] HC Deb 21 November 2018, vol 649, col 347.

[89] Criminal Procedure (Scotland) Act 1995, s275 C.

[90] Hansard (n 97).

elimination of the preconceived bias of the jury and allow the jury to become more effective within their role.[91]

It has been submitted that the law being unclear facilitates the jury to be ineffective. In R v Olugboja [1982] it was highlighted that the law surrounding rape and consent 'failed to meet a minimum requirement of clarity and certainty'.[92] This is because the Sexual Offences Act 1956, s 1 governed the law on rape, did not provide a statutory definiton for consent. It was therefore, established that consent was to be given its' ordinary meaning' as Parliament intended'.[93] However, as a result of 'consent' holding its' ordinary meaning', juries were then allowed to apply their 'own understandings of when someone consents'.[94] With the jury applying their own understanding, it allows for them to be influenced by rape myths such as, 'It isn't rape if the woman shows no obvious signs of being subject to physical violence'.[95] Thus, the case demonstrates the importance of legislation needing to be clear, as if it is not, the jury cannot be expected to understand the case and then deliver a legitimate judgment.

With a 'need to clarify the law regarding consent and rape', the Criminal Justice Act 2003 (CJA 2003) was implemented.[96] It is submitted that the CJA 2003, has clarified the law but the extent to which can be argued. For example, it was submitted that the definition of consent needed to allow individuals to know what the law recognises as a criminal offence, and what is acceptable within a sexual relationship'.[97] In doing so, the jury would be more effective, as the jury would be less able to misunderstand the evidence in front of them.[98] This is because, 'verbal and non-verbal messages can potentially be mistaken for consent', leading the jury to then misunderstand the situation and thus, the evidence Infront of them.[99] In 2003, the CJA stated that 'if the complainant agrees by choice, and has the freedom and capacity to make that choice', then the complainant consented.[100] It has been argued that the Act has been

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[91] Ibid.

[92] QB 320 and Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford 2002) 93.

[93] *R v Olugboja* [1982] QB 320.

[94] David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* (15th edn, OUP 2018) 759.

[95] Home Office, Setting the Boundaries: Reforming the law on sex offences (Home Office Consultation Paper, 2000 vol 1) 10.

[96] HL Deb 13 Feb 2003, vol 644, col 772.

[97] Home Office (n 95).

[98] Ibid.

[99] Ibid.

[100] S 74.

successful, as the legislation makes clear that: 'even though the claimant has not protested or been subject to injury, it does not necessarily signify the complainants' consent'.[101] Albeit an improvement, s.74 of the CJA 2003 still prevents the jury from being completely effective, as the definition does not provide for when juries have to assess whether the complainant 'consented to sex when they were intoxicated'.[102] This is because, the statutory definiton is 'silent as to the precise moment at which B's consent or agreement must be present'.[103] With it being to the jury to decide the issue of 'consent', it has been proposed that as different jurors hear different cases, 'inconsistency is created'.[104] With the law and courts valuing consistency, as well as fairness and the jury being a part of that system, it is submitted that the jury are therefore, ineffective within their role.

Although English law has not yet decided when consent ends, in situations where the complainant has become heavily intoxicated after giving consent when sober, Canadian law holds that consent ceases when an individual is unconscious.[105] It has been suggested that English law will soon see the law regarding the timing of consent, mirror that of Canadian law.[106] It is not just the judge's direction to the jury, or the juries own stereotyped thinking, prejudice, and beliefs in rape myths, which limit the jury's effect in rape trials. It is submitted that disclosure also poses a 'large issue'.[107] Disclosure is the 'process by which material collected by the police during an investigation is made available'.[108] It is for the prosecutor to disclose to the defence 'any unused investigative material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused'.[109] As disclosure has been described as a 'fundamental question of fairness' in criminal proceedings, when the disclosure process does not work as it should, 'crucial

[101] David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's 'Criminal Law'* (15th edn, OUP 2018) 759.
[102] Ibid 759-764.
[103] Ibid.
[104] *R v Olugboja* [1982] QB 320 [332].
[105] *AG of Canada* [2011] 2 SCR 440.
[106] *Ormerod and Laird* (n 101) 765.
[107] HM Crown Prosecution Service Inspectorate, 'Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases' (Criminal Justice Joint Inspection 2017) <www.justiceinspectorates.gov.uk/cjji/inspections/making-it-fair-the-disclosure-of-unused-material-in-volume-crown-court-cases/> accessed 13 March 2020.
[108] Justice Select Committee, *Disclosure of evidence in criminal cases***:** *The failures in disclosure* (HC 2018, XI) 6.
[109] Criminal Procedure and Investigations Act 1996, s 3(1(a)).

evidence may be omitted'.[110] This can adversely impact the jury from fulfilling their role, as evidenced by the events in the case of R v L [2015].[111] Two sets of jurors gave two inconsistent verdicts yet, on appeal a different outcome was decided – based on the evidence which was provided and evidence which had previously been omitted. In turn, highlighting situations where juries are ineffective in rape trials.

In R v L the defendant was tried for the offence of rape, found not guilty, but then re-tried and convicted. However, the defendant then appealed under s.9 Criminal Appeal Act 1995. The defendant appealed because, 'fresh evidence' was that of a previously undisclosed social worker's note.[112] The content of that note, indicated that the complainant had been raped 'previous to the current incident'.[113] This fact is important, as the medical evidence that was put in front of the jury, was that the complainant had 'been a virgin at the time of the alleged rape by the appellant'.[114] Consequently, the fresh evidence undermined (at the retrial) the prosecutions 'assertion that the evidence of hymenal penetration had resulted from the rape by the appellant'.[115] However, the jury (in the previous trial) were likely to have relied heavily on the medical evidence in conjunction with the complainant's evidence-in-chief, to conclude that the appellant was guilty.[116] This eventuality resulted in the jury not having had the opportunity to question the credibility of the witness. Consequently, it can be seen to be just that the court 'quashed' the appellants conviction of rape, holding that the 'fresh evidence undermined the integrity of the medical evidence, which was placed before the jury at the re-trial by the prosecution and so directed by the judge.[117] The effect of disclosure failings has said to have 'undermined public confidence in the justice system' and future juries could be 'deterred from convicting defendants in 'sexual assault trials', including rape.[118] It is therefore

[110] Justice Select Committee, Disclosure of evidence in criminal cases (Oral Evidence, HC 2018, XI) 53 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/disclosure-of-evidence-in-criminal-cases/oral/85452.html> accessed 15 May 2020 and Justice Select Committee (n120), 4.

[111] EWCA Crim 741.

[112] *R v L* [2015] EWCA Crim 741 [5].

[113] Ibid 6.

[114] Ibid

[115] Ibid 6.

[116] Ibid.

[117] Ibid.

[118] David Bowman and Frances Gibb 'Former lord chief justice warns of rape trials under threat' (The Times, 20 January 2018).

clear, that the jury are only effective within their role of 'assessing the credibility of the witness and 'determining a person's guilt', if they are given all of the facts surrounding the case.[119]

Overall, through the use of the CCC, it is evident that Nigel Booth is correct in stating that 'throughout the UK, the judiciary has warned the jury against stereotyped thinking' in relation to rape cases.[120] However, it is clear that the extent is limited. Thus, the view that the jury directions are having a 'limited if any real effect' is too true; although, the view that the guidance has hardly had 'any real effect' may be seen as an exaggeration.[121] This is because, despite the existence of the CCC, of which the primary purpose is to allow the judiciary to give consistent guidance on the matter of stereotyped thinking to juries, the study conducted by Dominic Willmott evidenced that the jurors (despite having been given the same guidance) acted upon their bias and stereotypical thinking.[122] Yet, the CCC has proven to have been effective when used in conjunction with legislation. For example, the CJPOA[123], decided that the jury should no longer be directed that: 'it is dangerous to convict on the evidence of the complainant alone'. This has said to have allowed the CCC to be effective, as doing so would prevent the jury from being exposed to the myth that 'women often lie about rape, unless the rape happened in the context of an ambush'.[124] It is perhaps the timing of the direction and the procedure of disclosure that needs to improve to allow the jury directions to be effective to the fullest extent. To exemplify, the recent version of the CCC allows for the jury direction to be given at any time within a trial; this in -turn allows for the judge to decide when the direction will be most effective.[125] Thus, it is not the jury directions themselves which are ineffective, but how and when they are used.

[119] Louis Blom-Cooper, 'Unreasoned Verdict: The Jury's Out', (Bloomsbury Professional 2019) Ch 2.
[120] Nigel Booth, 'Juries in Rape Trials' (2017) 181 JPN 662, 663.
[121] Ibid.
[122] Maddison Ormerod and Tonking Wait (n 11) and Dominic Willmott and Others, 'Juries in Rape Trials' (2017) 181 JPN 662, 663.
[123] s.32(1).
[124] Allen and Edwards (n 25) 11 and Wolchover and Heaton-Armstrong (n 24).
[125] Allen and Edwards (n 25), Ch 11; Ormerod and Wait (n 11) 1-13, 20-24.