Knowledge or Belief Concerning Consent in Rape Law: Recommendations for Change in Ireland

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The Law Reform Commission of Ireland has recommended altering the law in that jurisdiction in relation to knowledge or belief concerning consent in rape cases. Essentially, the recommendation is to move from a subjective test based on an accused's honest belief to a primarily objective test based on reasonable belief, taking account of specific subjective aspects of personal capacity and steps taken by the accused to ascertain consent. This article outlines the recommendations of the Law Reform Commission against the backdrop of the existing law and context in Ireland. It compares the newly-proposed law with the existing law in England and Wales, explores the preference for subjectivity in Irish criminal law (and its constitutional dynamic), and considers the potential impact of the recommended change. The effect of rape myths and stereotypes on jury deliberations is a theme which runs through the article.

Introduction

In April 2017 the Attorney General for Ireland requested the Law Reform Commission of Ireland (the Commission) to "examine and make recommendations on whether changes should be made to the element of knowledge or belief in the definition of rape".[1] The Commission undertook to do so and produced an Issues Paper in July 2018 and a Report in November 2019. Essentially the Commission recommends the alteration of the subjective test of honest belief in relation to consent to a

> "primarily objective test of reasonable knowledge or belief concerning consent, taking account of some aspects of the accused's personal capacity and any steps taken by the accused to ascertain consent."[2]

[1] Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (Law Reform Commission, 2019), p.1: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

[2] Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), p.4: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

The aspects of personal capacity are specifically listed—physical, mental or intellectual disability; mental illness; age and maturity—and no circumstances beyond those ought to be taken into account. The Commission describes this as a mixed test; primarily objective, having regard to certain subjective elements.[3]

This article, which analyses the proposed legislative reform, begins by setting out the existing law and context in Ireland. The proposed changes are then outlined and compared with the law in England and Wales. The preference for subjectivity in Irish criminal law and constitutional concerns around a shift to an objective test are then explored, before the article concludes with a consideration of the potential impact of the proposed changes. The impact of rape myths and stereotypes on jury deliberations is considered throughout.

Existing law and context in Ireland

Definition of rape

The offence of rape in Ireland was placed on a statutory footing under s.2 of the Criminal Law (Rape) Act 1981, as amended by the Criminal Law (Rape) (Amendment) Act 1990. This is the traditional, gender-specific offence of rape, which is committed by a man on a woman through penile penetration of the vagina without consent. Other forms of non-consensual sexual penetration are covered by a distinct offence known as "rape under section 4".[4]

Section 2 provides that:

> "(1) A man commits rape if—
>
> (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
>
> (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it …
>
> (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

This legislation is based on the common law at the time of its creation and the codification of that law in England and Wales under the Sexual Offences (Amendment) Act 1976. The actus reus of rape requires that the accused had sexual intercourse with a woman without her consent. There are two alternative mens rea

[3] Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (Law Reform Commission, 2019), p.4: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

[4] Criminal Law (Rape)(Amendment) Act 1990 s.4. The request of the Attorney General to the Commission was specific to the offence of rape under s.2 of the 1981 Act. The Commission did note, however, that it is at least arguable that the logic of the analysis in the Report should be applicable to other sexual offences. It undertook to examine this in its planned wider review of sexual offences under its Fifth Programme of Law Reform; Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (Law Reform Commission, 2019), p.93: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

states: either intention, where the accused knew at the time of intercourse that the woman was not consenting; or recklessness, where the accused took an advertent risk that the woman was not consenting.

The meaning of consent

The 1981 Act did not contain any statutory definition of consent. In 1990, following a Report from the Commission recommending certain changes to the law on rape and allied offences,[5] s.9 of the Criminal Law (Rape) (Amendment) Act provided a statutory basis for the understanding that submission does not equate with consent, stating that "any failure or omission by [a] person to offer resistance to the act does not of itself constitute consent to the act." In 2017, s.9 was amended[6] to offer a much more expansive definition of consent, and greater clarity on the (non-exhaustive) circumstances in which there is no consent. Section 9 now provides as follows:

> "(1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.
>
> (2) A person does not consent to a sexual act if—
>
> (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,
>
> (b) he or she is asleep or unconscious,
>
> (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,
>
> (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,
>
> (e) he or she is mistaken as to the nature and purpose of the act,
>
> (f) he or she is mistaken as to the identity of any other person involved in the act,
>
> (g) he or she is being unlawfully detained at the time at which the act takes place,
>
> (h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself."

Section 9(4) provides that consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place, and s.9(5) includes the original pronouncement from s.9 to the effect that any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.

[5] Law Reform Commission, *Report on Rape and Allied Offences* (Law Reform Commission, 1988), available at *https://www.lawreform.ie/_fileupload/Reports/rRape.pdf* [Accessed 17 March 2020].

[6] Criminal Justice (Sexual Offences) Act 2017 s.48.

In its submission to the Commission's Report on Knowledge or Belief, the Dublin Rape Crisis Centre considered that the legislative definition of consent under s.9, as amended in 2017, promotes the notion of free agreement and

> "embeds the concept of communicative sexuality in Irish law, sending a clear message that, to be legally valid, consent must be negotiated and communicated between sexual partners."[7]

On this basis they argued that

> "the so-called 'honest belief in consent' defence must also be reviewed and reformed so that it does not undermine the ideological and practical benefits of the new definition."[8]

The "defence" of honest belief

The accused's knowledge of consent, or his belief that the woman was consenting, is an important part of the mens rea of rape. Under current Irish law, the accused commits the offence of rape if he knows that the woman with whom he is having sexual intercourse is not consenting, or if he thinks there is a risk that she is not consenting but continues nonetheless. If the accused believes that the woman is consenting, even though he is in fact incorrect, he has not committed the offence of rape. This is known as the defence of "honest belief",[9] and it is subjective in nature, i.e. the question is whether this individual accused truly believed that the woman was consenting, even if no other person would have thought so.

Under the current law, not only can the belief be mistaken and still lead to acquittal, it can also be an unreasonable belief in consent, so long as it is genuinely held. Of course, a jury is probably less likely to accept that a belief is genuinely held in circumstances which seem to its members to be unreasonable. In this context, s.2(2) specifically provides that juries in rape cases should have regard to the presence or absence of reasonable grounds for the accused's alleged belief in consent, along with any other relevant matters. Ormerod and Laird have described the equivalent (now repealed) subsection in England and Wales as "largely a public relations provision explaining the jury's role in evaluating a defendant's mistaken belief of facts."[10] Section 2(2) brings some objectivity into the jury's deliberations,

[7] Dublin Rape Crisis Centre, *Submission to the Law Reform Commission on Knowledge or Belief Concerning Consent in Rape Law*, p.2: *https://www.drcc.ie/wp-content/uploads/2019/11/LRC-Submission-Knowledge-or-Belief-Concerning-Consent-in-Rape-Law.docx* [Accessed 17 March 2020].

[8] Dublin Rape Crisis Centre, *Submission to the Law Reform Commission on Knowledge or Belief Concerning Consent in Rape Law*, p1: *https://www.drcc.ie/wp-content/uploads/2019/11/LRC-Submission-Knowledge-or-Belief-Concerning-Consent-in-Rape-Law.docx* [Accessed 17 March 2020].

[9] There is some debate as to whether or not this is a "defence" in the true sense, or rather a negation of the mens rea of the offence. The Commission did not determine which view is correct, but, noting that the word "defence" is often utilised in this context, decided to follow that approach (Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), p.26, fn.7: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020]. This article also refers to the "defence" of honest belief throughout, though, in my view, the correct construction is the negation of mens rea. For a very interesting discussion of the mens rea of rape in the aftermath of *DPP v Morgan* [1976] A.C. 182; [1975] Crim. L.R. 717, the application of the Sexual Offences (Amendment) Act 1976 in England and Wales, and the options for reform see H. Power, "Towards a Definition of the Mens Rea of Rape" (2003) 23(3) *Oxford Journal of Legal Studies* 379.

[10] D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law*, 15th edn (Oxford University Press, 2018), p.790, referring to the Sexual Offences (Amendment) Act 1976 s.1(2) . On the similarity of the English and Irish provisions O'Malley suggests that the 1976 Act in England "clearly provided the model for the statutory definition introduced in Ireland in 1981": T. O'Malley, *Sexual Offences*, 2nd edn (2013), p.60.

though the legal question is still subjective and centred on whether or not this specific accused man honestly believed at the time of sexual intercourse that the woman with whom he was having such intercourse consented to it.

The Irish courts have, on a number of occasions, considered whether it is necessary to give a s.2(2) direction to a jury in all rape cases, or only under certain conditions. O'Malley has previously suggested that courts should be wary of omitting a s.2(2) direction from a rape trial

> "because a finding that the complainant did not consent should usually, if not invariably, lead a jury to consider the defendant's belief in the matter."[11]

However, the courts have held that a s.2(2) direction should only be given at trials where there is a specific basis in the evidence presented on which it might be claimed that the accused could have mistakenly but genuinely believed that the woman was consenting.[12] Such evidence existed in the important case of *People (DPP) v CO'R*,[13] which was specifically referenced in the Attorney General's request to the Commission: the Attorney General asked the Commission to take into account the jurisprudence in relation to the definition of the element of knowledge or belief in the Irish law on rape, "and in particular the judgment of the Supreme Court in *The People (DPP) v CO'R*".[14]

People (DPP) v CO'R

The facts of the *CO'R* case make for difficult reading, but it is necessary to recite them here. The appellant in this case was convicted of raping his 66-year-old mother on the night of Mother's Day in March 2008. Earlier that day the woman had been at a social function with other relatives to mark the occasion. She was at home in bed at 23:00 when her son, the appellant, arrived. She got up, in her nightdress and dressing gown, to let him in. He asked had she any drink and she produced a bottle of vodka—he had some and she had some with lemonade. The appellant suggested that they put on some music, and they started to dance together. The appellant described this to the trial court as dancing closely. His mother said that it was like ballroom dancing, but she was really only swaying. She suffered from both knee and hip problems which affected her mobility. There was a gap in the mother's memory or knowledge at that point, which she explained by suggesting that she must have had a blackout, because the next thing she could recount was that somehow she was on the floor and realised that her son was raping her. She said "leave me alone" but he continued to the point of ejaculation.

The appellant claimed that the sexual intercourse was consensual. This was entirely denied by his mother. The appellant said that their dancing together became erotic with kissing and touching. He admitted that his mother had said "leave me alone" but he said that this was after intercourse when he offered to help her up from the floor, as she preferred to stay where she was, and remained there when he left the house.

[11] O'Malley, *Sexual Offences* (2013), p.62.
[12] See *People (DPP) v McDonagh* [1996] 1 IR 565.
[13] *People (DPP) v CO'R* [2016] IESC 64; [2016] 3 IR 322.
[14] Law Reform Commission,*Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), p.1: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

In the Central Criminal Court, the appellant was convicted by a jury, on a 10-2 majority, and ultimately sentenced to 15 years' imprisonment, with the final two-and-a-half years suspended. He appealed unsuccessfully to both the Court of Appeal[15] and the Supreme Court.[16] Charleton J, who gave the decision of the Supreme Court, stated the current Irish law in the following terms:

> "The absence of consent to sexual intercourse is an objective fact. The accused's view as to the existence, or non-existence, of this fact is subjective. An honest, though unreasonable, mistake that the woman was consenting is a defence to rape. Any such alleged belief in consent must be genuinely held."[17]

He suggested that the issue of honest but mistaken belief arises very infrequently in rape cases.[18] It seems that the more usual occurrence is a direct clash of evidence on whether or not there was consent, with the accused not claiming that he mistakenly believed in consent, but claiming that consent was actually present. In *O'R*, however,

> "[t]he defence case was made that because of a blackout and because of the consumption of drink and drugs, the signals given by the victim may not have been in accordance with her testimony and may have been such that the accused believed that there was consent to sexual intercourse."[19]

The defence then was one of honest but mistaken belief, and there was some evidence on which such a claim could be based.

Charleton J held that the direction given to the jury in the instant case, though "somewhat thin"[20] was adequate and did not disturb the conviction. He gave the following guidance on the direction which ought to be given to juries in future cases involving a claim of honest belief:

> "If sexual intercourse and lack of consent is proven, then the jury should consider the mental element, in other words, what was the accused's state of mind at the time…Where…the accused claims to have mistakenly believed that a woman was consenting, then the jury should examine all of the facts which may support or which may undermine that claimed belief. They should consider all of the circumstances and focus on whether there are, or are not, any reasonable grounds for that belief…It needs also to be stated by trial judges, however, that no jury is under any obligation to believe an obviously false story."[21]

He went on to say that:

> "In these cases, every jury is entrusted, using shrewdness and common sense, to judge what the accused claims as to his mistaken belief against their view

[15] *The People (DPP) v CO'R* [2015] IECA 72.
[16] *The People (DPP) v CO'R* [2016] IESC 64; [2016] 3 IR 322.
[17] *The People (DPP) v CO'R* [2016] IESC 64 at [45]; [2016] 3 IR 322 at 352/353.
[18] *The People (DPP) v CO'R* [2016] IESC 64 at [40]; [2016] 3 IR 322 at 349.
[19] *The People (DPP) v CO'R* [2016] IESC 64 at [24]; [2016] 3 IR 322 at 340.
[20] *The People (DPP) v CO'R* [2016] IESC 64 at [29]; [2016] 3 IR 322 at 344.
[21] *The People (DPP) v CO'R* [2016] IESC 64 at [49]; [2016] 3 IR 322 at 354.

> of what an ordinary or reasonable man would have realised in the circumstances. The defence requires genuine belief."[22]

Impact of rape myths

It is clear that in rape trials where honest belief is in issue, the decisive question is a subjective one (what did the accused genuinely believe?), but the deliberative process to arrive at an answer to that question requires the jury to engage in objective consideration of what others would have believed in the circumstances, what they themselves would have believed, what characteristics of the accused might have made him think differently from others, and so on. Leahy points out that "[j]urors who adhere to stereotypical thinking about rape are more likely to believe an unfounded or unreasonable account of honest belief" and that the honest belief defence

> "…allows a defendant to appeal to … prejudicial myths and stereotypes in order to exculpate himself, thereby contributing to the perpetuation of these myths."[23]

Such myths are based on "prejudicial and erroneous attitudes about rape",[24] and include stereotypes about what a "real rape" entails, who is a "real victim", disproportionate concerns about the levels of false accusations of rape, notions about women "asking for it" depending on the clothes they have worn or the place they are in, and so on.[25] In the context of abusive and coercive relationships, Women's Aid's submission to the Commission stated very clearly that

> "[t]he fact that the honest belief defence does not include a reasonable test can allow abusive partners charged with rape to use as a defence the very same unreasonable and questionable beliefs about a woman's role in the relationship which underpin their abusive behaviour."[26]

The impact of rape myths and unsubstantiated, stereotypical beliefs on the conduct of rape cases more generally was crystallised in Ireland in November 2018, when, in a rape trial in Cork defence counsel referred the jury to the type of underwear worn by the 17-year-old complainant. She asked: "Does the evidence out-rule the possibility that she was attracted to the defendant and was open to meeting someone and being with someone?" And went on to say "You have to

[22] *The People (DPP) v CO'R* [2016] IESC 64 at [51]; [2016] 3 IR 322 at 355.

[23] S. Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 4.

[24] Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 4.

[25] See Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 4. See also L. Ellison and V.E. Munro, "A Stranger in the Bushes, Or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of Mock Jury Study" (2010) 13 *New Criminal Law Review* 781; Z. Adler, *Rape on Trial* (London: Routledge, 1987), pp.119–120; W. Larcombe, "Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law" (2011) 19 *Feminist Legal Studies* 27; and S. Leahy and M. Fitzgerald O'Reilly, *Sexual Offending in Ireland: Laws, Procedures and Punishment* (Dublin: Clarus Press, 2018), pp.5–7 and 147–148.

[26] Women's Aid, *Response to the Law Reform Commission issue paper on knowledge or belief concerning consent in rape law*, p.4: *https://www.womensaid.ie/assets/files/pdf/womens_aid_response_to_the_law_reform_commission_issue_paper_on_knowledge_or_belief_concerning_consent_in_rape_law_october_2018.pdf* [Accessed 17 March 2020].

look at the way she was dressed. She was wearing a thong with a lace front."[27] This seemed to suggest that this was somehow relevant to whether or not a rape had been committed. The 27-year-old accused was acquitted by the jury, who must have decided, following deliberations, either that the complainant had consented, or at least that the accused had honestly believed that she was consenting. There was widespread criticism of the defence counsel's approach, including protests and discussions in Dáil Éireann (the Irish Parliament),[28] and coverage by international media outlets.[29] This case and the response thereto arose after the Attorney General had already requested the Commission to examine the issue of knowledge or belief in consent in rape cases, and it certainly highlights the need to ensure that the law in this area is working fairly and appropriately.

Broader reviews

There are, at present, broader reviews of the law and legal process around rape and sexual offence cases also taking place or about to take place in Ireland. The Law Reform Commission itself, for example, under its Fifth Programme of Law Reform, is to undertake a Review and Consolidation of the Law on Sexual Offences.[30] Furthermore, the Department of Justice and Equality established an expert group to review the protections for vulnerable witnesses in the investigation and prosecution of sexual offences, in September 2018.[31] The report of this expert group is expected very soon. It is chaired by Tom O'Malley BL, who is a practising barrister, a senior lecturer in law at NUI Galway, and one of the foremost experts on sexual offences in Ireland.[32] He is also a Commissioner of the Law Reform Commission and was very much involved in the *Report on Knowledge and Belief*.

The Irish public was also gripped, in recent times, by the trial of a number of high-profile rugby players who stood accused, though ultimately acquitted, of rape in the Belfast courts. Some of the differences between the systems of Northern Ireland and the Republic were notable during the progress of that trial, including, for example, the fact that the accused were not entitled to anonymity, as they would be under Irish law,[33] and the existence of a defence of reasonable, rather than honest, belief in consent. The report of the Gillen Review, which followed on from

[27] S. Phelan and R. Riegel, "'She fears she wasn't believed' - new details on Cork rape trial expose ordeal endured by complainants" (24 November 2018), *Irish Independent*, *https://www.independent.ie/irish-news/courts/she-fears-she-wasnt-believed-new-details-on-cork-rape-trial-expose-ordeal-endured-by-complainants-37560842.html* [Accessed 17 March 2020].

[28] Phelan and Riegel, "'She fears she wasn't believed' - new details on Cork rape trial expose ordeal endured by complainants" (24 November 2018), *Irish Independent*, *https://www.independent.ie/irish-news/courts/she-fears-she-wasnt-believed-new-details-on-cork-rape-trial-expose-ordeal-endured-by-complainants-37560842.html* [Accessed 17 March 2020].

[29] V. Safronova, "Lawyer in Rape Trial Links Thong with Consent, and Ireland Erupts" (15 November 2018), *New York Times*, *https://www.nytimes.com/2018/11/15/world/europe/ireland-underwear-rape-case-protest.html* [Accessed 17 March 2020].

[30] Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), p.9: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

[31] Department of Justice and Equality, "Minister Flanagan publishes Terms of Reference for review of the investigation and prosecution of sexual offences" (7 September 2018): *http://www.justice.ie/en/JELR/Pages/PR18000279* [Accessed 17 March 2020].

[32] Amongst other things, T. O'Malley is the author of *Sexual Offences* (2013), currently in its second edition.

[33] The Gillen Review observes that "Ireland is the only common law country that we know of that grants anonymity automatically as a matter of course to accused persons post charge", Sir J. Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (May 2019), *https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf*, para.101.

that high-profile trial, has also been of great interest to the Irish public, and in particular to those working with victims, with offenders, in policymaking or within the criminal justice system. Having set out the existing law and context in Ireland, we turn now to examine the specific recommendations for change presented by the Commission.

The recommended changes

Both the Issues Paper and the Report published by the Commission are extremely impressive in their depth, clarity and engagement with existing Irish law, the comparable law in other common law jurisdictions, the options for change, and the broader societal context which influences both the commission and the trial of sexual offences. The broad outline of the proposed legislative change is to move from the subjective honest belief test to a primarily objective test.[34] The Commission has taken great care in specifically outlining how it thinks that this should be done.[35] There are three main elements to the proposals:

(1) The Commission recommends altering the mens rea of rape under s.2 of the 1981 Act, by adding a third potential mental element to the two which currently exist. At present a man commits rape if he has sexual intercourse with a woman who does not consent and (i) he knows that she is not consenting, or (ii) he is subjectively reckless as to whether she is consenting. The recommendation would add (iii) he does not reasonably believe that she is consenting.

(2) Second, at a rape trial wherein the issue of reasonable belief arises, the jury is to have regard to a specific and exhaustive list of circumstances related to the accused's personal capacity. Anything beyond the list is not to be taken into account. The list includes any physical, mental or intellectual disability of the man; any mental illness of his; and his age and maturity. This is said to introduce a subjective element to the test of reasonable belief. Did the accused, given those circumstances (and only those), reasonably believe that the woman was consenting to sexual intercourse with him?

(3) Third, introducing an element of "due diligence", where the issue of reasonable belief arises, the jury is also to have regard to any steps taken by the accused man to ascertain whether the woman consented to the intercourse. This aligns with "the concept of communicative sexuality" which, as previously mentioned, was referred to in the Dublin Rape Crisis Centre submission to the Commission.

[34] The Commission also considered, but rejected, the idea of introducing a new lesser offence of "gross negligence rape". Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), p.5 : *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020], and it recommended the retention of the existing law on self-induced intoxication, i.e. self-induced intoxication to the point where the accused lacked capacity to know if the woman was consenting or not is not a valid defence to a charge of rape.

[35] The Commission provided a very useful Draft Criminal Law (Rape) Amendment Bill which outlines how s.2 of the 1981 Act could be amended in order to implement the proposed changes: Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), Appendix B: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].

The existing law asks the jury to determine a primarily subjective question, through deliberation which involves objective considerations; the proposed new test would flip the approach and ask a jury to determine a primarily objective question, through deliberation which considers certain, limited, subjective factors. Both approaches are mixed, but the recommendation shifts the legal emphasis from subjective to objective, from honesty to reasonableness.

Comparison with the law in England and Wales

The law on knowledge or belief in relation to consent in the context of rape in England and Wales has already undertaken the shift in emphasis from subjective to objective, from honesty to reasonableness. While, as noted earlier, the existing Irish law is modelled on the common law position, as confirmed in the well-known case of *DPP v Morgan*,[36] and as previously provided for in England and Wales under the Sexual Offences (Amendment) Act 1976, the approach was altered in that jurisdiction in 2003.[37] Section 1 of the Sexual Offences Act 2003 provides that:

> "(1) A person (A) commits an offence if –
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis;
> (b) B does not consent to penetration; and
> (c) A does not reasonably believe B consents.
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."

Ormerod and Laird observe that this test is not *wholly* objective as the "defendant's personal characteristics and beliefs remain important."[38] The legislation requires juries to have regard "to all the circumstances" in considering whether or not the belief in consent was reasonable. The exact meaning of this is not clear and concerns have been raised that it leaves "the door open for stereotypes to determine assessments of reasonableness".[39]

Indeed, in a mock jury study published in 2006, Finch and Munro raised concerns about the types of factors which s.1(2) might allow juries to consider. They suggested, based on observations on mock juries operating the provision, that it allows jurors to express and consider a range of (ill-founded) views about "appropriate" socio-sexual interaction either on the basis that they are shared by the jurors, or as a basis for considering what views the accused might have held and might therefore be relevant to the question of reasonableness.[40] Mock jurors seemed confused about the level of objectivity required by the law with many of the study's participants determining that the accused had held a reasonable belief

[36] *DPP v Morgan* [1976] A.C. 182; [1975] Crim. L.R. 717.
[37] And in Northern Ireland in 2008: Sexual Offences (Northern Ireland) Order 2008.
[38] Ormerod and Laird, *Smith, Hogan and Ormerod's Criminal Law* (2018), p.791.
[39] Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland* (May 2019), para.11.16: *https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf* [Accessed 17 March 2020].
[40] E. Finch and V.E. Munro "Breaking boundaries? Sexual consent in the jury room" (2006) 26(3) *Legal Studies* 303, 318.

in consent where they did not consider the belief in question to be reasonable in general terms, but they were willing to accept that this particular defendant had reasonably held such a belief in the circumstances.[41] And those circumstances included factors such as the complainant being in attendance at a party, drinking, not telling the accused "no", and so on. Finch and Munro suggested that their study illustrated

> "the extent to which, on the invitation to consider 'all the circumstances', jurors effectively deduced sexual consent (or at least the defendant's reasonable belief therein) from other, often unrelated, events that lacked any temporal correspondence with intercourse."[42]

Interestingly, research conducted with serving juries in England and Wales in 2018 suggests that very few jurors themselves believe obvious myths and stereotypes. Preliminary findings from this study, conducted by Thomas, suggest that the vast majority of jurors were aware, for example, that violence is not an essential aspect of rape: only 3 per cent said that rape had to result in bruises or marks, and only 5 per cent said that it is not rape unless the person fought back. Virtually no jurors believed that a woman who wears provocative clothing or goes out alone at night puts herself in a position to be raped; a woman who sends a man sexually explicit texts or messages should not complain of being raped later on; it is difficult to believe a rape allegation that is not reported immediately; or that men cannot be raped. Almost all jurors believed that there are good reasons why someone who has been raped may be reluctant to tell anyone about it or report it to police; it is a hard thing to do to give evidence about a rape in court; and that rape within a relationship can take place over a long period of time before any complaint is made.[43]

It is encouraging that the vast majority of these jurors did not believe some of the more prevalent societal stereotypes and rape myths. Having said that, there remains the ongoing concern, highlighted by the Finch and Munro study, that in operating the legal test for the mens rea of rape jurors might accept that the accused held a particular view, based on a myth or stereotype, and that this made it reasonable "in all the circumstances" for him to believe there was consent.

Certain guidance for juries has been provided within the *Crown Court Compendium* in an effort to mitigate the potential range of factors which might be considered in their deliberations on the reasonableness of an accused's belief in consent. The *Compendium* suggests that s.1(2) circumstances include the defendant's

> "age, general sexual experience, sexual experience with this complainant, learning disability and any other factor that could have affected [his] ability to understand the nature and consequences of [his] actions (particularly the ability to appreciate the risk of non-consent)…"[44]

[41] Finch and Munro "Breaking boundaries? Sexual consent in the jury room" (2006) 26(3) *Legal Studies* 303, 317.
[42] Finch and Munro "Breaking boundaries? Sexual consent in the jury room" (2006) 26(3) *Legal Studies* 303, 318.
[43] The research conducted by Professor Cheryl Thomas of University College London was recounted in a valedictory lecture by Sir Brian Leveson, President of the Queen's Bench Division, entitled "Criminal Trials: The Human Experience", delivered at University College London on 13 June 2019: *https://www.judiciary.uk/wp-content/uploads/2019/06/Sir-Brian-Leveson-UCL-Valedictory-lecture.pdf* [Accessed 17 March 2020], pp.13–14.
[44] Judicial College, *Crown Court Compendium 20-1-10*, *https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-December-2019.pdf* [Accessed 17 March 2020], para.20-4-14.

Even this does not provide very clear boundaries for juries. The *Compendium* goes on to state that it is "important that the judge should alert the jury to guard against" making "unwarranted assumptions."[45] While, clearly, this must be done in a fair and balanced way, and put in the context of the evidence and arguments in a specific case, the *Compendium* lists a number of issues on which specific guidance may be necessary for the jury. These include, amongst others, supposed indicators of untruthfulness such as a lack of emotion/distress when giving evidence, or delay in making a complaint; supposed indicators of truthfulness such as a consistent account given by the complainant, or emotion/distress when giving evidence; supposed indicators of consent and/or belief in consent such as clothing worn by the complainant which is said to be revealing or provocative, intoxication of the complainant, lack of any use or threat of force, physical struggle and/or signs of injury.[46]

The fact that such guidance should be given, in an appropriate manner in appropriate cases, has been judicially endorsed, for example in *Beale* where Lady Justice Hallett stated that

> "[w]e need no persuading that myths and stereotypes about rape complainants still persist, and if the evidence of a complainant is to be assessed fairly the trial judge should give the guidance suggested by the Judicial College. It is part of the trial judge's overall duty to ensure the trial is fair. The courts have a far greater understanding now of the need to ensure that complainants in sexual cases are treated properly and that no one who has been raped should be deterred from coming forward for fear of how they will be treated in court."[47]

This recognition is important, and it is hoped that appropriate direction from trial judges can dissuade juries from relying on inappropriate factors based on myths and stereotypes, under the current law in England and Wales. While the Thomas study suggests that jurors are perhaps less likely to believe in certain myths than might have been previously thought, it also unveils an ongoing lack of clarity for jurors on some issues. For example, while factually most people who are raped are raped by someone they know rather than a stranger, almost a third of the jurors in the study said they were not sure about that. Also, while psychological research indicates that a person may not always be visibly upset when they are asked to recount a traumatic event like rape, over a third of serving jurors were not sure about this. There is certainly a value in clear judicial directions to jurors on matters of this nature so as to avoid the application of inappropriate assumptions.

Reflecting on Finch and Munro's mock jury study, and recommending a change to existing Irish law, Leahy suggested that any change to a more objective test would require juries to be properly instructed

> "on the characteristics which they are permitted to take into account in order to ensure that characteristics such as prejudicial or sexist attitudes do not

[45] Judicial College, *Crown Court Compendium 20-1-10*, *https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-December-2019.pdf* [Accessed 17 March 2020], para.20-1-10.

[46] Judicial College, *Crown Court Compendium 20-1-10*, *https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-December-2019.pdf* [Accessed 17 March 2020], para.20-1-11.

[47] *Beale* [2019] EWCA Crim 665 at [46]; [2019] 2 Cr. App. R. 19.

> influence determinations of whether the defendant's belief in consent was reasonable in all the circumstances."[48]

The Commission recommendations in fact go much further than this, specifically and conclusively listing in the proposed law the very limited capacity-oriented characteristics that can be taken into account by the jury in considering the reasonableness or otherwise of the accused's belief in consent, along with any steps the accused took to ascertain whether the woman was consenting. A jury may consider whether the accused's capacity to understand whether or not the woman was consenting was impacted by his physical, mental or intellectual disability; mental illness; age and maturity. If so, this can be taken into account in considering the reasonableness of his asserted belief in consent.[49] The Commission has determined that no other factors can be regarded as relevant. Even factors specifically suggested within the *Crown Court Compendium* are not included, such as the accused's general sexual experience or his sexual experience with this complainant. This is a very significant difference between the current test in England and Wales and the proposed new test in Ireland. The latter is far more restrictive and seems designed to avoid the types of jury discussions illustrated by Finch and Munro's mock jury research, under the "all the circumstances" formulation.

If strictly adhered to, the proposed new law could lead to jury deliberations which are significantly different in content from those under both existing Irish and current English law. Having said that, juries will still need to decide what they view as reasonable in general on the facts of a given case, as well as considering what was reasonable in relation to a particular accused given any capacity issues or efforts to ascertain consent. Accordingly, the types of jury discussions illustrated by Finch and Munro's research are unlikely to be entirely avoided. As in England and Wales,[50] research with real juries in relation to their deliberations in specific cases is prohibited in Ireland, but mock jury research on the operation of the new recommendations would likely be valuable.

Subjectivity in Irish law and constitutional concerns

Within Irish criminal case law generally, subjectivism has been favoured over objectivism. This is perhaps most clear in the defences of self-defence and provocation, though it is notable also that the notion of objective recklessness, which for some time was a part of English law, was never adopted into Irish law.[51] McIntyre et al state that the "preference for subjective tests over objective tests is a motif that repeats itself throughout Irish criminal law, particularly in the field of

[48] Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 7.

[49] Interestingly, and in seeming contrast to the approach recommended by the Irish Law Reform Commission, the Court of Appeal in England and Wales has held that capacity issues caused by mental illness which fall short of fulfilling the legal requirements of the defence of insanity cannot be considered in determining whether a belief was reasonable or not. In *B* the Court held that "beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it." [2013] EWCA Crim 3 at [40]; [2014] Crim. L.R. 312.

[50] Juries Act 1974 ss.20D–G as inserted by s.74 of the Criminal Justice and Courts Act 2015.

[51] See *People (DPP) v Noel & Marie Murray* [1977] IR 360.

defences".[52] Indeed, in some areas the judiciary have expressed concerns that the law has become too subjective.

In relation to the partial defence of provocation, for example, which can reduce a charge of murder to manslaughter, the only legal question which must be decided is whether or not the relevant accused was provoked. There is no objective requirement such as, for example, the need to show that a person with a normal degree of tolerance and self-restraint would also have been provoked.[53] A jury may have regard to the proportionality of the accused's response to the provoking act/words, but only in assessing the credibility of the subjective claim of provocation, not as a part of the legal test.[54] Hardiman J, in the Court of Criminal Appeal in 2001, described the current Irish law on provocation as "an extreme form of subjectivity".[55]

Self-defence is worth mentioning in this context also, as Ireland is alone in the common law world in allowing a reductive partial defence of self-defence in the context of a charge of murder, where the accused person used more force than objectively necessary but no more force than he genuinely believed to be necessary at the time.[56] This is a mixed test, but the subjective element is decisive in terms of whether the appropriate conviction is one of murder or manslaughter.

Not only does Irish law seem to favour subjectivism over objectivism, the preference for the former may have a constitutional underpinning, which could arguably make it difficult to supplant a subjective test and replace it with an objective one. This concern was addressed in the Commission Report,[57] and stems from the Supreme Court decision in one of the most significant Irish criminal law cases of the past twenty years, *CC v Ireland*.[58] This case concerned the constitutionality of s.1 of the Criminal Law Amendment Act 1935, which made it an offence, punishable by up to life imprisonment, to have sexual intercourse with a girl under the age of 15. This was an absolute liability offence, which allowed no defence of either honest or reasonable belief that the girl was 15 or older. The Supreme Court found the provision to be unconstitutional. Hardiman J, giving the judgment of the Court on the question of constitutionality, stated that the provision lacked balance as "it wholly removes the mental element and expressly criminalises the mentally innocent."[59]

He said:

> "It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end'…It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so

[52] T.J. McIntyre, S. McMullan and S. Ó Toghda, *Criminal Law* (Round Hall, 2012), p.64.
[53] As required, amongst other things, in the equivalent English law: Coroners and Justice Act 2009 s.54.
[54] *DPP v Keith Kelly* [2000] 2 IR 1.
[55] *People (DPP) v Davis* [2001] 1 IR 146, 159.
[56] First set out in *AG v Dwyer* [1972] IR 416.
[57] Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law*(2019), pp.53–62: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].
[58] *CC v Ireland* [2006] 4 IR 1.
[59] *CC v Ireland* [2006] 4 IR 1 at [77].

> treated, contrary to the State's obligations under Article 40 of the Constitution."[60]

While recognising that the offence set out to protect young girls from engaging in consensual sexual intercourse, the Court considered that the means to such an end was unfair and unconstitutional, from the perspective of protecting the accused's constitutional rights.

Interestingly, to return to *People (DPP) v CO'R*, the Supreme Court in that case viewed the offence of rape through the prism of the victim's constitutional rights. The trial judge in that case had told the jury that if the accused man believed the woman might be consenting, he ought to be acquitted. This is not the correct formulation of the current law. An accused person cannot escape liability if he believed that the woman *might* be consenting. He must believe that she *is* consenting. The error was classified by Charleton J as a likely slip of the tongue, though "an unfortunate one against victims of crime". He held that it had ultimately been in the accused's favour and was not grounds for a successful appeal. He went on to say that:

> "The crime of rape is about the right of a woman to be protected against a gross violation of her mental and physical integrity. Those rights are protected by the Constitution as part of the collection of rights which the State guarantees to respect and, specifically by making rape an offence, to defend and vindicate as far as practicable. No one is entitled under our law to justify any deprivation of the constitutional rights of another person on the basis that they might have been consenting. For any accused to take such a risk would be unjustifiable. To violate a woman on any such premise as that she might be consenting to intercourse is outside the legal order as defined by the Act of 1981. If an accused is aware of the possibility that a woman may not be consenting, any conscious disregard of this advertence to that possibility means that for him to proceed is for him to act recklessly; and thus criminally."[61]

This is a strong statement, acknowledging the impact of the crime of rape on a victim, both physically and mentally. Drawing on the wording of art.40.3.1 of the Constitution, Charleton J suggested that the State is required to defend and vindicate the victim's rights "as far as practicable."

A question arises whether the current subjective approach to belief in consent really protects victims' constitutional rights "as far as practicable"? Does the law go as far as it can in protecting them? Could a primarily objective approach, such as that now proposed, more effectively defend and vindicate those rights? Would such an approach be acceptable under the Constitution? Or, would this conflict with the accused's constitutional rights, which, on the basis of *CC*, may require an accused's own moral blameworthiness to be proven in the imposition of criminal sanctions?

[60] *CC v Ireland* [2006] 4 IR 1 at [78]–[79]; citing Wilson J in the Canadian case of *Hess; Nguyen* [1990] 2 SCR 906, which addressed the compatibility of a similar offence with the Canadian Charter of Rights. See also *B (a minor) v DPP* [2000] UKHL 13; [2000] 2 A.C. 428; [2000] Crim. L.R. 403, where the UK House of Lords considered the defence of honest belief in relation to the offence of inciting a child under 14 to commit an act of gross indecency.

[61] *The People (DPP) v CO'R* [2016] IESC 64 at [47]; [2016] 3 IR 322 at 353-354

In balancing the rights of both parties against one another, the observations of Ormerod and Laird within the English system may be instructive. They suggest that

> "When the conduct in question is of a sexual nature, the ease with which the defendant can ascertain the consent of his partner, coupled with the catastrophic consequences for the complainant if the defendant acts without consent, militate strongly against the purely subjective approach. The generosity the law extends to accepting a defendant's genuine but unreasonable mistakes in, for example, matters of self-defence need not be replicated in sexual cases because the conduct in question calls for a qualitatively different degree of vigilance on his part."[62]

In its Report, the Commission pointed to a number of offences within Irish law, outside of the area of sexual offending, which have objective elements, for example manslaughter by unlawful and dangerous act, where the "dangerousness" is assessed on the basis of objective standards; gross negligence manslaughter; and the offences of careless and dangerous driving. The Report also noted that the Supreme Court in the *CC* case, while making no decision on the appropriate legislative response, had mentioned different approaches which might be adopted in order to create constitutionally compliant offences relating to sexual intercourse with children, some of which included objective elements. As it happened, the initial legislative response to *CC* created the offences of defilement of child under the age of 15[63] and 17,[64] respectively, and provided a defence of honest belief as to the child's age. However, those provisions were amended by the Criminal Law (Sexual Offences) Act 2017, to create instead a defence of reasonable mistake as to age, thus moving to an objective approach.

On the basis of a wide-ranging assessment of Irish criminal law, the Commission concluded that "there is no constitutional obstacle to introducing an objective test of reasonable belief into the mental or fault offence of rape."[65] Of course, if enacted, this issue might be brought before the superior courts for definitive testing, but given that certain subjective elements may be taken into account within the proposed test, and that regard may also be had by the jury to the accused's efforts to ascertain consent, it seems that the Commission's conclusion is probably correct. Furthermore, where Irish law has become extremely subjective, the judiciary themselves have expressed disquiet. In relation to provocation, for example, O'Donnell J, stated, obiter dictum, in the case of *Curran* that

> "the formulation of the defence in wholly subjective terms is… capable of creating a dangerously loose formulation liable to extend the law's indulgence to conduct that should deserve censure rather than excuse."[66]

It seems that total subjectivism then is not the courts' desire, as it may be overly indulgent to the perspective of the individual accused.

[62] Ormerod and Laird, *Smith, Hogan and Ormerod's Criminal Law* (2018), p.791.
[63] Criminal Law (Sexual Offences) Act 2006 s.2.
[64] Criminal Law (Sexual Offences) Act 2006 s.3.
[65] Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law* (2019), p.62: *https://www.lawreform.ie/_fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf* [Accessed 17 March 2020].
[66] *People (DPP) v Curran* [2011] 3 IR 785, 796.

Conclusion

In *CO'R*, Charleton J stated that the border between rape and sexual intercourse is consent.[67] Murray contends that because of the existence of the honest belief defence, "this border is inadequately patrolled."[68] The proposed shift to focus on reasonable belief in consent, in the context of limited subjective elements and a due diligence provision, may hope to better secure the perimeter, though its actual impact, if enacted, will be interesting to observe.

Current Irish law is not wholly subjective, as it requires the jury to consider objective factors in its deliberations on the genuineness of the accused's claimed belief in consent. The question is subjective, but the process is objective. The proposed new law would entail an objective question, and the process of arriving at an answer to that question would allow for specified, rather limited subjective factors to be taken into account.

One wonders how much difference this inversion of emphasis will have in individual cases, or what impact it will have on the deliberations of juries. O'Malley has previously noted that because of

> "the inscrutability of jury verdicts, we cannot know how many, if any, defendants who are now acquitted would be convicted if an objective test were applied. In all probability there are very few such acquittals, particularly as juries must already have regard to the presence or absence of reasonable grounds when deciding whether the accused actually believed the complainant was consenting. Furthermore, recklessness as to the complainant's consent will suffice to found a conviction for rape."[69]

On the pre-2003 position in England and Wales, Ormerod and Laird observed that there was little empirical evidence to suggest that the defence of honest belief was successful in many cases, "so jurors were presumably not readily believing defendants' spurious claims". However, they went on to say that "[e]ven if generally unsuccessful, the plea was easy to run and difficult to disprove".[70]

Leahy notes, that even if the claim of honest belief ultimately fails at a rape trial,

> "the confusion which the defence may create, when coupled with the burden of proof in criminal trials, is enough to ensure that the defence can complicate trials and could potentially facilitate an acquittal on the basis of a wholly unreasonable belief in consent."[71]

As discussed above, this test also facilitates the ongoing existence, and indeed enhances the ongoing relevance, of stereotypes and myths about rape. A jury looking for reasonable grounds on which an accused person might have held a genuine belief in consent, may well find itself justifying that subjective belief on the basis of misconceptions and fallacies which they know to be untrue. The

[67] *The People (DPP) v CO'R* [2016] IESC 64 at [35]; [2016] 3 IR 322 at 346.
[68] A. Murray, "The Mens Rea of Rape in Ireland: Legal, Moral and Social Consequences" (2017) 27(1) *Irish Criminal Law Journal* 2.
[69] O'Malley, *Sexual Offences* (2013), pp.61–62.
[70] Ormerod and Laird, *Smith and Hogan's Criminal Law* (2018), p.790.
[71] Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 4.

acceptance of such false ideas in modern discourse and popular opinion, though evidentially unfounded, might lead jurors to see how this particular accused could have come to hold the belief he claims to have held.

Will the shift to a primarily objective test change this? As discussed earlier, mock jury studies carried out in England and Wales, using that jurisdiction's objective test, suggest that myths and stereotypes are still discussed, and relied upon, in jury deliberations. This can partly be explained by the requirement that the jury in England Wales should have regard to "all of the circumstances" in considering if the belief in consent was reasonable or not, though judicial guidelines on instructing the jury attempt to limit the breadth of this provision to a certain extent. The proposed factors which could be taken into account in Ireland are far more limited, relating only to matters of capacity, along with efforts to ascertain consent. Nonetheless, given that juries are being asked to determine what was reasonable in the circumstances, it may be important for judges administering the new Irish law, if enacted, to explain to juries the factors which they should take into account, but also to clearly advise on the issues which should not be considered.[72] The judiciary could play a helpful educational role if they went on also to explain the reasons for the exclusion of such matters from consideration. It may be valuable for such judicial instructions to the jury to be given at the outset of a rape trial, rather than waiting to the end, so that jurors are alerted to their own potential instinctive application of societally-engrained myths as they first encounter the evidence in the case.[73] Outside of the courtroom, there is also an ongoing job of work to be done to educate the public on the differences between the reality of rape and the myths that surround it.

Finally, it is important to state that even if moving to a defence of reasonable belief has no discernible impact on the number of convictions for rape, the symbolism of such a change is significant. MacKinnon has suggested that the existence of the honest belief defence means that while the injury of rape lies in the meaning of the act to its victims, the standard for its criminality lies in the meaning of that same act to the accused.[74] Similarly, Lees contends that the honest belief defence, centring, as it does, on what the accused thought at the relevant time, "explicitly denies a woman's 'no' if a man reads it as consent."[75] Greer suggests that in allowing the defendant to decide whether there is consent, we continue to assert male control, and his power and right to maintain the fear and

[72] Rape Crisis Network Ireland has suggested that legislation should disallow some rape myths: "it should not be possible for the defence to rely on evidence that a complainant has had many sexual partners, or many sexual encounters with a smaller number of them, or has been paid for sex in the past, to put forward the argument to the jury that her history makes it more likely that she was consenting to sexual activity on the occasion(s) now at issue in the trial": *RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences November 2018*: *https://www.rcni.ie/wp-content/uploads/RCNI-Review-of-investigation-and-prosecution-of-sexual-offences-autumn-2018-Submission-Final.pdf* [Accessed 17 March 2020].

[73] The Dublin Rape Crisis Centre made a similar suggestion in relation to explaining the definition of consent in its *Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, p.8: *http://www.drcc.ie/wp-content/uploads/2018/12/DRCC-Submission-Review-of-the-investigation-and-prosecution-of-sexual-offences-Dec-2018.pdf* [Accessed 17 March 2020].

[74] C.A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8(4) *Signs* 635, 652.

[75] S. Lees, *Carnal Knowledge: Rape on Trial*, 2nd edn (London; Women's Press Ltd, 2002) p.xxx—referenced in Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 4.

threat of rape.[76] Moving to insist on an objective level of reasonableness in belief can alter this dynamic. As Leahy puts it,

> "[a] move to an objective construction of the defence would have an important symbolic effect of sending a message that forming a unilateral and illogical view about a sexual partner's consent is not acceptable."[77]

This seems an important message to send.

[76] G. Greer, *On Rape*, (London: Bloomsbury, 2018), p.52.

[77] Leahy, "When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law" (2013) 23(1) *Irish Criminal Law Journal* 2, 4, drawing on A. Ashworth, *Principles of Criminal Law*, 3rd edn (Oxford: Oxford University Press, 1999), p.355.