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# Reform of Irish Rape Law: The Need for a Legislative Definition of Consent

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## Abstract

Perhaps the most challenging aspect of the prosecution's task in a rape trial is proving that consent was absent. Despite the centrality of consent, the concept is not legislatively defined in Irish law. In this respect Ireland has lagged considerably behind other comparable common law jurisdictions. Irish guidance on consent continues to be gleaned from common law rules and is generally not sufficiently developed to contribute to minimising the prosecution's difficulties of proving an absence of consent in rape trials. This article argues for the introduction of a statutory definition of consent in Irish law and considers the form that a prospective definition should take.

**Keywords:** Rape; Consent; Ireland; Reform

## Introduction

Consent is the central issue in most contested rape trials. To prove that a rape occurred, the prosecution must show that: (1) there was sexual intercourse; (2) it was non-consensual and; (3) the defendant had the requisite *mens rea* regarding consent.<sup>1</sup> In the majority of rape cases forensic evidence identifies the offender and verifies that sexual activity has occurred.<sup>2</sup> Thus,

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<sup>1</sup> That is, that the defendant knew that the complainant was consenting or was reckless as to whether or not she was consenting or that he did not hold an honest belief that the complainant was consenting: Criminal Law (Rape) Act 1981, s. 2.

<sup>2</sup> D.D. Koski, 'Jury Decision-making in Rape Trials' (2002) 38 *Criminal Law Bulletin* 21. See also: J. Temkin, *Rape and the Legal Process*, 2<sup>nd</sup> edn (Oxford University Press: Oxford, 2002) 166. Forensic examinations can uncover traces of semen which are relevant in demonstrating that sexual contact has occurred and can be used to help establish the identity of the perpetrator through DNA profiling: A.R.W. Jackson and J.M. Jackson, *Forensic Science*, 2<sup>nd</sup> edn (Pearson Education Ltd: Harlow, 2008) 208. Even where semen traces are not present, a defendant may be identified by the presence of other forensic evidence such as, the presence of skin under her

defendants who plead not guilty generally do so on the ground that the complainant consented and/or that the defendant lacked the necessary *mens rea* regarding the complainant's consent. An analysis of Irish rape trial transcripts in 2009 revealed that consent represented the primary defence strategy in eighteen of the twenty-eight cases in which it was possible to ascertain the principal defence tactic.<sup>3</sup> Despite the centrality of consent, the concept has not been statutorily defined in Irish rape law. The guidance which exists hails largely from case-law and provides little elucidation on what is necessary for a valid consent to sexual activity. In this respect, Irish law lags behind other common law jurisdictions such as England and Wales, Canada, New South Wales and Victoria who have opted to provide legislative clarification of the meaning of consent.<sup>4</sup>

The Irish government has promised a Sexual Offences Bill will be published in the near future.<sup>5</sup> In light of this, this article proposes the introduction of a legislative definition of consent which should form part of any prospective legislation. It is argued that the common law on consent must be replaced with a modernised positive statutory definition. This will produce both symbolic and practical benefits. Symbolically, it introduces a rich definition which sends a clear message regarding what is necessary for a legally valid consent to sexual activity. Practically, statutory clarification can contribute to minimising the difficulties of proving an absence of consent in rape trials by providing better guidance for jurors when they are deliberating about consent. The reforms proposed here are influenced primarily by the English Sexual Offences Act 2003 and an analysis of the relevant provisions of this Act will be provided. However, whilst the English legislation provides a template for reform, it will be seen that there are some shortcomings in that jurisdiction's approach to defining consent and recommendations for avoiding similar problems in an Irish context are discussed. In this way, the article also serves as a critique of the current English law in this area.

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nails, or his hair or saliva on her body: A. McColgan, *The Case for Taking the Date out of Rape* (Pandora Press: Hammersmith, 1996) 78.

<sup>3</sup> C. Hanly et al, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press: Dublin, 2009) 345.

<sup>4</sup> Consent has been statutorily defined in England and Wales (The Sexual Offences Act 2003, ss. 74-76); Canada (the Canadian Criminal Code, ss. 265 and 273) and the Australian jurisdictions of Victoria (the Crimes Act 1958, s. 36) and New South Wales (the Crimes Act 1900, s. 61HA).

<sup>5</sup> A date for publication of a Bill has yet to be announced but the Department of Justice has been engaging in a review of Irish sexual offences law (<http://www.inis.gov.ie/en/JELR/Pages/SP12000300>: last accessed: 20<sup>th</sup> August 2013).

## The current definition of consent in Irish rape law

Section 2(1) of the Criminal Law (Rape) Act 1981 defines rape as ‘sexual intercourse with a woman<sup>6</sup> who at the time of the intercourse does not consent to it’. This article focuses on defining consent in the context of rape in section 2, as opposed to the other non-consensual sexual offences against adults.<sup>7</sup> This is justified on the basis that the current rules on consent were developed largely with reference to the definition of rape in section 2. In addition, the objective of this discussion is solely upon defining consent (as opposed to examining other elements of sexual offences such as *mens rea*<sup>8</sup>). This is best achieved by assessing consent with reference to rape only, particularly as this is the offence with which issues of consent are most closely aligned. The definition proposed here could be equally applied to the other non-consensual sexual offences against adults. Indeed, in England this is precisely what has happened<sup>9</sup> and it is envisaged that a similar approach should apply in Ireland.

The current common law rules on consent are outdated, with some rules hailing from cases which were decided as far back as the late nineteenth century. Also, as the discussion below demonstrates, many of the current rules have been directly adopted from English case-law, with English authorities being relied upon as representing the Irish legal position. Indeed, given the lack of reported Irish judgments considering how to define consent in Irish law, English authorities are traditionally used in order to elucidate upon the concept in Irish law. Perhaps the central Irish authority on consent is *The People (DPP) v C*<sup>10</sup> where Murray J. described consent as:

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<sup>6</sup> The definition of rape in section 2 is gender specific, that is, it punishes only the rape of a woman by a man. Consequently, the discussion here uses the feminine gender when referring to complainants and the male gender when referring to defendants. This is not to deny the existence of male rape or the fact that women may also commit sexual offences. Rather, it simply reflects the definition of the offence of rape in section 2.

<sup>7</sup> That is, rape under section 4, aggravated sexual assault or sexual assault: Criminal Law (Rape) (Amendment) Act 1990, ss. 2, 3 and 4, respectively.

<sup>8</sup> A defendant cannot be found guilty of rape unless the requisite *mens rea* of rape is also proven. Section 2 also discusses the *mens rea* of rape, that is, intention or recklessness regarding the complainant’s absence of consent and the absence of the defence of honest belief in consent. However, the discussion in this article will focus on the definition of consent alone. For discussion of reform of the honest belief defence in Ireland, see: S. Leahy, ‘When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law’ (2013) 23(1) *Irish Criminal Law Journal* 2.

<sup>9</sup> In the Sexual Offences Act 2003, the definition of consent applies to all four non-consensual sexual offences against adults in that Act: see ss. 1-4.

<sup>10</sup> [2001] 3 IR 345.

...voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.<sup>11</sup>

The primary requirements for a legally valid consent to sexual intercourse are voluntariness, capacity and knowledge of relevant facts.

### *Voluntariness*

Consent to sexual activity must be given freely. Where participation in sexual intercourse is secured as a result of violence or the threat of violence, any apparent consent will be vitiated. It is not necessary to show that the complainant offered resistance to the efforts of her attacker. Section 9 of the Criminal Law (Rape) (Amendment) Act 1990 which states that:

... in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission on the part of that person to offer resistance to the act does not of itself constitute consent to the act.

In practice, notwithstanding section 9, a failure to offer resistance is likely to be taken into account by a jury as evidence from which consent may be inferred.<sup>12</sup> In the absence of obvious signs of physical injury, the prosecution could experience difficulty in proving that the complainant did not consent.<sup>13</sup> Given that the majority of rapes involve minimal physical injury<sup>14</sup>, such difficulties of proof will feature in a lot of cases.

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<sup>11</sup> [2001] 3 IR 345, 360.

<sup>12</sup> C. Hanly, *An Introduction to Irish Criminal Law*, 2<sup>nd</sup> edn (Gill & MacMillan: Dublin, 2006) 285.

<sup>13</sup> National Women's Council of Ireland, *Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and other Crimes of Violence against Women and Children* (National Women's Council of Ireland: Dublin, 1996) 79.

<sup>14</sup> In *Rape & Justice in Ireland*, interviews with rape victims, assessments of DPP files and a case-tracking exercise all found that physical injuries, where sustained, were relatively minor (e.g. bruises, cuts and scratches). For example, forty-four per cent of the victims interviewed reported sustaining relatively minor physical injury and fifteen per cent reported sustaining more serious physical injury: See Hanly, above n. 3 at 136.

In the English case of *R v Olugboja*, it was made clear that an apparent consent may be vitiated by fear of adverse consequences other than physical violence.<sup>15</sup> The Court of Appeal held that in determining whether a threat of adverse consequences was sufficient to vitiate an apparent consent the jury should reach their decision ‘by applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case’.<sup>16</sup> In light of this statement, it would appear that jurors have considerable latitude to determine what may be categorised as a threat which is sufficient to vitiate consent. Jurors are not confined to any particular definition of threat and are at liberty to assess each individual case on its merits. Nevertheless, in practice, this latitude is unlikely to translate into a broadened understanding of the types of coercion which are contra-indicative of a valid consent. The net effect of the failure to provide express guidance on the types of threats which might vitiate consent is that ‘much oppressive behaviour is likely to go *unpunished*’<sup>17</sup>, that is, that it will not be categorised as impeding consent. As Temkin comments, neither prosecutors nor juries can be expected to stray far from common understandings of rape as forcible compulsion.<sup>18</sup> Much of this reluctance may be attributed to social acceptance of the ‘real rape’ stereotype which suggests that genuine allegations involve physical violence or the threat thereof. For example, Ellison and Munro found that in mock jury studies involving a rape scenario where the complainant showed no signs of physical injury, jurors ‘routinely emphasized the significance of this to their not guilty verdicts’.<sup>19</sup> For jurors who are influenced by this type of thinking, a definitive statement that threats other than those of physical violence are sufficient to vitiate consent would be beneficial.

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<sup>15</sup> [1982] QB 320. This case is accepted as representing the law in Ireland also. O’Malley notes that the Irish case of *DPP v Reid* [1993] 2 IR 186 involved very similar facts and though consent was not discussed in the appeal judgment, it appears that it was uncontested that consent would be vitiated in such circumstances: T. O’Malley, *Sexual Offences*, 2<sup>nd</sup> edn (Round Hall: Dublin, 2013) 41.

<sup>16</sup> [1982] QB 320, 332.

<sup>17</sup> See Temkin, above n. 2 at 93.

<sup>18</sup> *Ibid.*

<sup>19</sup> L. Ellison & V.E. Munro, ‘Jury Deliberation and Complainant Credibility in Rape Trials’ in C. McGlynn, & V.E. Munro, *Rethinking Rape Law: International and Comparative Perspectives* (Routledge: Oxfordshire, 2010) 285-286.

## **Capacity**

In order to legally consent to sexual intercourse, an individual must have attained the legal age of consent (i.e. seventeen years)<sup>20</sup> and must not be suffering from a mental incapacity.<sup>21</sup> The individual must also not be affected by transient incapacity such as sleep or unconsciousness<sup>22</sup> when the intercourse took place. Intoxication may affect an individual's capacity to consent. However, it is not an automatic assumption that an intoxicated individual is legally incapable of consenting. The issue is not whether the complainant was intoxicated per se, but whether she was so intoxicated as to be incapable of consenting.<sup>23</sup> Assessments like this are difficult to make. Thus, where a complainant is intoxicated short of unconsciousness it may be difficult to prove that her consent was absent. Complainant intoxication is a feature of a lot of rape trials. In 2009, a case-tracking exercise which examined one hundred rape cases found that seventy-eight per cent of complainants were intoxicated at the time of the attack.<sup>24</sup> A similar study of one hundred and seventy-three rape case files which was conducted for the attrition study, *Rape & Justice in Ireland*, revealed that nearly two-thirds of the complainants in those cases had engaged in what is officially classified as 'binge-drinking' prior to the incident in question.<sup>25</sup> In light of these statistics, it appears that the absence of more definitive guidance on the effect of intoxication upon an individual's capacity to consent is likely to contribute to difficulties of proof in a substantial number of rape trials.

## **Knowledge**

For consent to represent a genuine choice, the complainant must have had knowledge of all relevant information. If her consent has been procured as a result of a fundamental deceit, it is

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<sup>20</sup> See the Criminal Law (Sexual Offences) Act 2006, ss. 2-3.

<sup>21</sup> See the Criminal Law (Sexual Offences) Act 1993, s. 5. Since sexual activity with children and individuals who are suffering from mental incapacity are not dealt with under the offence of rape as defined in section 2 of the 1981 Act, these forms of incapacity are not relevant for the purposes of the current discussion.

<sup>22</sup> *R v Mayers* (1872) 12 Cox CC 311; *R v Larter & Castleton* [1995] *Criminal Law Review* 75. Again, these English authorities are relied upon as there is no reported Irish case discussing intoxicated consent. However, O'Malley notes that there have been convictions for rape where defendants have had sex with sleeping complainants, namely, *DPP v Y(N)* [2002] 4 IR 309 and *People (DPP) v Keane* [2008] 3 IR 177. Both of these appeal cases focused on sentencing issues but it is clear from the judgments that the absence of consent where the complainant is sleeping was uncontested: See O'Malley, above n. 15 at 48.

<sup>23</sup> *R v Lang* (1976) 62 Cr App R 50.

<sup>24</sup> M. Corr, et al, *Different Systems, Similar Outcomes?: Tracking Attrition in Reported Rape Cases in Eleven Countries*, Country Briefing: Ireland (Child and Woman Abuse Studies Unit: London, 2009) 4.

<sup>25</sup> See Hanly et al, above n. 3 at 272.

invalid.<sup>26</sup> The deception must, however, be *fundamental*. Consequently, consent will only be deemed to have been absent where the complainant has been deceived as to the identity of her partner<sup>27</sup> or as to the nature of the act (i.e. where the complainant does not realise that she is engaging in sexual intercourse).<sup>28</sup>

Currently, Irish law is unclear as to whether fraud as to the purpose of sexual intercourse vitiates consent. It is possible that an individual could be deceived as to the purpose of sexual intercourse if a trusted professional such as a psychologist or counsellor were to suggest that sexual intercourse would be beneficial for treatment purposes.<sup>29</sup> However, it is perhaps most likely that this would arise in sexual assault cases. An example of such fraud would be where a healthcare worker who carries out a procedure such as a breast check or a vaginal examination on the basis that this is necessary for diagnostic or therapeutic purposes when in fact it is carried out for the healthcare professional's sexual gratification. A similar example would arise where an individual induces another into consenting to such a procedure on the basis that he is a medical professional when in fact he holds no such qualification. Some guidance on the latter scenario may be taken from the English case of *R v Tabassum*.<sup>30</sup> The defendant falsely represented himself as a breast cancer specialist and in this context women consented to his examining their breasts. All of the women testified that that if they had known that he was not a specialist they would not have consented to the examinations. Thus, their consent was held not to be valid. To date in Ireland there has been no case which involved this type of fraud. In light of the influence of English authorities in this area, it is quite likely that a similar approach to *Tabassum* would be adopted in this jurisdiction. However, legislative clarification of this point would be beneficial. There is a potential for

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<sup>26</sup> P. Charleton et al, *Criminal Law* (Butterworths: Dublin, 1999) 632.

<sup>27</sup> *People (DPP) v C* [2001] 3 IR 345.

<sup>28</sup> An example of such a case is the English case *R v Flattery* (1877) 2 QBD 410 where the defendant had sexual intercourse with a girl while pretending to perform surgery. The complainant thought that what was taking place was a surgical operation, believing that penetration was being effected with the defendant's hand or with an instrument. It was held that as the woman was unaware of the nature of the activity, she could not have given a valid consent. A similar situation arose in another English case, *R v Williams* (1923) 1 KB 340, where the defendant had sex with the complainant on the pretext that he was improving her singing voice by making an air passage. Because the complainant was deceived as to the nature of the act which was being performed on her, her apparent consent was vitiated.

<sup>29</sup> Of course, any trusted individual (such as a religious adviser or a social worker) could perpetrate a similar fraud (i.e. suggesting that sexual intercourse would be beneficial for the purposes of treatment of some mental condition). However, it is perhaps most likely that such a fraud would be operative in the context of mental health or medical treatment.

<sup>30</sup> [2000] 2 Cr App R 328.

sexual fraud cases not to be taken seriously by juries. Jurors may be inclined to view such cases as opportunist seductions or, at best, unfortunate situations which fall short of being labelled as sexual offences. Mock jury research has shown that jurors have a propensity to be circumspect about what constitutes a ‘real rape’.<sup>31</sup> Sexual fraud may not meet stereotypical assumptions about the types of non-consensual sexual activity which should attract criminal liability. Thus, legislative clarification that such frauds are serious violations of sexual autonomy which are worthy of the sanction of the criminal law would provide an incentive for jurors to take sexual fraud seriously.

### ***The problems posed by the current approach to defining consent in Irish rape law***

The current Irish legal guidance on consent is both vague and stagnant. Although this ambiguity in theory permits flexibility for the definition of consent to evolve incrementally on a case-by-case basis, the Irish courts have not taken advantage of this. This lack of clarity has the propensity to contribute to difficulties of proving an absence of consent in ‘hard cases’ where the facts do not align with the traditional narrow understandings of force, fear, fraud or incapacity. In such cases, it will be difficult for the prosecution to prove that the complainant has been subjected to non-consensual sexual activity. For example, in theory, a threat of adverse consequence such as job loss could be capable of vitiating an apparent consent. However, in practice, it is unclear whether a trial judge would direct a jury that such coercion is worthy of the attention of the criminal law. While jurors may believe that the defendant’s conduct in such a case is immoral, they might balk at finding that a complainant could not give a legally valid consent in these situations unless this option is expressly provided to them by the law.

A definitive legislative statement of the prerequisites for a valid consent to sexual activity could contribute to minimising trial judges’ problems when directing the jury in difficult

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<sup>31</sup> English mock jury studies have revealed the influence of the ‘real rape’ stereotype on juror deliberations: see J. Temkin and B. Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing: Oxford, 2008), 48. Victim-blaming attitudes have also been shown to be influential: E. Finch and V.E. Munro, ‘The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants’ (2007) 16 *Social & Legal Studies* 591.

cases, as well as helping the prosecution to show that the complainant did not consent. It is arguable that such a definition is unnecessary. In general, there is an absence of a clear definition of consent in criminal law so it may be questioned why statutory clarification is necessary in the context of rape. The justification is that rape is *sui generis*. First, the low conviction rate for rape is controversial. In the period between 2005 and 2007, the conviction rate for rape was recorded as eight per cent of reports.<sup>32</sup> It is important that the legislature is seen to have done everything in its power to contribute to improving these statistics. To date, this effort has been lacking and, given the centrality of consent in rape trials, reconsidering the law would seem to be an important and necessary effort to improve upon the current performance of the criminal justice system in this area. The second reason why consent is in need of reconsideration is the myriad of underlying societal influences which contribute to the difficulties of proving an absence of consent in rape trials. It is generally well-accepted amongst rape law scholars that such attitudes or ‘rape myths’ create unrealistic expectations about rape in society generally and necessarily also in the minds of jurors.<sup>33</sup> Examples of these myths include the ‘real rape’ stereotype which suggests that the only genuine allegation of rape is that which involves a stranger in a public place and which is accompanied by significant physical force.<sup>34</sup> Similar to the stereotype of the real rape, there appears to be a societal ideal of the ‘real victim’ which has created an imagery of the ‘deserving victim’ who has not engaged in what are seen as risky behaviours such as drinking to excess or dressing

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<sup>32</sup> See Corr et al, above n. 24 at 3.

<sup>33</sup> The influence of rape myths upon juror deliberations was first identified by feminist writers: See S. Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard University Press: Harvard, 1987); S. Lees, *Carnal Knowledge: Rape on Trial*, 2<sup>nd</sup> edn, (The Women’s Press Ltd: London, 2002); Temkin, above n.2. For acceptance of this view amongst Irish academics whose work is not feminist in orientation, see: C. Fennell, ‘Criminal Law and the Criminal Justice System: Woman as Victim’ in A. Connolly (ed), *Gender and the Law in Ireland* (Oak Tree Press: Dublin, 1993) 153; T. O’Malley, *Sexual Offences: Law, Policy & Punishment* (Round Hall, Sweet & Maxwell: Dublin, 1996) 1; C. McCullagh, *Crime in Ireland: A Sociological Introduction* (Cork University Press: Cork, 1996) 107; M.E. Ring, ‘Trial and Error: Current Problems in the Trial of Sexual Offences: A Prosecutor’s Perspective’ (2003) 13 *Irish Criminal Law Journal* 3, 5; Hanly et al, above n. 3 at 15; S. Leahy, ‘Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland’ (2014) 14(1) *Irish Journal of Applied Social Studies* 17.

<sup>34</sup> Empirical research has, however, revealed that this stereotype is quite at odds with the reality of rape. According to the National Statistics published by the Rape Crisis Network of Ireland for 2010, the most likely perpetrators of sexual violence against adults are friends, neighbours or acquaintances (38.9 per cent of cases) and current or ex-partners (27.7 per cent of cases). Sexual violence against adults was committed by a stranger in only twelve per cent of cases: M. Lyons, *National Rape Crisis Statistics and Annual Report 2010*, (Rape Crisis Network of Ireland: Galway, 2011) 39. In addition, in the analysis of Central Criminal Court files which was conducted by Hanly et al, it was found that nearly three-quarters of the incidents in which the location was specified occurred in a private place or vehicle: Hanly et al, above n. 3 at 269. This study also revealed that usually where physical injuries were reported, they tended to be relatively minor in nature. Only a small minority of complainants reported serious injuries such as broken bones (3.7 per cent), strangulation marks (2.78 per cent) and knife wounds (2.78 per cent): Hanly et al, above n. 3 at 274.

provocatively at the time of the alleged attack.<sup>35</sup> A strong legislative statement on consent can serve a normative purpose and contribute to counter-acting these stereotypes by sending a positive message about what constitutes appropriate socio-sexual behaviour. In this way, legislatively defining consent can have a powerful symbolic effect.

### **Proposals for legislatively defining consent in Irish rape law**

The Irish legislature should introduce a definition of consent which is similar to that contained in the English Sexual Offences Act 2003. The English law is chosen as a template for two reasons. First, prior to the recent reforms, the English rules on consent were virtually identical to the current Irish law. Since the English reformers faced similar difficulties to those which are currently experienced in Ireland, their approach to law reform provides important guidance for reform in this jurisdiction. Second, the English reforms are valuable because they are the product of considerable debate and consultation and are influenced by best practice from other common law jurisdictions.<sup>36</sup> The 2003 Act introduced a two-tiered definition of consent.<sup>37</sup> The first tier, enunciated in section 74, consists of a statutory definition of consent and represents a clear statement of what is necessary for a legally valid consent to sexual activity. The second tier may be found in sections 75 and 76 which comprise, respectively, of evidential and conclusive presumptions regarding the absence of consent.<sup>38</sup> The second tier elucidates upon the first tier by setting out circumstances where consent cannot be said to be present.

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<sup>35</sup> Evidence of the existence of this stereotype in an Irish context may be gleaned from an attitude survey which was conducted by the *Irish Examiner* newspaper in 2008. Thirty-three per cent of respondents felt that a woman who had consumed alcohol or taken illicit drugs was partially responsible if she is raped. Eight per cent thought that she is totally at fault. Thirty-seven per cent of respondents felt that flirting extensively with the defendant made a woman in some way responsible for any subsequent attack and twenty-six per cent felt that a woman who was raped while wearing sexy or revealing clothing was in some way responsible for rape: C. Ryan, 'Rape: Our Blame Culture' *Irish Examiner*, 26<sup>th</sup> March 2008.

<sup>36</sup> Law Commission, *Consent in Sexual Offences* (Law Commission: London, 2000); Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (Home Office: London, 2000); Home Office, *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences* (Home Office: London, 2002).

<sup>37</sup> This new definition applies to four newly defined non-consensual sexual offences against adults, namely, rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent: see the Sexual Offences Act 2003, ss.1-4, respectively.

<sup>38</sup> It must be noted that these presumptions also apply to honest belief in consent defence, that is, the *mens rea* of the relevant sexual offences. Thus, if the presumptions apply it will be presumed (either on a conclusive or an evidential basis) that the complainant did not consent and that the defendant did not honestly believe that she

### *The first tier of the legislative definition: defining consent*

Section 74 of the Sexual Offences Act 2003 provides that ‘...a person consents if he agrees by choice and has the freedom and capacity to make that choice’. This seems like a simple statement. However, upon closer examination, it is clear that this is far from the case. Most notably, section 74 may be seen as introducing the standard of communicative sexuality into English law. In addition, the requirements of ‘choice’, ‘freedom’ and ‘capacity’ represent a positive statement which sets out the minimum prerequisites for a valid consent to sexual activity. This may be contrasted with the understanding of consent in common law<sup>39</sup> where the concept is defined negatively with reference to factors which vitiate an apparent consent.

### *The significance of incorporating the ideal of communicative sexuality into law*

On a literal interpretation of section 74, it is not obvious that it introduces communicative sexuality into English law, much less what the connotations of this concept are. However, there is an acceptance within contemporary legal scholarship on sexual offences that framing a definition of consent in terms of ‘free agreement’ is indicative of the adoption of the communicative sexuality standard.<sup>40</sup>

On a principled level, communicative sexuality can be understood as a standard of acceptable sexual behaviour against which rape allegations may be judged. It requires mutuality and communication in sexual encounters so that both parties are afforded an opportunity to exercise genuine sexual choice. The notion of communicative sexuality was originally posited by feminist theorist Lois Pineau<sup>41</sup> who sought to promote a new method of

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was consenting. Since this article is focused upon the definition of consent, a discussion of the implication of using presumptions in relation to honest belief is beyond the scope of the discussion here.

<sup>39</sup> See the discussion of the Irish law above.

<sup>40</sup> Section 74 requires that an individual who agrees to engage in sexual activity ‘has the *freedom* and capacity to make that choice’. Commenting prior to the introduction of section 74, Rumney stated that a definition of consent which centres on ‘free agreement’ signifies a commitment to communicative sexuality because the essence of ‘free agreement’ is *communication* of desires, likes and dislikes in the absence of force, coercion or fraud: P.N.S. Rumney, ‘The Review of Sexual Offences and Rape: Another False Dawn’ (2001) 64 *Modern Law Review* 890, 898-899. See also: V.E. Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 944 and G. Firth, ‘Not an Invitation to Rape; the Sexual Offences Act 2003, Consent and the Case of the “Drunken” Victim’ (2011) *Northern Ireland Legal Quarterly* 99, 103.

<sup>41</sup> L. Pineau, ‘Date Rape: A Feminist Analysis’ (1989) 8 *Law and Philosophy* 217.

adjudicating upon rape allegations. Her solution was communicative sexuality which would create a 'minimum standard of sexual decency'.<sup>42</sup> She suggested that deviations from this standard should put the jury on alert that the complainant is unlikely to have consented. In practice, a definition of consent which centres on communicative sexuality encourages a context-sensitive approach when examining the facts of an alleged rape. Jurors are directed to examine the event in a holistic way in order to assess whether the situation represented an opportunity for genuine sexual choice. For example, jurors will be asked to assess whether the complainant was free to communicate her consent or whether there were coercive circumstances which made this impossible. This marks a break with the approach to juror deliberations about consent that is fostered by the common law rules. The latter tend to create a presumption of consent. Jurors must determine whether consent was absent with reference to the narrowly defined understandings of force, fear, fraud or incapacity. The practical effect is that the complainant is presumed to have consented until one of these vitiating factors is proved by the prosecution. This presumption of consent discourages jurors from engaging in a nuanced assessment of the context within which the encounter occurred in order to determine whether it presented a genuine opportunity for the complainant to exercise sexual choice. Rather, knee-jerk assessments about consent are based upon the presence or absence of the traditional vitiating factors.<sup>43</sup> The tendency for jurors to make ill-considered and hasty determinations about consent is compounded by their propensity to be influenced by prejudicial and erroneous societal attitudes about rape. The impact of rape myths upon juror deliberations in rape trials is similar to that of the presumption of consent that is created by the negative common law definition of consent. Instead of dispassionately judging cases on their merits, jurors are making spontaneous decisions about consent which are concentrated upon the absence of the stereotypical hallmarks of the 'real rape' or the 'real victim'.<sup>44</sup>

The ideal of communicative sexuality serves to off-set both the presumption of consent which is fostered by the common law rules and the effects of rape myth acceptance. Under this

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<sup>42</sup> V. Davion, 'The Difference Debate: Rape and Moral Responsibility' in K. Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press: Oxford, 1999) 230.

<sup>43</sup> For example, a mock jury study has suggested that claims of non-consensual sex that are not accompanied by evidence of physical force and attendant resistance are significantly less likely to be accredited as rape by jurors: L. Ellison and V.E. Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) *British Journal of Criminology* 202, 206.

<sup>44</sup> The English mock jury studies which have revealed the influence of the 'real rape' stereotype on juror deliberations are listed above: Above n. 31.

model, such influences are less likely to affect jurors' decision-making because attention is focused on the context of the encounter to decipher whether it is one which the complainant is likely to have consented to. Instead of seeking the presence of one of the traditional narrowly defined vitiating factors, the jury must look for evidence which suggests that the sexual encounter was welcomed by the complainant. Likewise, rather than making a spontaneous and prejudicial assessment of the circumstances of her allegation on the basis that it does not conform to stereotypical societal ideals about rape, jurors will be directed to focus only on the context of the case which is before them.

The adoption of a communicative sexuality standard when defining consent could ameliorate the difficulties of proof in rape trials where consent is in issue. Admittedly, the significance of couching a definition of consent in terms of 'free agreement' is not immediately apparent from the wording of section 74. Realisation of the ideal of communicative sexuality in practice will require considerable effort in the form of judicial interpretation and direction. To aid this process, judges who hear rape cases must be trained on how to interpret and apply the new definition of consent so that the goals of communicative sexuality are realised. Naturally, judicial training raises both financial concerns<sup>45</sup> and a considerable administrative burden. However, once the Irish Judicial Council is placed on a permanent statutory footing<sup>46</sup>, such training should be more straightforward to implement. Although by no means uncontroversial or infallible<sup>47</sup>, recent English research has suggested that such training is well-received by the judiciary and can aid them in applying challenging areas of the law. Rumney and Fenton assessed the Serious Sexual Offences Seminar which is mandatory for English judges who hear sexual offence cases.<sup>48</sup> The research found that the information

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<sup>45</sup> The lack of available funding for judicial education and training is cited on the Judicial Council website: [http://www.aji.ie/supports/judicial\\_education](http://www.aji.ie/supports/judicial_education) (last accessed: 29 September 2013)

<sup>46</sup> The Judicial Council Bill 2010 has yet to be implemented into law.

<sup>47</sup> See Temkin and Krahe, above n. 31 at 188-192.

<sup>48</sup> English judges who are 'ticketed' to hear sexual offences cases must complete this seminar once every three years. The training is provided by the Judicial Council (previously the Judicial Studies Board) and comprises of a three-day residential course. Lectures given during the training are delivered by individuals from a number of backgrounds including both legal professionals and academics as well as medical professionals and those from social science and psychological backgrounds: P.N.S. Rumney and R.A. Fenton, 'Judicial Training and Rape' (2011) 75 *Journal of Criminal Law* 473, 474-475. Rumney and Fenton interviewed the former and current course director of the programme and analysed some of the materials provided to judges during the training.

imparted during this training has influenced judicial decision-making.<sup>49</sup> Another initiative which might aid judges and is perhaps more feasible and less costly than training is the introduction of a bench book which provides instructions on how best to direct the jury in rape trials. This bench book could be modelled upon the English *Crown Court Bench Book*.<sup>50</sup> The latter sets out model directions which trial judges can use when instructing jurors on how to approach their deliberations about consent. In Ireland, a similar publication could show trial judges how to impart the message of communicative sexuality to jurors. Although such a publication must respect the independence of the judiciary and cannot prescribe how the law should be applied, it can offer valuable guidance to trial judges on how to explain the new law to the jury. While trial judges will certainly not be obliged to refer to the bench book and are free to tailor the suggested directions as they see fit, it is likely that they would make use of any available assistance in performing the difficult task of providing a balanced direction to the jury in a rape trial.

#### *The importance of positively defining consent*

The requirements of ‘choice’, ‘freedom’ and ‘capacity’ represent the minimum requirements for a valid consent under section 74. After the introduction of section 74, there was some evidence that moving to a positive definition of consent promoted a broader interpretation of the circumstances which are contraindicative of consent. Perhaps most notably, in *R v Jheeta*<sup>51</sup>, the new definition seems to have emboldened the English judiciary to adopt a more liberal understanding of the types of fraud which might prevent a complainant from being able to freely agree to sexual activity. The case concerned a defendant who had anonymously sent threatening text messages to the complainant, his ex-girlfriend. She consulted the defendant who told her that he would inform the police. He then texted the complainant, pretending to be the police, and in these messages he told the complainant that she should continue to have sex with the defendant or else she would have to pay a fine for causing him

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<sup>49</sup> Rumney and Fenton found that some of the sociological perspectives on rape provided during the training had been used in judgments and that the training on the use of sexual experience evidence was also influential in subsequent judicial practice: *Ibid.* at 479.

<sup>50</sup> This bench book, published by the Judicial Studies Board in March 2010, provides guidance for judges when directing the jury and contains a chapter on sexual offence cases. Although there is currently no equivalent publication in Ireland, it is possible that such a publication could be commissioned by the Judicial Studies Committee of the interim Judicial Council.

<sup>51</sup> [2007] EWCA Crim 1699.

distress. The complainant alleged that she had sex with the defendant on numerous occasions, solely as a result of what she erroneously believed to be police advice. The Court concluded that this was not a free choice or consent for the purposes of the Act.<sup>52</sup> Similarly, the recent case of *R v McNally*<sup>53</sup> has confirmed that deception as to the gender of one's partner can obviate a 'free agreement' to sex.

Given the restrictive definition of fraud in common law, it is unlikely that the defendant's actions in *Jheeta* would have been held capable of vitiating an apparent consent prior to the introduction of section 74. It is also unclear what stance the courts would have taken to deception as to gender. These cases demonstrate that positively requiring that the complainant be free to exercise choice can spark a fresh consideration of the types of fraud and deception that are incompatible with a valid consent. This more expansive understanding of sexual fraud may aid the prosecution in proving that consent was absent in situations where it may not previously have been possible to do so.

Section 74 also encouraged English judges to reconsider how to deal with cases where the complainant was voluntarily intoxicated. In *R v Bree*<sup>54</sup> Sir Igor Judge sent a clear message that intoxication short of unconsciousness may cause a complainant to lack the capacity to validly consent, whilst acknowledging the difficulties in reaching a decision regarding capacity in such cases:

If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. ...as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or

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<sup>52</sup> [2007] EWCA Crim 1699, para. 29.

<sup>53</sup> [2013] EWCA Crim 1051. This was a case involving assault by penetration. However, the interpretation of consent in section 74 is equally applicable to rape. For commentary see: G.A. Doig, 'Deception as to gender vitiates consent' (2013) *Journal of Criminal Law* 464.

<sup>54</sup> [2007] EWCA Crim 804.

not, however, is fact-specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.<sup>55</sup>

The reasoning in *Bree* was confirmed in *R v Hysa*<sup>56</sup>, where the court also highlighted that the prosecution does not need to show that the complainant was intoxicated to such a degree that she was incapable of communicating or offering physical resistance to the efforts of the defendant.<sup>57</sup>

The foregoing indicates that, to a certain extent, the new approach to defining consent has emboldened the English judiciary to expand upon the types of scenarios which are incompatible with the freedom to exercise genuine sexual choice. Nevertheless, a lot of questions remain unanswered. For example, although the understanding of sexual fraud was expanded upon in *Jheeta*, the limits of this broadened understanding remain unclear.<sup>58</sup> Similarly, although *Bree* and *Hysa* illustrate the judiciary's efforts to reconsider the problem of intoxicated consent in light of section 74, there is still little guidance for jurors deliberating in cases involving intoxication. Finally, there has been no comprehensive judicial consideration of the level of coercion which is incompatible with freedom to exercise genuine sexual choice.<sup>59</sup> For example, it is difficult to predict what stance the courts would take where

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<sup>55</sup> [2007] EWCA Crim 804, para. 34.

<sup>56</sup> [2007] EWCA 2056.

<sup>57</sup> In this case, the trial judge had withdrawn the case from the jury because the prosecution could not say that the complainant did not say 'yes'. The trial judge observed that, at its highest, the complainant's evidence was that she did not think she would have consented. The Court of Appeal allowed the prosecution's appeal against the trial judge's ruling, noting that there was sufficient evidence to allow the jury to make a determination on capacity to consent: See P. Rook and R. Ward, *Rook & Ward on Sexual Offences: Law & Practice*, 4<sup>th</sup> edn (Sweet & Maxwell: London, 2010) 60.

<sup>58</sup> As Fitzpatrick comments, 'questions remain as to whether any deception which brings about an instance of sexual intercourse which would not otherwise have taken place counts for the purposes of vitiating consent under section 74': B. Fitzpatrick, 'Rape: Consent' (2008) 72 *Journal of Criminal Law* 11, 13. Similar confusion has arisen in the aftermath of the decision in *R v McNally* where a 'common sense' approach to determinations of when deception is sufficient to vitiate consent was advocated: [2013] EWCA Crim 1051, para. 25. Doig comments that this approach can result in the law remaining in an 'uncertain and unsatisfactory state': see Doig, above n. 53 at 468.

<sup>59</sup> Fitzpatrick has suggested that the decisions of *R v Jheeta* and *R v Kirk* provide some indication that the new definition of consent in section 74 has encouraged trial judges to adopt a broader understanding of the types of pressures that are incompatible with a free agreement to engage in sexual activity: see Fitzpatrick, above n. 58 at 13. However, the focus of the court's decision in *R v Jheeta* was fraud. Since there was no express discussion of threats, any conclusion on the relevance of the court's decision for possible future interpretation of the term 'freedom' must be treated with circumspection. Similarly, although the decision in *R v Kirk* [2008] EWCA Crim 434 suggests that duress other than express threats of violence may be sufficient to vitiate consent, this case was

consent has been obtained by threats of adverse consequences such as job loss or withdrawal of financial support from an individual who is economically dependent on the defendant.

Most recently, it has been suggested that it is possible to give a conditional consent to sexual activity and, if the relevant condition is breached, consent will be vitiated.<sup>60</sup> Doig and Wortley note that English courts have ‘recognised that a woman is entitled to consent to sexual intercourse that her partner wears a condom<sup>61</sup> or agrees not to ejaculate inside her vagina<sup>62</sup>’.<sup>63</sup> As long as such a condition is communicated to the defendant, a deliberate decision by him to ignore it will give rise to criminal liability.<sup>64</sup> The idea of conditional consent is a significant development which allows individuals to consent to sex on a particular basis.<sup>65</sup> However, it is unclear as yet whether the concept of conditional consent will be extended to other situations<sup>66</sup> (e.g. consent on the basis that one’s partner is not suffering from HIV).

Although there have been some progressive interpretations of the definition of consent in section 74, much uncertainty continues to surround the precise meaning of, ‘choice’, ‘freedom’ and ‘capacity’. Arguably, this ambiguity has undermined the potential benefits of the introduction of a positive definition of consent. Thus, to maximise the benefits of a positive definition of consent and ensure a consistent approach to interpreting what constitutes genuine sexual choice, it would be beneficial to provide meaningful guidance on the parameters of the requirements of choice, freedom and capacity. This has been lacking in the English reform effort. However, if a definition such as section 74 were to be adopted in Ireland, judicial training and bench book guidance could be used to demonstrate the potential benefits of the positive definition of consent to judges and ensure that these benefits are

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decided prior to the introduction of the 2003 Act and thus is not a reliable guide to the likely judicial interpretation of section 74.

<sup>60</sup> See: *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) and *R (on the application of F) v DPP* [2013] EWHC 945 (Admin).

<sup>61</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin)

<sup>62</sup> *R (on the application of F) v DPP* [2013] EWHC 945 (Admin)

<sup>63</sup> G.A. Doig and N. Wortley, ‘Conditional Consent? An Emerging Concept in the Law of Rape’ (2013) *Journal of Criminal Law* 286, 289.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* at 291.

<sup>66</sup> *Ibid.*

realised. Accompanied by such measures, section 74 represents a sensible template for reform in Ireland. By introducing the concept of communicative sexuality into law, the definition paves the way for a new approach to adjudications of consent in rape trials. This goal is furthered by the positive orientation of the definition which encourages jurors to look for signs of free agreement rather than seeking to fit the facts of the case within one of the narrowly defined vitiating factors which are used to determine the absence of consent under the common law. Of course, significant judicial effort will be required to ensure that the definition is progressively applied and correctly explained to juries. This will be facilitated by judicial training and bench book guidance, as well as the introduction of a second tier within the definition which further elucidates on when free agreement to sex will not be present.

***The second tier of the legislative definition: Elucidating upon the meaning of consent***

The second tier of the definition of consent serves two goals. It gives guidance on situations where consent is unlikely to be present, thereby providing clarity on the definition provided in the first tier. Also, it has the practical effect of establishing two routes by which an absence of consent may be proved. The first will be to bring the facts of the case within one of the scenarios listed in the second tier. In this situation, the jury must be directed to find that consent was absent. If the facts do not fit within any of the scenarios that are listed within the second tier, the prosecution must revert to the second route of proving the absence of consent. This involves demonstrating the absence of consent in the traditional way, with reference to the first tier. It is important to remember that the second tier is non-exhaustive. It provides an illumination of the types of situations where consent will be absent and shortens the prosecution's process of proof in cases that fit within those paradigms. Cases that fall outside of this list can still, however, be dealt with by reference to the general definition of consent.

The second tier proposed here is largely based upon the equivalent provisions in the 2003 Act, that is, sections 75 and 76. However, there is one important difference. The list of circumstances included in sections 75 and 76 give rise, respectively, to evidential and

conclusive presumptions about consent.<sup>67</sup> When these circumstances<sup>68</sup> are proved consent will either be evidentially or conclusively presumed to be absent. This ‘presumptions’ method of structuring the second tier is a novel one and differs from the approach which other common law jurisdictions have adopted. The latter have all opted for the ‘list approach’ whereby the second tier consists of a list of situations where consent will be deemed to be absent.<sup>69</sup> The structure proposed here eschews the presumptions approach in favour of the list approach. The use of presumptions is complex and is likely to cause confusion amongst jurors.<sup>70</sup> The English provisions create a distinction between situations where consent will be conclusively presumed to be absent (i.e. essentially deemed to be absent) and those where there is a presumption that consent will be absent but this presumption may be rebutted by the defence. This adds an additional and unnecessary layer of complication to the rules.

Also, the use of evidential presumptions in relation to some of the circumstances which will be included in the second tier arguably represents a retrograde step. In the 2003 Act, only sexual fraud gives rise to a conclusive presumption of non-consent. Other traditional common law vitiating factors such as physical force and sleep or unconsciousness raise only an evidential presumption of non-consent. Legislatively providing that such circumstances raise a presumption of non-consent, as opposed to being constitutive of a lack of consent would in fact compromise the protection of sexual autonomy which is offered at common law.<sup>71</sup> Certainly, it is possible that in situations where the complainant was asleep or even where force was used that consent might still have been present<sup>72</sup> and in this sense an evidential

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<sup>67</sup> Sections 75 and 76 are also unique for applying to both consent and honest belief in consent, that is, the *mens rea* of the offence. Since this article is focused upon the definition of consent, a discussion of the implication of using presumptions in relation to honest belief is beyond the scope of the discussion here.

<sup>68</sup> The circumstances listed in both section 75 and 76 are discussed thematically later in this article.

<sup>69</sup> The list approach has been adopted in a number of common law jurisdictions, namely Scotland (Sexual Offences (Scotland) Act 2009, ss. 12-15), Canada (Canadian Criminal Code, ss. 265(3) and 273.1) and the Australian states of Victoria (Crimes Act 1958, s. 36) and New South Wales (Crimes Amendment (Consent-Sexual Assault Offences) Act 2007, s. 61HA).

<sup>70</sup> Rook and Ward state that the evidential presumptions are still widely misunderstood: see Rook and Ward, above n. 57 at 62.

<sup>71</sup> In their consideration of reform of the Scots law of sexual offences, the Scottish Law Reform Commission argued that stating that the situations listed in section 75 of the 2003 Act were merely indicative of a lack of consent was an incorrect categorisation. The Commission expressed itself to be of the view that these situations are not concerned with evidence used to prove lack of consent but are rather facts which represent lack of consent: Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scottish Law Commission, 2007) 25-26.

<sup>72</sup> A sleeping complainant may have been willing to engage in sexual activity with the defendant while sleeping. As regards force, sado-masochistic sexual activity may involve significance levels of force and still be

presumption may seem to be appropriate. However, such situations are likely to be rare and if they do come to the attention of the criminal justice system, an unfair conviction can be avoided by both prosecutorial discretion and the *mens rea* requirement.<sup>73</sup> Moreover, the second tier should serve a normative function and send a clear message about appropriate socio-sexual behaviour. Arguably, this outweighs the marginal benefit which an evidential presumption might provide in these rare cases. Another potential problem with the use of presumptions is the risk of creating an apparent hierarchy of gravity, with the situations giving rise to conclusive presumptions of non-consent perhaps being viewed as more serious than those giving rise to evidential presumptions. For these reasons, it is proposed that the list approach is the preferable option for Irish reform. This view would seem to be supported by the fact that this is the approach which has been adopted in the majority of common law jurisdictions which have sought to define consent.<sup>74</sup>

Having identified the list approach as the appropriate means of structuring of the second tier, the contents of that list must now be outlined, that is, the list of circumstances which should result in consent being deemed to be absent. The fact scenarios listed in sections 75 and 76 of the 2003 Act form a suitable template. The fact scenarios are discussed here thematically, with reference to the three necessary requirements of choice, freedom and capacity. Whilst it is recommended that some of the fact scenarios described in sections 75 and 76 should be adopted in full, in other instances some rephrasing is suggested. Additionally, it is proposed that some additional fact scenarios which are not found in sections 75 and 76 should be included in the second tier of the definition of consent in Irish law.

### *Choice*

If an individual is to exercise genuine choice she must not have been deceived in any way. The relevant provisions in relation to this theme are to be found in section 76:

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consensual. Of course, even consent will not be a defence to sado-masochistic activity which results in actual bodily harm: *R v Brown* [1993] 2 All ER 75.

<sup>73</sup> A defendant who believed that his partner was consenting will not have the requisite *mens rea* for rape: Criminal Law (Rape) Act 1981, s. 2(2).

<sup>74</sup> Canada, New South Wales, Victoria and Scotland.

- the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act<sup>75</sup>; or
- the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant<sup>76</sup>

In the first scenario, the inclusion of fraud as to purpose broadens the reach of the law in this area. At common law, only fraud as to the nature of the act vitiates an apparent consent.<sup>77</sup> The addition of purpose extends the law to cover situations where the complainant understands the nature of the act but is deceived as to its purpose (i.e. what the act is for). In *Jheeta*<sup>78</sup>, the Court noted that this provision would apply where a complainant consents to an act believing it to be for medical purposes when really it is merely for the sexual gratification of the defendant.<sup>79</sup> Similarly, in *R v Piper*<sup>80</sup>, it was held that there was fraud as to purpose where the complainant agreed to be measured for a bikini by the defendant on the understanding that this was necessary to determine her modelling potential when this was actually done for the sexual gratification of the defendant. Extending the understanding of fraud is to be welcomed. Cases like these represent a patent violation of an individual's sexual autonomy and the law should clarify that this type of deception obviates a complainant's ability to freely agree to sexual activity.

The second scenario concerns fraud as to identity. This reflects the common law whereby there cannot be a valid consent to sexual activity where the complainant was deceived about the identity of her sexual partner.<sup>81</sup> The provision is limited to impersonation of individuals who are 'known personally' to the complainant. As Ormerod comments, this phrasing is clearly intended to prevent the presumption arising when the defendant claims to be someone such a celebrity or other well-known figure with whom the complainant has no personal acquaintance but for whom the complainant may be expected to hold an attraction.<sup>82</sup> Thus, it

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<sup>75</sup> The Sexual Offences Act 2003, s. 76(2)(a).

<sup>76</sup> The Sexual Offences Act 2003, s. 76(2)(b).

<sup>77</sup> *R v Flattery* (1877) 2 QBD 410; *R v Williams* (1923) 1 KB 340.

<sup>78</sup> [2007] EWCA 1699.

<sup>79</sup> [2007] EWCA 1699, para 26.

<sup>80</sup> [2007] EWCA Crim 2131.

<sup>81</sup> It is noteworthy that under English common law prior to the introduction of the 2003 Act the only impersonation which was sufficient to invalidate consent was impersonation of the complainant's husband or regular sexual partner. Thus, this provision marked an extension of the English law.

<sup>82</sup> D. Ormerod, *Smith & Hogan's Criminal Law*, 13<sup>th</sup> edn (Oxford University Press: Oxford, 2011) 735.

would be confined to individuals whom the complainant would be familiar with in the course of her everyday life.

Although extending the meaning of sexual fraud is to be welcomed as an exercise in statutory clarification, it is worth considering whether a future Irish definition of consent should adopt a more expansive definition in this area. In particular, it is necessary to contemplate whether express provision should be made for lesser deceptions, for example, where a complainant has sex with the defendant because he has deceived her as to his level of romantic attachment to her or made a false promise of some benefit such as job promotion or financial recompense. Naturally, there is nothing to prevent a court from relying on the general definition of consent in order to find that these sorts of deceptions vitiate an apparent consent to sex. However, given the courts' tendency to take a cautious and restrictive approach when interpreting the factors which may vitiate an apparent consent, the impetus for development in this area will have to come from the legislature.

Herring has suggested that the English provisions should be expressly extended to cover deceptions such as false declarations of love or false promises of marriage.<sup>83</sup> In his view, restricting the information on which a person makes a choice can be as inhibiting of a free choice as making an option unattractive through a threat.<sup>84</sup> Indeed, he suggests that in one sense deception can be regarded as worse than a threat because the deception uses the victim's own decision-making powers against her; rendering her an instrument of harm against herself.<sup>85</sup> Consequently, Herring recommends that consent should be deemed to be absent 'where the complainant is mistaken as to a fact and had she known the truth about that fact she would not have consented to it'.<sup>86</sup> Hence, consent would be vitiated whenever a

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<sup>83</sup> J. Herring, 'Mistaken Sex' [2005] *Criminal Law Review* 511, 515.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* See also: A. Wertheimer, *Consent to Sexual Relations* (Cambridge University Press: Cambridge, 2003) 194.

<sup>86</sup> Herring suggests the formulation of a legal rule which provides that:

If at the time of the sexual activity a person:

(i) is mistaken as to a fact; and

(ii) had she known the truth about that fact would not have consented to it

then she did not consent to the sexual activity. If the defendant knows (or ought to know) that she did not consent (in the sense just described) then he is guilty of an offence:

See Herring, above n. 83 at 517.

complainant was mistaken about any fact relating to sexual activity if her understanding of that fact was influential in her decision to consent. Thus, it would include the situation where the complainant consented to sexual activity because she believed that the defendant loved her or was going to marry her. Regardless of whether or not such an approach is morally appropriate, it is unsuitable for adoption into law for a number of reasons.

First, deceptions other than those as to the nature and purpose of the act or the identity of one's partner are generally not serious enough to warrant the imposition of liability for rape. As Wertheimer notes, '[w]e may think it sleazy if a male lies about his marital status, affections, or intentions in order to get a woman into bed, but many do not think that this is a particularly serious matter'.<sup>87</sup> Whilst it is justifiable to impose criminal liability for rape in the case of fraud as to the nature or purpose of the act or the identity of one's partner, other lesser deceptions do not warrant the same penal consequences.

Second, frauds such as false declarations of love or fabricated promises of future benefits are difficult to prove. For example, it is difficult to show that the defendant's declaration of love or promise is untruthful. He may have meant it at the time and subsequently changed his mind.<sup>88</sup> Measuring the causal impact of the deception is also problematic. It may not be possible to show that the declaration or promise was the reason or at least a significant motivating factor in the complainant's decision to consent.<sup>89</sup> Even where the complainant has believed the deceptive statements and these statements have had a causal impact, the prosecution may not be able to demonstrate that this is so.<sup>90</sup> Schulhofer notes that particularly where feelings, commitments, and relationships with third parties are concerned, there are few solid guides to determining what is material and what is 'misrepresentation', as opposed

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The rephrasing recommended here is necessary to fit within the format of the second tier.

<sup>87</sup> See Wertheimer, above n. 85 at 193. Temkin makes a similar comment: J. Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 405.

<sup>88</sup> Schulhofer notes that it is difficult to distinguish between a false promise and a genuine change of heart: S.J. Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 *Law and Philosophy* 35, 90.

<sup>89</sup> See Wertheimer, above n. 85 at 201.

<sup>90</sup> Wertheimer notes that women often have sexual relations with men who do not say that they love them or intend to marry them: *Ibid.* at 201. Thus, it does not follow that because these statements were made, that they induced the complainant to consent.

to ‘puffing’ or ‘storytelling’.<sup>91</sup> This is a valid point. It would be notoriously difficult to reach firm conclusions regarding deceptions other than those included in section 76. The most likely result of such difficulties of proof is that a rule regarding lesser deceptions would be rarely (if ever) used. It is hard to justify the creation of a provision which will be of little practical effect, particularly when lesser frauds may be dealt with under the general definition of consent if the need arises. As a result of these concerns, with regard to choice, the list of situations where consent would be deemed to be absent should be limited to those contained in the English legislation.

### *Freedom*

To have freedom to consent one must be able to choose whether or not she will engage in sexual activity, free from external pressure or duress. The relevant provisions on this issue may be found in section 75, which refers to situations where:

- any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him<sup>92</sup>;
- any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person<sup>93</sup>; or
- the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act.<sup>94</sup>

The third scenario, which deals with the situation where the complainant is unlawfully detained and the defendant is at liberty, is uncontroversial. It is reasonable to assume that consent is absent in this scenario. It should be incorporated into the list of situations where consent will be deemed to be absent without any further discussion.

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<sup>91</sup> S.J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press, Cambridge, Mass., 1998) 158. See also J. McGregor, *Is it Rape? On Acquaintance Rape and Taking Women’s Consent Seriously* (Ashgate Publishing Ltd: Aldershot, 2005) 185.

<sup>92</sup> The Sexual Offences Act 2003, s. 75(2)(a).

<sup>93</sup> The Sexual Offences Act 2003, s. 75(2)(b).

<sup>94</sup> The Sexual Offences Act 2003, s. 75(2)(c).

Since the two situations dealing with violence employ similar terminology they may be discussed together. Both subsections refer to ‘any person’. Thus, the violence does not have to have been used or threatened by the defendant. The fact that the defendant took advantage of violence caused or threatened by another will suffice. Similarly, violence or the threat thereof may be directed towards the complainant or a third party such as a family member of a friend.

The provisions are, however, limited to situations involving ‘violence’ or threats of ‘immediate violence’. ‘Violence’ has been interpreted as being restricted to acts of physical harm.<sup>95</sup> In addition, the immediacy requirement seems to imply a fairly strict temporal limitation on the validity of a threat. However, as Rook and Ward point out, there is no stipulation that the complainant’s fear of violence must be based on reasonable grounds. Although there has been no judicial decision on this point to date, it seems that an honest but unreasonable fear of immediate violence suffices.<sup>96</sup>

Framing the provisions which relate to threats so as to exclude the situation where a complainant fears future violence is acceptable. In such a scenario the complainant will have an opportunity to seek help in the interim period. Should a case arise involving a threat of future violence where special circumstances exist which warrant a finding of non-consent, this could still be achieved with reference to the general definition.<sup>97</sup> However, it is arguable that confining the provisions relating to freedom to threats of physical harm is unduly restrictive and that the second tier should provide greater guidance on other types of sexual coercion.

Schulhofer suggests that any conduct that forces a person to choose between her sexual autonomy and any of her other legally protected entitlements (e.g. rights to property, to privacy, and to reputation) is by definition improper and should be treated as a serious

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<sup>95</sup> Ormerod notes that it is clear from the parliamentary debates that ‘violence’ was intended to be limited only to violence to the person: See Ormerod, above n. 82 at 735.

<sup>96</sup> See Rook and Ward, above n. 57 at 71.

<sup>97</sup> *Ibid.*

criminal offence.<sup>98</sup> There are a number of threats other than those of immediate violence which are serious enough to obviate one's freedom to exercise sexual choice. Examples would include threats to: abduct or detain the complainant or a third party<sup>99</sup> (e.g. the complainant's child); expose a secret which would be highly damaging to the complainant's interests<sup>100</sup> or ; withdraw financial support where the complainant is wholly dependent upon the defendant for survival. Where a complainant submits to sexual intercourse under any of these circumstances, she does not freely agree. Whilst threats like these could be dealt with under a general definition of consent, it would be beneficial to provide some statutory incentive to extend the understanding of threats so as to recognise non-violent sexual coercion.

Before the enactment of the 2003 Act, it was recommended that the situation 'where a person submits or is unable to resist because of threats or fear of serious harm or serious detriment of any type to themselves or another person' should be included in the second tier.<sup>101</sup> This provision should be included in the list of situations where consent will be deemed to be absent in Irish law. Read along with the provisions on violence, this provision sends a clear message that threats of adverse consequences other than physical violence can interfere with one's ability to freely exercise sexual choice. The flexibility of the terms 'serious harm' and 'serious detriment' permits courts to interpret them on a case-by-case basis. This is important because the gravity of a threat cannot always be stated in abstract terms and often depends on the particularities of the person being threatened.<sup>102</sup> Consider the example of a defendant who threatens a complainant with severe claustrophobia that he will lock her in a cupboard unless she agrees to have sex with him.<sup>103</sup> Whilst looked at objectively the threat of being locked in a cupboard may not seem like a threat of serious harm, in the foregoing situation it may well meet that threshold.<sup>104</sup> Similarly, the context in which a threat is made may influence the

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<sup>98</sup> See Schulhofer, above n. 91 at 132.

<sup>99</sup> See Temkin, above n. 2 at 101.

<sup>100</sup> *Ibid.*

<sup>101</sup> Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (Home Office: London, 2000), para. 2.10.9.

<sup>102</sup> See McGregor, above n. 91 at 167.

<sup>103</sup> A.P. Simester and G.R. Sullivan, *Criminal Law: Theory & Doctrine*, 3<sup>rd</sup> edn (Hart Publishing: Oxford, 2007) 428. (This point is not made in the fourth edition)

<sup>104</sup> Of course, if the defendant is not aware of the complainant's particular idiosyncrasy, it will not be fair to punish him for it. However, a person who subjects another to unwanted sex as a result of a wrongful threat of which he is unaware may be entitled to an acquittal on grounds that he lacked mens rea regarding the former's

interpretation of its seriousness. For example, the threat of loss of employment might be far more grave if made in an environment where jobs are in scarce supply than one in which jobs are plentiful and the complainant will easily find another job.

The inclusion of the word 'serious' as a precondition in relation to each of the terms will prevent more minor or trivial threats from being categorised as sufficient to interfere with one's ability to freely agree to sexual activity. It is likely that trial judges will exercise care in recognising threats under this provision. Nonetheless, its inclusion should provide the momentum for a more expansive interpretation of the types of coercion which are sufficient to result in consent being deemed to be absent.

### *Capacity*

An individual has capacity to consent if she can make a meaningful decision as to whether to engage in sexual activity. The relevant provisions on this issue in the 2003 Act are as follows:

- the complainant was asleep or otherwise unconscious at the time of the relevant act<sup>105</sup>;
- because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented<sup>106</sup>; or
- any person had administered or caused to be taken by the complainant, without the complainant's consent, a substance, which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act<sup>107</sup>

The first provision which deems consent to be absent where the complainant was asleep or unconscious is uncontroversial and merely represents a statutory restatement of the common

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non-consent: P. Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Ashgate Publishing Ltd: Aldershot, 2004) 183.

<sup>105</sup> The Sexual Offences Act 2003, s. 75(2)(d).

<sup>106</sup> The Sexual Offences Act 2003, s. 75(2)(e).

<sup>107</sup> The Sexual Offences Act 2003, s. 75(2)(f).

law.<sup>108</sup> There is no need for debate in relation to its proposed inclusion in the list of situations where consent will be deemed to be absent.

The second provision which deems consent to be absent where the complainant is unable to communicate only applies to those with physical disability and does not refer to complainants with a mental disorder who are not capable of communicating whether or not they consent.<sup>109</sup> Examples of individuals who may be affected by this provision are those suffering from cerebral palsy or the effects of a stroke.<sup>110</sup> Simester and Sullivan note that this provision might raise issues where there is an existing sexual relationship such that there is a mutual understanding about consent.<sup>111</sup> However, in such a scenario, a defendant would be able to exculpate himself where he lacked the *mens rea* for rape.<sup>112</sup> Consequently, this fact scenario should be included within the second tier. The definition of consent proposed here is instilled with the ideal of communicative sexuality, that is, that consent should be communicated. This ideology must be carried through to the second tier of the definition. If an individual cannot communicate, then she cannot give a valid consent and must be protected from unwanted sexual intrusion. Although the circumstances outlined in this provision are unlikely to occur very often, it is worthwhile as it fits within the ideology of the proposed approach to consent and protects potentially vulnerable individuals from unwanted sexual intrusion.

The English provision relating to intoxication is complex and has received criticism from commentators for a number of reasons.<sup>113</sup> On a practical level, it is of limited effect as it applies mainly to the ‘drug rape’ scenario where a complainant has had a drug such as Rohypnol surreptitiously administered to her. Hence, the provision may be seen as

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<sup>108</sup> *R v Mayers* (1872) 12 Cox CC 311; *R v Larter & Castleton* [1995] *Criminal Law Review* 75.

<sup>109</sup> See Rook and Ward, above n. 57 at 74. Individuals with mental incapacity are dealt with under other provisions of the law: Sexual Offences Act 2003, ss. 30-44.

<sup>110</sup> *Ibid.*

<sup>111</sup> A.P. Simester and G.R. Sullivan, *Criminal Law: Theory & Doctrine*, 5<sup>th</sup> edn (Hart Publishing: Oxford, 2013) 480.

<sup>112</sup> *Ibid.* Such a defendant would not have an intention to have sexual intercourse with the complainant without her consent and would not be reckless regarding her lack of consent. In any event, in an Irish context, such a defendant could rely on the honest belief in consent defence which exculpates a defendant who has an honest belief that the complainant was consenting: Criminal Law (Rape) Act 1981, s. 2(2).

<sup>113</sup> E. Finch and V.E. Munro, ‘The Sexual Offences Act 2003: Intoxicated Consent and Drug-Assisted Rape Revisited’ (2004) *Criminal Law Review* 789; J. Temkin and A. Ashworth, ‘The Sexual Offences Act 2003: Rape, Sexual Assault and the Problems of Consent’ (2004) *Criminal Law Review* 328, 339-340.

representing a retrograde step. The common law provides that consent is vitiated where the complainant is intoxicated to such a degree that she is unable to provide a valid consent to sexual activity.<sup>114</sup> Although this guidance is vague, there is no distinction between voluntary and involuntary intoxication.

Temkin and Ashworth posit that the English provision on intoxicated consent places those who take alcohol or drugs voluntarily in a different moral category from those who have had alcohol or drugs ‘administered’ to them against their will.<sup>115</sup> Consequently, the provision may be seen as protecting those who can be construed as ‘innocent’ victims.<sup>116</sup> However, Temkin and Ashworth suggest that even in situations where the defendant has not induced the complainant’s intoxication, he may still have taken advantage of the fact that, as a result of intoxication, the complainant was unable to resist his advances or to make an informed decision about whether to engage in sexual activity.<sup>117</sup> Distinguishing between voluntary and involuntary intoxication would appear to be based on the notion of the ‘deserving victim’ as opposed to the practical effects which intoxicants may have on an individual’s capacity to consent.<sup>118</sup> There is already a societal tendency to attribute blame to complainants who do not conform to societal ideals of the ‘real victim’ by engaging in what is seen to be ‘risky’ or inappropriate behaviour such as drinking to excess. It would be very unfortunate if the new legislative approach to defining consent had the effect of compounding the societal tendency to vilify such complainants. The salient issue for jurors is the impact which intoxication had upon the complainant’s capacity to choose. The source of the intoxication is irrelevant. Creating a distinction between voluntary and involuntary intoxication merely perpetuates prejudicial stereotypes in the law.

For these reasons, an alternative wording in relation to intoxication is preferable to the English approach. The second tier should state that consent will be deemed to be absent where ‘the complainant was too affected by alcohol or drugs to freely agree to sexual

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<sup>114</sup> *R v Lang* (1975) 62 Cr App R 50.

<sup>115</sup> See Temkin and Ashworth, above n. 113 at 339-340.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> See P.N.S. Rumney and R.A. Fenton, ‘Intoxicated Consent in Rape: *Bree* and Juror Decision-Making’ (2008) 71 *Modern Law Review* 279, 288 and Firth, above n. 41 at 115.

activity’. Admittedly, this is a vague provision and whether an individual was ‘too affected by alcohol or drugs to freely agree’ will have to be determined on a case-by-case basis. Since a high number of cases involve an intoxicated complainant, such determinations will need to be made on a frequent basis.<sup>119</sup> However, given the difficulty of gauging the impact of intoxication upon an individual’s capacity to consent, this is the only approach which is suitable. As noted in *Bree*, it would be unrealistic to endeavour to create some kind of grid system which would enable determinations of capacity to be related to some prescribed level of alcohol consumption.<sup>120</sup> The differing effects which alcohol and drugs may have on differing individuals and even on the same individuals on different occasions means there can be no definitive guidelines on precisely when an individual’s ability to consent is obviated by intoxication. Thus, any guidance which is given in this area must be flexible. The best that the law can achieve here is to send a clear message that, regardless of whether intoxication was voluntary or involuntary, there is a point of intoxication beyond which an individual is not capable of exercising genuine sexual choice. Although it is not ideal that determinations of capacity in this area must be made in an *ad hoc* manner in individual cases, this is the only approach which is workable in light of the individualised manner in which capacity to consent must be assessed. Even though the provision recommended here does not, and indeed could not, provide a test for determining whether an individual is so intoxicated that she cannot freely agree to sexual activity, it is still meaningful.

#### *Additional provisions not present in English law*

Whilst in general the fact scenarios contained in the 2003 Act represent appropriate guidance on consent, there are some additional situations which could be included in the Irish reforms in order to ensure that the second tier is as comprehensive as possible. First, there should be a provision which states that consent will be absent where ‘agreement is expressed by a third party not the complainant’.<sup>121</sup> It might be thought that this is unnecessary as it merely states

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<sup>119</sup> Statistics on the number of Irish cases involving intoxicated complainants are provided in the discussion of the Irish law above.

<sup>120</sup> [2007] EWCA Crim 804, para. 35.

<sup>121</sup> A similar provision had been considered for inclusion in the 2003 Act but was rejected during the parliamentary debates. See Home Office, above n. 101 at para 2.10.9; Temkin and Ashworth, above n. 113 at 339. For a synopsis of the discussion of this provision in parliament: See Home Affairs Committee, *Sexual Offences Bill: Fifth Report of Session 2002-03* (The Stationery Office Ltd, 2003), para. 33.

the obvious.<sup>122</sup> However, there is value in the law stating unequivocally that if sexual activity with someone is being contemplated then reasonable steps must have been taken to ensure that she has expressed her consent to it.<sup>123</sup> This is particularly the case given the fact that the proposed new law is intended to convey the message that consent must be communicated effectively between sexual partners.

The second additional provision which should be included is one which deals with withdrawal of consent. Common law provides that consent to sex may be withdrawn at any time and continuing to engage in sexual activity once consent has been withdrawn will make the defendant liable for rape.<sup>124</sup> This rule should be placed on a legislative footing. The second tier should include the situation where ‘the complainant having originally consented to engage in sexual activity expresses by words or conduct a lack of agreement to continue to engage in the activity’.<sup>125</sup>

Finally, the second tier should include the situation where the defendant induces the complainant to submit to sexual activity by abusing his position of trust, power or authority. This scenario could arise in the context of professional or caring relationships such as: medical professionals and their patients; religious advisors and those they minister to; social workers and those who they care for or; lawyers and their clients. Such relationships are of a fiduciary nature, that is, one person has justifiably placed confidence, faith and reliance in another whose aid, advice or protection is sought in some matter.<sup>126</sup> Jorgenson notes that most people seeking help from a therapist, physician, or lawyer do so in an admitted position of vulnerability, coping with a physical or psychological problem, a threatening legal matter,

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<sup>122</sup> See Scottish Law Commission, above n. 71 at 35.

<sup>123</sup> This was the recommendation of the Scottish Law Commission in their consideration of reform of the rules relating to consent in Scottish sexual offences law: *Ibid.* at 35. This provision has been included in section 13(2)(f) of the Sexual Offences (Scotland) Act 2009. It is noteworthy that a similar provision is also to be found in section 73.1(2)(a) of the Canadian Criminal Code.

<sup>124</sup> *R v Kaitamaki* [1985] AC 147.

<sup>125</sup> This wording has been taken from section 73.2(e) of the Canadian Criminal Code. A similar provision may be found in section 15(3) of the Sexual Offences (Scotland) Act 2009 which provides that consent to conduct may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct. Section 15(4) provides that if the conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

<sup>126</sup> L.M. Jorgenson, ‘Sexual Contact in Fiduciary Relationships: Legal Perspectives’ in J.C. Gonsioreck (ed), *Breach of Trust: Sexual Exploitation by Health Professionals and Clergy* (Sage Publications: London, 1995) 239.

or perhaps simply the vulnerability intrinsic to lack of knowledge.<sup>127</sup> The undesirability of sexual relationships between professionals and their clients is evidenced in the fact that the codes of conduct of many professions contain an express ban on such relationships.<sup>128</sup> The rationale for such censure is clear. These relationships present unique opportunities for the stronger party to abuse his position in order to induce the weaker party to submit to sexual intercourse. For example, the professional may threaten to withdraw his support or to reveal secrets which he has discovered in the course of the relationship.

However, whilst abuse of trust in these relationships may result in censure from professional bodies, it is unclear whether it would attract criminal liability. Of course, as pointed out by the Scottish Law Commission, a scenario where a professional abuses his position of authority in order to procure sexual activity with a vulnerable individual would probably be covered by one or more other situations on the list such as those relating to fraud or coercion.<sup>129</sup> Nevertheless, there may be circumstances which do not fit within the other presumptions and where it might be thereby difficult to prove that consent was absent.<sup>130</sup> Moreover, it is worth sending a clear message about the inappropriateness of this kind of abuse of authority. To make clear that such circumstances are within the remit of the criminal law, the list of situations where consent will be deemed to be absent should include the circumstance where ‘the complainant submits to sexual activity because of the abuse of a position of authority or trust’.<sup>131</sup> An individual should be found to stand in a position of authority or trust in relation to a complainant when he has supervisory or disciplinary

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<sup>127</sup> *Ibid.* at 240.

<sup>128</sup> For example, the code of conduct for medical professionals expressly forbids sexual relationships with patients: Irish Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, 7<sup>th</sup> edn (Medical Council: Dublin, 2009) para. 16.1. A similar prohibition may be found in the code of conduct for counsellors and psychotherapists: National Counselling Institute of Ireland, *Code of Ethics and Practice for Counsellors and Psychotherapists* (National Counselling Institute of Ireland: Dublin, 2008) para. 2.2.7.

<sup>129</sup> Scottish Law Commission, *Discussion Paper on Rape and other Sexual Offences* (The Stationery Office: Edinburgh, 2006) para. 3.55.

<sup>130</sup> For example, Temkin notes that a patient may not wish to have sexual relations with her therapist but may fear that he will otherwise terminate therapy, a result which she is too dependent or emotionally disturbed to contemplate. Alternatively she may welcome the therapist’s advances or be too confused to resist them: See Temkin, above n. 2 at 108. Although this conduct is reprehensible, a jury may not be willing to accept that it constitutes a threat sufficient to vitiate consent unless a provision of abuse of authority is available.

<sup>131</sup> This wording is based on section 61HA(6)(c) of the Crimes Act 1900 (New South Wales). A similar provision may be found in section 273.1(2)(c) of the Canadian Criminal Code.

authority over the complainant or is engaged in the provision of professional treatment, assessment or counselling to the complainant.<sup>132</sup>

*The proposed second tier of the definition of consent in Irish law*

At this point it is worth demonstrating the way in which the proposed second tier of the definition of consent would be presented in legislation:

A complainant is to be taken not to have consented to sexual activity where:

- 1) the defendant intentionally deceived the complainant as to the nature or purpose of sexual activity;
- 2) the defendant intentionally induced the complainant to consent to sexual activity by impersonating a person known personally to the complainant<sup>133</sup>;
- 3) the complainant submits to sexual activity as a result of violence or threats of violence towards the complainant or towards a third party;
- 4) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- 5) the complainant submits to sexual activity as a result of threats of serious harm or serious detriment of any type to the complainant or a third party;
- 6) the complainant was asleep or otherwise unconscious at the time of the relevant act;

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<sup>132</sup> This definition is adapted from a model provision recommended by Schulhofer: See above n. 91 at 283-284. The New South Wales and Canadian provisions do not define what is meant by a position of authority or trust.

<sup>133</sup> This is a slightly amended version of the equivalent English provision which does not seem to require that the defendant's deceit as to the nature or purpose of the act actually *caused* the complainant to consent. This is significant since the fraud may not actually have impacted on the complainant's decision whether or not to consent. Although in practice it is unlikely that the courts would find an absence of consent in such a circumstance, it is worth clarifying the phrasing of the provision.

- 7) the complainant was too affected by alcohol or drugs to freely agree to sexual activity;
- 8) agreement is expressed by a third party not the complainant;
- 9) the complainant having originally consented to engage in sexual activity expresses by words or conduct a lack of agreement to continue to engage in the activity; or
- 10) the complainant submits to sexual activity because of the abuse of a position of authority or trust.

This provision offers an important buttress for the definition of consent proposed above. First, it supports the new positive definition of consent by providing express guidance on the types of situations which will contravene the requirements of freedom, choice and capacity. Second, the provision supports the standard of communicative sexuality by encouraging jurors to look at the context of the impugned sexual encounter and not rely on stereotypes about rape or on the factors which have been traditionally held to vitiate consent. Given that these provisions deem consent to be absent, concern might be raised that this provision would contravene the fair trial rights of defendants.<sup>134</sup> However, it is submitted that the proposed provision will not fall foul of due process safeguards. First, although consent will be deemed to be absent when one of these situations is found to exist, this merely serves to prove the *actus reus* of rape. The defendant cannot be convicted unless it is shown that he had the requisite *mens rea* regarding the complainant's consent. Second, the existence of the circumstances must be proven beyond reasonable doubt by the prosecution and this is a considerable hurdle which must be surmounted before consent will be deemed to be absent. Consequently, it is submitted that the proposed provision will not compromise defendants' due process rights.

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<sup>134</sup> These rights are protected by Article 38.1 of the Irish Constitution and Article 6 of the European Convention on Human Rights.

The success of the second tier is heavily dependent on the way in which it is implemented and presented to the jury by trial judges. Thus, the bench book which was discussed above should also contain guidance on the list of situations where consent will be deemed to be absent. Trial judges should be directed on how to instruct jurors on the significance of the situations on this list, that is, if they are satisfied that one of these situations is present in the case before them, consent will be deemed to be absent. Judges will also require guidance so that the second tier is applied in a progressive manner. For example, trial judges should be shown how to direct jurors regarding the types of threats which may be sufficient to vitiate consent, bearing in mind that the legislation seeks to broaden the definition of such threats beyond those of physical violence. Similarly, judges may need to be shown how to direct jurors in relation to the abuse of a position of authority provision, which is a new addition to the law. Thus, as with the definition of consent, the bench book will provide an invaluable mechanism for ensuring that the second tier achieves its full potential and offers optimum support to the general definition of consent.

### **Conclusion**

The absence of a legislative definition of consent in Ireland has ensured that it lags behind its common law counterparts and that the prosecution is not afforded optimum opportunity to prove an absence of consent in rape trials. The definition of consent proposed here would offer a marked improvement upon the current law. The two-tier definition sends a clear message about what is necessary for a legally valid consent to sexual activity. In centring on the requirement of ‘free agreement’ and setting out prerequisites for a valid consent, the concept of communicative sexuality is introduced which encourages a new context-sensitive approach in juror deliberations about consent and thereby provides the prosecution with a fairer opportunity to prove that consent was absent. This process is facilitated by the second tier which gives clear examples of the breadth of circumstances which are capable of depriving an individual of the ability to exercise genuine sexual choice. Since many of these scenarios would not be seen as capable of vitiating consent under the current rules, the second tier thus helps to extend the reach of the criminal law and thereby broadens protection from sexual abuse and exploitation.

Certainly, the introduction of a definition of consent is not an end in itself. Much effort will be required to ensure that the new provisions are appropriately and progressively applied by trial judges. The judicial training initiatives and the bench book proposed here are vital tools which must be introduced if legislative clarification of consent is to achieve practical results. Thus, to a certain extent, the introduction of a definition of consent would mark only the beginning of the process of change in this area. In many ways, ‘the complex and largely invisible task’<sup>135</sup> of enforcing the new definition in the institutions of the criminal justice system is where the real progress will be made. At the same time, statutory clarification of consent represents a vital first step towards change and would signify the Irish legislature’s commitment to development of an area of the law which has lain stagnant and neglected for far too long.

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<sup>135</sup> L. Snider, ‘Feminism, Punishment and the Potential of Empowerment’ (1994) 9 *Canadian Journal of Law and Society* 75 98.