

## **A LITTLE JUDICIAL DIRECTION: CAN THE USE OF JURY DIRECTIONS CHALLENGE TRADITIONAL CONSENT NARRATIVES IN RAPE TRIALS?**

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### **I INTRODUCTION**

For the past 25 years, the Victorian Parliament has engaged in a series of legislative reforms in relation to sexual offences. Included in these reforms is a set of jury directions to be used in rape trials. Jury directions are instructions delivered by a judge to the jury at the conclusion of the trial as part of the judge's 'charge' to explain the relevant law and to link the facts adduced during the trial to the relevant legal tests. The jury directions that inform this article were designed to disrupt existing social narratives, or 'rape myths', that have the effect of disavowing women's claims of rape and which are thought to prevent juries from finding men responsible for sexual offences. Research suggests that in spite of increasingly specific legislative language aimed at displacing rape myths within trials, in fact, traditional myth-based narratives continue to resonate strongly.<sup>1</sup> Implementing theory concerning order, timing, and narrative schemata drawn from the humanities, we argue in this article that the damaging influence of rape myths can only be diminished if the signifiers that evoke them are controlled from the earliest moments in rape trial proceedings. To demonstrate this, we analyse the use of the jury directions on consent in two Victorian rape trials, paying particular attention to the point within the trial proceedings at which their intention is initially enacted. Although the trials we examine are factually similar, in one trial the judge called on the directions before the jury was even empanelled. The accused in this case was convicted. We juxtapose this trial with a more conventional example, in which the directions were only mentioned in the judge's charge to the jury and where the accused was acquitted. We argue that jury directions delivered at the conclusion of a trial come too late to disrupt rape myths. Indeed, we propose that the intention of the reforms to disrupt myths during rape trials is better met if the directions are implemented in

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1 Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22 *Griffith Law Review* 456.

early judicial decision-making. Such a radical approach may lead to more just outcomes for survivors of sexual violence.

This article is the result of a study of 10 rape trials conducted in the Melbourne County Court between 2008 and 2011. With permission from the presiding judges, complete trial transcripts were obtained and a detailed analysis of each trial was undertaken, focusing particularly on the way in which the jury directions on consent were delivered. In nine of the cases, the jury directions were utilised at the completion of the trial as part of the judge's charge to the jury. In the 10<sup>th</sup> trial, which we call Case B, the jury directions were utilised differently. Rather than only coming into operation at the very end of the trial, the judge used the themes behind the jury directions from the very beginning of the trial in discussions about how the rules of evidence, including so-called 'rape shield' provisions, would apply throughout the proceedings. As a result of these pre-trial decisions, the defence was prohibited from relying on several lines of argument that conventionally trigger damning rape myths at trial. At the same time, the prosecution was encouraged not to pursue a particular argument it had planned to run as an alternative theory of the case. The judge explained that it was a rape myth trigger which would invariably lead to an acquittal if offered to the jury. The result was a trial where rape myths were called upon and acted upon differently than in other trials, and where rape myths appeared to have had much less force than might have been expected given the facts of the case.

In order to investigate Case B in more depth, we selected one of the nine 'conventional' cases from our pilot study to use as a 'control' for comparison purposes. We call this Case A. The selection was made on the basis that Case A shares certain strong factual similarities with Case B. Despite these factual similarities, however, Case A played out very differently, both in process and in outcome. In Case A, the jury directions played a very minor role, being referenced only at the conclusion of the trial. In Case A, a number of rape myths were triggered early and referred to persistently throughout the trial. We argue that the early intervention of the judge in Case B greatly diminished the pervasiveness of rape myths throughout the trial proceedings, and that this may have contributed to the decision by the jury to convict the accused.

We will begin with a brief summary of the two cases, before outlining the history and legislative intention of the jury directions. We go on to explain the methodologies of narrative analysis as they pertain to conventional trial processes, and rape trials in particular, before utilising the methodologies in an analysis of each trial. This analysis leads to a conclusion that using the jury directions throughout the trial – for example, in informing evidentiary rulings and in the organisation of case theories – offers a far greater potential for disrupting traditional rape narratives than the usual approach of only referencing the directions at the conclusion of the trial, when it is arguably too late for the directions to do their work of challenging rape myths.

## II THE CASES

The 10 cases studied in the development of this article were identified from appellate reports throughout 2010 and 2011, after a search for all cases involving adult victim-complainants, where the judicial directions on consent were at issue. This search identified a total of 12 eligible cases, although due to the confines of the pilot study and relevant judicial permissions, we obtained access to only 10 complete trial transcripts. The 10 trials were commenced and finalised between 2008 and 2011. In order to provide anonymity to the accused and victim-complainant, the case citations and all parties have been de-identified.<sup>2</sup>

### A Case A

Case A began with the complainant, a young woman, going out for a drink with a colleague (who we will call CD) after work on a Friday night in inner city Melbourne. The complainant had recently broken up with her long-term boyfriend. While she was described in court as not a ‘habitual drinker’, she decided to drink that night. The complainant became very intoxicated, at least partly because she had not had anything to eat since much earlier in the day. At the pub, the complainant and CD met members of a professional sports team with whom they were a little acquainted through work; included in the team were YZ and the accused (who we will call O). The complainant spent about half an hour talking to YZ inside the pub before the decision was made for the complainant, CD, YZ and O to leave together and go back to YZ’s apartment. Prior to leaving the pub, the complainant kissed YZ ‘passionately’<sup>3</sup> while they were waiting for a taxi. By the time they arrived at YZ’s apartment, the complainant was feeling very unwell, so she was put to bed to ‘sleep it off’<sup>4</sup> in YZ’s bedroom. Evidence was led (although the complainant could not recall and denied it) that at this time the complainant again engaged in ‘passionate’<sup>5</sup> kissing with YZ on the bed, before the bedroom door was closed. The light was then turned off, and CD, YZ and O went upstairs together, leaving the complainant alone in the bedroom. The evidence was that the complainant could not move or speak at this point.

Sometime later, O went back downstairs to YZ’s bedroom. The complainant’s evidence was that after being put to bed, she faded in and out of consciousness, and that at one stage she came to, to find a man on top of her with his finger inside her vagina. In her witness statement, the complainant said that she used the words ‘no’ and ‘stop’ at this point, but that the man responded, ‘why not, you’re a sexy bitch?’<sup>6</sup> The complainant stated that she then fell out of

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2 For further details about the 10 cases selected for the pilot study, see *ibid.*

3 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 20 July 2011) defence closing, 4.

4 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 13 July 2011) 150 [10].

5 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 20 July 2011) defence closing, 4.

6 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 14 July 2011) 239.

consciousness again, before waking at some later point to find her underpants removed and O on top of her as he penetrated her vagina with his penis. The complainant later told YZ that when she became aware of the digital penetration (to which she had said ‘no’ and ‘stop’) she had assumed it was YZ. When she opened her eyes some moments later, while being penetrated with a penis, she discovered it was O and she ‘flipped out’.<sup>7</sup> Her evidence makes it clear that at no time was she fully conscious (and thus actually able to give ‘free agreement’ to penetration) nor was she in fact freely agreeing to any form of penetration with either man.

The complainant was found shortly after these events by CD and YZ on the floor of the hallway by the front door to the apartment, ‘hysterical’/‘crying’/ ‘couldn’t talk, wouldn’t speak, just crying’<sup>8</sup> (different expressions by witnesses), sending a text message to her former boyfriend for help. According to the police statements and witness testimony introduced at trial, YZ’s flatmate arrived at the apartment with other members of the professional sports team around this time and they all berated O, saying things like, ‘fuck off, get out of here’.<sup>9</sup> The team captain informed O that he was no longer wanted in the club. The team immediately called club management. O left the apartment, going to another woman’s apartment where he had sex with that woman. Evidence of O’s sex with the second woman was excluded from the trial as being prejudicial to O’s case.

The following morning, the whole team met with management and the team’s lawyers; after this meeting O gave a lengthy police interview in which he claimed that the complainant ‘rode him’ and was enthusiastically consenting throughout the entire event.

The complainant told CD, YZ, her former boyfriend, the paramedics, and the police who attended the scene, that O had raped her and that she had said ‘no’ to the penetration. The complainant was taken to the hospital where a rape examination found O’s semen, but no injuries to indicate physical force.

At trial, the defence theory of the case was that the complainant had given enthusiastic consent to all sexual contact. This relied on a number of rape myths, including: that the complainant’s inhibitions were lowered by excessive consumption of alcohol; that as a model/actress she was likely to consent to sexual activity; that she had claimed rape as a way of defending her reputation because O was of a different race than herself; and that, in the alternative, she lied about the rape as a way of seeking attention from her former boyfriend.

The pre-trial hearing focused mainly on excluding evidence that would be prejudicial to O (such as his sexual activity immediately after the alleged rape). Evidence traditionally used in rape trials to discredit the complainant, such as prior sexual history and clothing worn at the time of the rape, which are now regularly screened out using ‘rape shield’ legislation, made its way into this trial.

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7 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 13 July 2011) 152 [16].

8 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 14 July 2011) 240 [2] (‘hysterical’), 282 [6]–[7] (‘crying’, ‘couldn’t ...’).

9 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 20 July 2011) 3.

For instance, the defence insisted that use of photographs of the complainant's clothing would 'distort' the evidence, so the judge agreed to allow the jury to have physical access to the actual clothing, including her underwear, as long as they wore gloves when handling the items.<sup>10</sup> Likewise, evidence about the complainant's past relationships was introduced without controversy throughout the trial. Neither the prosecution nor the trial judge referred to the jury directions or the theme of rape myths until the completion of witness testimony, at which time submissions were invited from the parties as to which directions were appropriate on the facts to be given to the jury. The judge gave the jury clear instructions about each relevant direction and applied both prosecution and defence arguments about each relevant fact to each direction during the charge.

The jury returned a verdict of not guilty.

### **B Case B**

Case B involved a young woman, the complainant, and her boyfriend, GH, going out to join friends and acquaintances on a Friday night in inner city Melbourne. The accused (who we will call N) and the complainant were acquaintances, known to each other through other friends in a social group. On this evening, that group spent time at a nightclub drinking and dancing, and in the early hours of Saturday morning went to a flat belonging to one of their number (SM). Evidence suggested that the complainant was very intoxicated by the time they arrived at the flat. The complainant and her boyfriend had sex in the kitchen of the flat while the rest of the group were in other rooms.

At around 7.00 am, most of the group left the flat and were absent for approximately 45 minutes. At this time the complainant went into the bedroom where ZM, the 16-year old sister of one of the party, was asleep. The complainant lay down on top of the double bed next to ZM, fully dressed, and went to sleep. Three of the group, SM, OE and N, remained in the sitting room. OE fell asleep. SM was trying to stay awake because it was his flat. SM gave evidence at the trial that at some point he heard N say 'I'm going to have intercourse' as he headed towards the bedroom where the complainant and ZM were sleeping. The words were spoken in a language other than English. 'Intercourse' is the literal translation.

The complainant woke to find N on top of her with his penis inside her vagina. She pushed him off, and left the room crying and hysterical. The complainant told a number of people, including her boyfriend, that she had been raped as soon as they re-entered the flat. Amid a fairly chaotic scene, the complainant slapped N, and was then driven back to her university college. At some stage later that morning, a phone call took place between the complainant and N; the trial heard conflicting accounts about what was said during the call. About an hour later, the complainant went to hospital where a rape examination was conducted, and the police were called. The rape examination found semen from N, but no physical injuries.

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10 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 18 July 2011) 421.

N was arrested later that afternoon. During the initial and second interview he denied that any sex had taken place at all. Given the DNA evidence from the rape examination, these lies played an important part in the trial. They were used by the prosecution as evidence of consciousness of guilt. The defence argued that cultural reasons explained the lies. It was argued that the accused was extremely nervous of police due to his non-Australian background. For this reason, the jury could not automatically assume that the lies were evidence of a guilty conscience.

At trial the defence relied on a number of rape myths, including: that the complainant had consented to the penetration (after a whirlwind romance fuelled by dancing, flirting on social media, and intoxication); that the complainant's inhibitions had been lowered by drinking; and that she lied about the rape to protect her reputation and her relationship with her boyfriend. During the pre-trial hearing, the judge excluded from the trial all evidence relating to the kitchen sex as being prejudicial. The defence also sought to include evidence of an earlier instance of sexual activity and alleged rape that had unfolded during a high school camp the complainant attended. Various other pieces of evidence, including the complainant's clothing, were excluded at the pre-trial stage, and thus the rape myths that such evidence would have triggered were similarly excised from the main body of the trial.

At the conclusion of the trial, the judge relayed the jury directions to the jury in such a way that rape myths conventionally connected to the facts were clearly rebutted. The judge also reminded the jury of their obligation not to be swayed by myths.

The jury reached a verdict of guilty.

### **C A Short Note on Symmetry: Case A v Case B**

These two cases share similar facts: both complainants were asleep/unconscious when the sexual acts were perpetrated; neither complainant sustained physical injuries; both complainants had been drinking; both complainants were heavily intoxicated at the time of the penetration; and both complainants had engaged in some level of sexual activity earlier on the night in question, with men who were not the accused. Each of these shared facts is a classic signifier used in rape trials to activate myths that transform complainants' narratives of unwanted sexual penetration into stories of consensual sex.

It is also important to note that both of the accused lied in their police interviews.

However, there are also important differences between the facts in each case. In a direct comparison these differences could be argued to make the prosecution argument in Case B stronger than that of Case A. For instance, the fact that N directly lied, twice, about the fact of penetration taking place at all, contrasts with that of O, who admitted the penetration immediately, but denied that it was non-consensual.

On the other hand, historical reactions to the issue of race in which a black man is accused of raping a white woman might suggest a stronger likelihood of conviction in Case A. Certainly within the facts of the case itself, the different

racial backgrounds of accused and complainant played an important role in the initial reactions of those present, with stereotypical racial slurs and assumptions being made. Racial myths and stereotypes were not used this way in the trial, and did not lead to a conviction. Rather, myths about race, sex and rape were inverted to discredit the complainant as crying rape because of her racist horror of realising she had had sex with a black man. In this manner, the use of race may have contributed to the acquittal.

In Case B, both complainant and accused were of non-European, non-Australian backgrounds, and race played a much less obvious role in the trial.

It might also be relevant that Case A invoked celebrity and enormous press coverage. This was a concern within the trial, with the jury being asked to refrain from judging O on the basis of his celebrity status.

Direct comparison between the cases, outside the context of low Victorian rape conviction rates and all the research documenting how rape cases unfold predominantly towards acquittal, enables an assessment of the various strengths and weaknesses of each. However, both cases at the pre-trial stage contained all the elements necessary for the defence to mount the same set of rape myth theories. That Case B found a conviction coincidental with judicially-sponsored and jury direction-influenced disruptions to the potential rape myths it shared with Case A, makes a comparison of these two cases a potentially useful exercise.

In order to build this argument, we now consider the background to the jury directions, before describing and applying a narrative analysis interrogating the way these directions influenced each trial.

### III JURY DIRECTIONS RELATING TO CONSENT IN THE *CRIMES ACT 1958 (VIC)*

In 1987 the Law Reform Commission of Victoria undertook a comprehensive review of the offence of rape. One of its most significant recommendations was to change the long-established common law test for consent, that sexual penetration took place against the will of the complainant.<sup>11</sup> In 1991, a new legislative definition of consent was introduced, requiring proof that the sexual penetration took place without the ‘free agreement’ of the complainant.<sup>12</sup> Based on the state of mind of the complainant, this test does not require proof of physical, or even vocal, resistance. A non-exhaustive list of circumstances where consent is vitiated was also included with the definition. At the same time, a set of jury directions on consent was introduced, designed to assist the jury in moving away from the long-held societal (and legal) preference for evidence of physical resistance and injury in rape cases.

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11 See Victorian Law Reform Commission, *Sexual Offences: Final Report*, Report (2004) 346 [7.21] (‘Final Report’).

12 *Crimes (Rape) Act 1991 (Vic)* s 36.

The 1991 reforms were evaluated in 1996, with the conclusion that the new definition of consent remained a significant hurdle for rape prosecutions.<sup>13</sup> In 1997, the Victorian Parliament introduced substantial amendments to the jury directions.<sup>14</sup> Rather than leading to better prosecutorial outcomes, however, convictions for rape offences continued to drop, and concerns about the impact and effectiveness of sexual offences legislation as a whole increased.<sup>15</sup> In 2001, the Attorney-General referred the matter to the Victorian Law Reform Commission ('VLRC'). The VLRC delivered a discussion paper, an interim report, and then a Final Report between 2001 and 2004,<sup>16</sup> in which the jury directions were again reviewed. In the Final Report, the VLRC was particularly concerned that in many of the charges analysed, it appeared that judges were following the letter of the law, but the spirit behind the legislation was not making itself clear to the jury.<sup>17</sup>

The recommendations contained in the Final Report led to an expansion of the jury directions in 2006–07,<sup>18</sup> and it is this iteration that was in play in Case A and Case B. Introduced in 2007, section 37AAA of the *Crimes (Rape) Amendment Act 2007* (Vic) provided that:

37AAA. Jury directions on consent

For the purposes of section 37, the matters relating to consent on which the judge must direct the jury are –

- (a) the meaning of consent set out in section 36;
- (b) that the law deems a circumstance specified in section 36 to be a circumstance in which the complainant did not consent;
- (c) that if the jury is satisfied beyond reasonable doubt that a circumstance specified in section 36 exists in relation to the complainant, the jury must find that the complainant was not consenting;
- (d) that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;
- (e) that the jury is not to regard a person as having freely agreed to a sexual act just because –
  - (i) she or he did not protest or physically resist; or
  - (ii) she or he did not sustain physical injury; or
  - (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.

13 Melanie Heenan and Helen McKelvie, 'The *Crimes (Rape) Act 1991*: An Evaluation Report' (Report No 2, Department of Justice (Vic), January 1997).

14 *Crimes (Amendment) Act 1997* (Vic) s 4, amending *Crimes Act 1958* (Vic) s 37 ('*Crimes Act*').

15 The statistics released in November 2001 showed that the rate of conviction in Victoria dropped from 46 per cent (1989) to 24 per cent (2001): see Nina Philadelphoff-Puren, 'Contextualising Consent: The Problem of Rape and Romance' (2005) 20 *Australian Feminist Studies* 31, 39 n 1.

16 Victorian Law Reform Commission, above n 11.

17 *Ibid* 347–8 [7.24]–[7.49].

18 *Crimes (Sexual Offences) Act 2006* (Vic); *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic); *Crimes Amendment (Rape) Act 2007* (Vic).

The inclusion of these jury directions within the sexual offences legislative regime gives the appearance of a radical assault on both common law rape myth tradition and on the ‘common sense’ approach of the jury,<sup>19</sup> both of which have traditionally placed responsibility on women for men’s sexual offending. The jury directions mirror a political change in the relationship between state and society, and between men and women more generally. However, the directions appear to have had very little effect on the running and outcome of rape trials, with rape convictions in Victoria standing at historical lows.<sup>20</sup> In the years since the 2007 reforms, concern about the operation of the sexual offences regime, and specifically about the jury directions, has continued. In 2013, the Victorian Justice Department conducted a wide-ranging consultation into sexual offences, which in 2014 led to the substantive provisions of section 37AAA of the *Crimes Act* being moved (substantively unchanged) to section 61 of the *Jury Directions Act 2013* (Vic),<sup>21</sup> and then moved again to section 46 of the *Jury Directions Act 2015* (Vic) which repealed and replaced the 2013 legislation. The purpose behind the *Jury Directions Act 2013* (Vic) and its 2015 replacement is to effectively remove the ability to later challenge jury directions by requiring the parties to request, negotiate and settle on the form of directions before delivery to the jury. However, while the considerable concern about the form and effect of the jury directions on consent has led to their being rephrased, and rehoused, a number of times since they were first enacted, it is important to note that the substantive content and narrative thrust of the directions remain the same.<sup>22</sup>

Given the persistent drop in conviction rates, despite all the work that has gone into reforming jury directions to more effectively challenge rape myths, we are interested in examining how jury directions and rape myths actually function throughout the broader context of rape trial processes. A significant amount of research has been undertaken to explore rape myths in rape trials and how mock jurors respond to rape myths and jury directions.<sup>23</sup> However, the gap in the literature has been noted by previous authors, writing that the complexities through which the myths circulate during rape trials needs to be more thoroughly

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19 See Julia Quilter, ‘Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform’ (2011) 35 *Australian Feminist Law Journal* 23, 23–36.

20 See Wendy Larcombe, ‘Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law’ (2011) 19 *Feminist Legal Studies* 27.

21 *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), inserting s 61 into the *Jury Directions Act 2013* (Vic). The raison d’être of the *Jury Directions Act 2013* (Vic) is to eliminate appeals based on judicial directions; if the parties agree on the directions to be given, and if the judge gives the directions agreed on, appeals on the directions themselves are all but eliminated.

22 An important limitation to this claim is the following shift: prior to the 2015 amendment, s 37AAA(e) of the *Crimes Act* stated ‘that the jury is not to regard a person as having freely agreed to a sexual act just because ...’ (emphasis added). Following the 2015 reform, in which s 37AAA(e) was replaced by s 34C(3)(d) of the *Crimes Act*, the legislation now provides that the trial judge may ‘warn the jury that evidence of the following alone is not enough to regard a person as having consented to an act’. Clearly there is an important substantive difference to the operation of the three jury directions which follow that clause.

23 See Kirsty Duncanson and Emma Henderson, ‘Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials’ (2014) 22 *Feminist Legal Studies* 155, 160.

mapped before they can be more effectively challenged.<sup>24</sup> In the next part of this article, we address the often unseen mechanisms of narrative that influence the way information is consumed during rape trials. We begin by looking at the temporal location of jury directions and their related ability to operate as an effective technique for disrupting the traditional narratives of rape.

#### IV NARRATIVE, MYTH AND TIMING AT TRIAL

The order of trial proceedings is important and ritualised. It is invested with ideological meanings and justified by the long-held liberal and democratic values of procedural fairness and the desire to balance the rights of the accused with the power vested in the state. Timing and order is also crucial to narrative. The order and timing of information within the unfolding ritual of the trial affects which pieces of the abundant evidence available to a non-legally trained audience are retained. As such, timing and order has a significant impact on the narratives that a jury is able to hear or construct from the evidence. Listeners deploy implicit strategies in order to organise and make sense of otherwise complicated, disordered and emotionally challenging information. To explore how narrative functions within the rape trial, methodological tools derived from the humanities are useful. We use these tools to argue that jury directions can only effectively challenge rape myths in rape trials if they inform judicial decision-making from the very earliest proceedings of a trial. To make this argument, it is crucial to understand how consumers of information within a culture construct and use narratives that aid their comprehension and memory of that information. The order of information is crucial to this process, as schemata for narratives are triggered early and noncompliant information, as we demonstrate below, is forgotten or reconfigured to 'fit'.

Mainstream court proceedings in Australia are adversarial, characterised by a competition of two narratives. These are presented by the prosecution and then defence counsel at the opening of a trial in an order dictated by the accusatorial rules designed to protect individual defendants from the power of the state. Each party explains to the jury the narrative sought to be proved on the basis of the evidence drawn from witness testimony and forensic analysis. These competing narratives are repeated at the conclusion of witness examination, as counsel weave relevant or compliant pieces of evidence into their summation. The structure is based on a presumption that contestation between narrative claims

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24 See Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *International Journal of Evidence and Proof* 299; 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 Criminal Law Review* 781; Jennifer Temkin, "'And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13 *New Criminal Law Review* 710, 719.

will result in the finding of a verifiable ‘truth’ – or at least a truth that meets the burden of ‘beyond reasonable doubt’.<sup>25</sup>

The jury plays a central role in this process. The onus is on the jury to decide which narrative version best meets this burden. In reaching a verdict, jurors are required to actively assess the competing versions of the events in question, to test the evidence pertaining to each version, and then ‘to make a choice that validates one story and cancels out another’.<sup>26</sup> The jury is thus crucially engaged in narrative process and truth-production within the trial. Significant pressure rests on the jury to either accept that the complainant is telling the truth, or to conclude that reasonable doubt exists and thus that the defendant is innocent of the charge. In large part this is due to the material implications of the decision, such as the possible punishment and branding of the accused as a rapist.<sup>27</sup> In rape trials, this pressure is augmented by powerful and persistent myths about vengeful women making false allegations, and unsuspecting men confused by women’s (mis)communication of sexual dis/interest.<sup>28</sup>

Despite the centrality of narrative to the purpose and function of Australian criminal law, trials do not unfold in conventional narrative form. Rather, the process of information delivery is disjointed, lacking coherent structural continuity, and pitted by factual voids or narrative gaps. General rules of evidence designed to ensure a fair contest between the accused and the state exclude many forms of information from the trial. In addition, rules of evidence specific to sexual assault trials, created in response to a long history of defence advocacy described by complainants as a second rape, are designed to protect the complainant from the accused. Thus for example, evidence of a complainant’s sexual history and the clothes that she was wearing at the time of the alleged act are excluded from the trial unless they bear direct evidentiary value (such as holding traces of semen). Standard rules of evidence also limit the use of hearsay evidence (second-hand accounts of something that has taken place), and evidence which is more prejudicial than probative (such as the fact that the defendant, when arrested in Case B, was found in bed with an underage girl and was thus also facing child sex offence charges at the time of the trial). This means that

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- 25 Trish Luker, ‘Witnessing Whiteness: Law and Narrative Knowledge’ (2008) 4 *Australian Critical Race and Whiteness Studies Association E-Journal* 1, 1. It is important to note that the concept of ‘beyond reasonable doubt’ is inherently unquantifiable, and that research suggests juries place the standard of doubt extremely high, often requiring there to be no doubt at all before convicting: see Penny Darbyshire, Andy Maughan and Angus Stewart, ‘What Can the English Legal System Learn from Jury Research Published up to 2001?’ (Occasional Paper No 49, Kingston University Faculty of Business, February 2002). This is particularly relevant for rape trials, in which rape myths are used to insert doubt into the prosecution’s case: see, eg, Chief Justice Brian Martin, ‘Beyond Reasonable Doubt’ (2010) 1 *Northern Territory Law Journal* 225, 226.
- 26 Rae Kaspiew, ‘Rape Lore: Legal Narrative and Sexual Violence’ (1995) 20 *Melbourne University Law Review* 350, 360.
- 27 New Zealand Law Commission, *Juries in Criminal Trials Part Two: A Summary of the Research Findings*, Preliminary Paper No 37 (1999) vol 2; New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69 (2001).
- 28 See Wendy Larcombe, *Compelling Engagements: Feminism, Rape Law and Romance Fiction* (Federation Press, 2005).

chunks of information which may be considered relevant in a social or political context, but which are not ‘legally’ relevant, are not accessible to the jury.<sup>29</sup>

Compounding the fragmentary impact of evidentiary restrictions, the presentation of admissible evidence is predominantly structured in question–answer rather than narrative format. Prosecution and defence counsel keep strict control over what is spoken in each informational question–answer transaction. Pedantic questioning about obscure details of evidence divert from central narratives and have the potential to weary the jury, while carefully structured questions, with minimum scope for a response, obfuscate the actual answers provided.<sup>30</sup> The stories counsel seek to build from the evidence they gather are thus broken up into yes/no responses, strictly policed sentences or are otherwise obscured. The process of examination, cross-examination and re-examination further complicates the narrative process, jumping between different parts of the numerous stories being tendered, disrupting any possible coherent narrative during the main body of the trial. All of these components of a trial mean that the evidence presented to a jury rarely complies with conventional narrative structures, but instead appears de-contextualised and fragmentary.

Moments of narrative clarity are offered in the opening and closing arguments of counsel. The judge’s charge is also an attempt to provide narrative clarity for the jury. Unfortunately the comprehensive summary of facts and legal tests, as well as the detailed guidance for the jury on which ambiguous facts need resolution, set out in a charge can easily leave a jury mired in confusion.<sup>31</sup> Each of these significant trial moments offer up structures or narrative schemata the jury uses to make sense of evidence. However, the separate temporal points at which these moments of clarity are delivered within the overarching trial affects their capacity to shape the narratives which juries use in their deliberations. The earlier in a trial a narrative is introduced, the more influential it will be. This is because jurors process the information as it is presented during the trial, rather than gathering it all together, assessing it and arranging it during their deliberation.<sup>32</sup>

Due to the fragmentary and de-contextualised nature of the information provided during the trial, the narratives presented are often incomplete. In the absence of a comprehensive narrative, narrative schemata come into play. Sherwin explains that schemata act ‘like a familiar story that we carry around in our heads asking for completion’.<sup>33</sup> In other words, schemata are culturally shared skeletal scaffolding, providing the dot points of habitual narratives or

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29 Note that we are not arguing that the exclusion of these forms of evidence is inappropriate; only that the evidence that is presented to the jury is selective and thus prevents a truly coherent narrative from being formed.

30 See, eg, Alison Young, ‘The Waste Land of the Law, the Wordless Song of the Rape Victim’ (1998) 22 *Melbourne University Law Review* 442.

31 See, eg, Darbyshire, Maughan and Stewart, above n 25; Temkin, above n 24.

32 Alison Saunders, quoted in David Barrett, ‘Tackle “Unconscious Bias” in Rape Trial Jurors, Says Top Prosecutor’, *The Telegraph* (London), 9 June 2014, 1.

33 Richard Sherwin, ‘Law Frames: Historical Truth and Narrative Necessity in a Criminal Case’ (1994) 47 *Stanford Law Review* 39, 50.

coded frameworks. Commonly recognised reference points or signifiers trigger their deployment. For example, in the case analysis below, we identify a rape myth schema of ‘the sexually-active-and-thus-always-consenting woman’. This particular schema is activated by the provision of information that the complainant was sexually active at some point prior to the alleged rape. As the title of the myth suggests, this schema provides jurors with the scaffolding onto which they can build a narrative that makes consent to the alleged rape a logical conclusion to the transitory image of the complainant’s earlier sexual activity. It is important to note that the earlier sexual act does not need to be of the same nature, or the same degree of intimacy, as the alleged rape, nor does it need to have been with the accused, for the schema to work.

Schemata are triggered in the earliest moments of a text and are used immediately to interpret and assemble any ensuing information. Jurors then prioritise evidence that aligns with these schemata when seeking completion of the narrative. In other words, gaps in narrative are filled by the logic of the schema. Evidence that does not align is set aside. As the UK Director of Public Prosecutions recently stated, jurors are ‘making judgments along the way’ about the evidence they are hearing and on the basis of rape myths.<sup>34</sup> Ellison and Munro found that jurors are likely to decide on the key points at issue *during* the trial, rather than in their deliberations.<sup>35</sup> Consequently, evidence that counters rape myths, or that does not fit the schemata, easily slip from memory. Sherwin argues that the drive for narrative coherence is so strong that jurors will refuse to even effectively hear elements that are inconsistent with prevailing schemata.<sup>36</sup> Ellison and Munro found that during the deliberation process ‘jurors’ in mock jury trials went so far as to generate completely hypothetical scenarios, unrelated to the facts adduced during the trial, in order to fit contradictory evidence within the schema they were following.<sup>37</sup>

A consequence of these narrative mechanisms and organisational strategies is that inconsistent evidence can be lost permanently, such that it cannot be recalled at the conclusion of witness examinations when the judge implements the jury directions. This means that when the jury is directed to reconsider evidence in light of the false nature of the rape myths circulating through the courtroom, the jurors may have already lost access to evidence with which to construct or fill out an alternative narrative.<sup>38</sup>

Within the judge’s charge itself, the way in which jury directions are delivered is also crucial to their possible impact. Temkin has shown that the conventional format for countering rape myths can paradoxically reconfirm

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34 Alison Saunders, quoted in Barrett, above n 32, 1.

35 Louise Ellison and Vanessa E Munro, ‘Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009) 49 *British Journal of Criminology* 363, 377.

36 Sherwin, above n 33.

37 For instance, one juror hypothesised that a bruise on the complainant’s body might have been the result of riding a roller-coaster, even though the evidence led held no suggestion that the complainant had done such a thing: Louise Ellison and Vanessa E Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49 *British Journal of Criminology* 202, 208.

38 Sherwin, above n 33, 50.

them.<sup>39</sup> The specific conditions Temkin identifies as influencing the interpretation of jury directions include the entrenched nature of rape myths by that point within the trial;<sup>40</sup> the length of the judge's charge<sup>41</sup> (often the charge takes more than a full day to deliver); and the difficulty jurors consistently face in trying to understand much of what the judge is saying.<sup>42</sup> Within this context, the directions Temkin analysed followed a model of initially naming the rape myth before then explaining why it was false.<sup>43</sup> Temkin explains that jurors will cling to the components of the trial and the charge that they understand, and reinterpret the more incomprehensible or challenging components so that they comply with what the juror is already thinking.<sup>44</sup> Additionally, Temkin found that jurors attach greater authority to the information they hear first.<sup>45</sup> In a conventional rape trial, the jury hear the rape myth first, and the refutation of it at the end.

The result of these converging narrative practices, which require jurors to engage in complex negotiations with information, is that jury directions given at the conclusion of the trial are unable to effectively challenge the rape myths which circulated throughout that trial: the damage has already been done, and cannot be undone. In our analysis of the two cases, we use these theories of narrative to observe the way in which three specific sets of rape myths function within the trials and how the jury directions are used (or not used) to challenge them.

## A Analysis

The two cases share similar facts. Each of these shared facts is a classic signifier used in rape trials to activate rape myths that transform complainants' narratives of unwanted sexual penetration into stories of consensual sex. In analysing the transcripts of the two trials to identify how rape myth schemata were activated or controlled during proceedings in relation to the jury directions, we have focused on three key myths: the 'sexually-active-and-thus-always-consenting woman'; 'the drinking-and-thus-fucking woman';<sup>46</sup> and the 'inherently unreliable (woman) complainant'.

### 1 *The 'Sexually-Active-and-Thus-Always-Consenting Woman'*

Raising evidence of the complainant's previous sexual activity triggers a myth of her already always consenting, and thus consenting to the act in question. The myth thus functions to transfer consent (whether real or imagined) from an earlier sexual interaction onto the sexual act alleged to be non-consensual within the rape trial.

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39 Temkin, above n 24.

40 Ibid 725.

41 Ibid 722.

42 Ibid 721.

43 Ibid 725.

44 Ibid.

45 Ibid.

46 Young, above n 30, 455.

Section 37AAA(e)(iii) directly targeted this myth. The direction states that the jury must not regard the complainant as having consented to sex because ‘on that or an earlier occasion, she ... freely agreed to engage in another sexual act (whether or not of the same type) with that person, or ... another’. This direction should work in conjunction with what is often called the ‘rape shield’ rule – an evidentiary prohibition against the use of a complainant’s prior sexual history to prove that consent was present in the alleged rape.<sup>47</sup>

However, the reformed direction has not prevented defence counsel from finding ways to activate a narrative schema of a sexually active and thus already consenting woman at trial.

In both Case A and Case B, defence counsel tried to mobilise a veiled narrative of transferable consent based on instances of sexual conduct engaged in by each complainant on the nights in question. The point at which the success of the narrative diverges is the pre-trial hearing. In Case B, the trial judge exercised discretionary power to exclude evidence of the complainant’s previous sexual conduct. In Case A, this evidence was not excluded at this preliminary stage and the defence was more successful in triggering a narrative based on this myth.

We begin by considering the defence attempt in Case B to activate the myth of the ‘sexually-active-and-thus-consenting woman’:

Defence: Why I say it’s relevant is that it’s not designed to be a general smear on the Complainant; that because the central issue in this trial is about consent, the jury will hear that [the complainant] was asleep on a bed where there was another person asleep next to her ... in the absence of that evidence in the kitchen ... I, in my submission, say that is something that ought to be properly before the jury so that if there was any inference or discussion in the jury room that, ‘She wouldn’t have consented in those circumstances’, what happened in the kitchen then is highly relevant and would be highly prejudicial to the accused ... if that didn’t go in.

Prosecutor: The only inference that we would say could be drawn from this is [that] this [is] the type of woman who would have sex in a public place, or potentially a public place, in the kitchen, and therefore ... she [is] the type of woman who would consent to having sex in a bed next to someone who was asleep ...

Judge: Not so much is she the type of woman going to chastity or those parts of the provisions, but rather it rebuts the conclusion that might be drawn that the sleeping woman in the bed should be interpreted by the jury as making it unlikely that she would consent because if, as a fact, she had sex in the kitchen ... therefore she is the type of woman who would consent to sex in public, whoever was asking for it, or whoever was there.

Prosecutor: I say it goes further than that because ... the defence will be saying, ‘Look, she is prepared to have sex in the kitchen with the boyfriend. She is therefore prepared to consent, even though there might be a 16 year-old asleep on the bed next to her’. ... I think this is precisely [what the jury directions and s 343 of the *Criminal Procedure Act 2009* (Vic) are]<sup>48</sup> designed to prevent ... an attempt

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47 *Criminal Procedure Act 2009* (Vic) ss 341–4.

48 *Criminal Procedure Act 2009* (Vic) s 343 states: ‘Sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates’.

to ... paint her in some form of sluttish light ... It allows the jury to consider [her] in that light in the jury room without our knowledge of it.<sup>49</sup>

It is important to note that the defence asserts it does not wish to use the evidence of the sex in the kitchen to cast the complainant as promiscuous and thus always consenting. The defence states that it is not arguing that it is relevant to the issue of whether the complainant would have agreed to have sex with the defendant per se. Rather, the earlier conduct is related to the hypothetical concern that the jury might reject the possibility of consent on the basis that the alleged rape took place in the presence of another person. The defence argues that the sexual conduct in the kitchen disproves any modesty on the part of the complainant, and therefore it is directly relevant to a fact in issue in the trial. However, the judge agrees with the prosecution's objection to the evidence. The defence argument is exposed as an attempt to manoeuvre around the rules of evidence and the legislative intention embodied in section 37AAA(e)(iii), with the result being that the judge declines to allow the evidence. We would like to note clearly here the invocation of the jury directions within the pre-trial hearing as the judge engaged in decision-making about the inclusion and exclusion of evidence to be presented in the trial. In this manner, a classic signifier was prevented from entering the trial; the jury was thus unable to build any further evidence into the scaffolding of the 'sexually-active-and-thus-always-consenting woman' and the narrative failed to achieve the necessary persuasive depth.

The defence in Case A is more successful in activating this mythic schema. Focusing on the complainant's interactions with the friend and teammate of the accused, referred to here as YZ, the defence was able to successfully build a narrative based on the transference of consent from two earlier instances of sexual conduct. Much as in Case B, the earlier sexual conduct of the complainant referenced by the defence in Case A was not with the accused, but with another person on the same night of the alleged rape. However, while in Case B the conduct was ruled inadmissible by the trial judge, in line with both evidentiary rules about prior sexual history and the jury direction in section 37AAA(e)(iii), in Case A there was no objection to, or ruling against, the admissibility of evidence from YZ or CD that the complainant had engaged in this earlier sexual conduct with someone other than O:

Defence: Do you remember kissing [YZ] on ... Street ... outside the ... Hotel, adjacent to the location where you got into the cab?

Complainant: No, not at all.

Defence: Are you surprised to hear that allegation?

Complainant: Yes – yes, I am.

Defence: You know, do you not, that [YZ] says that he kissed you in that location, on the lips?

Complainant: I honestly do not remember, and I do not have any memory of that happening, no.<sup>50</sup>

Defence: You kissed [YZ] on the balcony on the lips, didn't you?

49 Transcript of Proceedings, *Case B* (Melbourne County Court, CR-09-00996, Judge X, 21 April 2010) 34.

50 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 13 July 2011) 176.

- Complainant: I do not remember.
- Defence: You kissed him passionately on the lips on the balcony, didn't you?
- Complainant: Well no because I don't remember.
- Defence: Are you disputing it?
- Complainant: I do not remember. I honestly – I honestly do not remember. I do not have any memory of doing anything like that.
- Defence: Because that would be an unusual thing for you to do, is that right?
- Complainant: Yes.
- Defence: You see [CD] said she saw you kissing him. Do you know that?
- Complainant: Well I'm saying what I remember. I'm not going to say what anyone else saw or said.
- Defence: So you don't dispute that you were kissing him if others say that they saw you kissing?
- Complainant: I can't dispute something – I do not remember what happened on the balcony. I remember being up there, I remember feeling drunk and I remember being in a room. That is all I can give you.<sup>51</sup>
- Defence: And he says that as he was lying on the bed next to you, you turned your head towards him and pulled at his top to kiss you and he proceeded to kiss you. What do you say about that?
- Complainant: I honestly, I honestly do not remember that.
- Defence: So [YZ] says that you then responded and kissed him passionately on the bed. Do you agree with that?
- Complainant: No, because I don't remember. I honestly – I do not remember that.<sup>52</sup>

As the evidence of this earlier sexual conduct with YZ was presented to the jury, jurors were given the opportunity to transfer the complainant's alleged consent to kissing and fondling YZ to the sexual penetration of the accused (O). The repeated denials are overcome by the repetition of the 'fact' of the kissing, and the repeated admission of the unreliability of her memory.

This also operates later in the trial, in relation to the complainant's statement that she thought it was YZ and not O who was digitally penetrating her at a time when she was insufficiently conscious to be capable of freely agreeing. Her statement about what she believed was happening at the time was reconfigured for the jury as evidence of her consent to the digital penetration (because she 'liked' YZ). It is important to remember that the chronology of events has her stating 'no' and 'stop' even when she believed that it was YZ digitally penetrating her. This alleged 'consent' to digital penetration by YZ was then available to the jury to transfer into actual consent to penile penetration by O.

The total lack of evidence demonstrating any interaction between O and the complainant prior to the penetration (and thus the irrational nature of an assertion that the complainant had had the opportunity to consent) is magically erased by this emphasis on consent elsewhere. While both the rules of evidence and the

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51 Ibid 177.

52 Ibid 179.

jury directions purport to prohibit this kind of consent transmission, we can see how effective the technique is in the narrative constructed by the defence in summing up. The paragraph below came after the conclusion of witness examinations and the prosecution's summing-up, and before the judge's charge. It is an example of the way in which the defence presents its narrative, bolstered by its chosen pieces of evidence from the body of the trial. It also functions to illustrate how evidence is built into the scaffolding of a rape myth schema to fill out the narrative and smooth over any discrepancies and gaps using the logic of the narrative schema.

Defence: [The complainant] was a responsive and willing participant. She said it would be unusual for her ... to kiss a man she barely knew, met an hour before [and have] no memory of it. But you see ladies and gentlemen, this is but a continuation of her intention to let her hair down, to have a good time, to enjoy herself. Why would she kiss YZ ... if she didn't want to? Why would she go back to the apartment if she didn't want to? She wanted to do those things ... she did them voluntarily. Alcohol freed her from her inhibitions but everything she did that night was voluntary ... Why was she affectionate towards YZ? Because she wanted to be ... that's how she felt at the time. There and then, that was the mood of the night. That was her mood. She wanted to do it.<sup>53</sup>

At no point in this narration does the defence explicitly state that the complainant consented to sex with the accused. Instead, a narrative atmosphere ('mood', to use the defence's word) of consent is called into being, and this atmosphere can then be used by the jury to pad out the rape myth scaffolding with evidence and further mythological logic into a narrative of a sexually active woman who consented to sex with the accused.

The sexually active woman myth does not act in isolation, but is frequently interwoven with other schemata. The 'drinking-and-thus-fucking woman' narrative, and the narrative of consent as an always/already condition of non-virginal women (or indeed, every woman) are two such schemata used to bolster the sexually active woman myth. In the extract above, intoxication is used to build the complainant's agency within the rape myth about her sexuality, by further demonstrating her intention to 'do things', to 'have a good time' and above all, to act 'voluntarily'.

The second of these interlacing schemata, the always/already consenting woman, is a modern echo of the ancient common law presumption that through marriage a woman consented to all sex initiated by her husband. It is also related to a common law defence, now repealed, that it is unfair on a man for a woman to change her mind after initially consenting to some form of sexual activity, and especially once penetration has occurred.<sup>54</sup> While the 'point of no return' defence has been repealed, and the offence of rape is now framed in such a way that consent can be withdrawn at any point before or during a penetrative act,

53 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 21 July 2011) 4.

54 This myth found legal form in the common law 'point of no return' defence, finally abolished by the Privy Council in 1984 in *Kaitamaki v The Queen* [1985] AC 147 ('*Kaitamaki*'), an appeal from the New Zealand High Court. *Kaitamaki* in turn led to the inclusion of 'failure to withdraw' as a separate form of rape in s 38 of the *Crimes Act 1958* (Vic).

nonetheless, the influence of the rule lingers. The defence can rely on the societal understanding of the implicitly ongoing and un-retractable nature of consent, and as such can create a narrative logic where discrepancies as to the actual sexual acts to which the complainant consented are buried outside the boundaries of the schema. Simultaneously, the schema's logic facilitates the transference of consent to the early conditions and acts to the acts performed by the defendant.

The myth of the sexually-active-and-thus-consenting woman is enhanced by the defence's repetition within this narrative of words synonymous with consent and free agreement: 'responsive ... willing participant ... intention ... want to ... want to ... wanted to ... did them voluntarily ... voluntary... wanted to ... [s]he wanted to do it'. In this manner, the complainant's kiss with a man who was not the accused builds into an 'intention to ... have a good time' and a 'mood' of willingness and participation, such that the defence can state abstractly that the complainant 'wanted to do it'. This final sentence, its object unspoken, its referent obscured by the abundance of activity previously listed, is carried by the narrative schema, logic and drive to mean the sexual act alleged to be rape.

This example demonstrates the way in which a rape myth is built from a schematic signifier into a dynamic narrative; as such it provides an example of a rape myth that section 37AAA was designed to challenge. The extract below demonstrates how a conventional approach to jury directions tackles the rape myth of the sexually-active-and-thus-consenting woman. This is taken from Case A, as the judge meets the requirements of the jury directions by bringing an alternative narrative to the attention of the jury:

[In relation to section] 37AAA(e)(iii) – just because [the complainant] agreed to kiss YZ earlier ... does not mean she freely agreed [to penetration by the accused]. But her actions with YZ may be relevant to your consideration of the defence contention as to whether she was so disinhibited by alcohol that she was doing many things which were unusual for her but nonetheless consensual. ... She may have agreed to kiss him or consented to being touched.<sup>55</sup>

That a woman consensually kisses a man or intentionally flirts with him or freely agrees to him touching her other than in the genital area does not necessarily or automatically mean that woman is consenting to future sexual activity with that man and, in particular, does not necessarily or automatically mean that woman is consenting to sexual penetration with that man. However, if you find that any of these things happened, that she did freely agree to kiss YZ, that she did not protest or physically resist the defendant or sustain physical injury, and that she freely agreed to kiss the defendant or freely agreed to him touching her elsewhere on her body shortly before each penetration, they are still relevant factors for you to consider in deciding whether this element that the Complainant was not consenting to the defendant penetrating her in the ways alleged ... is proved.<sup>56</sup>

Notice how, in the second paragraph, the judge contributed to the confusion by eliding YZ with the accused: 'that she did freely agree to kiss YZ ... and that she freely agreed to kiss the defendant'. There was no evidence led in the trial about the complainant kissing O (consensual or otherwise) so the judge mentioning it here introduces a new fact, and while the defence questioned the

55 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 21 July 2011) 32.

56 *Ibid* 33–4.

complainant about whether she had freely agreed to allow O to touch her prior to the penetration, those questions did not elicit any positive acceptance. While the logic of Temkin's critique about conventional myth-busting would suggest that naming the critique first has the potential for overcoming harmful narratives, as we see here in light of the judicial (re)interpretation of the facts, there are other elements at work in the maintenance of myths in a rape trial.

One of the myth-maintaining elements present in this extract is the way in which the force of the jury directions is diminished through the use of the judge's own interpretation. While the interpretation appears to be a gentle reworking of the legislative language, in fact there is a crucial omission. By removing the imperative within s 37AAA(e) that the jury 'are not to regard a person as having freely agreed just because ...' the judge offers an alternative. The reinterpretation proffers the direction as a consideration for the jury that 'just because' the complainant kissed one man 'does not mean' she agreed to have sex with another. Immediately following this articulation of the direction, the judge further weakens its effect by proposing that the jury can use the evidence of the complainant's consent to an act with one man to help them decide whether she decided to consent with another man.

By focusing on the way in which the specific rape myth of the sexually active woman circulated through the two cases, we have sought to demonstrate how the myth can be, but regularly is not, controlled. The conventionally framed and presented jury directions in Case A meet the technical requirements. However, the directions fail to counter the myth in this instance – to echo the VLRC, the judge's delivery does not capture the spirit of the jury directions but rather functions to augment the damaging myth.<sup>57</sup> In contrast, the intention of the directions is arguably forwarded in Case B from the first moments of the trial.

## 2 'The Drinking-and-Thus-Fucking Woman'

The complainants in both cases had consumed alcohol on the nights when the alleged rapes were perpetrated. Young has identified the use by defence counsel of a complainant's consumption of alcohol as 'metonymically speaking her willingness to have sex'.<sup>58</sup> The strategy Young describes uses the conceptual image of a woman drinking alcohol to conjure the conceptual image of a woman consenting to sex. The associative link that facilitates such metonymy is the range of rape myths concerning women, consent and alcohol. These myths include: that women make false allegations of rape after regretting sexual intercourse they have consented to while intoxicated; that alcohol reasonably makes women more likely to consent to sexual intercourse when otherwise they would not; and that women are responsible for making themselves vulnerable by drinking too much. These myths share the assumption that a woman who consumes alcohol in front of a man is both sexually disinhibited and

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57 Victorian Law Reform Commission, above n 11, xlix [26]–[30].

58 Young, above n 30, 455.

sexually available.<sup>59</sup> As Young puts it, a woman who drinks alcohol becomes ‘the drinking-and-thus-fucking woman’.<sup>60</sup>

This set of myths is pervasive and influential. Women complainants who have consumed alcohol prior to sexual acts they allege were non-consensual have less chance of their claims being accepted.<sup>61</sup> For instance, the Australian National Community Attitudes towards Violence against Women survey in 2013 found that 19 per cent of those surveyed would hold a woman responsible for her own rape if she was drunk or affected by drugs at that time.<sup>62</sup> Empirical research suggests that these myths constitute a significant hurdle for the prosecution in rape trials.<sup>63</sup>

The influence of these myths on jury deliberations was illustrated in Finch and Munro’s mock jury study.<sup>64</sup> During discussions about the merits of defence and prosecution arguments, jurors made statements of responsibility such as: ‘If she was drunk, she was more than likely flirting a lot’; ‘[d]rink makes people behave differently ... and if she behaved out of character, [she] really has to live with [her] mistake’; and ‘I think it was her fault, she’s responsible enough to say no, I don’t want to drink’.<sup>65</sup> Within each of these extracts, the individual mock juror follows the mythic narrative of the ‘drunken-and-thus-consenting woman’ to locate responsibility with the complainant, and thereby exculpate the accused.

The schema of these myths is instigated by the suggestion that the complainant imbibed alcohol on the day of the incident in question. This is such a powerful schema that it does not matter a great deal how small a quantity of alcohol the complainant consumed – any voluntary consumption of alcohol appears to raise the schema of the disinhibited woman.

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59 Emily Finch and Vanessa E Munro, ‘The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants’ (2007) 16 *Social and Legal Studies* 591, 599.

60 Young, above n 30, 455.

61 Finch and Munro, above n 59, 592–3.

62 Kim Webster et al, ‘Australians’ Attitudes to Violence against Women: Full Technical Report’ (Report, VicHealth, September 2014) 128. In the United Kingdom (‘UK’), a random telephone survey commissioned by Amnesty International in 2005 found 30 per cent of UK respondents would hold an intoxicated complainant at least partially responsible for her own rape; another four per cent would hold her fully responsible: Amnesty International UK, ‘UK: New Poll Finds a Third of People Believe Women Who Flirt Partially Responsible for Being Raped’ (Press Release, 21 November 2005) <<http://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being>>. Other rape myth findings in the survey include 26 per cent of respondents stating that a woman was partially or totally responsible for being raped if she was wearing sexy or revealing clothing; 22 per cent holding the same view if a woman had had many sexual partners.

63 See, eg, Joe Stone, ‘Editorial: Rape, Consent and Intoxication: A Legal Practitioner’s Perspective’ (2013) 48 *Alcohol and Alcoholism* 384. See also Ashley Wenger and Brian Bornstein, ‘The Effects of Victim’s Substance Use and Relationship Closeness on Mock Jurors’ Judgments in an Acquaintance Rape Case’ (2006) 54 *Sex Roles* 547; Karla Stormo, Alan Lang and Werner Stritzke, ‘Attributions about Acquaintance Rape: The Role of Alcohol and Individual Differences’ (1997) 27 *Journal of Applied Social Psychology* 279; Liz Kelly, Jo Lovett and Linda Regan, ‘A Gap or a Chasm? Attrition in Reported Rape Cases’ (Research Study No 293, Home Office (UK), February 2005) 72.

64 Finch and Munro, above n 59, 599.

65 *Ibid.*

Contrary to the myth, in the Victorian legal definition of consent, heavy intoxication in the complainant should be sufficient to vitiate consent. Sections 37AAA(a) and (b) remind the jury that the definition of consent has changed, and that the myths which commonly place responsibility with the victim of the violence, such as being grossly intoxicated, unconscious or asleep, are no longer acceptable reasons for finding that the complainant consented. Sections 37AAA(b) and (c) require the judge to inform the jury of this fact.<sup>66</sup> For this reason, the fact of a heavily intoxicated complainant is evidence available to the prosecution to prove the absence of consent.

The complainants in both of the cases we examine had been drinking on the night in question. In fact, both complainants drank enough to affect their capacity to stay awake with their companions, and they were both put into beds to ‘sleep it off’. Thus it could have been argued that consent was not possible in either case, on the basis that the complainant was either asleep or unconscious, or so intoxicated as to be incapable of consenting.

Highlighting the importance of early recognition of the legislative intention behind the jury directions, the prosecution decided early in Case A that, rather than focusing on the complainant’s evidence that she was asleep and/or fading in and out of consciousness as a result of intoxication, the main theory of the case would be that the complainant was not able to consent due to her level of intoxication. In Case B on the other hand, the Crown, following a pre-trial discussion with the judge about the difficulties inherent in proving a level of intoxication sufficient to vitiate consent and the way that the jury directions would play out at the end of the trial (in that, if the jury accepted that she was asleep, the direction in section 37AAA(c) would require the jury to accept that she was not in fact consenting), decided not to pursue this alternative but instead rely only on the theory that the complainant was asleep (and thus not consenting). Therefore, in Case B, the complainant’s drinking was configured into the narrative of her drowsiness rather than intoxication in its own right. The judge supported this configuration in his charge to the jury by explaining that:

The law says that consent means free agreement ... If you are satisfied beyond reasonable doubt that [the complainant] was asleep at the time she was sexually penetrated you must find that she is not consenting ... You can take all that into account in assessing whether, when she went into the bedroom, she went to sleep, that is[,] her level of alcohol intake and what she said about dozing off in the lounge. ... In essence the Crown says that [the complainant’s] evidence was that she was asleep and she woke up with [the defendant] on top of her and his penis inside [her]. So it would be plain to him, plain to him in all the circumstances she was asleep when he penetrated her ...<sup>67</sup>

In this example, the weight of the discussion is situated with the complainant’s claim that she was asleep, and it is this version of events that is presented as ‘plain’.

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66 Post-2015, the substance of this requirement is found by reading *Crimes Act 1958* (Vic) s 34C(2)(e) in combination with *Jury Directions Act 2015* (Vic) s 46(4)(a)–(b).

67 Transcript of Proceedings, *Case B* (Melbourne County Court, CR-09-00996, Judge X, 29 April 2010) 595.

In the paragraph from which this extract was taken, the judge reiterates that the complainant ‘was asleep’ or ‘dozing off’ at least seven times. He structures the drinking as part of the evidence of sleep. Thus, although the judge recounts in detail the list of drinks the complainant consumed, he does not immediately link it to her consent by requiring the jury to consider her drinking in the context of a consent-vitiating circumstance. Instead, the jury are directed to consider the amount of alcohol consumed as they assess whether the complainant was likely to be asleep or unconscious because she was intoxicated. The emphasis lies on assessing the evidence that she was asleep.

The judge then reiterates, perhaps inadvertently, that this sleep would be clearly discernible to the defendant (‘would be plain to him, *plain to him*’).<sup>68</sup> While reiterating the complainant’s condition as not consenting, the judge’s repetition also indicates the intention of the defendant to penetrate the complainant without her consent. In these ways, the judge’s charge functions like a bookend to the prosecution’s schema of the sleeping-thus-not-consenting woman. This successfully subverts the myth of the ‘drinking-and-thus-fucking woman’.

The implementation of the jury directions in Case B stands in contrast to the judge’s charge in Case A. In Case A, the judge placed emphasis on the myth the direction is supposed to challenge by making the direction an open question, and immediately following it with an ‘on the other hand’ statement which reiterated the myth (the drinking-and-thus-fucking woman) as a possible version of the events in question:

If the Complainant was so drunk that she could not consent, then her allowing the sexual activity to occur was not consent. If she was asleep or unconscious then of course she did not consent. ... On the other hand, the fact that the Complainant cannot remember or says that she cannot remember what happened is not conclusive. People sometimes do things when they are drunk that they would never do when sober. A consent or free agreement given by someone who is disinhibited by alcohol is still a consent.<sup>69</sup>

It is important to note that while the focus on the complainant’s sleep rather than intoxication in the prosecution argument in Case B functioned to limit the traction of the ‘drinking-and-thus-fucking woman’ schema throughout the trial, it also reduced the traction of other rape myth schemata. Thus, while the defence in Case A wove the figure of the drinking-and-thus-fucking woman into a greater narrative ‘mood’ or atmosphere of consenting (facilitating the transfer of consent in one instance of sexual activity into another instance), in Case B those other myths were rendered irrelevant because if the jury found that the complainant was asleep when N penetrated her, it would be compelled by section 37AAA(c) to find that she was not consenting. If the complainant were asleep at the time of penetration, the conversation N claimed established consent (N: ‘I’m hard’; Complainant: ‘I’m wet’) would be proved to be a lie, thus establishing mens rea and guilt.

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68 Ibid (emphasis added).

69 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 21 July 2011) 36.

We cannot know whether this was the logic of the jury. However, we do know that the jury decided to convict the accused. Given that we are not arguing that these cases are symmetrical in some of the important details (for example, the early lies told by the accused in this case should not be overlooked), all we are proposing here is that it is possible that the jurors were able to follow the logic that the complainant was asleep because the jury directions were used explicitly to direct them to the conclusion that an asleep woman – even a drunk asleep woman – cannot consent to sex. However, we do think it important to consider the role played by the pre-trial discussion between the judge and the prosecution about the impact of jury directions. It is arguable that reinforcing the effect of section 37AAA(c) enabled or encouraged the prosecution to resist the (all too common) temptation to rely on intoxication as an alternative consent-vitiating event – a narrative path that all too often facilitates the schema of the drinking-and-thus-fucking woman.

In Case A, the prosecution focused on the definition of consent, arguing that the complainant was ‘so affected by alcohol ... as to be incapable of consenting’.<sup>70</sup> Deploying this specific part of the definition in order to prove the absence of consent impels an assessment of the complainant’s degree of intoxication and whether she was cognitively capable of consenting. No objective measure of this is provided in the law. In Case A, the defence used the complainant’s testimony of verbal resistance to the digital penetration of her vagina to demonstrate, conversely, that she was cognitively capable of consenting. This significant and paradoxical moment is powered by the logic of rape myth schema: evidence of non-consent functions in this moment to prove the capacity of the complainant to consent, whilst the consent-refusing content of the evidence is not able to function as evidence in itself to prove consent was not present.

What we have identified here is the triggering of a rape myth schema by the metonymic use of the conceptual image of a woman consuming alcohol. The logic of the schema elides the content of the evidence of non-consent in order to prove the complainant’s capacity to consent, while at the same time filling out the narrative of a woman becoming sexually disinhibited and thus sexually available (and already consenting).

The defence takes up the threads of the schema in the paragraph analysed above in Part IV(A). As part of the defence’s developing narrative of willing participation and intention, the jury is told that ‘[a]lcohol freed [the complainant] from her inhibitions but everything she did ... was voluntary’. Resonating through this single sentence are all the rape myths about drinking complainants we listed in the introduction to Part IV of the article.

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70 Section 36 (now s 34C) of the *Crimes Act 1958* (Vic) lists a non-exhaustive set of circumstances which vitiate consent; s 36(e) (now s 34C(2)(e)) states that someone so affected by alcohol or drugs as to be incapable of consenting, cannot consent. Exactly what is meant by ‘so affected’ is undefined, but empirical evidence suggests that the complainant must be affected to (or very close to) the state of unconsciousness or automatism.

### 3 *The Unreliable (Woman) Narrator*

Sections 37AAA(e)(i) and (ii) challenge the underlying basis on which the common law legal test for consent rested – that rape could only be proved where there was evidence that the sexual penetration took place ‘against the will’ of the complainant. These jury directions require the judge to tell the jurors that they are not to regard someone as having freely agreed to a sexual act on the basis that she did not sustain any physical injury.

There are two rape myths operating here. The first is that if a woman did not want to have sex, she would resist to the point of sustaining injury (at least internal bruising).<sup>71</sup> Feminist theorists and activists argued strongly in favour of the new test of free agreement on the basis that requiring a woman to physically resist a perpetrator (who may be larger and stronger, or have a weapon) is dangerous, and that such a physical demonstration of ‘will’ is not a requirement in any other crime against the person. While the legal requirement for physical resistance has been replaced with a requirement based on mental opposition to penetration, nonetheless, there remains a strong societal belief that if only the complainant had kept her knees together, or delivered a sharp kick to the crotch, she would not have been raped.<sup>72</sup> The correlation between physical injury and conviction rates demonstrates a continuing attachment to demonstrable, rather than circumstantial or purely oral, evidence<sup>73</sup> and the jury direction is an attempt to re-educate the jury (and the community) that a ‘non-violent’ rape, or a rape where the complainant does not physically or vocally resist, can nonetheless be proved to be a real rape.

The second myth wrapped up in this requirement for a demonstration of ‘will’ was encapsulated in a warning to the jury about the inherent unreliability of female rape complainants.<sup>74</sup> Absence of physical injury creates an evidentiary gap in the trial narrative that the jury must seek to fill. When the major source of evidence used by the prosecution to prove lack of consent is testimony from the complainant herself, the fact that women have long been viewed as unreliable

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71 Temkin, above n 24.

72 Judges are not resistant to this pull: see, eg, Canadian Federal Court Judge Robin Camp, who is being investigated by the Canadian Judicial Council for allegedly asking the complainant during a 2014 trial, ‘Why couldn’t you just keep your knees together?’ and ‘Why didn’t you just sink your bottom down into the basin so he couldn’t penetrate you?’ The judge is also alleged to have stated that the complainant had not explained ‘why she allowed the sex to happen if she didn’t want it’: cited in Letter of Complaint from Alice Woolley and Jennifer Koshan to Canadian Judicial Council, 9 November 2015, 5 <<http://s3.documentcloud.org/documents/2510250/cjc-complaint-r-camp.pdf>>.

73 See, eg, Anne Edwards and Melanie Heenan, ‘Rape Trials in Victoria: Gender, Socio-Cultural Factors and Justice’ (1994) 27 *Australian and New Zealand Journal of Criminology* 213; David Brereton, ‘Rape Prosecutions in Victoria’ in Patricia Eastal and Sandra McKillop (eds), *Women and the Law: Proceedings of a Conference Held 24–26 September 1991* (Australian Institute of Criminology, 1993) 49, 58.

74 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) ch 18.

and untrustworthy narrators within legal processes becomes a significant issue.<sup>75</sup> The myth has a long and deeply pervasive history, evidenced by the words of Lord Matthew Hale in the 17<sup>th</sup> century, that rape is ‘an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent’.<sup>76</sup> Legal processes have historically supported this myth with rules requiring corroborative testimony in rape trials, and that warning be given to the jury about the dangers of uncorroborated complainant testimony.

Although now abolished in Victoria, in practice the myth that women easily and frequently lie about rape is persistently called on in trials, both overtly and implicitly, to suggest that a complainant’s testimony alone is an insufficient basis on which to convict an accused. Both Case A and Case B involved complainants who did not suffer any physical injuries as a result of the conduct in question. In both cases the defence sought to build narratives of women lying about consensual sex. In Case A, the defence successfully painted a picture of a vengeful and/or emotionally unstable (and thus lying) woman. In Case B, such efforts were headed off by the early intervention of the judge.

In Case A, the unreliability of the complainant’s testimony was a confusing but constant theme in the defence case. The complainant was argued to be lying about the things she testified she was certain of (for instance, waking up to discover she was being penetrated) because of the advanced level of her intoxication, while at the same time being accused of lying in the moment because of her awareness of the difficult situation she had created for herself by consenting to have sex with a(n Indigenous) man she did not know:

Could it be ... that after she had sex with [the accused] consensually and willingly... she suddenly came to the realisation [of] the magnitude of what occurred. Could it be that she instantly regretted it? Could it be she felt humiliated? Dirty? Maybe felt guilty? These are all inferences or conclusions you might consider. She felt like a slut. How could you reject the eminently reasonable hypothesis or proposition that she did, in fact, consent but she just does not remember doing so. That she could not believe that she would consent so she said she didn’t. ... You can apply that knowledge you have gained in your lives to the actions of everyone that night ...<sup>77</sup>

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75 Consider for example the police detective quoted by Firth as saying: ‘Women and children complainants in sexual matters are notorious for embroidery or complete fabrication of complaints’: Alan Firth, ‘Interrogation’, *Police Review*, 28 November 1975, 1507, cited in Jan Jordan, ‘To Believe or Not To Believe? Police Responses to Women Rape Complainants’ (Research Paper, 2003) 2.

76 Sir Matthew Hale, *The History of the Pleas of the Crown* (Professional Books, 1971) 635, cited in Philip Rumney, ‘False Allegations of Rape’ (2006) 65 *Cambridge Law Journal* 128, 128.

77 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 20 July 2011) 4–5. It is interesting to note the language used by the defence in this quote. It is possible to consider the use of the term ‘eminently reasonable’ in relation to the adjectives ‘dirty’, ‘humiliated’ and ‘guilty’ as dog whistling, in which the defence paints a picture of the complainant as racist and thus her testimony as false. That this contradicts the issue of consent is lost in the context of the statement. The issue of race within this rape trial appears inverse to the myths of gender, race and sex in the sense that it works against the white female complainant. While it is possible that race played an important role within this trial, and is worthy of further investigation, it does not relate to the jury directions and thus falls outside the parameters of this article.

My submission to you, ladies and gentlemen, is that [the complainant] is a most unreliable witness. Her lack of memory, what you might conclude is her selective avoidance of agreeing with certain propositions I put to her ... indicated unreliability. ... She told the police ... 'He took off my undies and then he put his penis inside my vagina.' If that's the truth then she couldn't have been asleep. She must have been awake. And all her utterances to others later, 'I was asleep. I woke up.' Etcetera. Etcetera. Just could not be right. Now is that a reliable version of events that you're being asked to act upon?<sup>78</sup>

The theme of this oration can be traced back to Hale, its emphasis on the woman-as-unreliable narrator schema completing the narrative that the complainant's testimony is a 'tissue of lies'. In the absence of physical evidence to satisfy the jury's need for certainty, the myth of the lying (because vengeful or forgetful) woman has a compelling resonance in many rape trials.<sup>79</sup>

In light of these overt defence claims to narrative devices which the jury directions would seem to suggest should not be given prominence in the trial, it might be assumed that in summing up the evidence and explaining the law to the jury, the judge would have taken a strong stance against some of these arguments. In fact, however, in the charge to the jury, we find that the defence claims are echoed back to the jury without criticism, and prosecutorial efforts to minimise their weight were likewise reflected back at the jury without emphasis. For example, in relation to the defence claim that the absence of physical injury could be used as evidence of the presence of consent, the judge stated:

[As regards] section 37AAA(e)(ii) – the law also says that you are not to regard AB as having freely agreed just because she did not sustain physical injury ... You heard evidence from Dr [X] that whether or not an injury is found is an unreliable indication of whether a rape has occurred.<sup>80</sup>

This statement is completely correct in all of the particulars. However, it is hard to see how such an objective and colourless statement could counter an always/already existing understanding about real rape. Recall that the jury have heard a strenuous cross-examination of the complainant about her lack of injury; the statement from the doctor as to the kind of injuries which might be expected in sexual violence situations; and a passionate closing statement by the defence about the complainant's failure to physically resist. In the face of all this evidence linking a lack of injury to a lack of resistance, a mere statement that a lack of resistance is not to be taken as a lack of consent has little chance of rendering the complainant's claim of non-consent sufficient or even believable.

In contrast, in Case B, defence attempts to provide an explicit narrative about the complainant as a woman who lied about sex were shut down by the judge before the trial even started. One example of this was an attempt by the defence to raise the possibility that during a school camp years earlier, the complainant had alleged falsely that someone had tried to sneak into her sleeping bag without her consent. The defence argued that this illustration of the complainant as a witness who had a tendency to lie about sex when her reputation was at stake (a

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78 Ibid 10.

79 Hale, above n 76.

80 Transcript of Proceedings, *Case A* (Melbourne County Court, CR-10-01407, Judge X, 20 July 2011) 31.

‘template’ for false accusations) made the story directly relevant to her credibility, and that the jury should have access to this evidence of her unreliability as a narrator. However, the judge ruled this evidence inadmissible on the basis that it was about sexual activity unrelated to the facts in issue and, in line with the jury direction in section 37AAA(e)(iii), found that it was therefore not probative.<sup>81</sup> Given that the defence was also prohibited from introducing any evidence of the kitchen sex (on the basis that its myth-based power to prejudice the jury against the complainant overwhelmed its probative value), and the choice (supported by the judge) not to lead the argument that the complainant was so intoxicated so as to be incapable of consenting, it becomes clear that the normal myth-based narrative basis for conviction was severely curtailed in Case B.

## V CONCLUSION

The Victorian Parliament, over several decades, has attempted to change the direction of rape narratives playing out in rape trials, in order to deliver better, more just, outcomes for the victims of sexual offences while maintaining the rights of the accused to a fair trial. The jury directions on consent, originally set out in the *Crimes Act 1958* (Vic) and now listed in the *Jury Directions Act 2015* (Vic), provide an opportunity for judges and the prosecution to address the persistent and harmful myths that continue to dominate societal understandings of sexual offending generally, and about women rape complainants specifically, within the context of the rape trial. In this article we have analysed the jury directions in light of a large body of work that demonstrates that the order and timing of information within the unfolding ritual of the trial has a dramatic impact on the ability of the jury to make sense of the competing narratives at play in a rape trial.

In both Case A and Case B, the presiding judge used the 2007 jury directions to counter the shared rape myths in each charge to the jury. However, in Case B, many of the myths which might have overwhelmed the trial were inhibited by the judge’s use of direction-influenced decisions about key pieces of evidence discussed at the pre-trial hearing and then excluded from the trial itself. In contrast, we argue that Case A was overwhelmed by rape myths triggered at the very beginning of the trial because the trial judge and prosecution, while dealing with very similar facts (and thus very similar myth-generating potential), did not engage with the legislative intention behind the directions at the crucial pre-trial stage. In Case B, the directions given at the end of the trial had much less work to do, because negative narratives were emphasised to a lesser degree within the trial, whereas in Case A, the directions delivered at the conclusion of the trial were clearly insufficient to counter the narratives that had had so much play during the trial. At the heart of our argument is the theory that the potential

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81 Transcript of Proceedings, *Case B* (Melbourne County Court, CR-09-00996, Judge X, 21 April 2010) 85.

effectiveness of the directions depends on the way the legislative intention behind them is utilised throughout the trial, and not merely at the end.

Essentially we have argued that jury directions given at the conclusion of the trial come too late in the piece to disrupt problematic narratives. Our hypothesis is that in order to successfully transform rape trials in the way that the legislators and reformers seem to have intended, the jury directions need to be given much greater prominence within the trial. It is possible that a little judicial direction in the early stages of decision-making, at pre-trial hearings and in evidentiary rulings throughout the trial, may help prosecution and defence counsel to move away from a continued tendency to rely on myths in trials. It also seems likely that judicial direction to the jury *before* the airing of evidence which may have the effect of triggering rape myth schemata, would be much more likely to reduce the impact of narratives found by the legislature to be irrelevant in contemporary Victorian trials.