

RAPE MYTHS AND THE USE OF EXPERT PSYCHOLOGICAL EVIDENCE

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There are many common misconceptions about sexual violence and the way that victims "should" behave during and after the offending. In trials for sexual offending these "rape myths" can impact on jurors' assessments of a complainant's credibility, rendering a guilty verdict less likely.

This article discusses how the use of counter-intuitive expert opinion evidence as a method of juror education in trials for sexual offending can address these prejudices to improve the operation of the criminal justice process. The article also identifies the limitations of such evidence in particular cases of acquaintance rape, and foreshadows whether such evidence will continue to be offered in the future.

I INTRODUCTION

There are many common misconceptions about sexual violence and the way that victims "should" behave during and after the offending. The prevalence of these popular, yet unfounded, "rape myths" amongst the general public is known to jeopardise the reporting and conviction of sexual offending, including by influencing the perceptions of jury members.

This article will first introduce the more common rape myths identified by research, before discussing a key way in which rape myths can impact on the criminal justice process, namely by illegitimately affecting juror assessments of a complainant's credibility and an accused's guilt.¹ The article will then look at the use of counter-intuitive expert opinion evidence, the risks associated with this type of evidence and what evidential tools can be invoked to minimise these risks.

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¹ Mirroring the focus of much of the literature and case law, the particular focus of this article is on those rape myths that arise in cases of sexual violence perpetrated by men against women. Many of the principles and issues discussed will, however, be equally applicable to other cases of sexual offending.

Finally, the article will discuss two recent developments, namely a study identifying the limitations of counter-intuitive evidence in cases of acquaintance rape and apparently increased media attention on the topic of rape myths and sexual offending. The author concludes that, while increased media attention may serve to weaken the presence and effect of rape myths and ultimately obviate the need for counter-intuitive expert opinion evidence, this should not occur without careful consideration of how best to address the various rape myths at play in cases of acquaintance rape.

II STEREOTYPES ABOUT SEXUAL OFFENDING

Rape myths are "descriptive or prescriptive beliefs about sexual aggression (ie about its scope, causes, context, and consequences) that serve to deny, downplay, or justify sexually aggressive behaviour".² They are "unjustified behavioural assumptions"³ about sexual offending, offenders and their victims. Various surveys across the United Kingdom,⁴ Australia⁵ and New Zealand⁶ have attempted to identify the prevalence of these misconceptions amongst the general public. The results of these surveys present three broad, overlapping categories of rape myths.

The first category is the common characterisation of rape as being a rare act of aggression between a stranger and a physically resisting (and typically female) victim.⁷ Despite accounting for only a minority of cases,⁸ preconceptions of "real rape" have become a barrier to the validity of complaints: sexual violence perpetrated by an acquaintance or occurring within a relationship is less

2 Jennifer Temkin "And Always Keep A-Hold of a Nurse, For Fear of Finding Something Worse: Challenging Rape Myths in the Courtroom" (2010) 13 *New Crim L Rev* 710 at 714–715, citing Heike Gerger and others "The Acceptance of Modern Myths about Sexual Aggression Scale" (2007) 33 *Aggressive Behavior* 422.

3 *M v R* [2011] NZCA 191 at [32].

4 Amnesty International UK *Sexual Assault Research Summary Report* (12 October 2005). See also Emily Finch and Vanessa Munro "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study" (2005) 45 *Brit J Criminol* 25.

5 Natalie Taylor *Juror Attitudes and Biases in Sexual Assault Cases* (Australian Institute of Criminology, August 2007).

6 Elaine Mossman and others *Responding to Sexual Violence: Environmental Scan of New Zealand Agencies* (Ministry of Women's Affairs, Wellington, 2009) at xxi.

7 Taylor, above n 5, at 2 and 5. See also Louise Ellison and Vanessa Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 *IJEP* 299.

8 Taylor, above n 5, at 2.

likely to proceed to trial and result in a conviction,⁹ as is offending without evidence of injury, explicit refusal of or physical resistance to the accused's advances.¹⁰

The second myth, "victim blaming", operates alongside the "real rape" stereotype and holds the victim in some way responsible for the offending. In one survey, participants asserted that a victim will be at least partly responsible for the offending if he or she: fails to clearly say "no" (29 per cent), behaves flirtatiously or encouragingly (28 per cent), has been drinking (26 per cent), dresses provocatively (20 per cent), or is known to have many previous sexual partners (14 per cent).¹¹ Other examples of victim blaming include situations where the victim has "put herself in a vulnerable position" by dint of associating with certain dangerous people or places. In these situations the myth holds that the victim was essentially "asking for it". Again, this myth poses particular problems for victims of acquaintance rape, with simple actions such as inviting the defendant inside for a cup of coffee apparently being capable of being misinterpreted as a "signal" for consent to sexual activity.¹²

The final category is the gross misconceptions about false complaints. The surveys identify the common belief that victims (in particular, female victims) are liable to invent complaints of sexual offending out of boredom, malice, fantasy, shame or regret.¹³ Significantly, the myth holds that a delay in reporting sexual offending, or evidence of prior unconvicted complaints, are both indications that the offending never occurred.¹⁴

III THE IMPACT OF RAPE MYTHS ON JUROR DELIBERATIONS

The prevalence of these rape myths amongst the general public jeopardises the reporting and conviction of sexual offending in four principal ways: by shaping the way the victim characterises his or her experience; by influencing the way that he or she feels the complaint will be received by those in the criminal justice process; by actually influencing the responses of those in the criminal justice process; and finally, by influencing the perceptions of jurors in trials for sexual offending. This section elaborates on the fourth identified consequence.

9 See Hart Schwartz "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1994) 31 CR (4th) 232 at 233.

10 Taylor, above n 5, at 2 and 5.

11 Amnesty International UK, above n 4, at Question 3.

12 Helen Reece "Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?" (2013) 33 Oxford Journal of Legal Studies 445 at 461.

13 Louise Ellison and Vanessa 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 L Rev 781 at 790.

14 Taylor, above n 5, at 2.

A jury is comprised of a panel of 12 individuals selected in accordance with the Juries Act 1981.¹⁵ The primary role of the jury is to assess the factual findings offered during the trial and come to a collective opinion as to those findings.¹⁶ In a criminal trial, this means to reach a verdict of guilty or not guilty based on the application of the law to the jury's impartial findings of fact.¹⁷ Every person who is currently registered on the electoral roll is qualified and liable to serve as a juror on a jury panel.¹⁸ The construction of juries is therefore seen as very human, democratic and reflective of a society's thinking and morals at a particular point in time.

The use of jury trials in cases of sexual offending affords a particularly unique benefit, in that it allows public input on whether the conduct in question crosses the threshold between socially accepted sexual interaction and sexual offending.¹⁹ However, where the jurors' collective threshold has been misinformed by rape myths, the use of a prejudiced jury in trials for sexual offending can be seen to undermine the impartial operation of the justice system and do a "serious injustice" to the victim.²⁰

The credibility of a victim will nearly always be in issue in trials for sexual offending. This is because, unless the accused pleads guilty, his or her defence will likely amount to a claim that the victim had consented or that the events never happened (or at least, did not happen with the accused). Ultimately, these claims amount to a defence that the claimant is either mistaken or lying – accusations which put the victim at the centre of a contest which pitches one person's word against that of another. The presence of rape myths in the minds of jurors in these situations inevitably produces a biased assessment of both the victim's credibility and the accused's guilt: if a jury believes that the victim is at least partly responsible for the offending, the accused will correspondingly be held less responsible and is less likely to be found guilty.

The "he said, she said" situation, and the corresponding issues of consent and credibility, is particularly problematic in cases of acquaintance rape: responsibility for communicating the fact of consent (or non-consent) is, by virtue of the sexual stereotype of women as "sexual gatekeepers",

15 Juries Act 1981, s 17.

16 Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at [8].

17 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at 17.

18 Juries Act 1981, s 6.

19 Law Commission, above n 17, at 48.

20 Tony Ward "Usurping the role of the jury? Expert evidence and witness credibility in English criminal trials" (2009) 13 E&P 83 at 94. See also 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 235.

placed on women.²¹ This means that, particularly where the complainant has communicated with (and even consented to sex with) the defendant in the past, her actions in respect of the alleged offending, and whether or how she communicated the fact of non-consent, will be more heavily criticised.

In an attempt to mitigate the bias against the complainant's credibility, counter-intuitive expert opinion evidence offered by psychologists and clinicians specialising in the treatment of sexual offending is now "frequently adduced" in trials for sexual offending in New Zealand,²² as detailed further below.

IV COUNTER-INTUITIVE EXPERT OPINION EVIDENCE IN TRIALS FOR SEXUAL OFFENDING

Counter-intuitive expert opinion evidence is a particular type of expert opinion evidence, the admission of which is governed by the Evidence Act 2006.

A statement of opinion is not generally admissible in a proceeding.²³ This is because the role of the witness is usually limited to delivering the relevant facts, leaving the jury to come to the ultimate and collective opinion of those facts. However, a key exception to the opinion rule permits the offering of opinions of expert witnesses on the basis that the opinion will assist or enable the jury in the fact-finding and decision-making process. Expert witnesses are seen as "able, and best placed, to draw inferences or reach conclusions which are not apparent to the fact finder".²⁴

"Expert evidence" means a statement or opinion of a qualified expert that tends to prove or disprove a fact.²⁵ The opinion will be derived from specialised knowledge gathered by the expert in the course of his or her training, study or experience in the particular field.²⁶ Such evidence will only be admissible if the jury:²⁷

... is likely to obtain substantial help from the opinion in understanding other evidence in the proceedings or in ascertaining any fact that is of consequence to the determination of the proceeding.

21 Joanne Conaghan and Yvette Russell "Rape Myths, Law, and Feminist Research: 'Myths About Myths?'" (2014) 22 Fem Leg Stud 25 at 39. See also Ellison and Munro, above n 7, at 311.

22 *K v R* [2013] NZCA 430 at [34]. Compare Evidence Act 1908, s 23G.

23 Evidence Act 2006, s 23.

24 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at [8.1].

25 Evidence Act 2006, s 4, definitions of "expert evidence" and "opinion".

26 Evidence Act 2006, s 4, definition of "expert".

27 Evidence Act 2006, s 25(1).

To a layperson, the use of expert evidence in trials for sexual offending may evoke images of forensic experts testifying as to the outcome of DNA analysis undertaken. This may well be a valid assumption where the identity of the accused is the fact in issue. However, where the consent of the complainant, and not the identity of the accused, is the fact in issue, expert testimony on DNA analysis will not be relevant. The expert evidence will instead be in the form of counter-intuitive opinion evidence, offered by psychologists and clinicians specialising in the treatment of sexual abuse for the primary purposes of providing jurors with information on the real circumstances surrounding rape and the potential behaviours of victims.

A Counter-Intuitive Expert Psychological Opinion Evidence

In accordance with the recommendations of the Law Commission,²⁸ the Court of Appeal in *M v R* accepted that, in sexual cases where the key task of the jury in assessing the victim's credibility may be influenced by "unjustified behavioural assumptions" about sexual offending or survivors, psychologists' expert evidence as to those assumptions that is relevant to the case at hand will meet the "substantial helpfulness" threshold provided for by s 25(1) of the Evidence Act.²⁹ Recent cases have stressed the requirement that the evidence be tailored to the particular issues or rape myths affecting a complainant's credibility in the case at hand, and avoid discussion of complainant behaviours that are not at issue at trial.³⁰

The expert's evidence will typically take the form of "counter-intuitive" or "consistency" evidence, that the complainant's behaviour (whether in respect of a delayed complaint, continued contact and habitation with the accused, or lack of physical resistance to the attack, for example) is neither consistent nor inconsistent with the behaviour of victims of sexual assault according to the expert witness's experience, and relevant studies and statistics.

Now "frequently adduced" in sexual cases,³¹ counter-intuitive evidence necessarily involves re-educating jurors on their perceptions or interpretations of the offending, and the victim's reaction to it. To this end, the evidence allows a complainant's behaviour to be "better understood and perceived quite differently" by jurors.³² The effectiveness of the evidence is also widely acknowledged: studies have shown that, in sexual cases where counter-intuitive expert opinion evidence is offered, jurors are more likely to proffer alternative explanations for the complainant's

28 Law Commission *Evidence Reform of the Law* (NZLC R55, 1999) at 25.

29 *M v R*, above n 3, at [24] and [32]. See also *Aryan v R* [2010] NZCA 57. Compare *R v S* [2009] NZCA 195.

30 See *DH v R* [2013] NZCA 670 at [22]–[24]; *R v Gaeth* DC Kaikohe CRI-2011-027-000771, 8 November 2011 at [22]; *R v Fraser* DC Palmerston North CRI-2011-054-2870, 16 October 2012 at [16]–[17] and [21].

31 *K v R*, above n 22, at [34]. Compare Evidence Act 1908, s 23G.

32 *Lockhart v R* [2013] NZCA 549 at [21].

behaviour in their deliberations and, as a consequence, are less likely to adhere to rape myth reasoning.³³

The Court of Appeal has described the fundamental purpose of the evidence as being:³⁴

... to educate the jury regarding behaviour that might, intuitively, be regarded as inconsistent with having been sexually abused and neutralise the effect of unjustified assumptions about how victims of sexual abuse are likely to behave. This kind of evidence is permitted on the basis that such matters are not necessarily within the ordinary competence of jurors and that the evidence may be substantially helpful for the purposes of s 25 of the Evidence Act 2006.

Of particular significance is the Court's use of the word "neutralise". As acknowledged above, rape myths typically serve to discredit the victim and his or her account of the offending. The presence of rape myths in the minds of jurors will mean that the victim's credibility is in a negative balance even before the trial begins. Although the counter-intuitive expert evidence of psychologists and clinicians cannot be used simply to "bolster the credibility of the particular complainant",³⁵ it is the restoration of the victim's credibility to a fair and impartial level that the evidence is intended to achieve.³⁶

Despite the fact that counter-intuitive expert opinion evidence is only intended to "neutralise" the complainant's credibility, the evidence nonetheless poses certain risks to the accused's right to a fair trial. As such, the evidence cannot be admitted until the risks and benefits are balanced.

B The Risks of Counter-Intuitive Expert Psychological Evidence

Fortunately, many of the risks that typically accompany the admission of expert opinion evidence are not as relevant in the case of counter-intuitive opinion evidence of psychologists and clinicians. For example, there is little risk that the jury will become confused by complex scientific terms, calculations and reasoning.³⁷ And, because the evidence is particularly general in nature, this makes it less likely that the jury will form unhelpful views of expert witnesses, whether of

33 For recent examples, see Ellison and Munro, above n 7; Louise Ellison and Vanessa Munro "Jury deliberation and complainant credibility in rape trials" in C McGlynn and VE Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Taylor and Francis, Hoboken, 2010) 281.

34 *T v R* [2013] NZCA 298 at [7] (citations omitted).

35 *K v R*, above n 22, at [35].

36 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, Volume 2, 1999) at [C111].

37 But see *Kohai v R* [2014] NZCA 83 at [40] and *DH v R* [2013] NZCA 670 at [20], where the Court held that the expert evidence offered at trial was too detailed and excessive in volume.

prosecution expert witnesses as blinded by institutional bias, or of defence expert witnesses as simply "guns for hire".³⁸

Nonetheless, any evidence that is offered as a means of dispelling rape myths from the minds of jurors in a criminal trial must balance three important needs of a responsive and democratic criminal justice system: first, the need to inform the jury on all matters relevant to its decision;³⁹ secondly, the need to promote fairness to witnesses (in these instances, the victims) by encouraging fair and impartial consideration of their evidence, as required by the Evidence Act;⁴⁰ and thirdly, the need to respect the autonomy of the jury in considerations of the victim's credibility in accordance with the accused's right to a fair trial.⁴¹

With the primary purpose of counter-intuitive opinion evidence being to educate the jury on the realities of sexual offending (and, in particular, the behaviours of its victims) in an effort to correct certain unjustified assumptions about the victim's credibility, the offering of counter-intuitive expert evidence meets the first two of these needs. However, the evidence risks upsetting the balance by unfairly prejudicing the accused's right to a fair trial in two key ways.

1 The opinion is educative, not instructive

A principal concern with expert evidence, whether counter-intuitive or not, is that jurors will give too much weight and deference to the opinion evidence, on account of the witness being an "expert". In the case of counter-intuitive opinion evidence given by psychologists and clinicians, the risk is that the jury will interpret the opinion evidence as indicative of the victim's credibility, or whether the offending actually occurred, when its primary purpose is to dispel juror stereotypes about sexual offending.⁴² The assessment of the victim's credibility is question of fact to be decided by the jury: in abandoning their role as independent finders of fact by accepting the expert evidence as evidence of the complainant's credibility, the jury is prejudicing the accused's right to a fair trial.

In response to the risk that an expert's "impressive credentials and mastery of scientific jargon" would be given undue weight by the jury in assessing the victim's credibility,⁴³ a majority of the Supreme Court of Canada held that counter-intuitive expert opinion evidence regarding delayed

38 Elisabeth McDonald and Yvette Tinsley "Evidence issues" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 370.

39 *RA v R* [2010] NZCA 57 at [1].

40 Evidence Act 2006, s 6(c).

41 Evidence Act 2006, ss 6(c) and 8(1)(a).

42 *M v R*, above n 3, at [49].

43 *R v DD* 2000 SCC 43, [2000] 2 SCR 275 at [53].

complaints is not necessary evidence⁴⁴ (the equivalent of the New Zealand standard, "substantially helpful"), and is therefore inadmissible.⁴⁵ While the Canadian Supreme Court decision on the matter is not reflective of the New Zealand position (and indeed, is argued to overstate the risk),⁴⁶ the concern is still relevant to the New Zealand context and will impact on the form and extent of the expert opinion, and whether, in the circumstances, it unduly tips the balance of fairness in the victim's favour.⁴⁷

2 *Confusing fact with opinion*

Another concern is that the way in which expert witnesses give evidence may not sufficiently alert the jury to the distinction between the facts of the case and an expert's opinion evidence. The concern is not that jurors will be confused by an expert witness blending his or her factual descriptions with opinion evidence, but rather that jurors will recognise a parallel between the expert's opinion evidence and the facts of the particular case and, as a result, allow their subjective opinion of the facts (namely, the victim's credibility and account of the offending) to mirror the objective opinion evidence of the expert witness.

Of course, this is not the purpose of the evidence: the Court of Appeal has clearly asserted that the counter-intuitive opinion evidence of psychologists and clinicians is "not intended to be linked to the circumstances of the particular complainant".⁴⁸ Further, in a more recent case, the Court held that an expert witness's description of the complainant's internal injuries as "concerning" went beyond (albeit only marginally) mere consistency evidence and "had the potential to undermine the warning that such injuries alone are not indicative of non-consensual activity".⁴⁹

44 At [58] and [64].

45 *M v R*, above n 3, at [30].

46 A recent study by Ellison and Munro noted that participants in mock jury trials for sexual offending found counter-intuitive expert evidence "helpful", 'useful' and 'interesting' and that those jurors gave no indication "that they interpreted [the evidence] as indirectly vouching for the credibility of the complainant." See Ellison and Munro, above n 33, at 291.

47 Evidence Act 2006, ss 7, 8 and 25.

48 *K v R*, above n 22, at [35]. The general nature of the evidence, however, has been criticised: it does not indicate how close the facts of the present case fit with those previously studied, nor how the personalities and traits of the complainant and defendant compare with those in other cases. See *R v Fraser* DC Palmerston North CRI-2011-054-2870, 16 October 2012 at [12]. See also Finn, McDonald and Tinsley, above 20, at 239.

49 *Lockhart v R*, above n 32, at [69].

To avoid crossing the boundary of consistency evidence, expert witnesses will typically include the following caveat to their evidence:⁵⁰

I confirm that, in this brief of evidence, I am not seeking to give expert evidence to the jury specifically about this individual case, and am not seeking to comment on the credibility or otherwise of any witness, including the complainants or the accused. Similarly, I am not seeking to explain, or give any view as to whether the complainants' allegations are true or untrue. I confirm that I have not interviewed or had any contact with the accused, or the either of the complainants or any other witness. The evidence that I will give does not prove or disprove that sexual offending has occurred in this case.

This caveat goes some way towards mitigating jurors' improper use of the evidence. However, the significance afforded to the accused's right to a fair trial justifies invoking other tools of the trial process to ensure that this right is not prejudiced by jurors' substitution of the expert evidence in favour of their own independent assessment of the facts.

C Countering Risk: Judicial Directions and Admission by Agreement

The risks identified above can, in the author's opinion, be adequately met by two options available in the criminal trial process: judicial directions, and, in some cases, the admission of the expert evidence by the agreement of both parties.

1 Judicial directions as to the use of the evidence

Trial judges generally have a wide discretion to allow judicial warnings and directions given to the jury to be tailored to the facts of each case.⁵¹ In particular, it is not uncommon for the presiding judge to remind jurors of the "human" function of the jury and that, as such, they are to use their common sense, intuition and experience in their assessments of evidence, arguments and, ultimately, their decision on a verdict.⁵²

The significance of the risks associated with counter-intuitive expert opinion evidence, however, means that the evidence must, as a matter of course, be followed by a specific judicial direction aimed at avoiding the risks of the jury using evidence in one of the two prejudicial ways identified above. While there exists some doubt generally about the efficacy of judicial directions,⁵³ the Court

50 Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2013) 20 *Psychiatry, Psychology and Law* 1 at 7.

51 But see the mandatory directions under Evidence Act 2006, ss 123–126.

52 Seymour and others, above n 50.

53 See Law Commission, above n 16, at [7.30]–[7.54]. See also Finn, McDonald and Tinsley, above n 20, at 237.

of Appeal in *M v R*, in recognising the necessity and utility of judicial directions on the use of counter-intuitive expert opinion evidence in sexual cases, issued the following guidance:⁵⁴

The judge should explain to the jury what the purpose of the evidence is and should caution them against improper use of it. The judge should instruct the jury that if they accept the expert evidence, they should not reason that the fact that the complainant behaved in one or more of the relevant ways ... is, of itself, indicative that the alleged abuse did, or did not, occur.

To give an example of a judicial direction, a jury may be reminded that "the evidence says nothing about the credibility of the *particular* complainant"⁵⁵ and that "it is for [you] to be satisfied about the essential ingredients and ... [you] are not bound to accept the opinion even of the most highly qualified expert."⁵⁶

These particularly neutral examples of judicial warnings are intended to mitigate the risk that, as with expert witnesses, jurors may interpret the warning as indicative of the trial judge's professional opinion of the case and will, as a consequence, abandon their independent assessment of the complainant's credibility.⁵⁷

2 Admission by agreement

It is possible for the counter-intuitive opinion evidence of psychologists and clinicians to be admitted by the agreement of the parties pursuant to s 9 of the Evidence Act. This approach was followed by the High Court in *R v Alden* where the Crown expert witness' brief of evidence was not objected to by defence counsel.⁵⁸ The evidence was accordingly admitted, subject to the condition that it be restricted to "general observations regarding complainants in sexual cases relating to delay in complaining and continuing friendship between an alleged perpetrator and complainant".⁵⁹

It is anticipated that evidence admitted via this route will become more common on account of it adequately balancing the competing fair trial interests: implicit in the agreement to admit the counter-intuitive opinion evidence pursuant to s 9 is the defence's acceptance that the evidence does not unfairly prejudice the accused's case.⁶⁰ However, on the basis that agreement between the parties is required before the evidence can be admitted, it is not possible to adopt this method of

54 *M v R*, above n 3, at [31] and [49].

55 *M v R*, above n 3, at [32].

56 *Oh v R* [2012] NZCA 111 at [46], citing *R v Flaws* (1998) 16 CRNZ 216 (CA) at 219.

57 See for example the particularly emotive language used in the judicial warning on appeal in the case of *R v D* [2008] EWCA Crim 2557.

58 *R v Alden* HC Palmerston North CRI-2010-054-1873, 1 October 2010 at [69].

59 At [70].

60 McDonald and Tinsley, above n 38, at 370.

mitigating the risks associated with counter-intuitive evidence where the substance, form or, of course, the necessity of the evidence is contested.⁶¹

Furthermore, it is likely that any counter-intuitive opinion evidence admitted pursuant to s 9 will still require judicial directions as to its legitimate use: even though the evidence may not in itself unfairly prejudice the accused's case, trial judges must still caution the use to which the evidence is put by the jurors.

V THE FUTURE FOR COUNTER-INTUITIVE EXPERT OPINION EVIDENCE

In its recent review of the Evidence Act, the Law Commission declined to address the operation of s 25, other than to identify certain policy issues and the role of s 9.⁶² Although the case law would suggest that the admission of counter-intuitive expert evidence is adequately meeting its intended purpose and the requirements of the Evidence Act, this may not always be the case.

Recent events in New Zealand have seen a proliferation of media coverage on sexual offending issues and cases that challenge the "real rape" myth and its prevalence in the community. In particular, the "Roast Busters" scandal has brought the issues of acquaintance rape and victim blaming to the fore.⁶³ Other recent cases to gain media attention and public disapproval raised arguments that the victim could have "closed her legs" if she did not want sex,⁶⁴ and that sex cannot mean rape in the absence of violence.⁶⁵

With growing public discussion and awareness of these issues, it is realistic to expect the development of a wider, informal public education campaign on the realities of sexual offending; a positive outcome of which might be the significant decrease in the presence of certain rape myths in the community. It is arguable then that, in turn, this decrease in the influence of certain rape myths may obviate the need for counter-intuitive expert evidence on these topics in trials for sexual offending. The argument is not that the presence and effect of rape myths has, in the case law and literature to date, been overstated or sensationalised,⁶⁶ but rather that some of the various educative

61 See for example *R v Linton* HC Palmerston North CRI-2012-009-13358, 21 February 2014.

62 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.37] and [1.50].

63 Patrice Dougan "Roast Busters: Radio show hosts 'victim blaming'" *The New Zealand Herald* (online ed, Auckland, 5 November 2013).

64 Michelle Duff "Rape victim could have 'closed legs', says lawyer" (11 November 2013) [Stuff.co.nz](http://www.stuff.co.nz) <www.stuff.co.nz>.

65 Jared Savage "We weren't violent so it wasn't rape, insist jailed abusers of girl" *The New Zealand Herald* (online ed, Auckland, 25 January 2014).

66 See Reece, above n 12. But see Conaghan and Russell, above n 21, at 39.

measures aimed at eradicating the presence and effect of rape myths may ultimately achieve their intended effect.

Where, by virtue of a common rejection of rape myths amongst members of the community, the victim's credibility is perceived to be at a neutral balance at the commencement of the trial, the evidence loses its "substantial helpfulness" quality and can no longer be admitted pursuant to s 25 of the Evidence Act.⁶⁷ Indeed, the evidence may not even meet the lesser threshold of "mere relevance"⁶⁸ if it does not prove or disprove anything that is of consequence to the determination of the proceeding (ie the victim's credibility).⁶⁹

Consistent with the view that the presence of certain rape myths amongst the general community may be declining, a recent study by Louise Ellison and Vanessa Munro found that, in particular cases of acquaintance rape, the inherently complicated nature of both the relationships of the parties and the offending may be to blame for a jury's inability to reach a guilty verdict, not the presence of rape myths.⁷⁰ In the study, mock jurors were presented with the following factual scenario: the complainant and defendant had recently ended an eight month long relationship on good terms. The defendant visited the complainant's house to pick up some possessions, but ended up staying for a conversation over a glass of wine. As the defendant was leaving, the pair kissed before the alleged sexual offending eventuated. Counter-intuitive expert opinion evidence was offered to explain that the complainant's injuries (external bruising and scratching) were "neither consistent nor inconsistent with rape".⁷¹

Sixteen out of the 20 mock juries in the study found the defendant not guilty.⁷² The authors concluded that the jurors' difficulty in returning guilty verdicts did not appear to be attributable to the presence of rape myths: the majority of the participants were alert to issue of acquaintance rape and the range of possible complainant responses.⁷³ According to the authors, it was the jurors' inability, by reason of their unfamiliarity with the parties and their prior relationship, to determine

67 This argument was recently considered by the High Court in *R v Linton*, above n 61, at [2]. However, the Court, being bound by the authority of the Court of Appeal in *M v R*, above n 3, found the evidence to be admissible (at [7]).

68 McDonald, above n 24, at [2.2.2(1)].

69 Evidence Act 2006, s 7.

70 Ellison and Munro, above n 7.

71 At 304

72 At 321.

73 At 309.

what could be considered "normal" sexual interaction in that particular situation, that prevented them from returning guilty verdicts:⁷⁴

At the heart of the ambiguities and complexities that jurors felt often pervaded this acquaintance rape scenario was the existence of a series of expectations and conventions regarding intimate heterosexual engagement, and the scope for sexual (mis)communication which these permitted. The jurors in this study invoked a number of acceptable "scripts", forged in the context of contemporary socio-(hetero)sexual relationships, against which the conduct of the parties, and the allegations of sexual assault, were measured. These scripts often positioned women as having the primary responsibility for acting as sexual gatekeepers, communicating their willingness or refusal clearly and unequivocally, whilst bearing in mind the presumed disposition of "red-blooded" men to "push their luck" as sexual initiators.

As this quote identifies, however, while the jurors may have been perfectly willing and able to accept the incidence of acquaintance rape, their deliberations were still heavily influenced by another rape myth: victim blaming. Factors such as the prior sexual history between the parties, and the alleged "signals" the complainant was sending to the defendant (including inviting him inside, offering him a glass of wine, kissing him and failing to clearly say no or to forcefully resist the defendant during the alleged offence) allowed the mock juries to place responsibility and blame for the offending squarely on the complainant.⁷⁵

The study identifies a serious problem with counter-intuitive expert opinion evidence in trials for sexual offending, namely that it is of limited use when it comes to addressing the victim blaming rape myth. The counter-intuitive evidence available in the mock trial spoke to the complainant's injuries only. While it is likely that evidence as to the complainant's failure to more forcefully resist the defendant's advances could also have been successfully admitted, the expert evidence of psychologists and clinicians cannot extend to assert that, in the context of a prior relationship, the particular complainant's actions and behaviours that may be seen to lead to the sexual offending are consistent with those seen in previous cases: this type of evidence is not routinely admitted by expert witnesses and is outside of their field of expertise.

Future opportunities for reform of the law surrounding counter-intuitive expert opinion evidence, including assessments of whether it continues to be relevant to the community's understanding of the realities of sexual offending and meets the "substantial helpfulness" threshold set by s 25, must therefore carefully consider how victim blaming rape myths, particularly in the context of acquaintance rape, can be eliminated from the minds of jurors in trials for sexual offending.

74 At 310–311 (citations omitted).

75 At 301 and 311.

VI CONCLUSION

Research has shown that inappropriate and unfounded stereotypes about sexual offending are present amongst the wider community and have the dangerous potential to prejudice the operation of the criminal justice system, including by prejudicing juror deliberations on the questions of the victim's credibility and the accused's guilt. The result is that few incidences of sexual offending are reported, and even fewer result in conviction.

The offering of counter-intuitive expert opinion evidence by psychologists and clinicians on the realities of sexual offending is intended to correct these misconceptions of sexual offending in the minds of jurors and accordingly reduce their impact on the jury's deliberations. Although the evidence is currently accepted to meet the "substantially helpful" threshold set by the Evidence Act, its inherent risks mean that the evidence can only meet the balance of rights and considerations required for a fair trial with the assistance of judicial directions and, where possible, the admission of the evidence by agreement.

Recent media attention and a study on the operation of rape myths in acquaintance rape situations have indicated that the continuing presence of certain rape myths may be declining in the minds of members of the community and therefore jurors. Ellison and Munro's study, however, also demonstrated that, particularly in the context of acquaintance rape, counter-intuitive evidence has a limited ability to respond to the presence of victim blaming rape myths. Thus, while the elimination of circumstances that necessitate the expert opinion evidence may represent a positive development for the operation of the criminal justice process, this development must be met by a careful consideration of how victim blaming rape myths, particularly in the context of acquaintance rape, can be eliminated from the minds of jurors in trials for sexual offending.

