The Judicial Gateway: An Analysis of the Judge's Role in the Perpetuation of Rape Myths in Sexual Assault Jury Trials in New Zealand.

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In New Zealand, there has been an increasing number of conversations over the past decade about rape myths in the criminal justice system. Most research regarding rape myths in the criminal justice system either focus on rape myth acceptance by jurors or by defence counsel's use of such myths. There is little research regarding whether the Court itself perpetuates such misconceptions. Judges influence trials by the evidence they rule admissible or inadmissible, thus, this paper first explores the definition of rape myths, sets out the most commonly used rape myths in trials and then analyses case law, focusing on what evidence the Court rules admissible/inadmissible in trials and the reasoning used. This paper also analyses these cases to determine whether a trend emerges showing courts developing an increasing awareness about the use of such myths and their response to the myths. This paper concludes there is an overall trend by the courts being more responsive in preventing the needless perpetuation of rape myths. Courts are relatively proactive at responding to rape myths used in cases which align with the 'stranger rape' scenario, however, are not as responsive in preventing the use of such myths in an 'acquaintance rape' situation.

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I hearby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgments), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

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Introduction

In November 2013, a group of young West Auckland men were boasting on social media about the number of intoxicated girls (some underage) they had sex with.[1] The men had held unsupervised parties where significant amounts of alcohol were consumed. Afterwards, some form of "serious sexual act[s]" took place.[2] Four girls, aged 13-15, came forward; one making a formal complaint to the police. A police investigation found that among the participants (willing or unwilling), there was very little understanding about consent and how alcohol could impact their ability to consent.[3] Furthermore, they thought that consent was not an issue if both parties were underage. No charges were laid.

When the story broke, two RadioLive radio hosts, John Tamihere and Willie Jackson, interviewed a female friend of one of the complainants.[4] The interview included questions about the age the interviewee had lost her virginity; questions that indicated Tamihere and Jackson thought that the interviewee should have known what the Roast Busters were up to; questions about whether rape had really occurred if the complainants considered the men attractive; and the hosts insinuated that girls should not be drinking regardless. There was significant public backlash in response to this interview and this scandal was a catalyst for the New Zealand public to discuss their views on sexual assault. One of New Zealand's biggest scandals, now known as the "Roast Busters" case, was arguably one of the first major discussions in recent years about consent and what New Zealanders thought constituted rape. It also exposed the prevalence and persistence of "rape myths" in New Zealand society.

On 5 October 2017, an international scandal re-opened the discussion about sexual assault. This was the #MeToo movement. The #MeToo movement was the result of a *New York Times* exposé which revealed that Harvey Weinstein, a highly influential Hollywood producer, had routinely

[1] The age of a person can (generally) legally engage in sexual acts in New Zealand is 16 years old: Crimes Act 1961, s 134.
[2] Laura Walters "Roast Busters: Police Shocked by Alcohol Use" (29 October 2014) Stuff <http://www.stuff.co.nz/national/crime/10675764/Roast-Busters-case-Police-shocked-by-alcohol-use>.
[3] Laura Walters, above n 2.
[4] Stuff "Expert appointed to head Roast Busters probe" (11 November 2013) Stuff http://www.stuff.co.nz/auckland/local-news/9386579/Expert-appointed-to-head-Roast-Busters-probe.

sexually harassed and sexually assaulted women for more than 20 years.[5] The #MeToo movement and the related Time's Up movement sparked an international conversation about sexual assault and consent, and revealed the many misconceptions people held regarding sexual assaults. It spawned a global awareness of how prevalent sexual assault and harassment was – something that had not been so openly shown before.

Despite these revolutionary conversations, a 2017 Gender Attitudes Survey (a "snapshot" of New Zealanders' attitudes regarding gender) showed that misconceptions about sexual assaults still persisted.[6] While the majority considered many historically gendered roles should be a shared responsibility and that most roles could be fulfilled by either gender, there was still a marked cohort who affirmed gendered expectations. For example, in response to the idea that many women lie about being raped, 29% of people agreed and 44% either were neutral or stated they did not know.[7] Only 54% of the responses disagreed with the statement that rape occurs when a man's sex drive overwhelms them and they cannot control it.[8] Another concerning statistic was that 27% (including neutral or unsure respondents) considered that a complainant was partially responsible for the sexual assault if they were intoxicated and 23% (again including those who were neutral or did not know) considered that if someone consented to kissing, it was not a big deal if the other person pushed them further and had sex.[9]

The prevalence of rape myths is a problem given New Zealand also has a major issue with sexual violence. However, it should be noted at the outset that obtaining statistics to determine the pervasiveness of sexual assault is an incredibly complicated task. The Law Commission noted this difficulty in their report regarding the justice response to sexual assault victims, as the data tends to be either dated, sporadic or inconsistent in its focus.[10] This will become apparent in the statistics

[5] Jodi Kantor and Megan Twohey "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades" New York Times (5 October 2017) https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news.

[6] New Zealand Council of Women of New Zealand "General Attitudes Survey: Full Results 2017" Gender Equal NZ < https://genderequal.nz/wp-content/uploads/2018/03/Gender-Attitudes-Survey-FINAL.pdf> at 4.

[7] At 22.

[8] At 23.

[9] At 23.

[10] Law Commission *The justice response to victims of sexual violence: criminal trials and alternative processes* (NZLC R136, 2015), at 37.

discussed below. It should be noted that the statistics below account for all sexual assaults and are not limited to sexual assaults involving adult female victims.

The Crime and Safety Survey, conducted by the Ministry of Justice, estimated that in 2013, approximately 186,000 sexual violence offences were committed against adults (this figure was not statistically significant for data obtained between 2008-2013).[11] Relying on 2008 data, only 7% of estimated sexual offending was reported to police.[12] Over the course of a lifetime, the survey stated that 24% of females experienced at least one incident of sexual assault (compared to 6% of males). The New Zealand Police provides more up-to-date statistics regarding how many sexual assaults are reported.[13] Between June 2018 and May 2019, there were 2,313 reports of sexual assault, compared to 1,748 reports between July 2014 and May 2015 (when the data was first collected).[14]

Using the same time period (2008-2013 inclusive), police statistics show that a yearly average of 3157 reports of sexual assault were made to the police.[15] Statistics NZ show that an average of 1079 defendants were prosecuted, averaging 663 convictions (approximately 61% of prosecutions).[16] In relation to charges resulting in conviction, the figure decreased to 43%, i.e. 43% of total sexual assault charges laid result in a conviction. The Ministry of Women's Affairs considered that this was due to cases including multiple offences that were "very much more

[11] New Zealand Crime & Safety Survey "Sexual Violence" (30 May 2018) Ministry of Justice <https://www.justice.govt.nz/justice-sector-policy/research-data/nzcass/survey-results/results-by-subject/sexual-violence/#prevalence>. Another self-report survey, the New Zealand Crime and Victims Survey, stated they had 193,000 reports of sexual assault in a 12-month period. New Zealand Crime & Victim Survey *Topline Report: March-September 2018 (Cycle 1)* (Ministry of Justice, 2018) at 14.

[12] It is noted that the 2008 statistics were flagged due to the margin of error and data from 2013 was not relied upon given the sampling error was too high.

[13] It should be noted that different methods of data collection and different categorisations were used from the Crime and Safety Survey.

[14] "Crime Snapshot" New Zealand Police <https://www.police.govt.nz/crime-snapshot>.

[15] New Zealand Police *New Zealand Crime Statistics 2013: A Summary of Recorded and Resolved Offence Statistics* (Police National Headquarters, April 2014) at 16.

[16] NZ.Statistics "Charges prosecuted against adults by offence type calendar year" (data extracted on 30 July 2019) <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7351&_ga=2.221449691.2145096735.1554104209-1888115640.1554104209#>. It should be noted that this data relates to defendants, thus, if they were found guilty of at least one charge, the data considers it as a conviction for that defendant. These statistics focus on adult defendants. There is no differentiation between adult victims and child victims. Charges relating to sexual assaults against children will have a high prosecution and conviction rate compared to adult victims, therefore, these figures will be somewhat skewed for the focus of this dissertation. I have chosen to focus on the prosecution of defendants, rather than charges, as I felt it more accurately matched the number of reports made as reports are made, against an individual and a report can result in multiple charges being laid.

likely" to cause charges to be laid.[17] Using these figures, only 34% of reports are prosecuted and of all total reports, only 21% result in a conviction. This is in line with a 2009 study by the Ministry of Women's Affairs which stated that only 31% of sexual assault reports are prosecuted and of those prosecutions, 42% of these prosecutions result in a conviction (which is approximately just 13% of reported assaults).[18] More recent statistics released by the Ministry of Justice show that of the complaints received by the police, 31% resulted in charges being laid, with 11% of complaints being successfully prosecuted.[19] These figures will be *much* lower when placed in the context of the total number of sexual assaults that are estimated to occur.[20]

As the above statistics show, sexual assaults are vastly unreported. The Law Commission considered this may be due to the high sentences attached to sexual assaults which provide a strong incentive for the defendant to vigorously defend the charge and elect a jury trial.[21] It was noted that a victim of a sexual assault is much less likely to engage in a process where their credibility (and potential sexual history) will be closely questioned and scrutinised in a public setting.[22] This may be particularly apparent where the complainant feels shame or guilt about the assault or where they may not have wanted the defendant to go to jail (either at all or for an extended period).[23]

A significant amount of research has been done around the relationships between rape myths and sexual assault trials. Most of the research focuses on the jury's use of rape myths in their deliberations or on how defence counsel use rape myths in their submissions in order to sway the jury. Other research focuses on the impact of rape myths on the attrition rate of cases or the different types of support available to victims of various sexual assaults. However, there has been little research regarding the impact a judge can have on the perpetuation of rape myths beyond their immediate response to defence counsel's use of it. While judges may have a less direct role in jury trials, given that the jury plays the role of the 'fact finder', a judge's decision regarding the admissibility of evidence will have a direct impact on the prosecution's likelihood of success. With

[17] Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, 2009) at 60.
[18] Law Commission, above n 10, at 40-41.
[19] *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, 1 November 2019) at 2.
[20] I have not included these figures in this dissertation given the large margin of error noted for this date in 2013.
[21] Law Commission, above n 10, at 22-23.
[22] At 24.
[23] Noting that the majority of defendant are individuals the complainant knew.

sexual assault legislation currently under review by the New Zealand government, it is important to ensure all aspects of the criminal trial is properly examined.

The aim of this dissertation is to review whether the court system is fit for purpose regarding sexual violence trials. There is a myriad of research analysing the relationship between rape myths and the criminal justice system. However, the scope of this dissertation will be to analyse the courts' response to rape myths relating to adult female complainants, particularly their response regarding the admissibility of evidence.

A large majority of sexual assault trials will be heard by jury. A judge's role in a jury trial is largely relegated to pre-trial applications and applications during trial (which most likely relate to the admissibility of evidence and how evidence should be heard) as well as ensuring that counsel operate within the confines of the law.[24] Thus, this dissertation will analyse evidentiary decisions from 2013 onwards to determine whether the court perpetuates rape myths when determining whether evidence is admissible or inadmissible.

This dissertation is set out in five parts: Part I explains what rape myths are and sets out the most pervasive rape myths used in a jury trial as noted by the New Zealand Law Commission. Part II briefly describes the relevant legislation, and Part III undertakes an analysis of case law to determine how judges use the current legislation. Part IV explores potential future developments in the criminal justice system's response to sexual assaults. Part V will conclude that the courts are relatively proactive in preventing the perpetuation of rape myths in 'stranger rape' allegations, however, are not as responsive in preventing needless perpetuation where the allegation involves an 'acquaintance rape'.

I What are 'Rape Myths'?

The above media portrayals and Gender Attitudes study show that rape myths are still widespread opinions in society. Martha Burt, a pioneer of the study of rape myth acceptance, defined 'rape myths' as incorrect but commonly held beliefs about rape, victims of rape and rapists that were

[24] Law Commission, above n 10, at [3.24].

prejudicial or stereotypical.[25] These beliefs "serve to deny, downplay or justify sexual violence that men commit against women"[26] and provides a framework that influences a person's expectations as to what constitutes sexual assault.[27] It limits the acts or situations that people believe constitute 'real rape'[28] and influences what sexual assaults are taken seriously.[29] Essentially, rape myths place the responsibility of the assault on the victim who has somehow invited or deserved it rather than blaming the perpetrator's sexually predatory behaviour.[30]

Rape myths derive from socially ingrained gender norms stemming from the notion that men are "sexual actors" and women are the subject of their sexual actions.[31] They are used to justify social norms.[32] That is to say, these myths "have typically been conceptualised in terms of victims' violations of gender stereotypes".[33] Given its connection to cultural and social attitudes, rape myths vary from country to country.[34] For example, rape myth acceptance vary between approximately 18-30% in Western countries and 32-50% in Eastern countries.[35] However, regardless of culture, these myths "follow a pattern whereby, they blame the victim for their rape, express a disbelief in the claims of rape, exonerate the perpetrator and allude that only certain types of women are raped".[36] These misconceptions relate to the notion that women should be seen as "sexually attractive, but not sexually available" and when a woman deviates from that expectation (for

[25] Mary Carr and others "Debunking three rape myths" (2014) 10(4) Journal of Forensic Nursing 217 at 217.
[26] Louise Ellison and Vanessa E Munro "A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13(4) New Criminal Law Review: An International and Interdisciplinary Journal 781 at 782.
[27] Jaqueline M Gray "What constitutes a "reasonable belief" in consent to sex? A thematic analysis" (2015) 21(3) Journal of Sexual Aggression 337 at 339.
[28] Law Commission, above n 10, at 25.
[29] Olivia Smith and Tina Skinner "How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26(4) S & LS 441 at 443.
[30] Jaqueline M Gray, above n 27, at 339.
[31] Elisabeth McDonald (ed) and others. *Feminist Judgements of Aotearoa New Zealand. Te Rino: A Two-Stranded Rope*. (Hart Publishing, Portland, 2017) at 451.
[32] Kimberly A Lonsway and Lousie F Fitzgerald "Rape Myths" (1994) 18 Psychology of Women Quarterly 133 at 134.
[33] Regina A Schuller and others "Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender and Victim Stereotypes" (2010) 13(4) New Criminal Law Review: An International and Interdisciplinary Journal 759 at 763.
[34] Sokraris Dinos and others "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision-making?" (2015) 43 IJLCJ 36 at 38.
[35] At 38. These figures reflect the United Kingdom (18.3%), Canada (29.5%), Hong Kong (32.9%) and Malaysia (51.5%).
[36] Amy Grubb and Emily 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 at 445.

example, being flirtatious or inviting a man back to their home), some of the responsibility of the assault will be placed on the woman as a consequence. Furthermore, there is an expectation that women should take care to avoid dangerous situations, such as walking alone at night or becoming intoxicated (i.e. behaviour which 'encourages' sexual assault) or are expected to react in particular ways to the assault. If the woman fails to avoid such situations or to react in the expected manner, she is deemed to blame.[37]

Rape myths are usually descriptive (i.e. outlines how people believe sexual assaults occur) or prescriptive (i.e. illustrates how a person should act in that situation).[38] Rape myths also tend to fall within one of four categories:[39]

1. Beliefs blaming the victim;
2. Beliefs absolving the defendant;
3. Beliefs doubting the allegations; and
4. Beliefs that state that rape is restricted to distinct societal groups.

Sexual violence is frequently misunderstood and common assumptions tend to run contrary to established research.[40] Rape myths are harmful, yet one can understand why allegations are often met with doubt and uncertainty given the distinctly private and hidden nature of sexual violence - we do not know what occurs behind closed doors between two people, where there very rarely are witnesses.

Rape myths negatively impact the criminal justice system. When presented with evidence, jurors interpret the evidence in accordance with their understanding of society - even if the evidence is presented carefully and methodically.[41] If extra-legal knowledge is used (either consciously or sub-consciously) and affects the judgments jurors make regarding the quality of the evidence and the credibility of the witnesses, the jury's verdict is likely to be a result of these incorrect beliefs, rather than the facts of the case or the evidence itself.[42] The Law Commission noted that one of the

[37] At 451. See also Law Commission, above n 10, at 25.
[38] Sarah Zydervelt and others "Lawyers' strategies for cross-examining rape complainants: Have we moved beyond the 1950s?" 57(3) Brit J Criminol 551 at 553.
[39] Sokraris Dinos, above n 34, at 37.
[40] Law Commission, above n 10, at 111.
[41] Jennifer Temkin, Jacqueline M Gray and Jastine Barrett "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 12(2) Feminist Criminology 205 at 206.
[42] Law Commission, above n 10, at 112.

functions of the jury is to apply their common sense and life experience to the facts of the case. If their 'common sense' and life experience (which includes their beliefs) are incorrect and inaccurately reflect the reality of sexual violence, these beliefs impede one of the core functions of juries.[43] Furthermore, when defence counsel utilise such myths in their submissions (as myths are often a key defence tool) or when judges allow such myths to be presented to the jury, these beliefs are reinforced.[44] These myths can and are challenged, however, prosecution and judges regularly miss opportunities to address, correct or curb these myths.[45] Studies consistently show that rape myths impact on jury decisions, particularly regarding the likelihood of a guilty verdict.[46]

As Justice Claire L'Heureax-Dubé, a former Supreme Court of Canada Judge, stated, "myths and stereotypes divorce the law from contemporary knowledge because they have more to do with fiction and generalization than with reality [and] they are therefore, incompatible with the truth seeking function of the legal system".[47] The situation is also aptly summed up by Lousie Ellison, who stated "[i]n an ideal rape the victim is expected to resist vigorously and sustain physical injuries. She is also expected to report an attack immediately. Despite the evidence that there is no typical response to rape, defence lawyers in both England and Wales and the Netherlands continue to cast doubt upon women's stories. Women continue to be judged by a standard infused with erroneous assumptions and rape mythology... [T]he "culpability" of the victim of sexual violence [continues] to play a central role in rape cases irrespective of the legal system in question."[48]

There are numerous rape myths that are commonly known or accepted by society.[49] Some myths consider that the complainant is fabricating the allegation, for example, when the complainant delays in reporting the assault or continues to associate with the offender after the assault. Other rape myths question whether the complainant really "didn't want it" or that she was "asking for

[43] At 111.
[44] Jennifer Tempkin, above n 41, at 207.
[45] At 218.
[46] Sokraris Dino, above n 34, at 46.
[47] Claire L'Heureux-Dubé "Beyond the Myths: Equality, Impartiality, and Justice" (2010) 10(1) Journal of Social Distress and the Homeless 87 at 89.
[48] Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 221, citing Louise Ellison "A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems" (PhD Thesis, University of Leeds, 1997) at 324.
[49] These examples are rape myths the Law Commission noted in their Issues Paper as still prevailing in society. Law Commission *The Second Review of the Evidence Act 2006 - Te Arotake i te Evidence Act 2006* (NZLC R142, 2019) at 204.

it". For example, the idea that if the complainant really didn't want his advances, she would have fought back but she didn't, so she must have wanted it or the idea that the complainant became intoxicated and/or allowed the offender to buy her drinks, so what did she expect? There are also rape myths associated with what a 'real rape' is that state that a 'real rape' is committed by a stranger, was an unexpected attack and would involve physical force and/or a weapon.

The above rape myths are only a sample of the various rape myths that still persist. Given the breadth of these myths, this dissertation will only focus on a selection, namely, that (A) a 'real rape' is committed by a stranger; (B) victims will fight back and have subsequent injuries (if they really do not want it); (C) the victim was partially responsible for the assault if they were intoxicated and/or engaged in other "victim-blaming behaviour"; and (D) the victim claims rape because she regrets having sex. It is these myths which the Law Commission has identified as being the most pervasive in sexual assault trials, thus, will be the focus of this dissertation. This is not to say that other myths will not be perpetuated in a sexual assault trial.

A It's Only a 'Real Rape' if the Perpetrator is a Stranger

Many people consider that it's only a 'real rape' if the assault was perpetrated by a stranger and occurred in a remote (but public) location. The more the facts of the case correspond with the 'real rape' scenario, the more likely it is that juries will consider the complaint as genuine.[50] Conversely, the less the facts of the case match the 'real rape' scenario, the greater the doubt cast on the allegation.[51] However, the reality is that only a small number of sexual assaults will match the 'real rape' scenario.[52] It has been estimated that between 20%-33% of cases involve a stranger as the perpetrator.[53] Research consistently shows that the majority of sexual assaults are committed by someone known to the complainant (an 'acquaintance rape')[54], thus, the situation most likely to occur is the situation in which the complainant is considered less genuine.[55]

[50] Louise Ellison, above n 26, at 783.
[51] Susan Leahy "Bad laws or bad attitudes? Assessing the impact of societal attitudes on the conviction rate for rape in Ireland" (2014) (14)(1) Irish Journal of Applied Social Studies 18 at 19.
[52] Louise Ellison, above n 26, at 783.
[53] Susan Leahy, above n 51, at 21. Similar statistics were cited in an American study, Hannah M Borhart & Karyn M Plumm "The effects of sex offender stereotypes on potential juror beliefs about conviction, victim blame, and perceptions of offender mental stability" (2015) 11(3) Applied Psychology in Criminal Justice 207 at 208.
[54] Law Commission, above n 49, at 212.
[55] Susan Leahy, above n 51, at 19.

Even where jurors understand that sexual assaults can be committed by a person familiar to the complainant, the literature implies that jurors expect the complainant to respond differently e.g. while jurors understand that someone sexually assaulted by a stranger may freeze or be unable to fight back, this same understanding does not apply where the complainant knows the offender.[56] In 'acquaintance rapes', there is an expectation that the complainant will fight back or robustly protest. Thus, the myth is more complex than jurors simply subscribing to antiquated notions of what a 'real rape' is; it reflects "an array of expectations regarding 'appropriate' forms of socio-sexual behaviour, conventions of sexual (mis)communication, and presumptions regarding the will and capacity of victims to resist an attack physically".[57] The distinction between a 'real rape' and an 'acquaintance rape' and the reality that 'acquaintance rapes' closely mimics consensual socio-sexual behaviour, plays upon the idea that men are sexual actors with women as the subject of their sexual behaviour. This is also a factor in the corresponding difficulties, complexities and ambiguities the 'acquaintance rape' situation creates for securing a guilty verdict.[58]

Given people are more likely to believe 'real rapes', 'real rape' victims have better access to support services, receive greater understanding and compassion from police and prosecutors, and experience less distressing cross-examination by defence counsel.[59] These cases are also more likely to go to trial and have higher guilty verdicts.[60] Comparatively, cases that are not considered 'real rapes' tend to have lower investigative interest from police, are less likely to go to trial and have much lower conviction rates.[61] These victims are also more likely to be blamed for the assault.[62] It is a common defence tactic to distance the current case from the typical 'real rape' scenario by emphasising the differences between the two situations.[63]

[56] Law Commission, above n 49, at 212.
[57] Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in(mock) juror deliberations" (2013) 17(4) E&P 299 at 302.
[58] At 310.
[59] Elisabeth McDonald, above n 48, at 41.
[60] At 41.
[61] At 41–42.
[62] Louise Ellison, above n 57, at 301.
[63] Jennifer Temkin, above n 41, at 210.

B Physical Resistance and Injuries

Another common belief is that perpetrators will use force to overcome their victim and that victims of sexual assault will fight against the assault, receiving injuries as a result.[64] This belief is commonly perpetuated at trial where defence attempt to qualify a lack of resistance and/or injuries as abnormal behaviour by the victim, thus, encourage juries to treat the victim with suspicion.[65]

There are differing expectations of appropriate reactions in a 'real rape' versus an 'acquaintance rape'.[66] In a 'real rape', jurors are more likely to understand that a person may be unable to fight back as they may be physically overwhelmed or in shock, thus, were 'paralysed' during the attack. However, there is a strong expectation that where the victim is familiar with the perpetrator, the victim would do absolutely everything in their power to protest and fight back (as their familiarity with the assailant would make them less fearful).[67] This belief is based on the idea that an assault by a stranger has a risk of increased violence, however, an assault by a familiar person will have less risk, thus, the victim would feel more 'comfortable' to physically resist or protest.[68] An exception to this expectation is if there was a history of family violence between the parties.[69] 'Acquaintance rape' cases face a double bind. If there is no evidence of resisting and receiving injuries as a result, the allegation is more likely to be considered false or ingenuine. However, even where injuries occur, they are often dismissed as either a result of the complainant enjoying "rough sex", a result of an unrelated activity, the complainant just bruising easily or the injuries were self-inflicted to reinforce the credibility of the allegation.[70]

As will be discussed below, this rape myth is used to deny or downplay sexual assaults against women and certainly influences what situations are considered to be sexual assaults. This myth likely derives from the idea that a woman's virtue should be protected and where a woman either fails to do so or chooses not to do so, she must suffer the consequences. This is also interrelated with the idea of women being "sexually attractive but not sexually available". Where a man operates in his role as a "sexual actor", there is an expectation that the woman defend her virtue to

[64] Law Commission, above n 49, at 213.
[65] Olivia Smith, above n 29, at 449.
[66] Louise Ellison, above n 26, at 790.
[67] At 790.
[68] Louise Ellison, above n 57, at 315.
[69] At 315.
[70] A 318.

keep her reputation intact and failure to do so will result in the woman suffering the consequences by being considered partly blameworthy.

The level of physical resistance (proved by the subsequent injuries) positively correlates with how genuine the claim is perceived.[71] In an English mock jury study, approximately one third of participants were either neutral towards or agreed with statements that if a woman did not fight back, the sexual assault did not occur and if there were no bruises or other injuries, then the sexual assault did not happen.[72] The reality is that physical force does not always occur and many victims are more likely to freeze than fight back.[73]

One Australian survey showed that, out of 2500 victims, just over half resisted.[74] Another American study stated that only about 20% actively resisted throughout the assault.[75] This reality is acknowledged by s 128A(1) of the Crimes Act 1961 which states that simply because a person does not protest or resist, does not mean that they consented to the sexual activity. There may be many reasons, beyond fear and shock, why a complainant did not resist or protest. The victim may have believed that by not resisting, they may suffer less injuries.[76] Studies show that the more the victim resists, the greater the injuries they suffer; lack of resistance may stem from self-preservation.[77] Other reasons could include self-blame or avoiding a social threat (i.e. the stigma against sexual assault and related social rejection).[78] Alcohol is another reason the complainant may not have resisted as alcohol is an inhibitor and often decreases a person's ability to respond quickly or effectively to a situation.[79] Even if it was accepted that the victim did not consent despite not fighting back, English and Welsh mock jurors considered, during their mock deliberations, that

[71] Louise Ellison, above n 26, at 790.
[72] At 790.
[73] Law Commission, above n 49, at 214.
[74] Victoria Police and Australian Institute of Family Studies *Challenging misconceptions about sexual offending: Creating an evidenced-based resource of police and legal practitioners* (Victoria Police and Australian Institute of Family Studies, Report, 2017) at 7.
[75] Mary Carr, above n 25, at 223.
[76] At 223.
[77] Jennifer S Wong and Samantha Balemba "Resisting during sexual assault: A meta-analysis of the effects on injury" (2016) 28 Aggression and Violent Behavior 1 at 7.
[78] Christine A Gidycz, Amy Van Wynsberghe and Katie M Edwards "Prediction of Women's Utilization of Resistance Strategies in a Sexual Assault Situation: A Prospective Study" (2008) 23(5) Journal of Interpersonal Violence 571 at 573.
[79] At 573 – 574.

the lack of physical resistance or protest meant that the defendant could have reasonably believed that the complainant was consenting.[80]

As for actual injuries suffered, research shows that sexual assaults can occur without any injuries being sustained.[81] In one American study, approximately 30% of victims suffered no injuries, with only 4% suffering severe injuries.[82] At best, the presence or absence of injuries is a neutral factor. It is very difficult to tell whether the injuries were caused by non-consensual sex or consensual sex, with many cases showing no injury at all.[83] A lack of injuries should not be a surprising finding as vaginal tissue is elastic, thus, may not easily be injured by penetration.[84] Furthermore, penises are also susceptible to injury, thus, any force exerted by a perpetrator is more likely used to physically restrain the victim, rather than force penetration.[85] Another reason why a lack of injuries or the presence of only minor injuries should not be surprising is because, as stated previously, the majority of sexual assaults do not follow the 'real rape' scenario where more force would be necessary for a stranger to overcome a victim in a sudden attack.[86]

That is not to say that victims do not suffer injuries. Given the myriad of ways sexual assaults occur and the uniqueness of each victim, there is huge variation amongst studies as to how often injuries occur and how severe they are. One study researched the prevalence of physical injuries after a sexual assault and undertook a large case review of 819 women.[87] The authors found that non-genital injuries occurred anywhere between 40-82% of patients and genital-anal injuries occurred in 6%-87% of cases.[88] The authors also found that non-genital injuries were twice as likely to occur than genital-anal injuries.[89] Genital-anal injuries were also mostly associated with younger or virginal victims.[90]

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[80] Louise Ellison, above n 57, at 321.
[81] Mary Carr, above n 25, at 223. See also Louise Ellison, above n 25, at 783 and the Law Commission, above n 33, at 214.
[82] At 223.
[83] At 223.
[84] At 223.
[85] At 223.
[86] Susan Leahy ""No means no", but where's the force? Address the challenges of formally recognising non-violent sexual coercion as a serious criminal offence" (2014) 78(4) JCL 309 at 317.
[87] N F Sugar, D N Fine and L O Eckert "Physical injury after sexual assault: Findings of a large case series" (2004) 190 American Journal of Obstetrics and Gynecology 71.
[88] At 71.
[89] At 75.
[90] At 75.

C Intoxication and Other Victim-Blaming Behaviour

The most pervasive rape myth is that of victim-blaming. This myth relates to the idea that the complainant either "asked for it" or was partially responsible for the assault (making the defendant less culpable) as they behaved in a manner which "good girls" would not do (notions which are based on antiquated expectations). This misconception is interrelated with the concept of the "genuine" victim i.e. a victim who is a "chaste individual who has not engaged in 'risky' behaviour".[91] Such behaviours involve becoming intoxicated, wearing provocative clothing or being flirtatious. Where the complainant engages in this type of behaviour, society adopts an attitude that "women who put themselves in compromising positions shouldn't complain when they are compromised",[92] that is to say, women who deviate from traditional gender norms will not be seen as a "genuine" victim.[93]

This notion is harmful as it moves the focus from determining whether the complainant consented to the sexual behaviour to whether the complainant was to blame for the situation.[94] The more sexually provocative the complainant's behaviour is perceived to be, the more likely others will believe that the victim, at least partially, caused the sexual assault.[95] It may seem that these notions are dated and no longer have a place in our modern society, however, the New Zealand Law Commission noted in their 2019 review of the Evidence Act that 15% of respondents still agreed that "[i]f someone is raped because they are drunk, they're at least partially responsible for what happens".[96] Another Irish survey found that approximately 41% considered that the complainant was partially responsible if they had consumed alcohol or drugs, 37% agreed that the complainant was partially responsible if they flirted with the defendant and 29% considered that the complainant had "invited" the sexual assault if they dressed provocatively.[97]

This misconception becomes particularly damaging when the third element of unlawful sexual connection becomes central at trial: whether the defendant had a reasonable belief that the

[91] Susan Leahy, above n 51, at 19.
[92] At 19.
[93] Kellie R Lynch and others "Who bought the drinks? Juror perceptions of intoxication in a rape trial" (2013) 28(16) Journal of Interpersonal Violence 3205 at 3206.
[94] Law Commission, above n 49, at 210.
[95] Bianca Klettke and Sophie Simonis "Attitudes regarding the perceived culpability of adolescent and adult victims of sexual assault" (2011) 26 Aware 7 at 7.
[96] Law Commission, above n 49, at 211.
[97] Susan Leahy, above n 51, at 24.

complainant was consenting. In an English mock jury study, researchers found that jurors considered that, based on the complainant's prior conduct with the defendant, the defendant would have had a reasonable belief in consent.[98] This was despite the complainant's subsequent passivity during the act itself i.e. the complainant's state of mind during the sexual act was not enough to counter the prior positive signals. The same jurors accepted that positive signals did not equate to actual consent (and should not replace the need for actual consent), however, still remained reluctant to discount the idea that the defendant could have reasonably believed the complainant had consented (in the absence of actual consent) based on prior behaviour.[99] This reluctance stems from the difficulty of differentiating the conventional heterosexual seduction script from an 'acquaintance rape' scenario.[100] Lousie Ellison and Vanessa Munro, professors of law, explained this script as:[101]

> The main elements of this script – which were often uncritically accepted by jurors – include the positioning of the man as the "proactive" sexual initiator, the woman as the "defensive" gatekeeper, and the man as having the higher sex drive. There was a clear expectation that "normal" heterosexual men will engage in multiple strategies to overcome women's reluctance or refusals, and that these strategies may extend to the use of verbal coercion, psychological pressure, and (within limits) physical force. Where sexual attraction is unwelcome, women are, by extension, expected to communicate nonconsent by responding to each successive advance with resistance, both verbal and physical. Notably, within this interpretive frame, responsibility for avoiding potential miscommunication in sexual encounters is asymmetrically placed on the woman. Thus, rather than positioning the man as a deficient decipherer of signals, it is the woman's verbal and nonverbal behavior that is typically scrutinized for culpable ambiguity.

This myth negates the fact that alcohol can significantly undermine a person's ability to communicate non-consent, thus, the expectation that someone should repeatedly communicate non-consent until it is understood by the other party becomes unreasonable. The myth is further complicated by the fact that alcohol is commonly used as a social lubricant, thus, often features in consensual sex as well.[102]

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[98] Louise Ellison, above n 26, at 791.
[99] At 792.
[100] At 792.
[101] At 792–793.
[102] Susan Leahy, above n 51, at 23.

Intoxication frequently triggers victim-blaming notions.[103] The level of blame or responsibility attributed to the complainant is heavily dependent on whether the complainant voluntarily consumed alcohol.[104] There is wide variation as to how blameworthy a complainant who became voluntarily intoxicated is considered, with some people believing that this behaviour completely absolved the defendant (likely those who highly endorse this rape myth), whilst others considered that the defendant was still culpable, however, the behaviour fell short of rape.[105] Yet, a double standard exists. Men who are intoxicated are deemed less responsible for their actions, whilst women, as shown so far, are considered more responsible.[106]

A high percentage of sexual assaults involve alcohol. One Danish study, analysing 2541 reports of sexual offending, found 60% of those cases involved alcohol.[107] Another Irish study estimated it to be approximately 78%.[108] Alcohol is the most common drug used by perpetrators, either by intentionally getting the victim intoxicated to incapacitate them or increase the chances of a sexual encounter, or by taking advantage of a female who is already intoxicated.[109] Approximately 75% of male college students admitted to this behaviour when asked whether they encouraged female college students to consume alcohol in an attempt to increase the likelihood of obtaining sex.[110] Perpetrators of sexual assault are opportunistic and are highly likely to take advantage of the victim's intoxicated state.[111] One English pilot study looked at the relationship between victim-blaming and intoxication.[112] It noted that there were only two circumstances where placing the responsibility for the assault shifted from the victim to the defendant: where the defendant intentionally interfered with the victim's drink in order to procure sex and where the defendant was either sober or significantly less intoxicated than the victim.[113]

[103] At 23.
[104] Emily Finch and Vanessa E Munro "Juror stereotypes and blame attribution in rape cases involving intoxicants: The findings of a pilot study" (2005) 45(1) Brit J Criminol 25 at 30 - 31.
[105] At 31.
[106] Rose Mary Lynn Ubell "Myths and Misogeny: The Legal Response to Sexual Assault" (Master of Studies in Law Research Papers, Western University, 2018) at 16.
[107] Victoria Police, above n 74, at 10.
[108] Susan Leahy, above n 51, at 22.
[109] Victoria Police, above n 74, at 10.
[110] Kellie R Lynch, above n 93, at 3206.
[111] Victoria Police, above n 74, at 10.
[112] Emily Finch, above n 104.
[113] At 31 and 35.

Once a sexual assault complaint goes to trial, research shows that intoxicated victims are seen as less credible and considered more responsible for the assault (compared to sober victims).[114] Not only did mock jurors consider the victim more responsible, they were more likely to interpret the event as consensual if alcohol was consumed prior to, or during, the event.[115] This perception is based on the societal attitude that women who are drinking are perceived as more receptive to sexual advances, more easily persuaded and more likely to engage in sexual behaviour (likely stemming from traditional gender norms and the attitudes towards those who deviate from them).[116] Related to this myth is that many drunken encounters are subsequently regretted, and women will "cry rape" in an effort to redeem themselves after deviating from accepted gender norms.[117]

D Regret Results in Lies

One misconception which is particularly resistant to change is that women lie about being sexually assaulted as it is an easy allegation to make and they have nothing to lose by making it.[118] This is also based on the idea that men and women differ in their expectations regarding relationships and their sexuality: women value commitment and relationships (thus, lie that the act was unwanted when they realise that the man was not seeking a relationship) whilst men value freedom and pleasure; promiscuity negatively impacts a women's reputation but enhances a man's (so women lie to protect their reputations); and women are creatures of revenge and are calculating (therefore, they made up a complaint to right a perceived slight), while men are simple and straightforward creatures.[119]

Given the above stereotypes, it is often thought that a female complainant consented to sex but was ashamed and later regretted her behaviour, thus, cried rape.[120] An Irish survey of 3000 individuals found that approximately 37.9% of women and 42.3% of men thought that sexual assault allegations were often false.[121] Where such attitudes are present at a sexual assault trial,

[114] Kellie R Lynch, above n 93, at 3207.
[115] At 3207.
[116] At 3206.
[117] Jennifer Temkin, above n 41, at 213.
[118] Louise Ellison, above n 26, at 797.
[119] At 798.
[120] Victoria Police, above n 74, at 10.
[121] Susan Leahy, above n 51, at 24.

the juror will be suspicious of the complainant,[122] thus, no longer becomes the impartial decision-maker – a crucial element of the fact-finder's role.[123]

It is very difficult to estimate how many sexual assault allegations are actually false or "unfounded", given the various definitions regarding what constitutes a false or unfounded allegation, the criteria used to determine whether the allegation was false and the individual reporting practices of each jurisdiction.[124] The statistics vary (and are often a result of bias), however, a review of international studies in 2009 showed that false allegations occurred in roughly 2–8% of complaints.[125] The Crown Prosecution Services ("CPS") in the United Kingdom issued a report whereby the CPS studied the number of cases which contained allegedly false accusations of rape and domestic violence.[126] They found that, of the 5631 rape prosecutions which occurred, CPS prosecuted 35 of those cases for making false complaints of rape (approximately 0.6% of total prosecutions).[127]

Unlike the infamous remark by Lord Hale, that "it must be remembered... that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent",[128] the reality of making a formal complaint is not easy, both in making the actual complaint and in progressing the complaint to trial. It is much easier to defend an allegation given the general lack of evidence and the high burden of proof required in the criminal court. Furthermore, the process between making the complaint and completing the trial is incredibly taxing for a complainant. There are multiple disincentives in making a complaint, such as: the stigma surrounding sexual assault, the highly personal nature of the questions, the stresses related to trial, the demanding cross-examination and the low probability that the prosecution will result in a guilty plea.

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[122] At 20.

[123] Judge Michael Crosbie "The role of the jury in a democracy in action" (2018) The District Court of New Zealand <http://www.districtcourts.govt.nz/about-the-courts/j/the-role-of-the-jury-in-democracy-in-action/>.

[124] Bruce Gross "False Rape Allegations: An Assault on Justice" (2009) 18(1) Forensic Examiner 66 at 67.

[125] Rose Mary Lynn Ubell, above n 106, at 22.

[126] Alison Levitt QC and Crown Prosecution Service Equality and Diversity Unit *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* (Crown Prosecution Service, March 2013) at 3. Given that the report was conducted 4 years after the 2009 international study, this indicates that these figures are relatively stable and are unlikely to have changed significantly in 2020.

[127] At 3.

[128] Sir Matthew Hale *Historia Placitorum Coronae: The History of the Pleas of the Crown* (R and R Nutt and R Gosling, 1736) at 635-636.

II The Legislative Landscape

Around 2006, the Crimes Act 1961 underwent a long-awaited reform. The Evidence Act 2006 also came into force, significantly reforming the admissibility of evidence in sexual assault trials.[129] These reforms intended to mitigate the use of rape myths in the courtroom.[130] As the focus of this dissertation is analysing whether rape myths are used in by judges in preparation of or during a criminal trial of the criminal justice system, it is important to explain the context in which rape myths may be used. The following section briefly explains the sexual offences contained in the Crimes Act as well as noting certain situations where the legislature has removed the victim's ability to consent to the sexual encounter, thus rendering the incident as a sexual assault. A more in-depth analysis of the Evidence Act will follow given the specific focus of this dissertation in determining whether the reasons behind admitting evidence (or not admitting it) perpetuate rape myths.

A Crimes Act 1961

The Crimes Act 1961 defines what behaviour amounts to sexual offending in Part 7 of the Act. Consent is not defined in the Act despite being an element in almost every sexual offence.[131] When reforms to the Act were considered in 2005, the Select Committee opined that a definition should not be included as they considered that common law sufficiently defined "consent".[132] However, the Act does set out situations the complainant cannot consent or cannot be deemed to have consented in s 128A.[133] These situations include an inability to consent where the complainant is unconscious or asleep, if they are so intoxicated that they are not in a position to consent or where they have an impairment or condition to such a degree that they cannot consent and removes the argument that a complainant is deemed to have consented simply because they did not protest or resist.

Section 128A directly address a few of the rape myths discussed above. For example, a failure to protest or resist does not mean that a person has consented (responding to the misconception that

[129] Elisabeth McDonald, above n 48, at 33.
[130] Sarah Zydervelt, above n 38, at 554.
[131] The offences which do not contain an element of consent are those related to incest, offences which focus on the victim being under the legal age of consent in New Zealand or involve animals.
[132] Elisabeth McDonald, above n 31, at 425.
[133] Crimes Act 1961, s 128A.

if a person really did not want the activity, they would have protested/resisted). However, the use of the phrase "just because" merely means that "consent cannot be inferred only from the fact that the person does not protest or offer physical resistance".[134] This is a lower standard than the subsequent situations in s 128A, all which describe situations where a person cannot consent or where consent has been vitiated.[135]

The most serious offence is rape or unlawful sexual connection.[136] Rape or unlawful sexual connection is when a sexual connection occurs between two individuals, without the complainant's consent and where the defendant (who continued the sexual activity) did not have a reasonable belief that the other person was consenting.[137] In regard to the last element, the prosecution must prove that defendant did not believe the complainant was consenting (subjective limb) *and* that no reasonable person in the defendant's position would have considered that the complainant was consenting (objective limb).[138] It is important to note the three different elements of this offence (which are also echoed in other sexual offences). It is through defending each of these elements that the courts are likely to admit evidence perpetuating rape myths, particularly in regard to the second and third element. The evidence defence often attempt to admit will likely be that the complainant consented to the activity i.e. "wanted it" or that the defendant thought the sexual act was consensual (thus, can play on a myriad of rape myths such as victim-blaming myths or myths relating or lack of protest/resistance).

B The Evidence Act 2006

As shown in the previous section regarding rape myths, misconceptions about sexual assault negatively affects how jurors perceive and analyse evidence in sexual assault trials. The Evidence Act is crucial in sexual assault trials as New Zealand courts are adversarial. Parties present evidence to a neutral fact-finder, either judge or jury, who determines the case by applying the relevant law to the facts of the case. The facts of the case are determined by the evidence, thus, a case will stand or fall by the evidence admitted at trial.[139] Judges play a pivotal role in determining

[134] *Christian v R* [2017] NZSC 145; [2018] 1 NZLR 315 at [45].
[135] At [44]. See also *R v Brewer* CA516/93, 26 May 1994.
[136] Crimes Act 1961, above n 133, s 128.
[137] Section 128(2) and (3).
[138] Annette King *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* (Ministry of Justice, Corp 371, August 2008) at 19.
[139] Law Commission, above n 10, at 52.

what evidence is admissible. Where a party purports to place evidence before the fact-finder and it is challenged by the other party, the Judge will decide whether the evidence is admitted under the Evidence Act.[140]

Generally, evidence is admissible if it is relevant and its probative value outweighs its prejudicial effect.[141] Whilst all evidence must satisfy the relevance and probative threshold, this dissertation will focus on the sections which were specifically implemented for sexual assault trials or are aspects which significantly impact these trials. These sections relate to the use of expert witnesses, the "rape shield" provisions, cross-examination and judicial directions.

1 Counter-intuitive and expert evidence

The Evidence Act provides various mechanisms to ensure jurors receive information to counteract any misconceptions they may have. One is counter-intuitive evidence via an expert witness' opinion. While opinions are generally inadmissible,[142] expert opinion is an exception if it substantially helps the fact-finder to understand evidence or determine any fact which may be significant to the case.[143]

Expert evidence informs jurors about certain facts they may be unaware of.[144] In sexual assault trials, its purpose is to enlighten jurors about the normal and diverse responses by victims or to provide information about common elements of sexual assault.[145] It provides a social and psychological background which jurors can use to assess the evidence.[146] This evidence is known as counter-intuitive evidence. Essentially, it explains behaviour that could otherwise be interpreted as the complainant lying, being unreliable or suspicious. It aims to educate jurors that, for example, a delay in reporting is common, giving reasons for delaying, or that complainants commonly associate with the perpetrator after an assault (given that most assaults are committed by acquaintances).[147]

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[140] At 52.
[141] Evidence Act 2006, ss 7-8.
[142] Section 23.
[143] Section 25.
[144] Louise Ellison and Vanessa E Munro "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49(3) Brit J Criminol 363 at 365.
[145] Elisabeth McDonald, above n 48, at 239.
[146] Louise Ellison, above n 144, at 365.
[147] *AM (CA315/2017) v R* [2017] NZCA 345 at [23].

Research suggests that expert evidence can mitigate rape myths if introduced early in a case (although studies have been unable to establish that it directly bears on verdicts).[148] To be most effective, it should be specific to the case or at least should link to the present facts (e.g. via hypothetical scenarios).[149] However, this can be highly problematic as such evidence is often considered conclusive (rather than an expert opinion). This will detrimentally affect a case if the jury abdicates their fact-finding role by failing to assess the evidence against the facts and simply adopting the expert's opinion as a statement of fact.

The Supreme Court endorsed using counter-intuitive evidence.[150] The Court stated it could counter illegitimate reasoning or erroneous beliefs regarding sexual assault. However, it should be "confined to what would be substantially helpful, there is focus on live issues and that the evidence is not unduly lengthy or repetitive and is expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of trial."[151]

Counter-intuitive evidence can even the playing field between prosecution and defence by providing an alternative explanation to defence arguments, given defence often seek to discredit the allegation by labelling the complainant's behaviour as abnormal or unusual.[152] However, it must not go beyond levelling the playing field and bolster the complainant as a witness as that impinges on the defendant's fair trial rights, creating a ground for appeal with the potential consequence that the complainant would have to undergo another trial in the future.

2 "Rape shield" provisions

Section 44 (and s 44A) is colloquially known as the "rape shield" provision and states that a complainant's sexual history is generally inadmissible. Section 44 is incredibly important in sexual trials. A study showed that evidence of the complainant's sexual history is highly influential in a trial[153] and that complainants often feel as though they are on trial, not the defendant.[154] Where a

[148] Elisabeth McDonald, above n 48, at 239.
[149] At 239.
[150] *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625.
[151] At [110].
[152] Louise Ellison, above n 144, at 363.
[153] Jennifer Temkin, above n 41, at 213. See also Gillian R Mason, Stephanie Riger and Linda A Foley "The Impact of Past Sexual Experiences on Attributions of Responsibility for Rape" (2004) 19(10) J Interpers Violence 1157.
[154] Law Commission, above n 49, at 49.

complainant's history is examined, the victim is more likely to be blamed for the assault, rather than the defendant's conduct being scruitinised.[155]

Section 44 states that evidence regarding the complainant's sexual experience with persons other than the defendant is inadmissible, unless the Judge rules it admissible.[156] Sexual experience with the defendant remains admissible (if relevant and probative). The Law Commission suggested that s 44 should be extended to include the complainant's sexual experience with the defendant, however, Parliament did not adopt that suggestion when enacting the Evidence Act.[157] To admit this evidence, a heightened relevance test must be satisfied: the evidence must be so relevant to the facts in issue, that it would be contrary to the interests of justice to exclude it.[158] The rationale behind this heightened test was discussed in *B (SC12/2013) v R,* where the Supreme Court held that:[159]

> Rape shield provisions... are intended to reduce the humiliation and embarrassment faced by complainants and to prevent the use of reasoning based on erroneous assumptions arising from a complainant's previous sexual history. In *Bull v R* , the majority of the High Court of Australia identified two erroneous lines of reasoning that might arise in this context: because a complainant has a particular sexual reputation, disposition or experience, either (1) he or she is the kind of person who would be more likely to consent to the activity which is the subject of charges or (2) he or she is less worthy of belief than a complainant who does not have those characteristics. Against these concerns, however, must be balanced the defendant's right to a fair trial and the right to present an effective defence in particular.

Section 44 was enacted to "prevent the entirely reprehensible and inappropriate blackening of the characters of particularly women complainants by directly or indirectly 'tarring' them in the eyes

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[155] Elisabeth McDonald, above n 48, at 326.
[156] Evidence Act, about n 141, s 44(1).
[157] Simon France (ed) *Adams on Criminal Law - Evidence* (online looseleaf ed, Thomson Reuters) at [EA44.03]. In most jurisdictions, rape shield provisions extend to include the complainant's previous sexual activity with the defendant: *Law Commission*, above n 33, at 54. The Law Commission suggested the extension in their 2019 review of the Evidence Act but clarified that it would only relate to the details and the nature of the sexual relationship between the complainant and the defendant (not the fact that there had been/was a sexual relationship between the complainant and defendant). It is unclear why Parliament did not adopt that decision. Neither Hansard, legal commentary nor the Law Commission in their 2019 review of the Evidence Act suggest a reason why Parliament declined to incorporate that suggestion
[158] Evidence Act, above n 141, s 44(3).
[159] *B (SC12/13) v R* [2013] NZSC 151; [2014] 1 NZLR 261 at [53].

of the jury".[160] It acknowledges that evidence should be related to the actual event, not prior events occurring in the complainant's life.[161] Evidence relating solely to the complainant's sexual reputation is completely inadmissible.[162]

Section 44 is subject to s 44A which governs applications for adducing evidence or asking questions about the complainant's sexual experience and ensures that the evidence defence wish to admit is clearly specified.[163] The Law Commission recommended this section be amended to require defence to include reasons why the evidence is of such direct relevance.[164] If adopted by Parliament, it would be a significant step forward as it would be harder for defence to justify such evidence.

Section 88 of the Evidence Act restricts disclosing the complainant's occupation in sexual cases. The rationale behind this is to protect the safety and privacy of the complainants.[165] It too has a heightened relevance test which must be satisfied before a Judge will admit this evidence.

3 Cross-examination and other lines of questioning

Under s 92 of the Evidence Act, a lawyer must cross-examine in certain circumstances.[166] The duty only arises once a fourfold test is satisfied: the topic is significant, is both relevant and a live issue, it contradicts a witness's evidence and the witness reasonably expected they would give evidence on the topic.[167] The purpose of cross-examination is to allow an opposing witness to address evidence which will be called later and protects the interests of the party who called the witness.[168] It is also a method of testing the evidence.[169] Section 85 allows Judges to intervene if they consider a question "improper, unfair, misleading, needlessly repetitive or expressed in language that is too complicated for the witness to understand".[170] If cross-examination

[160] *R v Clode* [2007] NZCA 447 at [24].
[161] Law Commission, above n 49, at 49.
[162] Evidence Act, above n 141, s 44(2). This can be compared to the previous legal position where reputation evidence could be admitted with the permission of a Judge: Simon France (ed), above n 171, at [EA44.02].
[163] At [EA44A.01].
[164] Law Commission, above n 49, at 17.
[165] GF Orchard "Sexual violation: The rape law reform legislation" (1986) 12 NZULR 97 at 109.
[166] Evidence Act, above n 141, s 92(1).
[167] Simon France (ed), above n 157, at [EA92.01].
[168] *Howe v Auckland District Court* HC Auckland CIV-2009-404-1197, 30 June 2009 at [27].
[169] Law Commission, above n 10, at 55.
[170] Evidence Act, above n 141, s 85(1).

"humiliate[s], belittle[s] and break[s] the witness" it is inappropriate and a Judge should intervene, ruling that line of questioning impermissible.[171]

Cross-examination is one of the most criticised aspects in sexual assault trials and is one of the primary reasons why trials have been described as a "second rape".[172] Cross-examination, while never pleasant, is particularly trying in sexual assault cases given the private and intimate nature of the offence and the intrusiveness of answering such questions in front of an audience.[173] Cross-examination is often used by defence to perpetuate rape myths as judges are not well-equipped to intervene in witness questioning and are wary about interfering as they do not want to be seen as "descending into the arena".[174] However, given the court's adversarial nature, there are limits on what can be done to address these criticisms. Defence have a duty to protect their client from conviction and present a "fearless, vigorous and effective defence".[175] Defendants also have a right to examine the witness under the New Zealand Bill of Rights Act 1990.[176]

4 Judicial directions

Judicial directions are instructions to a jury providing guidance as to how to approach the consideration of evidence presented to them at trial.[177] It informs jurors (who are unfamiliar with evidentiary law) about any limitations or risks regarding certain evidence.[178] It also helps jurors focus on the probative value of evidence as well as encouraging them "not to be influenced by assumptions, prejudices or misunderstandings that the evidence would otherwise give rise to".[179] Directions can include that evidence be given in an alternative manner,[180] cautions about accepting or placing great weight on evidence which may be unreliable,[181] and warning jurors against placing undue weight on evidence that suggests the defendant lied.[182]

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[171] *R v Thompson* [2005] 3 NZLR 577 (CA) at [68].
[172] A term coined by Rebecca Campbell and others in "Preventing the "Second Rape": Rape Survivors' Experiences With Community Service Providers" (2001) 16(12) Journal of Interpersonal Violence 1239.
[173] Elisabeth McDonald, above n 48, at 315.
[174] At 313.
[175] At 314.
[176] New Zealand Bill of Rights Act 1990, s 25(f).
[177] Law Commission, above n 10, at 117.
[178] At 117.
[179] At 117.
[180] Evidence Act, above n 141, s 83.
[181] Section 122.
[182] Section 124.

One direction specifically relating to sexual assault trials is the caution against placing disproportionate weight on evidence showing the complainant delaying or failing to make a complaint about a sexual assault. The purpose of this direction is to "permit the Judge to tell the jury that there can be good reasons why the victim in a sexual case may delay making a complaint. The point of such a direction is to neutralise the erroneous perception that a victim of a sexual offence would complain immediately".[183]

The Law Commission recommended that other directions be enacted allowing a judge to addresses any misconceptions the jury may have about sexual violence.[184] It suggested that these directions could address misconceptions about "victim-blaming behaviour", that a 'real rape' is perpetrated by strangers (or that acquaintance rapes are less serious) and that it cannot be rape unless physical force was used and/or the complainant suffered injuries as a result.[185] For judicial directions to have an effect, it is imperative they are a clear and simple and should not stress the false belief too much.[186] Judicial directions should correct rape myths without substituting "correct" assumptions (which would be prejudicial to the defendant).[187] Any judicial directions should be readily able to be updated in response to the developing literature regarding misconceptions of sexual assault.

III Sexual Assault Trials in the Criminal Courts

The following section will analyse whether (and if so, how) the courts perpetuate rape myths in sexual assault trials through the evidence the courts consider should be admissible. The focus will be on appeal cases from 2013 onwards and will be chronological to determine whether a trend emerges of courts gaining a greater awareness of the use of such myths in the trial context and steps taken to prevent such myths being utilised. This timeframe was chosen as it was the approximate time the RoastBusters scandal came to light in New Zealand and was, arguably, one of the first public discussions about consent and rape myths still present in New Zealand society. It should be noted that Judges can still perpetuate rape myths through their own beliefs and justifications – this is distinguished from the scope of this dissertation which focusses on the

[183] *Bain v R* [2015] NZCA 595; (2015) 27 CRNZ 627 at [51].
[184] Law Commission, above n 49, at 19.
[185] At 20.
[186] At 203.
[187] Susan Leahy, above n 51, at 26.

judicial influence on the evidentiary basis of sexual assault charges.[188] The cases discussed are generally cases where one party has appealed a ruling which either admitted or did not admit evidence in a sexual assault trial and will show how rape myths are perpetuated (or not) though the reasons the court gives in their ruling on the appeal.

(a) Leighton v R [2013] NZCA 102; (2013) 26 CRNZ 187.

In *Leighton*, the defendant had accompanied the complainant's friend, RJ (with whom he was in a casual sexual relationship), to the complainant's house for drinks. The complainant and the defendant did not know each other. The defendant became heavily intoxicated and fell asleep in the kitchen. When he woke up, the gathering had ended and he made his way into the closest bedroom. He saw a woman sleeping there and thought it was RJ. He climbed into bed and began having sexual intercourse with the woman. The defendant claimed that the woman made encouraging noises. The woman was the complainant, who was asleep in bed with her husband. She stated that she was asleep but started waking up when she felt herself being penetrated. She stated she only fully woke up when her husband began shouting and discovered that it was the defendant penetrating her.

Defence argued that a statement by RJ should have been admissible as it showed that the complainant had a tendency to engage in sexual activities with people other than her husband. RJ's statement stated:

> I remember that [the complainant's husband] walked into the back lounge and demanded that I get up and have sex with his wife while he watched. I told him to 'get fucked' ... About five minutes later [the complainant] walked into the room and she said 'Come into my bed and come sleep with us. [The complainant's husband] wants to see it.' I said no ...

The trial Judge ruled the above statement engaged s 44 as it was evidence of a tendency to engage in extra-marital sex. The Judge considered the statement was irrelevant as the conversation

[188] For example, in *T v Police* [2019] NZHC 533, a discharge without conviction was granted to an appellant who pleaded guilty to a charge of sexual conduct with a young person between 12 and 16 years of age. The Judge noted that alcohol was involved (thus, placing the blame on the victim whilst providing an excuse for the defendant), that a 17-year-old male was as immature as a 14-year-old female (as the rates of brain development differed between teenage males and females), that the female victim had not communicated her lack of consent strongly enough, emphasised that the defendant did not take advantage of the complainant (i.e. the fact that it was an 'acquaintance rape' scenario minimised the offending) and the defendant's future should not be adversely affected by one moment which was "out of character" for the defendant.

occurred without the defendant's knowledge, thus, had no bearing on whether he reasonably believed that the complainant consented. On appeal, defence argued that the statement was admissible as it was essential to the narrative as these facts fell outside of the general juror's experience. The defendant conceded that the complainant had not made any sexual overtures towards him or otherwise indicate that she was interested in having sex with him.

The majority judgment (Mackenzie and Mallon JJ) considered that the evidence was admissible as it directly related to the issues at trial.[189] It was relevant to the defendant's claim that he thought the woman in bed was RJ because the jury had to assess the defendant's credibility. The majority considered that the complainant and husband's invitation to RJ was part of the factual matrix and would make the jury consider it less surprising that the defendant would enter the nearest bedroom thinking RJ was there.[190] Furthermore, it was relevant to the issue of the complainant's consent. If the evidence was before the jury, the majority stated that it:[191]

> …renders those circumstances significantly less compelling because it shows that on the night in question the complainant was willing to engage in sexual activity with another person in the marital bed and in the presence of her husband. To put it another way, the evidence suggests the presence of her husband in the same bed would not necessarily have been a factor which inhibited her from giving consent, as might otherwise be automatically assumed.

They considered it was also relevant to the defendant's reasonable belief in consent given the noises she made which the defendant interpreted as encouraging. RJ's statement was considered relevant "to the jury's assessment on the likelihood that the woman involved, who was in fact the complainant, might have responded in such a way".[192]

This case is a clear example of the Court perpetuating the rape myth that the complainant somehow asked for it (therefore, the defendant was less culpable).[193] The statement by the majority (regarding the evidence rendering the "circumstances significantly less compelling") clearly encapsulates this rape myth. There was evidence before the Court that the complainant engaged in non-normative sexual activity (i.e. engaged in extra-marital sex whilst her husband watched) -

[189] *Leighton v R* [2013] NZCA 102; (2013) 26 CRNZ 187 at [21].
[190] At [22].
[191] At [24].
[192] At [29].
[193] See Kellie R Lynch, above n 93.

behaviour "good girls" would not do. The defendant had no knowledge of the conversation between the complainant, her husband and RJ, nor was there a suggestion that the defendant generally knew of the complainant's tendency to participate in sexual activities with people other than her husband, whilst her husband watched. Thus, as French J stated below, the statement made by RJ was irrelevant as to whether the defendant had a reasonable belief that the complainant was consenting (given his lack of knowledge). Furthermore, even if the defendant had had knowledge of the complainant's tendencies, the complainant's tendencies had no relevance to reasonable belief as such tendencies do not (or rather, should not) impact on whether the complainant consented to having sexual intercourse with the defendant at that particular point in time. A willingness to engage in non-normative sex does not equate to being more open or more likely to engage in sexual activity with whomever.

This was recognised by French J (minority). While her Honour agreed that the statement was relevant and admissible, she did not consider that it was relevant to the defendant's reasonable belief in consent.[194] French J considered the statement was only relevant to the issue of the complainant's consent. Her Honour noted that the defendant had no knowledge of the conversation prior to the offending, thus, it could not have influenced his belief in consent. Furthermore, French J noted that nothing had occurred during the evening which suggested that he would have sexual intercourse with RJ nor was there anything in the circumstances suggesting that RJ was in the bed. Her Honour considered that "the reasonableness of a person's belief must be assessed by reference to the facts as they are known to that person".[195]

This case also engages the rape myth regarding the 'acquaintance rape' scenario.[196] While the defendant and complainant were initially strangers, the complainant and defendant had met during the evening (as the defendant acknowledged that the complainant had not indicated that she was interested in having sex with him). Had it been a complete stranger who had climbed into the complainant's bed and began having sexual intercourse with her, the circumstance would more likely have been considered a 'real rape'. Coupled with the idea that the complainant's sexual preferences made the defendant less culpable, these myths likely created a perception that the

[194] *Leighton v R*, above n 189, at [39].
[195] At [41].
[196] See Susan Leahy, above n 51.

sexual assault was less serious, therefore, increased the probability of a not guilty verdict.[197] Lastly, this case may have also engaged the myth relating to intoxication.[198] Where the perpetrator is equally (or more) intoxicated than the complainant, the culpability of the perpetrator tends to decrease.

(b) R v S [2015] NZHC 801

The complainant and the defendant had previously been in a sexual relationship for approximately four years. Throughout the relationship, the parties heavily used drugs, particularly gamma-hydrobutyric acid (GHB).[199] GHB was used during almost all sexual interactions between the parties where it, on occasions, caused the parties to fall asleep. Their sexual encounters were also filmed. After the relationship ended, the complainant watched some of those videos. She noticed that, on six instances, the defendant engaged in sexual acts with her where she appeared to be asleep or unconscious and she became concerned as a result.

The trial Judge considered that the first two elements of sexual violation had been met; the Judge was satisfied the physical acts had occurred and that the complainant had not consented.[200] However, regarding the final element of the defendant's reasonable belief in consent, the Judge considered there was reasonable belief. The defendant's testimony directly contrasted with the complainant's testimony in this regard. The defendant gave evidence that the parties had agreed that the defendant could continue the sexual activity if the complainant fell asleep/became unconscious as long as he woke her up before he ejaculated. The complainant stated that the agreement was that he would wake her up before any sexual activity occurred. The trial Judge preferred the defendant's evidence and considered there were reasonable grounds to believe the

[197] There was evidence that the complainant was sympathetic towards the defendant. This would have further added to the perception that the sexual assault was less serious. Whilst not discussed as one of the rape myths in this paper, the author acknowledges that the fact that the complainant was sympathetic is arguably related to the myth that if a complainant continues to associate with the defendant, it means that the sexual assault either did not occur or that the complainant, to some extent, wanted the sexual action, thus, further undermines the seriousness of the offence.

[198] While the Court does not discuss this, it is open on the facts that this myth may have been (at least) sub-consciously engaged.

[199] Side effects of GHB include drowsiness, increased sexual libido, loss of consciousness, sweating, sluggishness, confusion or amnesia. "About a Drug: GHB" *Matters of Substance* (New Zealand, February 2016) at 28.

[200] The element of consent was only met in five of the six charges as one instance showed the complainant actively participating. The Judge considered that on the remaining five charges, lack of consent had been established given s 128A of the Crimes Act precludes that consent cannot be given when a person is either so affected by drugs or is unconscious, nor could the complainant consent to future sexual activity.

complainant was consenting: both parties were aware of GHB's side effects (including loss of consciousness and sleepiness), that the (rigorous) sex recorded on the video seemed normal for the parties' sexual relationship and that (before the commencement of one of the incidents), the complainant had engaged in oral sex and taken off her underwear. The defendant was acquitted of all charges.

The Solicitor-General appealed on a question of law asking whether the defence of reasonable belief in consent was available where a person is deemed unable to consent because they were asleep or unconscious.[201] The Solicitor-General argued that, given that s 128A deems individuals as incapable of giving consent in certain situations, the defence of reasonable belief in consent should be unavailable in situations where s 128A applies (as it was a matter of policy to ensure that people could only give consent in situations they were capable of doing so).

The High Court considered that s 128A was not an exception to the Crown's duty to prove every element of an offence beyond reasonable doubt which, in the case of sexual violation, includes the defendant's lack of reasonable belief in consent.[202] The Court held if Parliament intended to relieve the Crown its obligation to prove each element, Parliament would have explicitly stated so, particularly in a context involving serious charges. Furthermore, when enacting s 128A, Parliament had the opportunity to legislate such a change, however, chose not to do so.[203] Lastly, the Court did not see any logical reason why the Crown would be obligated to prove that the defendant did not have a reasonable belief in consent in cases where the complainant made an informed decision not to consent, however, would not be obliged to prove that same element in situations where the complainant is deemed not to be able to consent.[204]

The Court noted that it would only be in extremely rare circumstances that a defendant could prove a reasonable belief in consent where the complainant was unconscious or asleep – it would likely only be available in situations such as this case "where the particular nature of the relationship between the parties means that they have had cause to discuss and reach agreement about what should occur if either of them should fall asleep or become unconscious during sexual activity".[205]

[201] *R v S* [2015] NZHC 801 at [24].
[202] At [32].
[203] At [33].
[204] At [36].
[205] At [37].

Much of the rape myths engaged in this case relate to the trial itself rather than the appeal. The trial engaged both the 'acquaintance rape' myth and victim-blaming myths.[206] In relation to the 'acquaintance rape' myth, the parties were in an established sexual relationship for approximately four years. They regularly engaged in sexual activities and it was suggested, at least from the complainant's perspective, that they were in an exclusive relationship. Given the established sexual relationship, the lines between the conventional heterosexual seduction script and a sexual assault by an acquaintance becomes much harder to differentiate, thus, the defendant's rationale for why he held a reasonable belief in consent becomes that much more plausible. The defendant's explanation, that the complainant had told him that he could continue to engage in a sexual activity even if she was asleep or unconscious (as long as he woke her up before ejaculating), raises a reasonable doubt about whether he did not believe she was consenting (despite s 128A). Without the 'acquaintance rape' bias, it is arguable that most people would not place much weight on such an explanation.

This case also engages the rape myth relating to intoxication and other victim-blaming behaviour. The fact that the complainant was both voluntarily intoxicated (from drugs) and had participated in oral sex and removed her underwear before becoming unconscious means there was a greater risk that her behaviour was interpreted as "asking for it". In these types of situations, where a complainant has willingly placed herself in a "compromising" position, individuals tend to believe that they should not complain when they become compromised and they are less likely to be viewed as a "genuine" victim. This attitude moves the focus from the defendant to the complainant and assesses how the complainant contributed to the position she found herself in i.e. the focus becomes how culpable the complainant was for giving the "wrong idea" to the defendant. The judgment notes that the complainant was aware of the effects of taking GHB, thus, it is suggested that, given that the complainant knew of the risk that she would fall asleep or become unconscious and still voluntarily took the drug, she was at least partially responsible for what occurred.[207]

[206] See Susan Leahy, above n 51, and Emily Finch, above n 104.

[207] Interestingly, while the Judge acknowledged both parties were aware of the effects of GHB, the analysis of this knowledge was not applied as stringently to the defendant as it was the complainant when considering whether he reasonably believed in consent. This may partly be due to the fact that, as acknowledged by the Judge, that New Zealand law does not require the defendant to take reasonable steps to ascertain consent.

The focus on the complainant's prior conduct, rather than on whether the defendant had a basis to reasonably believe that the complainant was consenting *in the moment*, negates the reality that consent is a continuous notion and can be withdrawn at any time regardless of a person's prior conduct. It also undermines the importance of *actual* consent – reasonable belief should not be based on the complainant's prior activity; it should be based on the complainant's current behaviour throughout the sexual activity. The fact that the complainant had, whilst under the influence of GHB, willingly participated in oral sex and (either consciously or unconsciously) removed her underwear does not equate to further consent of other sexual activities.[208]

(c) Singh v R [2015] NZCA 435

Two co-defendants, Parampreet Singh (24 years old) and Amritpal Singh (21 years old) were charged with various sexual violations against a 17-year-old complainant. The complainant had met Parampreet on social media and exchanged some messages (including telling the defendant her age). Parampreet asked to meet her on two occasions, both which were declined. On a third request, the complainant agreed and also agreed that his friend (Amritpal) could join them.

The defendants picked up the complainant and took her to a surf club. During the drive, they gave the complainant alcoholic drinks, each stronger than the last, and encouraged the complainant to drink them quickly. As a result, the complainant became heavily intoxicated. Once parked, Parampreet asked Amritpal to leave the car and then climbed into the back seat where he started kissing the complainant, removed her clothing, digitally penetrated her and raped her. He ignored the complainant when she said she was could not have sexual intercourse as she had her period. Both defendants then took the complainant to the roof of the surf club. The complainant required help navigating the stairs due to her severe intoxication. Once they reached the rooftop, both defendants repeatedly raped and sexually violated the complainant, only stopping when the complainant had to roll over and vomit.

The defendant agreed sexual activity had occurred but argued it was consensual. Defence applied to cross-examine the complainant regarding some sexually explicit messages she had sent to another male on the same social media site she had met Parampreet. The purpose for cross-

[208] The complainant testified that she got very hot when consuming GHB, thus, took her clothes of both consciously and unconsciously.

examination, according to defence, was to establish that the complainant used the social media site to meet men and initiate sexual activity, therefore, was willing to engage in sexual activity with men she had only recently met in person and with whom she had been conversing with on social media. The trial Judge agreed; his Honour considered the evidence was directly relevant to the case. The Crown appealed the ruling arguing it invited impermissible reasoning (being that the complainant was willing to engage in sexualised activity with strangers on social media, therefore, could be seen as more likely to be willing to engage in sexual activity with the defendants).

The Court of Appeal overturned the trial Judge's ruling.[209] The Court considered the messages between the complainant and the other man had no bearing on whether the complainant consented to the sexual activity with the defendants or their reasonable belief in her consent. The defendants were unaware of the messages at the time of the offending and, more fundamentally, the Court considered that each ground the defence had advanced (with the exception of the complainant's credibility) invited illogical reasoning.[210]

The Court had two objections to defence submissions which were based on *Leighton* (above). Firstly, the Court considered that *Leighton* was distinguishable on the facts as the complainant's behaviour and intention in *Leighton* was more unusual, thus, required the evidence to be admitted to ensure the jury had an accurate view of the factual matrix. Secondly, the Court noted that defence had to address the improbability of the complainant consenting in the actual circumstances of this case. The Court considered that the conversation had no bearing on the complainant's consent and that the defence's true purpose for cross-examining the complainant's messages with other males was to "embark on the character blackening exercise proscribed by s 44".[211] Ultimately, the Court considered the messages were inadmissible and held that the fact that the complainant had considered a sexual relationship with another person had no bearing on whether she consented to the sexual activity with the defendants.

Singh seems to indicate a progression in recognising rape myths and mitigating their use in sexual assault trials. However, the Court in *Singh* still upheld the ruling in *Leighton.*[212] The Court

[209] *Singh v R* [2015] NZCA 435 at [29].
[210] At [32].
[211] At [38].
[212] At [36].

reiterated that the interests of justice required the unusualness of the facts (being the complainant's non-normative sexual preferences) to be before the jury.

Even though both cases involved a request to admit a conversation the complainant had regarding their sexual experience with another person, conversations the defendant knew nothing about at the time of the offending, each case received different treatment by the Court. This difference may be because *Singh* could be described as more akin to a 'stranger rape' scenario, whereas *Leighton* was more akin to an 'acquaintance rape' (with 'stranger rapes' often considered more a more serious and genuine situation than 'acquaintance rapes'). In *Leighton,* the complainant had not met the defendant prior to the house gathering, however, would likely have met and became known to each other due to the social nature of the gathering and the fact that they had a mutual person in common, RJ. The sexual assault in *Leighton* also occurred within a private dwelling. In contrast, in *Singh,* the complainant only (superficially) knew Parampreet through some conversations via social media. She had not met Amritpal before the assault. The sexual assault also took place in a remote public place. Thus, the 'acquaintance rape' myth may not have been as strongly engaged in *Singh.* The more the facts align with a 'stranger rape' scenario, the more genuine the complaint will seem.

Furthermore, the difference in treatment may have been influenced by the fact that it can be inferred from the facts that the defendants in *Singh* were either sober or significantly less intoxicated than the complainant. In *Leighton,* the inference was that the defendant was likely more intoxicated than the complainant. Thus, *Singh* fell within one of the two exceptions mentioned above to the burden of responsibility being placed on the complainant where intoxication is present in a factual scenario.

(d) Ah-Chong v R [2015] NZSC 83; [2016] 1 NZLR 445

During a lunch break, the complainant, a new employee, went to the women's bathroom. When she came out of the toilet, she saw the defendant standing at the bathroom's entrance. She informed him that it was not the men's bathroom and began washing her hands. When she turned back, she noticed that the defendant had closed the door and was standing in front it. She tried to step around the defendant, however, he grabbed her from behind in a bear hug. He pressed his erect penis into her back and attempted to remove her clothing in preparation to have sex with her, despite the complainant's repeated protests. The defendant claimed the complainant had been flirting with

him and had signaled that he should follow her into the bathroom. He denied grabbing the complainant in a bear hug, but rather he had taken her hand and pulled her towards him. He stated he stopped when the complainant said no.

The defendant appealed the trial Judge's jury direction that the jury had to be satisfied that the defendant did not have reasonable grounds to believe the complainant was consenting. Defence argued that this direction was incorrect as the charge was assault with intent to have sexual connection by rape; a charge involving two *mens rea*. In relation to the assault element of the charge, a defendant can have a mistaken belief in consent, even if such a belief is unreasonable. They argued this would remain the case even if the *mens rea* for an intent to rape (the second *mens rea*) was satisfied by an unreasonable (but honest) belief that the complainant consented.

The majority of the Supreme Court noted that the defendant's belief in consent had to be objectively reasonable.[213] The Court also noted that s 128A barred consent being inferred into a situation simply because the complainant did not protest or resist. *Ah-Chong* arguably is the first case which indicated a preparedness to depart from the previous legal position that, where there is nothing in the circumstances to infer that the complainant was not consenting (such as a lack of dissent), it would be difficult for the Crown to prove an absence of reasonable belief in consent.[214] The Court was uneasy with the conclusion that a defendant could rely on an unreasonable but honest belief in consent in a situation where a complainant could not consent in fact (as per s 128A). The Court considered that to allow such a conclusion would undermine the policy underpinning s 128A, however, ultimately declined to express a view in relation to this particular case.

While the Court did not definitively remove the availability of the defence of reasonable belief in consent where a complainant cannot legally consent, this case highlights a turning point by the courts. Section 128A is a legislative attempt to prevent certain rape myths (such as myths relating to resisting/protesting or being intoxicated) being perpetuated by expressly stating that certain situations do not amount to consent. The Court's openness to consider that where the legislature has removed the ability to consent, so too should the defence in a reasonable belief in consent be removed, signals a change in the courts' position regarding the ability to rely on rape myths in

[213] *Ah-Chong v R* [2015] NZSC 83; [2016] 1 NZLR 445 at [28].
[214] This was previously held in *R v Tawera* (1996) 14 CRNZ 290 (CA).

constructing a defence. Whilst the Court made no definitive ruling, this case created an opening for future courts to prevent any needless perpetration of rape myths that the legislature had already indicated were unacceptable.

(e) Kumar v R [2017] NZCA 189, [2017] 28 CRNZ 310

The defendant and the complainant met on a social media site and began talking. They then agreed to meet in person. The defendant picked the complainant up and they went to a bar where they each had a glass of wine. They then drove around for a while, stopping at a liquor store where the defendant bought two packs of pre-mixed drinks (which they consumed) before continuing to another bar, where they had another glass of wine. The complainant became heavily intoxicated as a result. Instead of taking the complainant home, the defendant took her to a hotel. CCTV footage showed the complainant in a grossly intoxicated state and required help walking.

The defendant stated that he left the room and went to find more alcohol. When he was unsuccessful, he returned to the room and found the complainant asleep. The victim stated that when she woke up, she found herself in the hotel room, naked. She asked the defendant if anything had happened between them and he claimed that nothing had. However, the complainant noted her vagina was painful and had vague recollections of the defendant forcibly removing her clothing, forcing her legs apart and having sexual intercourse with her. The next day, the complainant was forensically examined and three bruises were found on her thigh. Sperm was also located and DNA test results showed it belonged to the defendant.

He initially denied having sex with the complainant, stating that the complainant was highly intoxicated. He claimed that he fell asleep at the hotel and was woken up by the complainant asking for water. He also stated that he had only had one and a half glasses of wine and two pre-mixed drinks. At trial he recanted his previous statement, stating that the staggered movements of the complainant were not due to intoxication but because she was struggling with her shoe. He conceded that sexual intercourse had occurred, stating it had been initiated by the complainant. The trial Judge gave a definition of consent in his summing up and stated that "[i]f the complainant was so drunk that she could not consent or refuse to consent, then her allowing the sexual activity to occur was not consent".[215]

[215] *Kumar v R* [2017] NZCA 189, [2017] 28 CRNZ 310 at [30].

Defence, upon appeal, objected to the above sentence in the trial Judge's summing up arguing that the word "allowing" resulted in the jury being informed that consent given reluctantly did not constitute consent. The Court of Appeal considered that the summing up was accurate as the sentence encompassed s 128A(4) (which states that a person cannot consent to sexual activity where they are so affected by alcohol).

The appeal could have easily perpetuated the myths relating to intoxication (i.e. victim-blaming behaviour) and injuries.[216] The complainant engaged in "risky behaviour" and became voluntarily intoxicated with a male whilst on a date. Furthermore, given the complainant's vague memory of the defendant forcefully removing her clothing and opening her legs, the appeal could also have perpetuated the myth that, had the defendant's behaviour really been without consent, there would have been injuries. In fact, the trial itself did play on these myths to convince the jury that the complainant was wrong.[217]

Nevertheless, the Court upheld the trial Judge's directions regarding what constituted consent. The Court noted that the trial Judge correctly stated the law and the inclusion of the relationship between consent and intoxication was an allusion to s 128A(4).[218] Furthermore, the Court stated that it was open to the trial Judge to make such directions as the jury would have been entitled to infer from the evidence that the complainant was so grossly affected by alcohol that she could not be deemed to have given true consent.

However, there remains a question as to whether this is an example of the Courts becoming more responsive to preventing rape myths in sexual assault trials. Whilst the Court upheld the trial Judge's directions (which seems to lack any suggestion of supporting or perpetuating rape myths), as noted above, rape myths nevertheless played a major role in the defence case. There is also a question as to whether the unbiased summing up (the subject of the appeal) was a result of the

[216] See Emily Finch, above n 104, and Louise Ellison, above n 57.
[217] *Kumar v R,* above n 215, at [19]. This is an example of questioning the complainant's memory of the event. It is also an attempt by the defence to distance the situation from what would be considered a 'real rape' through defence's description that rape is a "heinous crime" and that the defendant "cannot be guilty of this heinous crime if what happened between him and her did not involve that element if it happened mutually in whatever way it did". See also [14] and [27] which shows that the defendant asked the Police "what is [the complainant] making up?" and that the complainant made up the allegations as she regretted her mistake. Furthermore, the defendant's testimony that the sexual activity was initiated by the complainant further plays on the idea that the complainant was lying and was not a "genuine victim" as she had sex with him when he was quite intoxicated.
[218] At [33].

Court attempting to minimise the presence of rape myths or whether the Court was influenced by the fact that this case was more akin to a 'stranger rape' scenario, thus, the complainant was a "genuine victim" and required more protection.

(f) Christian v R [2017] NZSC 145; [2018] 1 NZLR 315[219]

The defendant founded the church the complainant's mother attended. The complainant and her mother lived on the defendant's property in a different building. Over a three-year period, the defendant repeatedly raped the complainant. The complainant stated she did not consent to the sexual activity, however, had not protested or resisted due to fear. Defence argued that none of the sexual assaults had occurred. The defendant was found guilty of three counts of rape (two of which were representative charges).

This finding underwent a number of appeals. In the Court of Appeal, the Court endorsed the tentative view expressed in *Ah-Chong* i.e. there cannot be a reasonable belief in consent in the absence of "actively expressed consent".[220] Defence appealed this ruling stating that the requirement for positive consent essentially changed the law via a judicial decision as Parliament had not enacted a similar requirement in the legislation.

The Supreme Court discussed the relationship between consent and a failure to protest or resist. The majority considered that if a failure to protest or resist cannot constitute consent, then a belief in consent based solely on the lack of protest or resistance cannot be a reasonable belief in consent.[221] However, they considered that the Court of Appeal went beyond the statutory wording in requiring consent to be expressed positively.[222] The Court held that s 128A(1) only stated that consent could not be inferred simply from the fact that the victim did not protest or resist the defendant's advances; there "must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent".[223] The Court noted that this could be something as obvious as positive consent or it could be a more nuanced situation, such

[219] Whilst the complainant was a young teenager (between the ages of 13 and 16 years old) when the offending occurred, I have included this case as research shows that female adolescent victims are often subjected to the same rape myths as adult women. Bianca Klettke and Sophie Simonis, above n 95, at 7.
[220] *Christian v R* [2016] NZCA 450 at [49].
[221] *Christian v R*, above n 134, at [32].
[222] At [43].
[223] At [45].

as, where there was an established sexual relationship and the sexual advances were conducted in accordance with the previously established sexual expectations (and there was nothing to indicate that the previously established expectations are no longer accepted).[224]

In relation to the case, the Court noted the lack of evidence before the jury as to the defendant's reasonable belief in consent. On the evidence available to the Court, at most, it could be said that there was a basis for a "reasonable possibility" that the defendant believed the complainant was not protesting or resisting, thus, was consenting i.e. there was only a belief in a failure to protest/resist, not a belief in consent (as s 128A states failure to protest or resist, by itself, does not constitute consent).[225] The majority held that to allow a defendant to have a reasonable belief in consent based purely on a lack of protest or resistance would be illogical and would undermine the policy behind s 128A.

Elias CJ disagreed with the majority ruling. Her Honour considered that it was "suspect" to equate s 128A (the ability to give consent) with reasonable belief in consent.[226] Her Honour was of the opinion that s 128A was only concerned with actual consent, not with a defendant's belief in consent (something the majority was of the opposite opinion).[227] The situations stated in s 128A could still be relevant to whether the defendant held a reasonable belief i.e. the defendant's belief is still a question of fact which needs to be determined based on the evidence as a whole.

The primary rape myth engaged in this case is that victims of sexual assault will fight if they truly do not want the perpetrator's advances.[228] This is particularly prevalent where the victim knows the perpetrator, such as in this case, as the familiarity with the perpetrator would mean the victim would be less fearful. Whilst the majority of the Court considered that where the law had removed the ability for impermissible reasoning to be used to establish that the complainant consented in certain situations, there should be no basis for the jury to find that the defendant had a reasonable belief in consent (where that consent was based solely on those situations), Elias CJ held that this should not be the case. Her Honour considered that actual consent and reasonable belief in consent

[224] At [46].
[225] At [60].
[226] At [104].
[227] At [105]. Compare with the majority opinion at [33] where the majority held that they disagreed with the statement in *R v Tawera*, above n 214, that s 128A did not bear on the defendant's reasonable belief in consent.
[228] See Law Commission, above n 49.

were two distinct concepts and simply because the complainant could not legally consent or could not legally be deemed to have consented did not mean that the defendant could not reasonably believe, on the same facts, that the complainant was consenting. Therein lies crux of the problem.

Whilst the majority held otherwise, this case is a prime example of how rape myths are often perpetuated in courts. Time and time again, rape myths can be argued before the Judge or jury as part of proving that the defendant had a reasonable belief in consent. Prior to *Christian*, even where the law had intervened to remove impermissible reasoning related to the complainant's actual consent (whether it be based on the idea that because the complainant did not protest/fight back, she consented or whether the complainant "asked for it" when she became intoxicated), such reasoning still played a role in sexual assault trials in relation to the third element of sexual violation – the defendant's reasonable belief in consent. *Christian* is a considerable step towards mitigating the use of rape myths and is a significant departure from the previous legal position as stated in *R v S*.

R v S held that even where Parliament has indicated that consent cannot be given in certain circumstances (or be deemed to be given), reasonable belief remained a defence and was still a necessary element that had to be proved. The majority judgment in *Christian* states that reasonable belief is no longer a defence where such a belief is based solely on a situation contained in s 128A. This ruling will only affect a very small number of cases given that the defendant's belief in consent has to based solely on a circumstance listed in s 128A – the vast majority of cases will involve something more in the factual matrix.[229] This was a similar ruling to the indication the Court gave in *Ah-Chong*, however, after *Ah-Chong*, cases still allowed the defence of a reasonable belief in consent to be argued (where the belief was based on a circumstance in s 128A). Given *Christian* is a Supreme Court decision, it is likely to hold greater weight and, hopefully, it will be a more permanent advancement in the courts' response to rape myths in sexual assault trials.

(g) Jones v R [2018] NZCA 288

The defendant, his partner and the complainant were close friends. One night, they were out celebrating an important occasion. They started celebrating at lunchtime, went out to a restaurant

[229] It remains unclear whether the prosecution must still prove the defendant did not have a reasonable belief in consent or whether it can be presumed in such a situation.

for dinner and then later returned to a friend's flat. The complainant was drinking throughout the day and into the night. and, as a result, became heavily intoxicated and was put to bed. The defendant lay next to the complainant but then left with his partner to go back to their own apartment. He later returned to the apartment the complainant was at, woke her up and asked her to come back to his apartment to stay the night. The complainant agreed.

Once they arrived at the defendant's apartment, the complainant climbed into the defendant's and his partner's bed, lying down next to the defendant's partner. She fell asleep but woke up when the defendant was removing her pants. He informed her that she could not sleep in her clothing and the complainant fell back asleep. She woke up again later when the defendant climbed into bed. He then touched her bottom and breasts and digitally penetrated her. The complainant pretended to still be asleep and when the defendant eventually stopped, the complainant left the apartment.

At trial, the defendant accepted that sexual contact relating to the touching had occurred but claimed it was consensual. He denied the digital penetration. He stated that the complainant had been invited back to the apartment for a threesome and the complainant accepted the invitation. He also stated that the complainant had removed her own pants (and only required assistance to get them past her ankles) and that he saw the complainant and his partner kissing after he had returned to the bedroom after taking a shower. Once he climbed into bed, he stated the complainant had turned around and kissed him. He testified that the complainant had then turned back to his partner, became frustrated when she saw her asleep and all sexual activity ceased at that point.

Defence applied to cross-examine the complainant about her previous sexual experience on the basis that she knew the defendant and his partner were polyamorous and involved in the "swing scene", with the defendant taking direction from his partner as who to invite into their relationship. Defence contended that the complainant had expressed interest in participating in swinging on various occasions (through flirting, referring to herself as their "girlfriend", expressing sexual attraction towards another female and inviting the defendant's partner to have a threesome), thus, it was argued, it supported the defendant's reasonable belief in consent.

The trial Judge declined this application, applying s 44 of the Evidence Act, and considered that admitting this evidence would invite the jury to engage in impermissible reasoning. His Honour considered that the previous conversations/remarks the complainant had made regarding sexual

preferences could not support a defence that the complainant consented or the defendant thought she was consenting as they were not contemporaneous with the offending and the "divide between those events and the critical time for consent or reasonable belief simply cannot be bridged by reliance on those facts".[230] Furthermore, questions regarding any sexual behaviour between the complainant and the defendant's partner would invite "illogical thinking that just because those women were kissing each other they must naturally be inviting [the defendant] to join them".[231] The Judge was of the opinion that excluding this evidence would not prejudice the defendant as the defendant could still rely on his evidence that the complainant kissed him when he climbed into bed.

The Court of Appeal considered each category of evidence individually. Regarding the evidence of the complainant referring to herself as the couple's "girlfriend", the Court held that, under s 7(3) of the Evidence Act, the evidence was admissible as it was relevant to the defendant's belief in consent.[232] They considered that the comment supported the defendant's contention that the parties had a close relationship which was becoming progressively more sexual and that it formed part of continuous chain of events which should be considered in its entirety in order to accurately assess the defendant's reasonable belief.

Regarding the evidence that the complainant knew of the couple's exploration of the swing scene and, as a result, becoming flirtatious and expressing interest, the Court considered it another essential link in the defendant's defence.[233] It was potential evidence further proving the increased sexualisation of the relationship. The Court considered that s 44 did not apply as the flirting occurred when the defendant was present. Furthermore, the Court did not consider the six-week gap between expressing interest in a threesome and the offending undermined its relevance as there was nothing otherwise to indicate that the complainant's previous interest had changed.[234] As the Court stated:[235]

> The essence of the defence case is that the sexual interest allegedly shown by the complainant towards [the defendant's partner] on the night, her agreement to accompany Mr Jones back to the

[230] *Jones v R* [2018] NZCA 288 at [15].
[231] At [16].
[232] At [38].
[233] At [43].
[234] At [47].
[235] At [47].

> apartment to spend the night with them and then "making out" with [the defendant's partner] in the bed were all indications that the complainant was acting on her expressed interest in participating in a threesome with them.

The Court considered that this evidence satisfied s 44's heightened relevance test and stated that it would be difficult to see how an expression of interest in a threesome with the couple would not be relevant to the defendant's belief in consent.[236] In their view, it would be contrary to the interests of justice if the evidence was excluded as it related to a "critical development" in the parties' dynamics which the defendant relied upon as it gave "rise to mutual expectations" noted in *Christian*.[237] The Court considered that this was further supported by the defendant's evidence that he saw the complainant and his girlfriend kissing on two occasions – once at the flat earlier that evening and once back at the defendant's apartment. In the Court's opinion, this evidence was highly relevant as went directly to the issue as to whether the defendant had a reasonable belief in consent.[238]

The Judges did not consider that evidence of the complainant kissing the defendant's girlfriend was evidence of sexual experience as it did not happen on a previous occasion.[239] The Court stated that s 44 did not apply to situations which occurred at the time of the offence and, in any event, was critical evidence to the defendant's belief in consent. Generally, the Court was of the opinion that to exclude any evidence of sexual interactions between the complainant and the defendant's partner during the night the alleged offending occurred would be artificial as the defence case was that the defendant believed the complainant consented to a threesome.[240]

This case engages rape myths related to victim-blaming behaviour.[241] The Court of Appeal considered that, given the complainant's previous behaviour, it was open to the defendant to reasonably believe that the complainant was consenting to his advances. This case is an example of the idea that, whilst understanding that prior positive signals may not equate actual consent, the complainant's subsequent passivity during the act was not enough to counter the prior signals. The complainant was partially responsible for, at minimum, the defendant's belief in consent given she

[236] At [48].
[237] At [48].
[238] At [49].
[239] At [50].
[240] At [52].
[241] See Kellie R Lynch, above n 93.

had flirted with the couple, joked that she was their "girlfriend" and expressed interest in their swing lifestyle, thus, she should have made it clearer that the advance was unwanted. Given the defendant was a friend of the complainant, it is likely that this "requirement" was made stronger due to the effect of the 'acquaintance rape' myth. Yet the complainant only engaged in sexual activity with the defendant's partner; much of the prior behaviour relied upon by the defendant was behaviour directed to the defendant's partner where the defendant happened to be present.

This rape myth was compounded by another myth relating to the fact that the complainant did not protest or resist.[242] The combination of the two myths gives the impression that not only did the complainant encourage the defendant or was at least partially responsible for misleading the defendant, the complainant did not correct his inaccurate perception, thus, the complainant "should have known better" and should not have been surprised when he acted on her "encouragement". It is interesting to note the Court's reliance on an obiter comment made in *Christian* about the behaviour giving rise to mutual expectations. In *Christian*, that comment was related to expectations within an established sexual relationship. In this case, there was no established sexual relationship – there was no evidence before the Court that there had been any sexual relationship between the defendant and the complainant. Any prior alleged sexual activity occurred between the complainant and the defendant's partner (with the exception of the defendant's testimony that the complainant kissed him when he climbed into his bed). As the trial Judge previously noted, it invites illogical reasoning to consider that because the two women were kissing in the vicinity of the defendant, they must have been inviting the defendant to join them.

(h) Arona v R [2018] NZCA 427

Two defendants, Mr Arona and Mr Chambers, were convicted of unlawful sexual connection by penile penetration of the complainant's mouth and rape respectively. The complainant, through a combination of alcohol and cannabis, had become heavily intoxicated. The Crown's case was that the intoxication was such that the complainant was unable to give consent. Defence disagreed with the level of intoxication and stated that consent had been given freely. Defence wished to admit evidence of an incident, which occurred in 2015, involving the complainant and other males as it was very similar to the situation before the Court and showed that the complainant had a propensity

[242] See Louise Ellison, above n 26.

to become intoxicated, engage in group sexual behaviour, then subsequently feel shame and lie about her level of intoxication. Defence argued that the evidence would rebut the presumption that the complainant would not normally engage in group sex.

The Court of Appeal stated that the starting point "is that evidence of consent to previous unrelated sexual activity is unlikely to provide any logical support for a suggestion that a complainant consented to the sexual activity at issue".[243] The Court considered that evidence of the prior conduct was neither substantially helpful (under s 37 of the Evidence Act) nor relevant (under s 44).[244] The Court considered that the defence did not attempt to limit the scope to which the evidence would be used as defence only argued that it would be necessary to explain the point regarding intoxication. The Court believed the defence's submissions made it clear that the defence wanted to show the jury that the complainant had a propensity to engage in group sex, which engaged illogical reasoning, thus, remained inadmissible.[245]

The case primarily engaged the rape myth that regret results in lies i.e. the complainant consented to the sexual conduct, however, became ashamed of her behaviour and regretted it, thus claimed it was a sexual assault in order to redeem herself.[246] However, the Court prevented this myth being relied upon, despite the slightly unusual fact relating to group sex, as they recognised the illogical reasoning the defence intended to perpetuate. When compared to *Leighton*, this indicates another significant step forward. *Legihton* allowed the evidence to be admitted given the unusual factual matrix of the case. The Court in *Singh* continued to uphold the ruling in *Leighton* for the same reason, stating that a miscarriage of justice would have occurred if the evidence had not been admitted. *Arona* is a departure from this position and indicates that the courts are now recognising the rape myths inherent in such arguments and will take steps to actively prevent the unnecessary perpetuation of rape myths.

IV Where to From Here?

Jan Logie, Parliamentary Under-Secretary to the Minister of Justice, was tasked with reviewing proposals regarding changes to the criminal justice system's response to sexual violence. On 2

[243] *Arona v R* [2018] NZCA 427 at [19].
[244] At [28].
[245] At [28].
[246] See Victoria Police, above n 74.

July 2019, Jan Logie issued a proactive release.[247] The report outlined a package of reforms with further proposals for future work. Numerous proposals aimed at improving complainant's experiences in the criminal justice system were contained in the proactive release, however, only the proposals relevant to this dissertation will be highlighted in this section. The first proposal suggested that voluntary specialist training regarding best practice in sexual violence cases for defence counsel be funded.[248] It was considered that such training would improve the treatment of complainants. Jan Logie noted that "legal participants" may unwittingly perpetuate rape myths or otherwise act in a manner which caused complainants undue stress. It was proposed that such training would also be provided to prosecutors.

Another proposal aimed at extending and clarifying an evidentiary requirement that, before a complainant's sexual history (with anyone other than the defendant) could be admitted, it need to satisfy the heightened relevance test. Jan Logie's proposal suggested that this rule be extended to include the complainant's sexual history with the defendant as well (although would not extend to the fact that the defendant and complainant had a sexual history).[249] A further proposal suggested changing the current discretionary power judges have to intervene when they consider counsel's questioning of a witness to be "improper, unfair, misleading, needlessly repetitive or too complicated" to conferring a duty upon judges to intervene.[250] Lastly, a proposal was included stating that the Evidence Act explicitly provide for judges to direct the jury on rape myths.[251]

The above proposals were changes Jan Logie considered could be implemented during the current parliamentary term. The proactive release, however, also considered longer-term changes which included alternative resolution processes (where the victim did not want to engage with the criminal justice system),[252] including a positive definition of consent in the law,[253] whether juries

[247] Jan Logie *Proactive release – Improving the justice response to victims of sexual violence* (Ministry of Justice, Cabinet Office Circular (18) 4, 2 July 2019).
[248] At [17].
[249] At [43].
[250] At [46].
[251] At [49].
[252] At [77].
[253] At [81].

should continue to be a feature of sexual violence trials,[254] and establishing a post-guilty plea specialist sexual violence court which would provide offenders with an intervention plan.[255]

Parliament is also currently reviewing the Sexual Violation Legislation Bill which was introduced by the Minister of Justice, Hon Andrew Little, on 11 November 2019. Its aim is to reduce the retraumatisation victims may experience when attending court and giving evidence. This Bill currently intends to increase the application of s 44 to include the complainant's sexual experience with the defendant (thus recognising that consent must be given in each sexual encounter).[256] It also specifically extends the application of the rape shield provisions to certain civil proceedings. This is encouraging as it means that complainants whose allegations were not taken to trial on their behalf by police and prosecution services now have the same protection afforded in criminal trials should they choose to take the defendant to court themselves. The Bill has also incorporated another judicial direction which specifically allows a judge to give the jury directions they consider necessary or desirable addressing any rape myths related to sexual cases.[257] While the rape myths the judge can choose to address is not limited, the Bill specifically includes various victim-blaming behavior rape myths and the fact that 'acquaintance rapes' occur and are not less serious than a 'stranger rape'.

V Conclusion

It is quite clear from the above case law that the Courts do play a role in perpetuating rape myths in the criminal justice system through the evidence they admit in a trial. The case law cannot tell the reader whether this perpetuation is due to a judge's personal high rape myth acceptance or whether it is a result of a judge ensuring that the defendant can present a full and effective defence. What the case law does suggest is that rape myths are more prevalent in the second and third elements of sexual violation: the issue of whether the complainant consented and whether the defendant had a reasonable belief in such consent respectively.

This dissertation discussed and analysed eight cases which were determined over a five-year period. In each of the cases discussed above, defence attempted to admit evidence (which

[254] At [84].
[255] At [88].
[256] Sexual Violence Legislation Bill 2019 (185-1), cl 8.
[257] Clause 16.

perpetuated a rape myth) to prove that the complainant either consented[258] or prove that the defendant had a reasonable belief in consent.[259] In three of these cases, the court aided the perpetuation of rape myths.[260] Of the remaining five, the courts declined to admit evidence which would invite "illogical reasoning". On the face of this, it seems that the courts are relatively proactive in ensuring rape myths are not needlessly perpetuated, however, upon closer analysis of the cases which declined to admit evidence, it becomes evident that the majority of these cases were cases akin to the 'stranger rape' scenarios.[261] As noted in the discussion of the individual rape myths, allegations akin to 'stranger rape' scenarios are much more likely to be considered genuine and thus, are more likely to be taken seriously by the justice system. 'Acquaintance rape' scenarios unfortunately do not receive the same treatment - they are either viewed as false allegations or, if believed, are viewed as less serious (given its close proximity to the normal heterosexual seduction script). Thus, it seems that the current legislative scheme and practice in courts are relatively effective in guarding against rape myth perpetuation in 'stranger rape' scenarios, however, grievously lack the same protection where the allegation is more akin to an 'acquaintance rape' scenario – the scenario more likely to occur. Thus, it is arguable that the fact that 'acquaintance rape' scenarios do not receive the same protections as 'stranger rape' allegations is a direct perpetuation of the 'stranger rape'/'acquaintance rape' rape myth.

Whilst it is necessary for a defendant to be able to effectively defend themselves, defendants are not the only stakeholders in the justice sector, thus, where the defence are clearly attempting to discredit the complainant through rape myths, courts should not be afraid to descend into the legal arena to ensure that such rape myths are not needlessly perpetrated. This was, in fact, recommended in Jan Logie's report regarding the sexual violence courts.[262] Jan Logie's recommendation reiterated the Law Commission's recommendation that judges should have a mandatory duty to intervene where they are of the opinion that a line of questioning is inappropriate. This recommendation will hopefully allay any fears judges may have of

[258] See *Leighton*, *Singh*, *Kumar* and *Arona.*
[259] See *Leighton*, *R v S*, *Ah-Chong, Christian* and *Jones*.
[260] In *Leighton*, *R v S* and *Jones*.
[261] The defendants in *Ah-Chong* and *Kumar* were relative strangers to the complainant and in *Christian*, while the defendant and complainant would have known each other given the complainant lived on his property, there was likely a power imbalance as the defendant was a church leader and the victim was a teenage girl who attended the church.
[262] Jan Logie, above n 247, at [46].

inadvertently creating avenues of appeal. As seen in the cases of *Leighton, Singh* and *Jones*, defence often apply to cross-examine a complainant on a sexual matter, thus, this new recommendation would allow judges to have greater control to ensure the questioning did not go beyond what was necessary to allow the defendant to present an effective and full defence. The author highly supports this recommendation as, without significant law reform (such as reworking the second and third element of sexual violations so as to minimise the ability to rely on rape myths), the ability to curtail cross-examination is one of the best options available to the courts.

The author also applauds the recommendations currently adopted in the Sexual Violation Legislation Bill. These proposed clauses will have a marked impact on the perpetuation of the rape myths discussed as it is an indication by Parliament that the use of such rape myths are not acceptable, thus, will hopefully encourage judges to be more confident in preventing the perpetuation of these myths.

As mentioned in the introduction, rape myths will be much more prevalent than this dissertation suggests. This dissertation was limited to rape myths perpetuated by courts in relation to evidentiary applications. It was beyond the scope of this dissertation to explore the role of juries in sexual assault trials (especially where jurors have high rape myth acceptance), the personal biases of judges in relation to rape myth acceptance[263] or how frequently defence counsel used rape myths while presenting their defence.[264] It is this author's hope that the repeated recommendations submitted by the Law Commission, now echoed in the Jan Logie report, is adopted by Parliament in their consideration of the new Sexual Violence Legislation Bill so as to ensure that incorrect and "illogical reasoning" plays no role in determining a defendant's culpability.

[263] For example, biases which came to light during sentencings or appeals which did not relate to the admissibility of evidence.
[264] Either through the questions they asked in examination-in-chief, cross-examination or their submissions.

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