

# "I THINK SHE'S LEARNT HER LESSON": JUROR USE OF CULTURAL MISCONCEPTIONS IN SEXUAL VIOLENCE TRIALS

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*The extent to which decision-making in sexual violence jury trials is impacted by culturally embedded misconceptions is not well understood. In this article, we provide an insight into the views of 121 real jurors in 18 sexual violence trials, illustrating that rape myth acceptance scales give an incomplete view of when and how jurors might be influenced by cultural misconceptions. Prompted in part by the behaviour and tactics of counsel, jurors in real trials often expect complainants to fight back and to report sexual offending immediately. They also have expectations of complainants and defendants that derive from misconceptions about "real rape". While our study confirms that jurors are susceptible to cultural misconceptions, it also demonstrates the complexity of assessing the extent of their influence and the difficulties in designing reforms to reduce their use.*

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## **I INTRODUCTION**

In common with international research, reporting from survivors and observations of trials, New Zealand grapples with the "gulf between myth and reality" about sexual offending.<sup>1</sup> In particular, "misunderstandings about 'real rape' and 'real victims' ... can influence the perceptions and reactions of different actors in the criminal justice process."<sup>2</sup> In this article, we examine the influence of such misunderstandings, commonly termed "rape myths" and labelled here as "misconceptions", of jurors in sexual offending trials. While there is acceptance in New Zealand that jurors may be impacted by

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1 Camille E LeGrand "Rape and Rape Laws: Sexism in Society and Law" (1973) 61 CLR 919 at 941.

2 Ministry of Women's Affairs *Restoring Soul: Effective Interventions for Adult Victim/Survivors of Sexual Violence* (Wellington, 2009) at 40.

misconceptions about sexual offending, the fact and degree of the influence of those misconceptions on juror decision-making has recently been questioned elsewhere.<sup>3</sup> The resulting debate has had international impact, including on our close neighbours in Australia.<sup>4</sup>

In this article, we briefly outline common misconceptions about sexual offending and current knowledge about their influence on jurors and the jury as a group. We then provide an analysis of the use of misconceptions by jurors in the 18 sexual offending trials from the New Zealand field study cases in the Trans-Tasman Jury Study. Our research fills a gap in current knowledge, stemming as it does from post-verdict interviews with jurors in real sexual offending trials. By providing a rare insight into discussions by real jurors, we hope to provide practitioners, judges, jury researchers and law reform bodies with an evidence base that is rarely available. While our research shows that misconceptions do influence the way jurors view the evidence in sexual violence cases, we identify issues of complexity that illustrate why it is difficult to assess the extent of that influence in deliberations or its contribution to eventual verdicts. We conclude with some tentative thoughts about attempts to reduce the impact of misconceptions on juror decision-making in sexual violence cases.

## **II CULTURAL MISCONCEPTIONS ABOUT SEXUAL OFFENDING**

In 2015 the Law Commission accepted that:<sup>5</sup>

A set of powerful cultural conceptions are associated, for instance, with the expected response of a victim to sexual violence. This is for a victim to physically resist or struggle, yell to draw the attention of others, immediately cut all contact with the perpetrator and report the sexual violence directly. Many people who experience sexual violence, however, may not call attention to it at the time. They may freeze out of shock or as a form of self-protection.

Culturally embedded misconceptions about sexual offending, including those set out by the Law Commission above, have been characterised by some commentators as inter-connected schema and scripts<sup>6</sup> that make up a "master narrative" of what people expect sexual violence to look like and in

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3 Cheryl Thomas "The 21st Century Jury: Contempt, Bias and the Impact of Jury Service" (2020) 11 Criminal Law Review 987.

4 Queensland Law Reform Commission *Review of consent laws and the excuse of mistake of fact* (QLRC R78, 2020).

5 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 25.

6 Meagen M Hildebrand and Cynthia J Najdowski "The potential impact of rape culture on juror decision making: Implications for wrongful acquittals in sexual assault trials" (2015) 78(3) Albany Law Review 1059 at 1071–1072.

particular, how victims are expected to act.<sup>7</sup> This master narrative acts as a lens through which sexual violence is often viewed in society.<sup>8</sup> Elsewhere, Baylis has argued that the foundation of the master narrative is the misconception that women *commonly* make false allegations of rape.<sup>9</sup> From this foundational misconception flows the "real rape" scripts of physical force and resistance, with an expectation of immediate reporting by an emotional victim. According to these scripts, real victims are "wholesome" with faultless lifestyles, and sexual offenders are scary monsters, not ordinary men and women.

Embedded in the false allegation misconception are beliefs about the prevalence of women falsely reporting because of regret following consensual sex or as a way to get revenge on men.<sup>10</sup> The idea that false allegations are "common", and the assertion that rape is an easy accusation to make but hard for an innocent party to defend, has had a profound effect on the common law and on criminal justice policy.<sup>11</sup> Until relatively recently, official Police advice to detectives clearly subscribed to the idea that false allegations are prevalent. The Commission of Inquiry into Police Conduct reported that before 1983, detectives were advised that false rape complaints are "not uncommon" and may be motivated by pregnancy, shame and revenge.<sup>12</sup> Between 1983 and 1993, the instructions advised investigators to avoid being too hasty in determining a complaint was false, but that "[r]ape may be falsely alleged ... (ii) as an excuse for being late home".<sup>13</sup> Some members of the criminal bar also subscribe to the misconception. During previous research by one of the authors of this paper, an email was received from a criminal practitioner stating that "most, if not all, of sexual abuse prosecutions

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7 Julia Quilter "Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform" (2011) 35(1) *Australian Feminist Law Journal* 23 at 56.

8 Joanne Conaghan and Yvette Russell "Rape Myths, Law, and Feminist Research: 'Myths about Myths?'" (2014) 22(1) *Feminist Legal Studies* 25.

9 Claire Baylis "Dice – A Novel. Shaping Juror Narratives in Sexual Violence Cases: The influence of Rape Myths and Misconceptions – Critical Component" (PhD Thesis, Victoria University of Wellington, 2021).

10 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 *New Crim LR* 781.

11 Matthew Hale *History of the Pleas of the Crown* (Payne, London, 1736) at 636. See also Glanville Williams' statement in Glanville Williams "Corroboration – Sexual Cases" (1962) *Criminal Law Review* 662 at 662, that:

sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed.

12 Dame Margaret Bazley *Report of the Commission of Inquiry into Police Conduct: Volume 1* (Commission of Inquiry into Police Conduct, March 2007) at 67.

13 *New Zealand Police Manual for Detectives* (Wellington, 1983) at 48.18 and 48.21.

are instigated and/or motivated by women (behind the scenes in various roles) in what has been termed the sexual abuse industry".<sup>14</sup>

The false allegation misconception is widespread in New Zealand society and has proven remarkably robust despite decades of legal and policy reform regarding sexual offending. The New Zealand Gender Attitude Survey, which gives results based on a nationally representative sample of adults, found in 2019 that 35 per cent of respondents agreed with the statement, "*false rape accusations are common*".<sup>15</sup> In fact, while the actual rate of false reporting of sexual violence is unknown, it is unlikely to be "common": it is well established that the process of making and following through a complaint is not an easy one.<sup>16</sup> The process of making a rape complaint has profound, far-reaching and generally negative consequences on complainants' wellbeing and lives, as a result of which common sense suggests there is little incentive to make a false allegation. This is now reflected in Police policy and training in New Zealand, which emphasise that inconsistencies and inaccuracies may occur with genuine complaints. Officers must record their reasons and get permission from a supervisor before raising the possibility of fabrication with the complainant.<sup>17</sup> However, in practice, culturally embedded misconceptions which minimise sexual violence or encourage a lack of trust in complainants' veracity are widely thought to contribute to low reporting, charging, and conviction rates in sexual violence cases.<sup>18</sup>

The false allegation misconception gives rise to other misconceptions about how victims "should" react during and after sexual violence. If there is a complaint, there are also culturally embedded misconceptions about how victims of sexual violence will act while reporting and giving evidence in any later trial. Mock jury research suggests jurors may expect victims to react with distress after the attack and at all times when recounting it, and therefore, complainants who are unemotional when

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14 Email from Elisabeth McDonald to Yvette Tinsley regarding research on sexual violence reforms (9 May 2011).

15 National Council of Women of New Zealand, Gender Equal NZ and Research NZ *2019 Gender Attitudes Survey* (2020) at 55. Only 21 per cent of respondents disagreed with the statement, the remainder being neutral or choosing "don't know".

16 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: Victims' experiences* (Ministry of Justice and Gravitas Research and Strategy Ltd, August 2018).

17 New Zealand Police *Adult sexual assault investigation (ASAI) policy and procedures* (New Zealand Police, 2009) at 36.

18 See for example Yvette Tinsley "Investigation and the Decision to Prosecute" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 120 at 120–121 and 123–126; Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (University of Canterbury Press, Christchurch, 2020); and Jennifer Temkin "'And Always Keep A-hold of Nurse, for Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom" (2010) 13(4) *New Crim LR* 710.

testifying may not be seen as credible.<sup>19</sup> This focus on demeanour as an indicator of veracity belies the scientific evidence that we cannot reliably determine from observation whether someone is lying, and ignores evidence that heuristic thinking such as the "halo effect" may bias decision-makers.<sup>20</sup> In sexual violence cases, utilising demeanour to determine the complainant's credibility may be particularly unreliable due to the personal and distressing nature of the allegations. Yet, as recognised by the Court of Appeal, "in a 'she said/he said' type of case, demeanour may assume greater importance in the absence of other factors such as inconsistency or any inherent implausibility".<sup>21</sup> If these types of expectations are culturally embedded, there is a real risk that jurors will be influenced by them.

While there is widespread acceptance that misconceptions about sexual violence influence discretionary decision-making at every part of the criminal justice process, the relationship of misconceptions to decision-making is complex. The extent of the impact of misconceptions is not fully understood. Nor is it clear whether they simply make jury deliberations less efficient or affect outcomes in cases. The most recent review of research was by Leverick, who analysed quantitative and qualitative studies on the impact of jurors' prejudicial and false beliefs about sexual offending.<sup>22</sup> She concluded that the studies provided:<sup>23</sup>

... overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases. This evidence is both quantitative and qualitative.

Jurors who do not seem to carry high levels of prejudicial beliefs in the abstract can nonetheless fall back on such beliefs when faced with a concrete case.<sup>24</sup> In 2021, Chalmers, Leverick and Munro published their research findings on mock jurors' attitudes in rape trials from the Scottish mock jury

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19 Louise Ellison and Vanessa E Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49(2) *Brit J Criminol* 202.

20 The halo effect can be defined as the tendency of decision-makers to assume that once a person has a known good (or bad) characteristic, other unrelated characteristics are likely also to be good (or bad).

21 *E v R* [2013] NZCA 678 at [48].

22 Fiona Leverick "What do we know about rape myths and juror decision making?" (2020) 24(3) *International Journal of Evidence and Proof* 255. This research built on Dinos's previous meta-analysis: Sokratis Dinos, Nina Burrowes, Karen Hammond and Christina Cunliffe "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision-making?" (2015) 43 *International Journal of Law, Crime and Justice* 36.

23 Leverick, above n 22, at 273.

24 At 256.

research, involving 863 participants and 64 mock juries, which also found "considerable evidence of the expression of problematic attitudes towards rape complainants during deliberations".<sup>25</sup>

Despite the evidence from mock jury studies, the absence of research examining the use of rape myths and misconceptions by real jurors has been repeatedly raised by researchers.<sup>26</sup> Recently, Thomas has concluded that "previous claims of widespread 'juror bias' in sexual offence cases are not valid".<sup>27</sup> While this article is not designed as a response to Thomas, we make three points.

First, Thomas's research involved post-verdict surveys which asked jurors who had deliberated on a range of offence types direct questions relating to their belief in rape myths. An example of a statement used is: "Many women who claim they were raped agreed to have sex and then regretted it afterwards".<sup>28</sup> Researchers have pointed out that attitudinal surveys have limitations, including that participants "may be well-versed in the socially 'appropriate' attitudes to be voiced at this abstract level".<sup>29</sup> It could well be that this drive to respond in a socially appropriate manner is intensified by recent civic service as jurors.

Secondly, Thomas's results are less clear-cut than suggested by her generalised conclusion. She concedes that some jurors "are uncertain of the factual reality and a small number hold incorrect views" regarding demeanour and the prevalence of stranger versus acquaintance offending.<sup>30</sup> Her results relating to false allegations belie her conclusion that there is not widespread bias. For example, only 41 per cent of jurors disagreed that *many* women who claim they are raped actually had consensual sex.<sup>31</sup> The ambiguity of the wording of "many women" is also problematic.

Thirdly, Ellison and Munro's research, which used both attitudinal surveys and mock jury research with observed deliberations, found that:<sup>32</sup>

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25 James Chalmers, Fiona Leverick and Vanessa E Munro "The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials" (2021) 48 J Law Soc 226 at 248.

26 See for example Temkin, above n 18, at 719; and Louise Ellison and Vanessa E Munro "Jury deliberation and complainant credibility in rape trials" in Clare McGlynn and Vanessa E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, Oxford, 2010) 281 at 283.

27 Thomas, above n 3, at 1004.

28 At 1004.

29 Ellison and Munro, above n 10, at 799; and Heike Gerger, Hanna Kley, Gerd Bohner and Frank Siebler "The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English" (2007) 33(5) *Aggressive Behaviour* 422.

30 Thomas, above n 3, at 1005.

31 At 1004 (emphasis added).

32 Ellison and Munro, above n 10, at 788.

... when compared with the overall tone and direction of participants' deliberations, it is clear ... that uncritically reading off from the questionnaires to make predictions about how myths will be deployed in the jury room, let alone about verdict outcome in a particular case, is problematic.

Like Ellison and Munro, our research suggests it might be problematic to assume that, because real jurors in an attitudinal survey claimed not to believe misconceptions about sexual violence, culturally embedded beliefs will not impact on deliberations in actual trials.

It should also be noted that myths and misconceptions tend to take two forms. First, there are misconceptions based on perceived facts that are wholly without foundation and altogether irrelevant to decision-making. For example, a belief that a complainant's clothing is generally relevant to whether she consented (or indeed whether there was a reasonable belief in consent) has no evidential foundation.<sup>33</sup> If the assessment of a complainant's credibility takes into account evidence of that sort (which ought arguably to be *prima facie* inadmissible), it will inevitably lead to fallacious reasoning and flawed decision-making.

Secondly, there are misconceptions about the degree of relevance of a particular fact. For example, we have already referred to the misconception that false allegations are common. While the possibility of a false allegation may be relevant to whether the case is proved beyond reasonable doubt, a belief that it is common will likely lead to its being given undue weight in decision-making. Undue weight might then be placed on other misconceptions that flow from the false allegation conception, including those discussed below relating to demeanour, immediate complaint and physical injuries.

This distinction between the two forms of misconception is rarely articulated in the literature on rape myths, but it points to the fact that the use of such misconceptions is more nuanced than the research undertaken by Thomas is capable of uncovering.

### ***III THE NEW ZEALAND JURY FIELD STUDY ON JUDICIAL COMMUNICATION: METHODOLOGY***

Research into jury decision-making must carefully navigate ethical issues to ensure the administration of justice is not undermined and to respect the need for jury secrecy "to protect the deliberations of juries in individual cases from outside scrutiny."<sup>34</sup> This secrecy is a barrier to jury research in many common law jurisdictions, which has resulted in "an important gap, a jury-shaped

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33 While specific issues as to clothing may be relevant in individual cases, this differs from a belief that "provocative" clothing has general relevance to consent. See Alison Young "The Waste Land of the Law, the Wordless Song of the Rape Victim" (1998) 22(2) *Melbourne University Law Review* 442; and Sophie Doherty "Exhibition review: a reflection on Ruth Maxwell's *Not Consent* exhibition as a method of challenging rape myths in Ireland" (2020) 14(2) *Law and Humanities* 273.

34 Neil Cameron, Susan Potter and Warren Young "The New Zealand Jury" (1999) 62(2) *Law and Contemporary Problems* 103 at 129.

hole" in terms of research with real jurors.<sup>35</sup> New Zealand, however, has allowed some research with real juries, including the most comprehensive and influential study, *Jury Trials In New Zealand: A Survey of Jurors* (the Jury Survey) conducted by Young, Cameron and Tinsley.<sup>36</sup> The current research follows on from that original study and was designed by two of the authors of this article, Tinsley and Young, in collaboration with James Ogloff, Jonathan Clough and Ben Spivak from Victoria, Australia. The New Zealand field study was part of a multi-modal Trans-Tasman Jury Study, and was co-funded by the Australian Research Council and the New Zealand Law Foundation.<sup>37</sup> The main focus of the wider study was on juries' understanding and application of judicial instructions, particularly in relation to the use of question trails provided to the jury by the judge.<sup>38</sup> The juror interviews took place shortly after the trials, and usually lasted between 45 and 90 minutes. The interviews consisted of more than 50 questions covering the trial process chronologically but focusing on the deliberation phase. Judges were also interviewed, and the researchers were given access to transcripts of the openings, closings, summings-up and notes of evidence of the trials in the study.

In the New Zealand field research, there were 18 sexual violence trials, from which 121 jurors were interviewed. For the purposes of this article, we employed a thematic analysis approach to identify whether and how misconceptions shaped jurors' and juries' responses in real sexual violence trials.<sup>39</sup> All 18 of the sexual offending trials in the study involved a male defendant, 16 involved one or more female complainants, 13 involved multiple sexual violence charges and four involved child sexual abuse charges only. None of the cases involved strangers and in five cases, the complainant (or one of the complainants) was in an ongoing sexual relationship with the defendant at the time of the alleged offending.

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35 Jacqueline Horan and Mark Israel "Beyond the legal barriers: Institutional gatekeeping and real jury research" (2016) 49(3) *Australian & New Zealand Journal of Criminology* 422 at 433.

36 Warren Young, Neil Cameron and Yvette Tinsley *Jury Trials in New Zealand: A Survey of Jurors* (Wellington, 1999); and Law Commission *Juries in Criminal Trials Part Two: A summary of the research findings* (NZLC PP37 Volume 2, 1999). See also for example Suzanne Blackwell and Fred Seymour "Prediction of Jury Verdicts in Child Sexual Assault Trials" (2014) 21(4) *Psychiatry, Psychology and Law* 567.

37 For further details of the wider study see Spivak and others "The Impact of Fact-Based Instructions on Juror Application of the Law: Results from a Trans-Tasman Field Study" (2020) 101(1) *Social Science Quarterly* 346; and Jonathan Clough and others "The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension" (2018) 42(5) *Crim LJ* 278.

38 Question trails are given in written form to the jury prior to deliberation. They comprise a series of factual questions relating to the elements of the offence that need to be proved.

39 See for example Victoria Clarke and Virginia Braun "Thematic analysis" (2017) 12(3) *The Journal of Positive Psychology* 297; and Virginia Braun, Victoria Clarke and Nikki Hayfield "A starting point for your journey, not a map": Nikki Hayfield in conversation with Virginia Braun and Victoria Clarke about thematic analysis" (2019) *Qualitative Research in Psychology* 1.



It should be emphasised that our research did not set out to identify whether or how jurors and juries are impacted by or use cultural misconceptions in sexual violence trials. The responses concerning misconceptions about sexual violence in the remainder of this article were therefore spontaneous comments which arose organically in interviews in relation to either jurors' own views of the evidence or deliberation, or their comments on other jurors' responses. This is likely to mean that jurors' use of misconceptions about sexual violence is under-represented by our findings.

There are two significant limitations to the existing evidence regarding misconceptions about sexual violence in New Zealand that our research could not attempt to address. Nonetheless, there is an urgent need for further research in these areas by those qualified to undertake it. First, while we know that Māori are more likely to be victims of interpersonal and sexual violence,<sup>40</sup> and there is growing awareness of the cultural and spiritual inadequacies of definitions of sexual violence that sit within Pākehā frameworks,<sup>41</sup> little is known about the particular impact on Māori of the misconceptions we discuss in this article. Secondly, most research about misconceptions in sexual violence cases is focused on cisgender women rape complainants where the alleged offender is a cisgender man. There is therefore relatively sparse evidence about the impact of misconceptions on discretionary decision-making regarding cisgender male, non-binary and transgender complainants.

#### ***IV "PEOPLE'S PREJUDICES CAME OUT BIG TIME": THE USE OF CULTURAL MISCONCEPTIONS BY JURORS IN NEW ZEALAND SEXUAL VIOLENCE TRIALS***

The results discussed in this section illustrate the limitations of relying on rape myth acceptance scales or people's stated views in the abstract. When confronted with the difficulties of a real case, even those who might think they do not subscribe to cultural misconceptions about sexual violence may nonetheless fall back on those misconceptions. For example, our results include comments containing such misconceptions from a juror who had worked for Rape Crisis, and at least one juror who had been sexually assaulted. This happens because, even if jurors do not explicitly believe in misconceptions about sexual violence, these deeply embedded cultural assumptions can still "provide sources of meaning upon which [they] draw often unconsciously."<sup>42</sup> Before illustrating the way jurors used and were influenced by misconceptions about sexual violence, we must first canvass the role of counsel in introducing or playing on existing prejudicial beliefs.

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40 Joint Venture of the Social Wellbeing Board *Prevention of Family and Sexual Violence: Briefing to the Incoming Minister* (Joint Venture of the Social Wellbeing Board, November 2020); and New Zealand Crime and Victims Survey *Māori victimisation in Aotearoa New Zealand: Cycle 1 and 2* (Ministry of Justice, 2021).

41 Leonie Pihama and others "Māori Cultural Definitions of Sexual Violence" (2016) 7(1) *Sexual Abuse in Australia and New Zealand* 43; and Rashmi Pachauri-Rajan and Nicole Waru *Understanding Māori Perspectives: tamariki and rangatahi who are victims of sexual violence or display harmful sexual behaviour* (Oranga Tamariki|Ministry for Children, 2020).

42 Conaghan and Russell, above n 8, at 43.

### *A Influence of Counsel Use of Misconceptions*

In at least 14 of our cases, defence counsel referenced the supposed prevalence of false allegations of sexual offending or reinforced aspects of the "real rape" paradigm during cross-examination or in closing submissions. Temkin and Krahe argue that in this way, defence counsel "cognitively prime" jurors to activate misconceptions or stereotypes as they respond to the evidence.<sup>43</sup> While defence counsel have a duty to defend their clients, and often need to present an alternative narrative on the specific facts, the use of stereotypes which reinforce misconceptions seems targeted at bringing out the potential prejudices of jury members. In our cases, some defence counsel referred explicitly to the false allegation misconception as a generalisation, implicitly referred to it by using signifiers such as the term "cry rape", or argued that sexual violence is an easy accusation to make and hard to disprove.<sup>44</sup>

In addition, there is a strong suggestion from our cases that the style of cross-examination is often driven by the misconception and consequently, grossly over-emphasises the possibility of lying. Counsel repeatedly referred to complainants as "liars", "overacting", putting on a "stellar performance", being manipulative, and crying "crocodile tears". In one case where the complainant's veracity was not integral to the defence, the defence accused her of lying 10 times in a brief cross-examination exchange consisting of only 249 words. This cannot be an effective means of exposing whether a complainant is in fact lying; it is clearly designed simply to give the impression to the jury that the complainant's credibility is always under question in these types of cases.

Defence counsel also provided culturally embedded tropes that generalised about why women lie about rape. Motives alleged by the defence drew on the idea that the complainant was "mad, bad or sad", including motivations of spite, regret, jealousy and collusion. In many cases, defence counsel argued that the events did not match a "real rape" or that the behaviour of the complainant or defendant did not match that of a "real victim" or "real rapist", thus raising the possibility that it was a false allegation and the standard of proof had not been met. For example, in assessing complainant credibility, jurors were most likely to rely on assumptions about real rape victims' demeanour if the defence "primed" them to use this. It is also worth noting that on occasion, the Crown too drew on jurors' stereotypical expectations when it suited the case – for example, by emphasising enhanced credibility where there was an immediate complaint.

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43 Jennifer Temkin and Barbara Krahe *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 111.

44 See also McDonald "Rape Myths as Barriers to Fair Trial Process", above n 18, at 419.

### ***B Expectations that Victims will Resist and Make Efforts to Escape or Get Help***

In some cases where jurors have doubts for other reasons about whether the offence has been proved beyond reasonable doubt, it may be understandable and legitimate for them to take into account the absence of injuries or evidence of resistance. However, if that translates into a belief that a rape cannot be proved beyond reasonable doubt, or indeed, a belief that it is unlikely to have occurred in the absence of injuries or resistance, that is clearly ascribing undue weight to that evidence and results in fallacious reasoning.

Jurors in our study expected complainants to have evidence that they tried to "fight back" to show that they did not consent or, as one juror put it, to provide "a consistent message of non-consent – screaming, and repeated reiterations of, 'no I don't want this'". Individual jurors in 11 of the 18 cases stated that the extent of the complainant's resistance affected their (or other jurors') assessment of how credible the allegation was. This expectation of vociferous and vigorous resistance echoes the misconception that a defendant would need to have used force to effect sexual violation, and that there would be injuries to the victim as a result. As Temkin and Krahé have observed:<sup>45</sup>

... people expect victims of rape to behave in an unrealistic fashion, because that's what society imagines or people imagine they would do – to complain straightaway, to be distraught, to fight [...] not to give in.

In at least seven cases, there was evidence that the complainant had reacted to the alleged sexual offending by freezing or disassociating for at least part of the time. These reactions were not always emphasised or fully contextualised by the Crown. While there may have been good reasons for the lack of emphasis, without an alternative narrative, jurors continued to expect medical evidence of injuries resulting from the defendant's force and the complainant's resistance. Without such evidence, the complainant's credibility was undermined in their eyes:

If he'd held her down wouldn't there still be bruises? That was the thing that did it for us.

I was sure that if someone had done that to me, I would have been covered in bruises.

In at least three cases, jurors described jury discussion that appeared to subscribe to what the Supreme Court (in the context of child abuse) has called the "erroneous reasoning" that sexual offending cannot occur while others are close by.<sup>46</sup> Discussion tended to focus on beliefs that complainants could have shouted for help or that there would have been noise others could hear:

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45 Temkin and Krahé, above n 43, at 132. Mock juror research results are consistent with this observation. See for example Chalmers, Leverick and Munro, above n 25, at 234; and Natalie Taylor and Jacqueline Joudo Larsen *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology, Research and Public Policy Series No 68, Canberra, 2005) at 59.

46 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [92].

They just had difficulty understanding exactly how someone could rape a little child with no one finding out. You'd think someone would make a lot of noise or the child would tell someone.

It wasn't until one of the witnesses called by the defence was talking about the house in which the first rape was supposed to have taken place, and described a very small house and the layout in a way that was much clearer in a human sense, as far as there might be noise or how crowded it was, and how difficult it would be for the action to have occurred against the will of the complainant.

In one case involving an adult complainant, several jurors felt that there should have been more witnesses, even though the only other person who lived in the house was a prosecution witness, because "if it was constant abuse, which is what we thought it might have been, surely the whānau would have seen it".

In addition, in three cases, jurors commented that a complainant's veracity was doubted – and there was a belief that she might even have been at fault – because she did not leave the scene. For example, in a case in which the jury were told that the defence did not dispute that the complainant was asleep when penetrated, one juror suggested the complainant was at fault because "she could have left the room, even if it was hers". Similarly, in another case one juror stated, "she's saying that it happened again an hour or two after the first one, well she could have gone, there was no stopping her".

Expectations of physical resistance, crying for help and leaving the scene reflect what is known from the research about ideas of "real rape". These jurors may therefore have been influenced by the false allegation misconception: they accepted stereotypical ideas about the behaviour of victims during and after sexual offending and viewed complainants as less credible when they did not act as jurors expected them to.

### ***C Expectations of Immediate Reporting of Complaints***

It is well recognised that, even though it is common,<sup>47</sup> delayed complaint can seem counter-intuitive to decision-makers. Delayed complaint is one "real rape" misconception that has already been recognised and addressed by way of an evidential warning that "there can be good reasons" for a victim of sexual violence "to delay making or fail to make a complaint".<sup>48</sup> It is arguable that, at least in some cases, a delay in reporting may be relevant to the assessment of other evidence calling into question the complainant's credibility. But the evidential warning rightly stresses that the jury must consider the fact that there are likely to be good reasons for delay, and that a delay in itself should not be sufficient to dismiss the complainant as lacking credibility.

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47 Immediate complaints were made in only three of our 18 cases.

48 Evidence Act 2006, s 127.

However, our cases illustrate that the judicial warning is not always effective in preventing jurors from placing undue weight on this factor. For example, in a case which involved the delayed reporting of sexual and physical assaults during a relationship, the defence strongly argued that the delay and the continued relationship made the complainant's narrative implausible. The judge gave a fulsome delay warning, yet some jurors nonetheless saw the fact of her delay in complaining as undermining her credibility. Four jurors commented explicitly, with one stating "if she had laid the complaint the next day or day after, I would have said guilty". In another case involving ongoing sexual and physical violence, one juror suggested delayed reporting was a significant factor in viewing the allegations as false, tying delay to ideas of vengeance that are central to the false allegation misconception:

When you're a little girl you don't get interfered with and not go to your mummy. They never said anything to their mum. It's all vengeance.

#### ***D Previous Sexual Contact with the Defendant***

The "real rape" paradigm and the narrative that flows from it see victims who are "good" – not drunk, not promiscuous and so on – as being more likely to be truthful. The complainant's behaviour leading up to alleged offending can therefore be influential in jury discussions. In particular, jurors closely scrutinise any previous sexual contact between the defendant and complainant. This becomes problematic when it tips into a belief that earlier consensual sexual contact is highly indicative of whether there was consent to whatever came after. In one case, the idea of implied consent on the basis of earlier consensual conduct was even raised where it was accepted that the complainant was asleep when penetration occurred. The law states that a person who is sleeping cannot consent.<sup>49</sup> Yet in deliberation the jury discussed not only whether they believed she was really sleeping, but also "the whole lead up to it ... whether she could have implied consent." Similarly, in another case the jury seemed to accept the complainant was asleep or unconscious, yet a number of jurors "mulled over, for a long time, the consent issue":

We were concerned that although in legal terms if someone is asleep or unconscious they are not in a position to give consent, if [the defendant] had been given indications all day that [the complainant] wanted him to come and sleep with [the complainant] at night and [the complainant] provided him with a key, then it was reasonable to assume ... there was an intimation of consent and that the guy was welcome ... a lot of my colleagues on the jury were really concerned that the guy had been given or led to believe that he was on for an evening.

In both these cases, the juries, with the aid of the question trail and judge's instructions, still convicted. But the issue of the complainant's alleged prior "invitation" caused a great deal of inefficiency in deliberations.

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49 Crimes Act 1961, s 128A(3).

### *E Lifestyle Choices*

As well as prior conduct with the defendant, the general behaviour and lifestyle choices of the complainant can be a focus of deliberations. While this is perhaps an inevitable feature of difficult cases with little evidence that is additional to the testimony of the complainant (and possibly the defendant), gauging the credibility of complainants based on their profession, dress and lifestyle leads all too easily into ideas of "good" victims that run through "real rape" stereotypes.

The reality is that, when a person has laid a complaint of rape, there is no evidence that their profession, dress or lifestyle makes it more or less likely that they were consenting. However, in at least 10 of the 18 cases, some jurors appeared to believe that it did and expressed sentiments that could be characterised as victim-blaming. Jurors made explicit comments about complainants' clothing, allegedly flirtatious behaviour, intoxication, lifestyle, prior sexual behaviour, or behaviour leading up to the alleged offence, as suggesting that the victim was at least partly to blame for the sexual offending. For example:

[Defence counsel] threw in a couple of curly [questions] and the Judge called him up. It was just about her underwear, how tight it was, sort of whether it was a G-string and things like that, more or less, [questions to] the other flatmates as to whether she was a little bit loose or something like that. Just tried to put her in a different frame. Actually, the women were good in the jury ... they started feeling there was a different side to it from she might not be blameless type of thing.

I think both parties were at fault in some ways – they were drugged and pissed and in some very bad head spaces. And I just think, 'Oh, God.' In fact, we decided in the jury room that we just wanted to take them and bang their bloody heads together ... She struck me as, I think she's learnt her lesson.

In a case where the complainant did escort work, one juror stated: "she's the worse one out of the two of them for the life that she was living and that she'd been a player". This judgment about the complainant's lifestyle led to the idea that she had made a false allegation on the basis of revenge: "I think she just got nasty." In another case, judgments about lifestyle were supplemented by speculation as to the possible motivation for a false allegation:

She is a mum that's been involved with gangs and drugs. She'll know the ins and outs of how to lie – that how she's had to survive. She's got [a number of] children – where's all the dads? Where's the stability? ... I still don't have enough evidence to say, yes, he's guilty, no he's not, because of the [complainant's] background, because girls today get good payouts if they can prove rape cases. They get paid good money, and when you've got children to feed ... they'll be after what they can get.

### *F Demeanour*

As discussed in Part II above, if jurors do not understand the range of ways complainants might react to sexual violence, there is a danger that they will determine the complainant's credibility on the basis of misconceived expectations about real rape victims' demeanour. In seven cases, jurors suggested that the complainant's lack of emotion undermined her credibility. Jurors' expectations

about the complainant's demeanour are illustrated in the following comment from a case involving family and sexual violence with multiple complainants:

These women were so assertive, they were so strong and assertive, one of them was even giving a bit of cheek to [defence counsel]. She was giving a bit of lip ... Maybe I'm missing a link. Maybe I was expecting somebody that had been raped and abused would be upset and shaking.

Other jurors in this case were aware that the fact the complainants "weren't shivering, mumbling wrecks" influenced some of the jurors' views about credibility.

In a case where the complainant's demeanour was a strong factor in the jury's acquittal, her narrative remained consistent from the immediate reporting through to her court testimony. By contrast, the defendant's version of events changed multiple times during police interviews and included what was later admitted to be a lie – that no intercourse had taken place that night. Even though the jury only heard from the defendant on these police interviews, one juror said he didn't "sound" guilty, and another stated:

[H]is was more realistic, hers looked like it was an act. Whether it was or not who knows.

Reflecting Lees' argument that "paradoxically, the complainant's distress is not seen as corroborative, but absence of distress can be used against her",<sup>50</sup> this jury placed emphasis on defence arguments that the changing nature of the complainant's demeanour suggested she was not credible. Jurors also called on their own expectations of how rape victims might look and act: "anyone would think" a rape victim would be "extremely traumatised" and "quite upset" as opposed to acting like a "calm normal girl". Yet, when the complainant did appear traumatised, she was described as being "Hollywood" and as "turning on crocodile tears when it suited":

She seemed more upset a year after the fact than she was in her actual interview the day after. It was just so obviously 'I got caught, I cried rape'.

In both cases discussed in this section, defence counsel had made strong arguments about the complainants' demeanour not being consistent with how an honest rape victim would behave. The idea that there are typical behaviours of "honest" rape victims was reflected in the comments of some individual jurors in other cases too. For example, some expressed the belief that it was easier for the complainant to lie if she gave evidence behind a screen, or suggested that they needed to see a video interview of the complainant at the time of reporting, because they believed complainants could lie more easily at the trial, having had time to straighten out their story:

In a case like what we had, that's very important because she's up on the stand and she's got a screen in front of her and she puts on a cry you know.

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50 Sue Lees *Carnal Knowledge: Rape on Trial* (Hamish Hamilton, London, 1996) at 119.

### ***G Juror Beliefs and Expectations About Behaviour and Characteristics of Perpetrators of Sexual Violence***

Our focus so far has been on juror comments about complainants' behaviours and demeanour. However, in eight cases, some of the jurors also drew on stereotypical assumptions about the characteristics of "real rapists". Defence counsel sometimes encouraged this by arguing that the complainant's narrative was implausible because the defendant had not acted in a calculated manner consistent with being a "predator" or a "rapist". This kind of argument ignores the fact that sexual violence can be opportunistic, or as pointed out by one judge, that a defendant's judgement in that regard might be impaired by intoxication. Jurors discussed whether the characteristics of the defendant himself matched their preconceptions, including expectations that rapists are predators who offend more than once, are violent, are evil, and are not from respectable backgrounds:

My initial thought was he was a clean-cut guy ... As soon as I saw him sitting there, I thought, my goodness, this isn't a brute we're talking about. This was a family man with small children.

In two cases, jurors made assumptions about the defendant's good character based on other evidence, such as that he was a "businessman" or came from a good background:

When his mother came on the stand a lot of [the jurors] were convinced he was innocent ... 'Oh, isn't she lovely? He comes from a really nice family. Look at his mum. How lovely he is.'

At other times jurors minimised the defendant's behaviour on the basis that it did not meet their expectations of how a "real rape" would occur. This was particularly evident in two cases where the complainant was allegedly asleep or unconscious. One juror discussed having difficulty because s/he did not regard the defendant as a "horrible and evil person", while in the other case, the jury discussed their discomfort in labelling the defendant as a rapist when there was no violence or home invasion. Six of the interviewed jurors in this case expressed sentiments that minimised his actions as not being those of a real rapist – because it was "not premeditated"; rather, "he overstepped the mark" and had "taken advantage":

We all agreed that he didn't have any malice or ill thoughts to do the crime; it was just a stupid mistake at the end of the day.

In cases where the defendant was intoxicated, this was used by some jurors as justification to argue the defendant's behaviour was not rape but "a drunken mistake":

He's like a young guy that drank too much, and he slipped up. Probably a bit naïve.

The degree to which this type of minimisation affected outcomes depended on whether other jurors challenged the reasoning, and on the impact of the judicial instructions and question trail.

Problems with how jurors treated the defendant's behaviour also arose in cases where the defendant was proven to have lied. In this instance, the judge will usually warn the jury to consider carefully what, if any, weight to put on the fact a defendant has lied, and that lies do not necessarily



mean he is guilty. While that is true, in sexual violence cases the complainant's credibility is often pitted against the defendant's. In such cases, the defendant's lies are able to be used by the jury to determine that the complainant is truthful if her testimony stands in direct contrast on a specific issue, such as whether intercourse happened. Instead, jurors in these cases rarely placed weight on the fact that the defendant had lied prior to the trial.

#### ***V PROBLEMS WITH ASSESSING THE EXTENT AND IMPACT OF CULTURAL MISCONCEPTIONS ON JUROR AND JURY DECISION-MAKING***

As we have shown, our cases revealed clear examples of jurors using problematic reasoning on the basis of cultural misconceptions about sexual violence. However, four difficulties with analysing jurors' responses in actual cases from post-deliberation interviews need to be considered. These reflect the complexity and difficulty of sexual violence cases, particularly those involving "acquaintance rape".

First, there is often no way to determine the degree to which illegitimate reasoning affected the outcome in these cases. Even if jurors reported that a specific line of misconception-based thinking was crucial, we usually cannot know what would have happened had that reasoning not been employed. That is partly because the collective decision-making process may over-ride or neutralise flaws in individual juror decision-making, and there may have been a collective view that there was reasonable doubt anyway.<sup>51</sup> Combining mock and real juror research findings could help with this difficulty, as mock juror or experimental studies can control for variables in ways that research with real jurors cannot.

Secondly, if there are multiple issues raised in a case that may trigger culturally embedded assumptions it can be difficult to unpack their cumulative effect and determine the extent to which any or all of them result in illegitimate reasoning.

Thirdly, in the current literature the question of credibility is often equated with whether or not there is reasonable doubt. But the two are not the same when the standard of proof is beyond reasonable doubt. It is possible for a juror or the jury as a whole to find the complainant credible but nevertheless acquit because there is insufficient evidence for them to be certain that the offence is proved to the criminal standard, and that is exactly what the law requires them to do. This is starkly demonstrated by the juror who explained:

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51 Where the majority of jurors hold the same misconception (as may be the case in sexual violence cases), the collective process is thought to be less likely to over-ride individual juror flaws: Jeremy Finn, Elisabeth McDonald and Yvette Tinsley "Identifying and qualifying the decision-maker: The case for specialisation" in Elisabeth McDonald and Yvette Tinsley (eds) *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 234–236.

What's gut-wrenching is ... I can't even write to this girl to say I believed you ... I can understand why women don't take rape cases. It really pissed me off. It gave me a lot of sleepless nights ... I don't think we served that girl justice ... a lot of us believed the story we just couldn't put the two together ... that poor girl must have gone away absolutely shattered. I just think, 'Oh, God.' We knew it happened, but we couldn't prove it. So, this guy walks away.

The difficulty in determining which reasoning and discussion is based on legitimate evidential concerns and which is based on illegitimate use of cultural misconceptions is illustrated by jurors' search for – and treatment of – hard evidence, and their treatment of the complainant's testimony. The law in New Zealand does not require corroborating evidence for sexual offences. However, in many trials there will be some other evidence in addition to the complainant's testimony. This can include text messages, other witnesses, propensity evidence, forensic evidence, technological data, police interviews with the defendant in which he lied or was inconsistent, evidence of physical injuries, and photographs of damage at the scene.

Despite this – and reflecting the evidential difficulty of acquaintance rape cases in particular – many jurors in our study expressed the desire for more hard evidence. Some expressed real frustration with the police or the prosecution for failing to provide it. This is consistent with the findings of the New Zealand Jury Study in 1999 that "jurors were frequently frustrated when they did not get definitive evidence – especially what they described as 'hard evidence' – to enable them to assess the versions of events presented by the witnesses for the prosecution and defence."<sup>52</sup>

If jurors believe that on the *specific* facts they need corroborating evidence before they can place sufficient weight on the testimony to reach the standard of proof, this is legitimate reasoning. However, if jurors believe there *must* be corroborative scientific or medical evidence before it is possible to *ever* reach the evidential threshold, this reasoning is illegitimate, especially if it is based on a generalisation that a person's word cannot never be relied on with surety. That appeared to occur in some trials.

Defence counsel often fostered such reasoning by creating the expectation that the complainant's testimony alone could not be enough to reach the standard of proof. One way they did this was by labelling it a "he said, she said" case with the inference that there was no evidence other than testimony, and therefore the standard of proof could not be met. This also created some confusion about the weight and status that could be afforded to oral evidence, with one juror reporting that "there was a bit of a struggle to understand the witnesses' statements are evidence". In at least 10 of the cases, some jurors either believed they were not allowed to rely on the complainant's testimony without corroborating evidence or were unclear about it.

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52 Young, Cameron and Tinsley "Jury Trials in New Zealand", above n 36, at 105.

The desire by jurors for corroborating evidence often took the form of an expectation that there should be forensic or medical evidence. This can be problematic when sexual violence occurs within an ongoing sexual relationship, there is delayed reporting by the complainant, or the defence attempts to neutralise the evidence by claiming the sex was consensual even if initially the defendant denied penetration. In these cases, there is the risk of cumulative misconceptions coming into play, increasing the problems of distinguishing legitimate from illegitimate reasoning.

Therefore, while the search for hard evidence can be logical and legitimate, it can also be unrealistic and based on misconceptions about sexual violence and the standard of proof. Even with the advantage of all the notes of evidence and openings and closings, as we had in this study, it was often difficult for us to determine where jurors and juries crossed the line from legitimate weighing of the evidence to illegitimate views of what was required to reach the standard of proof. The additional evidence jurors sought was at times irrelevant or would not have definitively proved the complainant's veracity anyway, yet some jurors perceived it as a crucial evidential gap. Illegitimate reasoning based on cultural misconceptions was thus evident, but its impact, extent and how much it swayed the jury away from legitimate reasoning, was unclear.

Finally and most significantly, jurors typically listen to and interpret evidence according to what has been labelled the "story model" of decision-making: they construct a narrative of what the case is about and interpret and assess the evidence against that narrative.<sup>53</sup> If their construction and revision of the story is derived from a reasonable view of the evidence, that is unproblematic. But if the narrative is based upon a set of generalised and mistaken beliefs based on conceptions of "real rapes" and the prevalence of false allegations, it is likely to lead to illegitimate reasoning. The difference between the two is not easy to detect through questioning of jurors about their decision-making after the event, and even more difficult to discern through general questioning about a juror's beliefs.

Take, for example, the proposition that jurors are more likely to question the credibility of complainants in acquaintance rape cases than in stranger rape cases. If jurors expound the general belief that those who know each other are more likely to be consenting than those who do not, but they do not use that belief as a starting point in assessing credibility, they are not necessarily employing illegitimate reasoning. They may properly take the belief into account in assessing whether the allegation can be proved beyond reasonable doubt, without treating it as an overriding and determinative factor. But if they approach the case by thinking from the outset that a complainant is

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53 Nancy Pennington and Reid Hastie "The story model for juror decision making" in Reid Hastie (ed) *Inside the Juror: The Psychology of Juror Decision Making* (Cambridge series on Judgment and Decision Making Cambridge University Press, Cambridge, 1993) 192; Nancy Pennington and Reid Hastie "A Cognitive Theory of Juror Decision Making: The Story Model" (1991) 13(2-3) *Cardozo L Rev* 519; and Nancy Pennington, Reid Hastie and Abraham Tesser "Explaining the Evidence: Tests of the Story Model for Juror Decision Making" (1992) 62(2) *Journal of Personality and Social Psychology* 189.

likely to be telling lies and give the general belief undue weight, that will necessarily entail illegitimate reasoning, especially if they apply the belief regardless of the evidence.

Similarly, if evidence of the complainant's intoxication is used to discuss their reliability and credibility, this is legitimate reasoning. However, where jurors hold complainants partly responsible for sexual assaults because they are intoxicated, this is illegitimate reasoning based on conceptions of the complainant as "asking for it" or "deserving it".

The difficulty is that both legitimate and illegitimate reasoning may be employed in these examples, and as some stereotypical thinking can be subconscious, jurors themselves may not recognise it even if educated about the relevant cultural misconceptions. For example, in one trial in our study, an intoxicated complainant allegedly woke to the defendant penetrating her, and the jury reportedly discussed not only her reliability, but also how the complainant could "put herself in that position". This appears to contain both legitimate reasoning based on the evidence, and illegitimate reasoning based on prejudicial beliefs, but the relative extent of the illegitimate reasoning is difficult to establish.

## ***VI HOW MIGHT WE ADDRESS THE USE OF CULTURAL MISCONCEPTIONS ABOUT SEXUAL VIOLENCE BY JURORS?***

While it is outside the scope of this article to fully examine possible reforms to law, process and procedure that could assist in reducing the impact of cultural misconceptions on jury decision-making in sexual cases, it is possible to at least outline some of the options available to ameliorate their harmful influence.

The use of judicial question trails and existing judicial directions can be seen to have had some impact on illegitimate reasoning. For example, in two cases in our study, jurors reported victim-blaming because of intoxication and exhibited hindsight bias in their expectations of how the complainant should have behaved. Some of the jurors were reluctant to convict, but reported being conscientious in following the question trails and the judge's other instructions, as this juror's comment illustrates:

I so felt for that defendant, because it was just stupid silly drunken mistake on both sides, that's how I felt, you know, before I went out to deliberation. [But] he was guilty because of the evidence that was brought up ... because of those five questions [on the question trail.]

However, the extent of the impact of question trails and existing judicial instructions in this respect obviously depends on the way the questions and instructions are written and conveyed in the individual case. Where judicial directions were used in the study cases, the results were mixed: they were certainly not a panacea and were sometimes the subject of confusion. The evidence therefore suggests that they are not sufficient to address the problem.

Several other options have been suggested or are in use as ways to address illegitimate reasoning stemming from misconceptions in sexual violence cases. Like question trails, all of these have potential limitations and drawbacks.

First, some jurisdictions have prescribed the mandatory use of judicial directions on counter-intuitive evidence. While New Zealand does not currently mandate the use of such directions, the Sexual Violence Legislation Bill, currently before Parliament, proposes a requirement for judges to direct juries as "necessary or desirable to address any relevant misconception relating to sexual cases"<sup>54</sup> with a non-exhaustive list of possible misconceptions relating to false allegations, victim blaming and real rape myths. Such directions rely on sound judicial education and implementation by individual judges. But even if that occurs, if such directions had mixed results when they were employed by judges voluntarily, it is hard to say that they will fare any better if applied on a general basis regardless of the nature of the particular case, even if done perfectly. And if done poorly, directions may focus jurors on the misconceptions they set out to rectify and could make the situation worse.<sup>55</sup> For these reasons, the introduction of judicial directions should be done with care, and they are unlikely to be sufficient to offset the problem of juror use of misconceptions in sexual cases.

Secondly, expert counterintuitive evidence has been called in some cases to explain the ways that a complainant may not behave as jurors might expect. In New Zealand, the use of such evidence has generally been in child sexual abuse cases rather than in the adult jurisdiction.<sup>56</sup> While some research lends support for the employment of expert counterintuitive evidence, there are also some legitimate concerns about the expansion of its use. In New Zealand, our pool of qualified experts is small, which may require creative approaches such as court-appointed experts, greater use of s 9 of the Evidence Act 2006 for admission of evidence that is agreed upon by the parties, "hot-tubbing" opposing experts so that evidence (particularly cross-examination) takes place at the same time, or use of audio-visual links to bring in international experts.<sup>57</sup> All of these options are relatively costly. The use of international experts may also lead to experts being called who lack cultural knowledge about New Zealand social conditions.

Thirdly, there is a growing interest in other forms of juror education. For example, information about cultural misconceptions could be sent out with jury summons, provided in writing or by video at the time of jury selection, or left in the jury room. There is also the possibility of wider education

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54 Sexual Violence Legislation Bill 2017 (185-2), cl 126A(1).

55 Temkin, above n 18, at 725; and Norbert Schwarz and others "Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns" (2007) 39 *Advances in Experimental Social Psychology* 127.

56 Law Commission "Justice Response", above n 5 at 119 and [6.67].

57 Law Commission "Justice Response", above n 5, at 119–120; and Yvette Tinsley "Science in the Criminal Courts: Tool in Service, Challenge to Legal Authority or Indispensable Ally" (2013) 25(4) *New Zealand Universities Law Review* 844.

through efforts such as government social media or television campaigns. As with other methods of delivering counterintuitive information, the aim of these types of juror education is to increase awareness and improve the ability of jurors to challenge others who utilise cultural misconceptions. In some cases in our study, jurors did effectively question other jurors' misconceptions or assumptions. For example, in a case where the jury struggled to conceive of the behaviour as rape or the defendant as a rapist because it did not accord with their conceptions of "real rape", one juror commented:

We had to kind of say to them that you can't [bring in that emotional view,] we've got to stick with the facts.

Wider juror education could have the potential to enhance this effect. However, as with other forms of juror education about misconceptions, there is relatively little known about what works and to what extent awareness impacts reasoning in real cases. While education is useful in addressing some forms of biased or stereotypical reasoning, others are not able to be educated away.<sup>58</sup> This suggests that any method of juror education will be imperfect in its ability to address the use of cultural misconceptions in decision-making in sexual cases.

All of these attempts to educate the jury not only acknowledge that jurors bring cultural misconceptions with them, but also accept that misconceptions might be introduced in the course of the adversarial trial. However, changes could be made to the working practices of both prosecution and defence counsel to reduce the use of misconceptions by jurors. For example, the prosecution could provide a contextualised rebuttal to defence arguments based on misconceptions. In one case in our study, the prosecution successfully argued an alternative narrative to the expectation of physical resistance. The defence had cross-examined the complainant about not screaming, nor suffering visible injuries. They argued that these facts showed the allegation was false and the complainant regretted consensual sex. The prosecutor responded by telling the jury that there is no rulebook of reactions, and that while it might be easy in the courtroom for jurors to imagine they would have reacted in a certain way, in traumatic situations, people react in a variety of different ways. The prosecutor also explained that there was no evidence that the type of struggle that occurred would have resulted in injuries. While these arguments alone may not have led to the jury convicting, they seem to have disrupted the influence of the cultural misconceptions introduced by the defence.

As we discuss in Part IV(A), many of the problematic instances of misconceptions that affected deliberations were introduced by defence counsel, often as generalised tropes. Section 85 of the Evidence Act allows for the Judge to disallow questions that are "unacceptable" because they are considered to be improper, unfair, misleading, or needlessly repetitive. However, our study and other

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58 Finn, McDonald and Tinsley, above n 51.

New Zealand research suggest that s 85 does not prevent defence introduction of unacceptable questions based on misconceptions, nor of counsel referring to them in closing submissions.<sup>59</sup>

## ***VII CONCLUSION***

From this research, it is clear that some juries or jurors use cultural misconceptions about sexual violence. There are some jurors whose response to the evidence illustrates clear illegitimate reasoning about sexual violence. There are also examples of reasoning where it is difficult to determine whether jurors undertook a legitimate discussion of whether the evidence met the standard of proof or whether they were influenced by misconceptions about sexual violence. It appears that where there are multiple areas that raise mistaken assumptions about sexual violence, particularly where these have been emphasised by defence counsel as casting doubt on the complainant's veracity, there may be a cumulative impact on the jury. While further research with real and mock jurors is required, the difficulty of determining the legitimacy of jury reasoning in these cases also underlines the problems inherent in many sexual violence trials in a society where cultural misconceptions about sexual offending are deeply embedded.

Notwithstanding that difficulty, our study supports the view that at least some significant degree of illegitimate reasoning does occur. However, options for addressing this within the current criminal justice structure, and its reliance on an adversarial process for the presentation and testing of evidence, are limited. While there have been numerous calls to abolish the jury in sexual cases, the answer cannot lie in merely changing the decision-maker while leaving the rest of the process intact. Certainly, an increase in judge-alone trials would be unlikely to fully address the problem that misconceptions may impact decision-making in sexual trials, given that research suggests that judges are also prone to subconscious misconception-based reasoning.<sup>60</sup> This suggests that there needs to be a more fundamental rethink of the way in which cases are constructed and presented, and guilt determined, in sexual violence cases and perhaps criminal cases more generally. That must include consideration of whether the centrality of oral testimony and the related reliance on demeanour as a key means of determining credibility are warranted. This raises broader questions that are beyond the scope of this article.

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59 McDonald "Rape Myths as Barriers", above n 19.

60 Finn, McDonald and Tinsley, above n 51, at 224–233; and Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich "Inside the Judicial Mind" (2001) 86 Cornell Law Review 777.

