

# Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence

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The Journal of Criminal Law  
2017, Vol. 81(5) 367–392  
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DOI: 10.1177/0022018317728824  
journals.sagepub.com/home/clj



## Abstract

Despite repeated legislative attempts to restrict the use of sexual history evidence in rape trials, it continues to be admitted in many cases, causing considerable debate and leading to further attempts to reform the law. In this light, this article examines afresh the admissibility of sexual history evidence in rape trials. It focuses particularly on evidence relating to persons other than the accused (third-party evidence), following the recent controversial judgment of the Court of Appeal in *R v Ched Evans* where such evidence was introduced. The justifications for restricting sexual history evidence are considered, as well as research data on how often it is being used. Following an analysis of the current law, the article concludes that urgent reform is needed and a number of law reform options are examined.

## Keywords

Sexual history evidence, rape trials, section 41, Youth Justice and Criminal Evidence Act 1999, rape shield, sexual behaviour, Heilbron Report, Ched Evans, *R v A*

Lord Coleridge, giving judgment in 1887, would be forgiven for thinking that in *R v Riley* he had settled the law on whether sexual history evidence with parties other than the accused is relevant in rape trials. He said that in seeking to prove whether or not a criminal attempt to rape, as was the issue in that case, has been made ‘upon her by A, evidence that she has previously had connection with B and C is obviously not in point’.<sup>1</sup> He continued that any such evidence should be excluded:

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1. *R v Riley* (1887) 18 QBD 481 at 483–4. Lord Pollock concurred stating that it is ‘clear that evidence of the woman having had connection with other men would not be relevant’ and Mathew J said that this approach is ‘in accordance with justice and common sense’.

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not only on the ground that to admit it would be unfair and a hardship to the woman, but also on the general principle that it is not evidence which goes directly to the point in issue at the trial.<sup>2</sup>

Finally, he identified the dangers of permitting such evidence, 'It is obvious, too, that the result of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of this nature'.<sup>3</sup>

Unfortunately, the clarity of Coleridge's exposition was not reflected in the development of English law. An increasingly tolerant judicial approach to permitting sexual history evidence led to calls for reform, with the 1975 Heilbron Report recommending significant new restrictions.<sup>4</sup> The subsequent Sexual Offences (Amendment) Act 1976, however, resiled from the stricter Heilbron approach, placing its faith in judicial discretion to limit the admission of such evidence. This discretionary approach, however, did little to stem the flow of sexual history evidence being admitted: once again leading to demands for legislative reform.<sup>5</sup> Eventually, the Youth Justice and Criminal Evidence Act 1999 was adopted, replacing the discretionary regime with a closed set of exceptions to a general rule of exclusion and, importantly, no overriding judicial discretion. Nonetheless, despite the clear legislative intent to curtail the use of sexual history evidence in rape trials, it continues to be admitted in a considerable number of trials. In addition, shortly after the introduction of the 1999 Act, the House of Lords decision in *R v A* reintroduced an element of judicial discretion.<sup>6</sup> Not surprisingly, therefore, there have been continued calls for (further) legislative reform. Most recently, proposals were made in Parliament to strengthen the law following the controversial Court of Appeal judgment in *R v Ched Evans* where it was held that sexual history evidence relating to persons other than the accused was admissible and potentially relevant.<sup>7</sup> Following a retrial, where this evidence was introduced, the defendant was acquitted of rape.

In this context of high-profile and contentious public debates, and likely further attempts to reform the law, this article examines afresh the admissibility of sexual history evidence in rape trials.<sup>8</sup> In light of the *Evans* controversy, it focuses particularly on evidence relating to persons other than the accused (third-party evidence). In order to provide necessary context, it begins by considering the justifications for restricting sexual history evidence, followed by an outline of the research data on how often this evidence is used. The current law, as set out in s. 41 of the Youth Justice and Criminal Evidence Act 1999, is then analysed, including a detailed assessment of the *Evans* judgment. Concluding that the law is in urgent need of reform, the final section puts forward a number of recommendations.

## Justifying Restrictions on Sexual History Evidence

Evidence focusing on a complainant's sexual history has long been introduced in rape trials, originally focusing on ensuring that evidence of prostitution—'notorious bad character'—was before the court to

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2. Ibid.

3. Ibid. Coleridge was not alone. Ten years later, in the Scottish case *Dickie v HM Advocate*, Lord Justice-Clerk Macdonald stated in relation to sexual history evidence with third parties: 'I am not aware that such evidence has ever been allowed, and indeed it could only be allowed upon the footing that a female who yields her person to one man will presumably do so to any man—a proposition which is quite untenable' (1897) 24 R(J) 82 at 84. Lord MacDonald did hold that such evidence would be admissible if it was part of the events which formed the subject matter of the charge.

4. Heilbron Committee, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352 (HM Government, 1975).

5. In *R v A*, Lord Steyn stated that the 1976 Act 'did not achieve its object of preventing the illegitimate use of prior sexual experience in rape trials': [2001] UKHL 25 at 28.

6. Ibid.

7. *R v Ched Evans* [2016] EWCA Crim 452.

8. For ease of reference, the terms 'rape' and 'rape trials' are used throughout, but should be taken to include all sexual offences and sexual offence trials.

both infer consent and challenge credibility.<sup>9</sup> Subsequent cases tested the boundaries of this early case law, suggesting that evidence of promiscuity, while not prostitution, similarly challenged complainant credibility and implied consent. Such inferences about women's sexuality and credibility—that sexually active women are less credible as witnesses and more likely to consent—are the 'twin myths' that restrictions on sexual history evidence have been trying to counter.<sup>10</sup>

As explained by Justice McLachlin in the influential Canadian case *R v Seaboyer*:

These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar.<sup>11</sup>

As a result of the beliefs underpinning these 'twin myths' being increasingly challenged, attempts have been made across many jurisdictions to restrict the admissibility of sexual history evidence. Often termed 'rape shield' laws, such provisions seek to limit the introduction of what is commonly referred to as 'sexual history evidence', though this term does include sexual activity after an alleged rape as well as evidence relating to other forms of sexual behaviour and character.<sup>12</sup> However, despite legislation being introduced to restrict admission of these forms of evidence, debate has continued to rage over the uses to which it is put.

### *Protecting Autonomy: Consent as Person and Situation Specific*

Sexual history evidence is most controversially introduced to support inferences of consent and/or to challenge credibility.<sup>13</sup> In relation to consent, adducing sexual history evidence relies on an assumption that previous consent is indicative of consent on the occasion in question. Such a rationale profoundly challenges the notion of consent being person and situation specific. Specifically in relation to sexual activity with the accused, it assumes that consent can be inferred from prior consent. This position was articulated by Lord Steyn in *R v A* where he stated that:

As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind.<sup>14</sup>

In a similar vein, analysing *R v A*, Di Birch claims that the 'complainant's prior sexual behaviour with A makes her non-consent highly unlikely'.<sup>15</sup> Not only does this suggest that prior consent may be relevant but indeed claims that it makes consent *more likely*.

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9. For a discussion of the early case law, see Jennifer Temkin, 'Regulating Sexual History Evidence: the limits of discretionary legislation' (1984) 33 ICLQ 942 and above n. 4 paras 93–110.
  10. An analysis of the laws and practice relating to sexual history evidence is necessarily gendered due to the vast majority of rape victim-survivors being women (Ministry of Justice, *An Overview of Sexual Offending in England and Wales* (Ministry of Justice, 2013)). Further, the history of this area is one of gendered assumptions about women's sexuality and credibility impacting on admissibility decisions. Questions of relevance and prejudice regarding the sexual history of male complainants require specific consideration beyond the scope of this article. Note, however, the judgment in *R v B* where the Court of Appeal held that just as questions relating to a woman's 'promiscuity' should be excluded, so too questions of alleged homosexuality: [2007] EWCA Crim 23.
  11. *R v Seaboyer* [1991] 2 SCR 577 at 634.
  12. While English law refers to 'sexual behaviour' (s. 41–43 of the Youth Justice and Criminal Evidence Act 1999), the term 'sexual history' is used here as the commonly employed term in this area.
  13. The other common reasons for its introduction include: evidence to prove that a person other than the accused was responsible; motive to lie; rebut prosecution claims; and similar act evidence.
  14. Above n. 5 at para. 31.
  15. D. Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' (2002) *Criminal Law Review* 531 (July) at 542. Note that the complainant disputed that there had been previous consensual sexual relations.

While this is a commonly held position, infusing English jurisprudence and scholarly work in the field, it is a prohibited form of reasoning in Canadian law because it is based on one of the 'twin myths'. In particular, such an approach does not sufficiently recognise that consent is given afresh on each occasion. Also, in assuming consent to be *more likely*, it does not sufficiently recognise the variety of contexts of sexual relationships, including coercive or abusive relationships. Further, it neglects to consider the possibility that, in fact, having once engaged in sexual activity with the accused, he may become the person to which the complainant is least likely to consent in future. Indeed, assuming that someone is more likely to consent to sexual activity if they have done so in the past, is not so far away from the once-held assumption, and legal position, of implied consent during marriage.

Accordingly, while it is commonly assumed that evidence of previous consensual sexual history is relevant to support an inference of consent, this approach must be challenged. While it might be possible to say, in some circumstances, that evidence of previous consensual relations is legally relevant, it being marginally more likely that sex was consensual than not, as a general proposition, this fails to take into account the variety of conditions within which sexual relations take place. Even in cases in which evidence might be said to be relevant, this should not mean that such material is necessarily admitted (due to its potential prejudice and/or only marginal relevance to the issues).

Notwithstanding ongoing debate over the use of sexual history evidence with the accused to infer consent, there is greater agreement of its irrelevance regarding third-party evidence. As Lord Coleridge noted all those years ago, there is no probative connection between consenting to one person and consent to a different person. The Heilbron Report agreed, concluding that third-party sexual history evidence is 'of no significance so far as credibility is concerned and is only rarely likely to be relevant to issues directly before the jury'.<sup>16</sup> The Report recommended that 'in general' third-party sexual history evidence 'ought not to be introduced'.<sup>17</sup> Nonetheless, there are those who have maintained its relevance to consent. In the legislative debates leading to the 1999 Youth Justice and Criminal Evidence Act, the then Lord Chief Justice Lord Bingham stated that where the defence wished to ask a complainant whether she had voluntarily had sexual intercourse with men other than the accused on the days before and after an alleged rape, 'no rational person would think that those questions are irrelevant'. He continued that this evidence or questioning was relevant both to the 'truth of the complaint made' and to the defence of consent and that this was only 'good sense'.<sup>18</sup> This serves to highlight the tenacity of some beliefs regarding sexual history evidence and its relevance and brings to mind the cautionary note sounded by Canadian Justice L'Heureux-Dubé:

Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. There are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth... This area of the law has been particularly prone to the utilisation of stereotype in the determination of relevance.<sup>19</sup>

Nonetheless, more common today are judicial pronouncements disavowing the relevance of third-party evidence to consent, including Lord Clyde in *R v A* who clearly stated that while some evidence of previous sexual behaviour with the defendant may be relevant to an issue of consent, he did not 'consider that evidence of her behaviour with other men should now be accepted as relevant for that purpose'.<sup>20</sup> This affirms the notion of consent as expressed by Lady Hale:

16. Above n. 4 para. 131.

17. Above n. 4 para. 134. The only exceptions were where the previous sexual conduct was 'strikingly similar' to the alleged offence and where evidence was necessary to rebut prosecution claims.

18. Hansard, 8 February 1999, col. 55.

19. *R v Seaboyer* above n. 11 at 228.

20. Above n. 5 para. 125.

It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.<sup>21</sup>

Applying this reasoning clarifies that consent to sexual activity with a third party is never relevant to the issue of consent with the accused.<sup>22</sup> However, despite the authority of this approach, not only jurisprudentially but also conceptually in terms of the values of sexual autonomy and free choice, it has been sorely tested, with the judgment in *Evans* once again raising the prospect of sexual history evidence with third parties being used to demonstrate consent.

### *Prejudicial Impacts and the Integrity of the Trial*

The other problematic use of sexual history evidence, the second of the ‘twin myths’, is its introduction to challenge credibility. While it is rarely suggested nowadays that sexually active women are less truthful, focus has shifted from ‘probative credibility’ (i.e. truthfulness) to what Aileen McColgan has termed ‘moral credibility’.<sup>23</sup> Moral credibility refers to evidence to ‘show the complainant to be so morally inferior as either not to deserve the court’s sympathy or not to provide a suitable foundation for punishing the accused’.<sup>24</sup> Similarly, while restrictions may have been introduced on sexual history evidence (such as identifiable acts or practices), evidence relating to ‘sexual character’ may continue to be admitted with adverse impacts.<sup>25</sup> ‘Sexual character’, often implied by innuendo, references to women’s lifestyles, personal habits, dress and such like, can be more nebulous than specific instances of sexual history, making it more difficult to control or deny. In practice, evidence implying sexual character invites moral judgments about complainants, with the risk of influencing determinations as to credibility and responsibility.

Related to this use of sexual history evidence is the argument that the ‘task of the defence’ is to ‘normalize rape into sex’.<sup>26</sup> The more the defence can assimilate the activities under scrutiny in the trial to normal, everyday sexual behaviour, the less likely the jury are to consider the events to constitute rape.<sup>27</sup> In this way, evidence of a complainant’s sexual proclivities can distract jurors’ attention from the consideration of ‘rape’, directing them towards that of ‘sex’.<sup>28</sup>

This idea of ‘moral credibility’, and the influence of sexual character evidence, helps to explain why despite decades of the commonly stated position that sexually active women are not less worthy of belief, the defence may find value in introducing sexual history evidence. It seems that knowledge of a woman’s sexual activities contributes to shifting the focus of the trial from the defendant’s actions to those of the complainant, thereby also shifting legal and moral blame from the defendant to the

21. *R v C* [2009] UKHL 42, para. 27. For an analysis of how concepts of autonomy may be undermined by generalisations, such as ones being discussed here, see A. Pundik, ‘Freedom and Generalisation’ (2017) 37 *Oxford Journal of Legal Studies* 189–216.

22. Many US states exclude entirely sexual history evidence with third parties on the basis of its irrelevance. For a discussion, see E. Kessler, ‘Pattern of Sexual Conduct Evidence and Present Consent: limiting the admissibility of sexual history evidence in rape prosecutions’ (1992) 14 *Women’s Rights Law Reporter* 79 at 82.

23. A. McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ (1996) 16 *OJLS* 275. Note also that while it will rarely be declared that sexual history challenges truthfulness, sexual history evidence is admitted in order to demonstrate ‘motive to lie’ (see further below).

24. *Ibid.* at 281.

25. For a discussion, see M. Burman, ‘Evidencing sexual assault: women in the witness box’ (2009) 56 *Probation Journal* 379–398, esp. at 384–386.

26. Above n. 23 at 306.

27. This is due to the dominance of various rape myths, particularly assumptions as to what constitutes ‘real rape’ (that rape is committed by strangers with violence).

28. Above n. 23 at 306. See also L. Ellison and V. Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49 *British Journal of Criminology* 202–219.

complainant.<sup>29</sup> As the Heilbron Report identified many years ago, ‘unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial’.<sup>30</sup>

For these reasons, sexual history evidence risks introducing irrelevant or prejudicial material which may distort rather than promote the truth-finding role of the trial and rectitude in its decision-making. Restrictions on this evidence are necessary, as further identified by the Heilbron Report: the ‘exclusion of irrelevant evidence at the trial will make it easier for juries to arrive at a true verdict’.<sup>31</sup> Similarly, Justice Gonthier in the Canadian case of *R v Darrach*, upholding the constitutionality of Canadian restrictions on sexual history evidence, held that the accused is not entitled to procedures that would ‘distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial’.<sup>32</sup> The risk, as identified by Lord Hutton in *R v A*, is that the ‘sexual history of the complainant may distort the course of the trial and divert the jury from the issue which they have to determine’.<sup>33</sup> The integrity of the trial, therefore, means that irrelevant or prejudicial evidence, especially evidence that may mislead the jury or distract it from the task at hand, must be excluded from the trial.

A range of studies across different jurisdictions have identified potentially distorting impacts of sexual history evidence, specifically that sexual history evidence makes acquittals more likely as jurors consider complainants less credible and more likely to have consented.<sup>34</sup> It seems that juries often focus on the ‘respectability’ of women complainants, with evidence of previous sexual activity, alongside drinking, drugs or other ‘risk-taking’ activities, reducing their ‘respectability’ which, in turn, reduces the assessment of credibility.<sup>35</sup> This approach was neatly summed up by one QC who explained that ‘if the complainant could be portrayed as a “slut” this was highly likely to secure an acquittal’.<sup>36</sup>

### Protecting Witnesses from Unnecessary Humiliation and Distress

In this context, it is not difficult to understand how research evidence and witness testimony over decades has raised concerns about the extent to which rape complainants are facing humiliating and traumatic trial processes. Phrases such as the ‘second rape’ or ‘judicial rape’ have become common parlance due to the enduring evidence from complainants of their adverse treatment in court.<sup>37</sup> Thus,

29. The Ched Evans case provides a recent example of the enduring nature of negative attitudes towards sexually active women with social media being replete with disparaging references to the complainant as ‘slag’ and far worse: as discussed in Holly Baxter, ‘Justice should never be done like it was in the Ched Evans rape trial’. *The Independent*. Available at: <http://www.independent.co.uk/voices/ched-evans-footballer-rape-trial-acquitted-justice-woman-misogyny-consent-prison-walk-free-a7362276.html> (accessed 27 July 2017).

30. Above n. 4 para. 91.

31. Above n. 4, para. 133.

32. [2000] 2 SCR 443, para. 24.

33. Above n. 5 at 142.

34. See, for example, L. Kelly et al., *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Report: London, 2006); B. Brown et al., *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (Scottish Office Central Research Unit: Edinburgh, 1992); Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Department for Women: New South Wales, 1996); Z. Adler, *Rape on Trial* (Routledge and Kegan Paul: London, 1987); Regina Schuller and Patricia Hastings, ‘Complainant Sexual History Evidence: Its Impact on Mock Juror Decisions’ (2002) 26 *Psychology of Women Quarterly* 252. See also the judgment of L’Heureux-Dubé J in *R v Seaboyer* ([1991] 2 SCR 577 at 661–5) for a judicial discussion of these and similar US and Canadian studies.

35. Ibid as well as the discussion in S. Easton, ‘The Use of Sexual History Evidence in Rape Trials’ in M. Childs and L. Ellison (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2000) 167–189.

36. Quoted in J. Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 *Journal of Law and Society* 219 at 234.

37. See, for example, S. Lees, ‘Judicial Rape’ (1993) 16 *Women’s Studies International Forum* 11; S. Payne, *Rape: The Victim Experience Review* (Home Office: London, 2009); V. Stern, *Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office and GEO: London, 2010).



while giving evidence and facing cross-examination will always be a stressful activity, and there is no dispute over the need for careful cross-examination on salient issues, the research evidence suggests continuing practices which go beyond necessary questioning and become bullying, harassing and humiliating. Accordingly, restrictions on sexual history evidence, by limiting evidence and cross-examination to only highly probative material, are justified by the need to reduce the humiliating and distressing nature of cross-examination in rape trials, as well as protecting a complainant's right to privacy.

### **Securing Best Evidence**

Reducing humiliation and trauma is necessary in and of itself, but also vital to ensuring that complainants are able to give their best evidence. Perhaps not surprising in the light of the research discussed above, another recent review of rape victims' experiences found that they were highly anxious before and during court due to the evidence-giving process.<sup>38</sup> While some anxiety will be unavoidable, the fear and reality of unnecessary cross-examination on prejudicial material will interfere with a complainant's ability to give evidence in the most suitable ways for the court and jury. Therefore, restrictions on sexual history evidence, and related procedural safeguards, can help secure the best evidence from complainants which, in turn, is necessary for the trial process and can have a positive impact on trial outcomes.

### **Encouraging Police Reports and Supporting Prosecutions**

However, many rape cases get nowhere near a court. One reason is the fear of the trial process, with many studies identifying it as a key barrier to both reporting offences to the police and continuing with prosecutions.<sup>39</sup> Thus, effective restrictions on sexual history evidence are vital both to encouraging victims to report to the police and then to continue to support prosecutions.

### **Justice for Victim-Survivors**

Ultimately, ensuring a fairer trial process for complainants will go some way towards securing their justice interests. These interests include convicting the guilty as well as being treated with dignity and respect and having a 'voice' through meaningful participation in the trial process.<sup>40</sup> With public policy supposedly focused on placing victims' interests at the 'heart' of the criminal justice system,<sup>41</sup> central to securing that aim is enacting and enforcing robust laws to secure just outcomes.

## **Prevalence of Sexual History Evidence in Rape Trials**

Despite the compelling justifications for restrictions on the use of sexual history evidence, it continues to be regularly admitted in rape trials across England and Wales, often for erroneous purposes and frequently without following the procedural rules. Research in the 1980s and 1990s revealed the extensive use of sexual history evidence in rape trials, with the majority of the evidence relating to sexual activity with men other than the accused.<sup>42</sup> A comprehensive study in 2006 concluded that, on the whole, the

38. Payne *ibid*.

39. See, for example, Kelly et al., above n. 34 at 69; O. Smith, 'The practicalities of English and Welsh Rape Trials: Observations and Avenues for Improvement' (2017) *Criminology and Criminal Justice* forthcoming. Lord Slynn in *R v A* acknowledged that the use of sexual history evidence in trials has an adverse impact on decisions to report to the police: above n. 5 para. 1.

40. On rape victim-survivors' ideas of justice, see C. McGlynn et al., 'Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences' in E. Zinsstag and M. Keenan (eds), *Restorative Responses to Sexual Violence—Legal, Social and Therapeutic Dimensions* (Routledge: Oxford, 2017) 179–91.

41. M. Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan: Cullompton, 2009).

42. Adler, above n. 34 at 100 found that the sexual history evidence of 96% of victims was introduced in some way in the trial, 59% related to third-party evidence and, for the most part, it was introduced as being relevant to consent. Sue Lees found that over half of complainants were asked about previous sexual activity with men other than the defendant: S. Lees, *Carnal*

current restrictions were ‘evaded, circumvented and resisted’.<sup>43</sup> Specifically, the study found that applications to admit sexual history evidence were made in just under one-third of trials sampled, though in practice this evidence was raised in two-thirds of trials as it was often introduced without following the proper procedures.<sup>44</sup> Hardly any applications were made in advance of the trial, contrary to the procedural rules, and two-thirds of those made at trial were successful.<sup>45</sup> Broadly equal numbers of applications were made relating to the accused and third parties.<sup>46</sup> Further, there was a statistically significant association between an application to admit sexual history evidence and an acquittal.<sup>47</sup> The study also found that information on sexual behaviour appeared to influence Crown Prosecution Service decision-making.<sup>48</sup> More recently, a study observing 30 rape trials during 2015–2016 found that sexual history evidence was introduced in just over one-third of the trials, often in circumvention of the procedural rules.<sup>49</sup> Of the 11 cases where this evidence was introduced, 6 involved evidence or questioning relating to third parties.

These findings from England and Wales echo the practice in jurisdictions with similar legislative provisions. A recent New Zealand study found that questioning about the complainant’s prior sexual history (including with third parties) was introduced in 43% of recent cases.<sup>50</sup> The most recent Scottish statistics reveal that applications to admit sexual history evidence have been made in 72% of sexual offence trials (one-fifth relating to third parties) and only 7% of the applications were refused.<sup>51</sup> Worryingly, this demonstrated an *increase* in the use of sexual history evidence following new reforms aiming to restrict this material.<sup>52</sup> In Ireland, a study of rape trials during 2003–2009 found sexual history evidence was admitted in two-thirds of cases (with a 70% success rate for applications) most commonly related to previous sexual activity with the accused, previous alleged false allegations and ‘promiscuity/routinely displays suggestive behaviour’.<sup>53</sup>

While we need more up-to-date data on the use of sexual history evidence, one thing we can say is that there is no evidence to support claims by the government that the use of sexual history evidence is ‘exceptional’.<sup>54</sup> Indeed, the evidence we do have shows that it is commonly introduced in trials, including third-party evidence, and often without following the prescribed procedural rules.

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*Knowledge: Rape on Trial* (The Women’s Press: London, 2002). In Scotland, a 1990s study found that complainants were asked about their previous sexual behaviour in about half of all sexual offence trials involving juries, with over half relating to third-party evidence: B. Brown et al., *Sex Crimes on Trial: The use of Sexual History Evidence in Scottish Courts* (Edinburgh University Press: Edinburgh, 1993) 197, 59–60. See also Brown above n. 34.

43. Kelly et al., above n. 34 at 77.

44. Ibid. at vi.

45. Ibid. at 23. Importantly, the chances of success varied hugely depending on when the application was made: 38% success pre-trial, 66% at trial: ibid. at 24.

46. Ibid. at 24–5.

47. Ibid. at vii. The acquittal rate was 90% where an application was successful, compared with 52% where no s. 41 application made (at 26).

48. Ibid. at 36–7.

49. V. Baird et al., *Seeing is believing: the Northumbria Court Observers Panel Report on 30 Rape trials 2015–2016* (Northumbria Police and Crime Commissioner: Newcastle, 2017) 8.

50. S. Zydervelt et al., ‘Lawyers’ Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s? (2017) 57 *British Journal of Criminology* 551–9, at 565.

51. Above n. 25 at 388 and 391.

52. Ibid. The most recent snapshot provided by the Scottish Government reveals a 90% success rate of applications to admit sexual history evidence, discussed in L. Campbell and S. Cowan, ‘The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences’ in P. Duff (ed.), *Scottish Criminal Evidence in the 21st Century: Evolution or Revolution?* (Edinburgh University Press: Edinburgh, 2017).

53. Rape Crisis Network Ireland, ‘Previous Sexual History Evidence and Separate Legal Representation: RCNI Position Paper’ (RCNI: Dublin, 2012). Available at: <http://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf> (accessed 27 July 2017). Another Irish study found this evidence used in 40% of cases: C. Hanly et al., *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press: Dublin, 2009).

54. Secretary of State for Justice, L. Truss, ‘A Speech on Criminal Justice Reform by the Secretary of State for Justice’. Available at: <https://www.gov.uk/government/speeches/a-speech-on-criminal-justice-reform-by-the-secretary-of-state-for->



## Section 41 and Restrictions on the Use of Sexual History Evidence

As noted above, the 1975 Heilbron Report recommended strict limitations on the use of third-party sexual history evidence in rape trials, but the subsequent 1976 Act failed to follow such an approach. It placed its faith in judicial discretion to limit the introduction of such evidence, despite it being the exercise of judicial discretion that had led to the calls for reform. Perhaps not surprisingly, therefore, the 1976 Act did little to alter the practice of the courts, leading to sustained pressure for change.<sup>55</sup>

By the 1990s, the need for reform was widely recognised, leading to the enactment of the s. 41–43 of the Youth Justice and Criminal Evidence Act 1999.<sup>56</sup> Section 41(1) provides that except with leave of the court, no evidence may be adduced at trial, and no question may be asked in cross-examination, by or on behalf of the defendant about any ‘sexual behaviour’ of the complainant.<sup>57</sup> Section 41, therefore, applies to evidence relating to sexual activity both with the accused and with third parties. The restrictions only apply to the defence (and not the prosecution)<sup>58</sup> and leave may only be given if the evidence falls within one of the four exceptions, relates to ‘specific instances’ of sexual behaviour (s. 41(6)) and satisfies two further criteria, namely, a refusal of leave might have the result of rendering unsafe a conclusion of the court or jury (s. 41(2)(b)) and the purpose or main purpose is not to impugn the credibility of the complainant (s. 41(4)).<sup>59</sup> Notably, s. 41 does not provide an overriding discretion for judges to admit evidence.

The first exception is where the issue to be proven is ‘not an issue of consent’ (s. 41(3)(a)) which includes evidence to support a defence of reasonable belief in consent, motive to lie, as well as being used to admit evidence relating to alleged previous ‘false’ complaints. The other exceptions apply where the issue is consent. The second exception is where the evidence relates to sexual behaviour at or about the same time as the sexual activity in question (s. 41(3)(b)). Evidence of sexual behaviour that is ‘so similar’ that the ‘similarity cannot reasonably be explained as a coincidence’ is the third exception (s. 41(3)(c)) and evidence is permitted under s. 41(5) where it is necessary to rebut prosecution claims.

This legislative regime can only be properly understood in the context of the 2001 House of Lords judgment in *R v A*.<sup>60</sup> This case was the culmination of a legal challenge to s. 41 on the basis that it contravened a defendant’s right to a fair trial enshrined in Article 6 of the European Convention of Human Rights and the Human Rights Act 1998. In *R v A*, the accused wished to adduce evidence of a supposed relationship with the complainant in the weeks before the alleged rape. Finding that such evidence did not come within one of the exceptions set out in s. 41 and therefore not admissible, the first

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justice (accessed 27 July 2017). Similar claims have been made in the national media, for example, that it is ‘extremely rare for judges to allow the jury to hear details about the sexual history of a complainant’: M. Dathan, ‘Law Could be Changed to BAN Defence Lawyers using the Sexual History of Rape Complainants Following Ched Evans Trial’, *Daily Mail*, 27 October 2016.

55. See the discussion in V. Baird, ‘Changes to Section 2 of Sexual Offences Act 1976’ (1999) 39 *Medicine Science and the Law* 198.

56. For a detailed discussion, see J. Temkin, ‘Sexual History Evidence—Beware the Backlash’ (2003) *Criminal Law Review* 217.

57. ‘Sexual behaviour’ is tautologically defined as ‘any sexual behaviour or other sexual experience’ (s. 42(1)(c)). The Court of Appeal has said it would be ‘foolish’ to seek to define sexual behaviour in detail as there will often be ‘borderline’ cases and it is ‘really a matter of impression and common sense’: *R v Mukadi* [2003] EWCA Crim 3765, para. 14. A broad approach can have advantages such as the trial judge’s ruling in *Mukadi* which excluded evidence of the complainant getting into a car and exchanging phone numbers with a person other than the accused. This ruling ensured (regrettably reversed on appeal) that the focus of the trial was on the question of consent with the accused, and was not distracted and prejudiced by aspersions relating to casual sex earlier in the day or possible prostitution.

58. *R v Soroya* [2006] EWCA Crim 1884 confirmed that s. 41 does not cover the prosecution leading evidence of sexual behaviour. See further below on the need to reform this provision.

59. These latter two criteria have little bite compared with alternatives in Canada and Scotland, as discussed further below. Note also the judgment of the court of Appeal in *R v Martin* [2004] EWCA Crim 916 where it was held that when seeking to show ‘motive to lie’, the main purpose is not ‘impugning credibility’.

60. Above n. 5.

instance ruling was appealed to the House of Lords. On holding that the blanket exclusion of such evidence might interfere with the defendant's rights, Lord Steyn held that the 'test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to an issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention'.<sup>61</sup> Deploying the interpretative obligation under s. 3 of the Human Rights Act 1998, the judgment effectively rewrote s. 41 to permit (otherwise inadmissible) evidence between the accused and complainant where there is a risk of contravening the defendant's right to a fair trial.<sup>62</sup>

The judgment in *R v A* introduced a considerable element of confusion and ambiguity into the law. While according to precedent, the ruling only applies to sexual history evidence with the accused, with no impact therefore on third-party evidence, its impact has been taken to be broader. For example, research with judges has found that with only one exception, they interpreted *R v A* as giving them a broad discretion to admit evidence where necessary to ensure a fair trial.<sup>63</sup> This is despite Lord Hope's clear opinion that it was not possible to read into s. 41 'a new provision which would entitle the court to give leave whenever it was of the opinion that this was required to ensure a fair trial'.<sup>64</sup>

The Court of Appeal has on occasion been robust in resisting defence applications to introduce otherwise inadmissible evidence<sup>65</sup>; at other times, it has been more forgiving.<sup>66</sup> In *R v Andre Barrington White*, for example, the court was clear that *R v A* was 'not authority for any wider reading of s. 41' in cases of third-party sexual activity.<sup>67</sup> But the court took a different view in *R v Hamadi* stating that the 'wider importance' of *R v A* lies in the 'recognition' that protecting complainants from 'indignity and humiliating questions' to which 'section 41 is directed, must ultimately give way to the right to a fair trial'.<sup>68</sup>

This latter approach appears to presume that a defendant's interests take precedence over the other interests when considering the fairness of trials. Importantly, the right to a fair trial is a qualified right, as emphasised by the European Court of Human Rights which has stated that the 'principles of a fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.<sup>69</sup> This balance requires consideration of 'the right to respect for the victim's private life'.<sup>70</sup> More recent jurisprudence has confirmed this approach, with Scottish provisions restricting sexual history evidence, which are similar in essence to those in England and Wales, recently

61. Ibid. at 46.

62. For an alternative interpretation of the law and feminist rewriting of the judgment, see C. McGlynn, 'R v A', in R. Hunter, C. McGlynn and E. Rackley (eds), *Feminist Judgments: from theory to practice* (Hart: Oxford, 2010). An extract is available online: *The Guardian*. Available at: <https://www.theguardian.com/law/2010/nov/10/rape-juries-feminist-judgment> (accessed 27 July 2017).

63. Kelly et al., above n. 34 at vi.

64. Above n. 5 para. 109.

65. *R v Mokrecovas* [2001] EWCA Crim 1644.

66. In *R v Martin* [2004] EWCA Crim 916 (alleged prior sexual activity between complainant and accused) the court stated that had it not been possible to interpret 41(4) so as to permit evidence of motive to lie, it would have been necessary to invoke s. 3 of the Human Rights Act.

67. [2004] EWCA Crim 946 para. 35. This is a particularly robust rejection of the defence application to introduce evidence that the victim had worked as a prostitute with the aim of supporting the claim of consent and motive to steal.

68. *R v Hamadi* [2007] EWCA Crim 3048 para. 18. While on the particular facts, the court upheld the trial judge's refusal to admit third-party evidence, this judicial comment fails to recognise that the legislative aims of s. 41 are far wider and include, as discussed above, the fair administration of justice by excluding irrelevant, prejudicial material that may adversely affect the truth-seeking function of the trial. Excluding irrelevant or prejudicial material is, therefore, entirely compatible (and indeed secures) fair trial rights.

69. *Doorson v Netherlands* (1996) 22 EHRR 330 at para. 70. Though see A. Ashworth, who refers to Article 6 as an 'intermediate' right: *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell: London, 2002) 76.

70. *Baegen v Netherlands*, Report of the European Commission of Human Rights Application No 16696/90, 20 October 1994. See also *AG v Sweden* where the court stated that criminal proceedings involving sexual offences were often conceived of as an ordeal for the victims and, therefore, in the assessment of whether or not there was a fair trial, account must be taken of the victim's right to respect for private life: (2012) 54 EHRR SE14, 10 January 2002, para. 45.

being upheld.<sup>71</sup> While confirming that the admission of evidence is a matter for domestic courts to determine, it was held that the Scottish Parliament was ‘fully entitled’ to its view that sexual history evidence was ‘rarely relevant and, even where it was, its probative value was frequently weak when compared with its prejudicial effect’.<sup>72</sup> The right to a fair trial, therefore, neither takes precedence over other interests nor requires admission of all relevant evidence. Indeed, restrictions on sexual history evidence can enhance the fairness of trials, protecting the legitimate interests of witnesses, defendants and all of society.

## Admitting Sexual History Evidence: The Exceptions

Having outlined the current legal regime in s. 41, this section examines each of the four exceptions to the general exclusion of sexual history evidence, focusing specifically on the admission or exclusion of third-party evidence.

### *Similarity Evidence, Third Parties and Inferring Consent*

Controversial since its inception, the use of the ‘similarity exception’ in the *Evans* case caused a public furore and sparked a number of parliamentary reform initiatives discussed further below. Its genesis goes back to the Heilbron Report which first proposed an exception based on similarity, specifically that permitting evidence of sexual behaviour which was ‘strikingly similar’ to the alleged events on the occasion in question.<sup>73</sup> Due to the overall permissive nature of the 1976 Act, however, no such exception was introduced.

The question of similarity evidence arose again during the parliamentary debates leading to the 1999 Act. No similarity provision was included in the original bill, the exception only being added in the House of Lords when Baroness Mallalieu suggested that the law needed to permit evidence that a complainant had previously engaged in a ‘Romeo and Juliet fantasy’, namely, a desire to have sex with men after they have climbed into the bedroom from a balcony.<sup>74</sup> This eccentric suggestion was sufficient to persuade the government that another exception was needed, quite likely on the assumption that this peculiar example was not going to affect the overall operation of the law. Accordingly, s. 41(3)(c) permits evidence that relates to consent and the sexual behaviour is ‘in any respect, so similar’ to (i) any sexual behaviour of the complainant that took place as part of the event that is the subject matter of the charge or (ii) any other sexual behaviour of the complainant that took place at or about the same time as that event and that the ‘similarity cannot reasonably be explained as a coincidence’.

Few other jurisdictions permit sexual history evidence on the basis of similarity and specifically not to infer consent. Jennifer Temkin has noted that New South Wales rejected a similarity exception as ‘there would be difficulties in determining when a similarity in the sexual context was sufficiently striking’.<sup>75</sup> While in Canada similarity evidence is admissible, it is not permitted to demonstrate consent.

71. *Judge v UK*, Application No 35863/10, 2011 SCCR 241 at 28. For a discussion of the Scottish context, see Campbell and Cowan above n. 52.

72. Ibid. Note also that the European Court stated in *Schenk v Switzerland* that Article 6 ‘does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law’ ([1988] EHRR 242 at 46).

73. Above n. 4 para. 137. This provision was recommended so as to permit evidence of prostitution. It was accepted that there may be other scenarios of similarity, but that such cases would be ‘exceptional’ (para. 136).

74. Hansard, vol 597(2) February 1999, col. 45.

75. Above n. 56 at 229–30 also noting that in the US, only Florida, Minnesota and North Carolina have such an exception. In rejecting a similarity exception, the New South Wales Government queried the sorts of factors that might be said to constitute similarity: ‘Would the pick-up point have to be a wine bar or would a coffee shop be sufficiently similar? Would a mini-skirt/wine bar/missionary position combination be sufficiently strikingly similar to a pair of jeans/coffee shop/unorthodox position combination? What about the afternoon episode on the one hand with the cocktail hour or after theatre episode on the other?’

In *R v Seaboyer*, Justice McLachlin permitted an exception as follows: 'Evidence of prior sexual conduct which meets the requirements of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness'.<sup>76</sup> She continued that this evidence of 'prior sexual conduct draws upon the inference that prior conduct infers similar subsequent conduct' and it therefore 'closely resembles the prohibited use of the evidence and must be carefully scrutinized'.<sup>77</sup>

Unfortunately, while other jurisdictions exclude entirely similarity evidence, and Canada does not permit it to demonstrate consent, s. 41 both permits it and to prove consent. Of central importance, therefore, is what constitutes a 'similarity', with s. 41 requiring activity that is 'so similar that the similarity cannot reasonably be explained as a coincidence'. Writing shortly after s. 41 was adopted, Jennifer Temkin questioned the value of the exception 'since it is hard to justify an exception on similarity alone', continuing that it 'provides an open invitation to an interpretation which could fundamentally undermine the very purpose of this type of legislation'.<sup>78</sup> Perhaps alive to such risks, it was the government's stated view that the similarity provision in s. 41 was to be narrowly construed. Government Minister Lord Williams stated that to be admitted, the behaviour must be 'so unusual that it would be wholly unreasonable to explain it as coincidental'.<sup>79</sup> Further, the exception was not to cover:

evidence of a general approach towards consensual sex such as a predilection for one night stands, or for having consensual sex on a first date. Still less does it include the fact that the complainant has previously consented to sex with people of the same race as the defendant, or has previously had sex in a car, for example, before alleging that she was raped in a car. Such behaviour could reasonably be explained as coincidental, as it falls within the usual range of behaviour that people display.<sup>80</sup>

However, while the government's intention was to focus on unusual conduct, and ensure a narrow interpretation of the exception, the practice of the law has proven different.

The problems began with Lord Clyde in *R v A* when he stated that the similarity provision 'does not necessitate that the similarity has to be in some rare or bizarre conduct'.<sup>81</sup> It will be remembered that *R v A* involved an alleged prior relationship, with Lord Clyde's opinion seeking to find ways to bring such evidence within the confines of s. 41. One way to do so was to give an expansive interpretation of the 'similarity' exception to include relationship evidence. Lord Clyde's focus, therefore, was on sexual history evidence with the accused (not third parties), as he made clear when stating that admitting third-party evidence 'is not the question in the present appeal'.<sup>82</sup>

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(New South Wales Department of Attorney General, *Report on Rape and Various other Sexual Offences* (Sydney: New South Wales Parliament, 1977) 29).

76. Above n. 11 at 635.

77. Ibid. at 615. Justice McLachlin held that evidence of a prostitute reporting rape after allegedly seeking an increased payment is the kind of 'similarity' evidence of a 'modus operandi' permissible (at 615–616). The evidence goes to credibility and truthfulness regarding the alleged extortion, and not therefore the prohibited ground of consent. Further, Justice McLachlin has held that evidence meeting similar act standards must be 'so unusual and strikingly similar' that their 'similarities cannot be attributed to coincidence': see the discussion in E. Craig, 'Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions' (2016) *Canadian Bar Review* 45–83, Vol. 93, esp. 63–64.

78. Above n. 56 at 229–230.

79. Hansard, 23 March 1999, col. 1218. Government Minister Paul Boetang also stated that the amendment 'does not allow the court to admit evidence, even strikingly similar evidence, that, for instance, the complainant had previously enjoyed one-night-stands, has had sex in the open air or in a car with different men on consecutive nights. That would be pure coincidence': Standing Committee E (Pt 1), 24 June 1999, quoted in N. Kibble, 'The Sexual History Provisions: Charting a Course Between Inflexible Legislative Rules and Wholly Untrammelled Judicial Discretion?' (2000) *Criminal Law Review* 274 at 285.

80. Hansard, 23 March 1999, col. 1218. The government's original intention in enacting the 1999 Act is examined in detail by Vera Baird QC in the paper 'The impact on future rape trials of the Ched Evans case' (privately circulated, with publication forthcoming).

81. Above n. 5 para. 135.

82. Above n. 5 para. 131.

In any event, while Lord Clyde's statement that rare or bizarre conduct is not required has been cited with approval, no notice appears to have been taken of his further comments. He continued that in determining similarity, the following needs to be identified: 'something about the sexual behaviour of the complainant on each of the occasions, such as something said or done by him or her which is *not so unremarkable* as to be reasonably explained as a coincidence'.<sup>83</sup> Where something is 'not so unremarkable', it becomes remarkable; that is, unusual or rare. This statement, therefore, seems to be at odds with his prior opinion that rare or bizarre conduct is not needed. This brings a level of confusion to Lord Clyde's comments and while this may not have been his intention, it is the meaning of his words.

At best, therefore, Lord Clyde's opinion on the scope of the similarity exception is valid only in relation to sexual history evidence with the accused. In relation to third-party evidence, his opinion lacks clarity, his interpretation of the law is questionable by reference to parliamentary intention and it is, in any event, obiter. Nonetheless, his statement that similar conduct need not be rare or bizarre to satisfy the exception has been followed in subsequent case law including *Evans*.

The current position is best examined by looking, first, at the most recent Court of Appeal judgment on the similarity exception, *R v Guthrie*.<sup>84</sup> Handed down shortly after *Evans*, though making no reference to that case, the Court of Appeal sought to summarise the applicable law on the similarity exception. It emphasised a number of key elements but, problematically, failed to draw a distinction between evidence with the accused and third parties.

The court began by stating that a 'striking similarity' is not required, citing as authority Lord Clyde in *R v A*.<sup>85</sup> Instead, all that is required is a 'relevant similarity'. This provides little real guidance beyond the surely obvious requirement of relevance. Further, in neglecting to distinguish between evidence with the accused and with third parties, the court does not recognise that Lord Clyde's comments are obiter in relation to third parties (and open to being distinguished on that basis as well as in relation to parliamentary intention).

Nonetheless, the court's third 'principle' provides an example of similarities that might be deemed irrelevant. It approved the ruling in *R v Harris*, specifically that if the evidence would be 'tantamount' to saying that the complainant was a person who engaged in casual sex in the past, and therefore would have been more likely to do so on the occasion in question, cross-examination will not be allowed.<sup>86</sup> This is a welcome rejection of this form of evidence. However, if we look in more detail at the specifics of *R v Harris*, there are concerning undertones that take on greater significance in light of the expansive ruling in *Evans*.

In *R v Harris*, the defendant wished to adduce evidence regarding the complainant's experience of alleged drunken and 'risky' sexual encounters with strangers. The trial judge was rightly robust in dismissing this application as it amounted to saying that as the complainant had engaged in casual sex in the past with other men, she was more likely to have consented to the defendant on this occasion.<sup>87</sup> This would appear to be a straightforward and obvious ruling, recognising that consent is to a person not a circumstance. On appeal, however, the Court of Appeal said that this was not an 'easy' case, without giving any more reasons as to why. The Appeal Court did decide that the trial judge's ruling was within his 'margin of judgment', but this is not exactly a ringing endorsement.<sup>88</sup> The Court of Appeal was clearly of the view that this was a marginal case, with the implication that they themselves might have decided the case differently. Yet, the so-called similarities related simply to sex with strangers (men other than the accused), following the consumption of alcohol. If this were to satisfy a similarity ruling,

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83. Ibid. (authors' emphasis).

84. *R v Guthrie* [2016] EWCA Crim 1633.

85. Ibid. at para. 10.

86. Ibid. para. 10, citing *R v Harris* [2009] EWCA Crim 434 para. 17.

87. *R v Harris* ibid. para. 17.

88. Ibid. para. 19.

then vast swathes of sexual behaviour would be apt to be admitted, seriously undermining Parliament's intention to restrict the use of sexual history evidence, especially that with third parties.

Interestingly, therefore, we have the Court of Appeal in *R v Harris* only reluctantly upholding the first instance ruling excluding third-party evidence relating to casual sex, but the later Appeal Court in *R v Guthrie* incorporating the first instance judicial comments into its 'principles'. To the extent that this means, most recently, an endorsement of the first instance approach, it is welcome. However, this also tells us that decisions regarding admission are not clear-cut and judges do take different views; potentially a justifiable exercise of judicial discretion. However, it also underlines the lack of clarity in this area of law which encourages defence applications, at the same time as discouraging complainants from reporting and giving evidence. Furthermore, the irrelevance and highly prejudicial nature of the sexual history evidence with third parties being considered in *R v Harris* should have been obvious.<sup>89</sup> If it is not apparent that s. 41 should be excluding evidence of casual sex with third parties, then it is not difficult to understand why this area of law has become the subject of reform proposals to further limit judicial discretion.

The judgment in *R v Harris* and its concerning undercurrents has resonances with the earlier Court of Appeal judgment in *R v Hamadi*.<sup>90</sup> In this case, the victim accepted a lift from the defendant, whom she had not met until that time, late at night and instead of taking her home, he drove to deserted ground and raped her. The defendant claimed consent and sought to introduce evidence of the complainant's previous sexual activity with men other than her boyfriend on the grounds of similarity, namely, that the complainant instigated sexual activity, it took place outside in relatively public places, in winter and while she was in a relationship with another.<sup>91</sup> The trial judge refused the application, holding that any such evidence had no bearing on the issue of consent, an admissibility ruling upheld by the Court of Appeal. However, in giving judgment, the Appeal Court emphasised that the victim's supposedly 'promiscuous nature' was of a different nature to evidence such as someone being prepared to 'pick up strangers off the street' (which is what the allegation was in *Hamadi*).<sup>92</sup> This appears to suggest that while evidence of general promiscuity was not sufficiently similar (or relevant), if there had been evidence relating to 'picking up strangers', the ruling might have been different and the evidence deemed admissible. The clear implication is that it was only that her previous 'promiscuous' sexual activity had not been with 'strangers' that saved her from having this evidence adduced.<sup>93</sup> In both *R v Harris* and *R v Hamadi*, the Court of Appeal excluded sexual history evidence with third parties. However, they were not unequivocal and robust judgments. They harbour much potential for defence teams seeking to introduce sexual history evidence, including with third parties.

About the only potentially helpful guidance on 'relevant similarity' was offered in *R v Harris*, with the Court of Appeal describing the case of *R v T (Abdul)* as an 'easy' one where the 'the similarity was so

89. Yet, the judgment has been described as 'harsh' on the basis that the medical evidence 'does not merely go to the likelihood of the complainant engaging in casual sex but to her state of mind in engaging in that behaviour': N. Kibble, 'Case Comment: *R v Harris*' (2010) *Criminal Law Review* 54 at 54 and 59. Kibble also takes aim at the Canadian Supreme Court's insistence that sexual history evidence must not be admitted to shore up one of the 'twin myths', namely that evidence of previous sexual behavior is logically probative of consent (at 60). In making this criticism, however, he mis-quotes Justice McLachlin in *R v Seaboyer*, erroneously attributing to her Harriet Galvin's recommendation that the law should include similarity evidence as probative of consent. In fact, Justice McLachlin is clear that such (similarity) evidence 'cannot be used illegitimately merely to show that the complainant consented' (above n. 11 at 635).

90. *R v Hamadi* [2007] EWCA Crim 3048.

91. *Ibid.* para. 23.

92. *Ibid.* para. 25.

93. It is also worth noting that while this particular evidence was excluded, the trial judge did permit evidence of the complainant having sex with a third party on a previous occasion when she had 'asked him to tie her to the bed', as well as evidence that earlier that evening in a bar, she had jumped into the arms of a male friend 'simulating sexual movements'. The admission of these forms of evidence was not the subject of the appeal: Above n. 90 para. 11.



clear it was not disputed'.<sup>94</sup> The case involved an alleged rape by a former partner that took place within a children's climbing frame in a park. The defence wished to adduce evidence that consensual sexual activity had taken place, between the parties, in the same climbing frame a few weeks before the alleged rape, and in the same sexual position (standing up and from behind). The Court of Appeal held that this evidence should have been permitted under the similarity exception, referring to the climbing frame and sexual position, and quashed the conviction. While it remains possible to dispute the relevance of this material, the judgment does at least attempt to clarify that such a situation 'easily' passes the threshold of admissibility of similarity evidence. However, it does raise many further questions. What if the activity had been in the bushes in the park, not the climbing frame? Where, for example, does this leave sexual activity taking place in other circumstances, such as in a car? During the s. 41 legislative debates, the government identified this as a factual scenario outside of the scope of any similarity exception.<sup>95</sup> Further, no reference is made, either in *R v T (Abdul)* or in *R v Harris*, to this also being a case of sexual history evidence with the accused which should put it on a different footing to third-party evidence. It seems most likely that *R v T (Abdul)* is an 'easy' case because of its relative peculiarity (and it is sexual activity with the accused); indeed, it might even be said that it is a 'rare' or 'bizarre' scenario. But, as the Court of Appeal in *R v Guthrie* emphasises that only a 'relevant similarity' is required, we are little wiser.

Nonetheless, in continuing their summary of key principles, the Court of Appeal in *R v Guthrie* suggested that there must also be a 'sufficient chronological nexus between the events' to render the sexual material probative.<sup>96</sup> The court referred to *R v MM* where it was held that sexual activity three to four months prior to the alleged offence was not sufficiently close in time to be relevant.<sup>97</sup> Further, a distance of one year in *R v Guthrie* itself was too remote. While both of these cases involved sexual history evidence with the accused, in situations where it is deemed that third-party evidence is relevant, this principle should go some way towards potentially limiting fishing expeditions regarding a complainant's prior sexual history.

Finally, the court stated that in all cases 'there is an exercise of judgment' and that this will demonstrate the 'high threshold' required.<sup>98</sup> This does little to help determine the scope of the exception, other than, as identified above, emphasising the fluid nature of judicial interpretations. While the court stated that there is a 'high threshold', it continued that only a 'relevant similarity' is required. Evidence must be 'truly probative', though there is always an overarching 'exercise of a judgment'. There is no differentiation in the case law between evidence relating to third parties and that with the accused, either factually or in terms of Lord Clyde's influential obiter dictum. In relation to specific factual scenarios, we only know that where the evidence is with the accused, sex in a public climbing frame is sufficiently similar. Where the evidence involves third parties, there is little to no guidance other than the (lukewarm) exclusion of casual sex (*R v Harris*) and 'promiscuity' (though maybe not 'picking up strangers', *R v Hamadi*). Further, in *R v Guthrie*, there is a (surely deliberate) failure to refer to the *Evans* judgment, despite similarity being the central issue. How does *R v Evans* fit into these key 'principles'? Is it an 'easy' case? Does it exemplify a 'high threshold'? Or, is it simply an 'exercise of judgment' with which the court in *R v Guthrie* perhaps disagreed (hence the lack of endorsement)? It is to an examination of the *Evans* case that we now turn.

***R v Ched Evans*.** This case was notorious long before the Court of Appeal ruled on the admissibility of sexual history evidence. As a well-known footballer, Evans's conviction for rape caused a media frenzy. Post-conviction, supporters of Evans mounted campaigns to clear his name and unlawfully shared online

94. *R v Harris* above n. 86 para. 19, referring to *R v T (Abdul)* [2004] 2 Cr App Rep 552.

95. Lord Williams, Hansard, 23 March 1999, col. 1218.

96. Above n. 84 para. 10.

97. *R v MM* [2011] EWCA Crim 1291, para. 48.

98. Above n. 84 paras 10–12.

the victim's identity, the latter leading to a few successful prosecutions.<sup>99</sup> The campaigns, including offering substantial financial rewards for 'new' information, kept the issue in the public eye, though Evans's appeal against conviction was initially refused.<sup>100</sup> It was only when the Evans' defence team and private investigators found new witnesses who had had sex with the victim, that the Criminal Cases Review Commission referred the case to the Court of Appeal which quashed the conviction.<sup>101</sup>

The Court of Appeal determined that the sexual behaviour evidence with third parties 'would have been relevant and admissible' at trial.<sup>102</sup> The court relied on Lord Clyde's obiter comments in *R v A*, holding that the behaviour need not be 'unusual or bizarre'.<sup>103</sup> It then identified the similar elements as being (a) the complaint 'had been drinking', (b) she 'instigated certain sexual activity', (c) she 'directed her sexual partner into certain positions' and (d) 'used specific words of encouragement'.<sup>104</sup> Specifically, the sexual intercourse included the 'doggy style' sexual position and she allegedly used the phrase 'f.k me harder'.<sup>105</sup> The evidence was held to be potentially admissible under the similarity exception in s. 41(3)(c)(i) and the conviction quashed. A retrial was held at which the sexual history evidence was admitted and the defendant was acquitted.

Not surprisingly, counsel for the Crown had argued that this alleged sexual activity was commonplace and therefore not conduct from which consent could be inferred. While it is difficult to be definitive about people's sexual habits, the evidence available does confirm the popularity of this sexual position.<sup>106</sup> Further, language such as that allegedly used in *Evans* also appears to be common, being a standard trope in mainstream pornography.<sup>107</sup> Two other features were identified by the court as providing evidence of the complainant behaving with the other men in a 'very similar fashion', namely, 'drinking' and 'instigating' certain sexual activity.<sup>108</sup> If the consumption of alcohol is to become an element which can be raised in evidence to demonstrate similarity, then any suggestion of there being a 'high threshold' will need to be revised. As to 'instigating' sexual activity, aside from determining what this actually means in practice, its reference here suggests outdated and prejudicial assumptions about women's passivity in sexual activity. In sum, this was ordinary and commonplace sexual activity which could reasonably be explained as a coincidence.<sup>109</sup>

99. BBC News, 'Ched Evans: Nine admit naming rape victim on social media'. Available at: <http://www.bbc.co.uk/news/uk-wales-north-east-wales-20207408> (accessed 27 July 2017).

100. *R v Evans* [2012] EWCA Crim 2559.

101. Above n. 7.

102. Above n. 7 para. 72.

103. Ibid. para. 73.

104. Ibid. para. 71.

105. Ibid. para. 12. Note that while in *Evans* it was alleged the complainant said 'f.k me harder', in one of the 'similar' cases, the words supposedly used were 'go harder'. Presumably, therefore, it is the word 'harder' that is the similarity.

106. Indeed, one study suggests that it is the favourite position adopted in Wales: 'The UK's "favourite sex positions" revealed in new survey', *The Independent*, 11 February 2015, with 51% of respondents in Wales saying that 'doggy style' was their favourite sexual position. Another survey found this position to be the favourite of 57% of respondents in the north of England, *Huffington Post*. Available at: [http://www.huffingtonpost.co.uk/entry/favourite-sex-positions-uk-london\\_uk\\_589c3fe4e4b0505b1f5aa9b5](http://www.huffingtonpost.co.uk/entry/favourite-sex-positions-uk-london_uk_589c3fe4e4b0505b1f5aa9b5) (accessed 27 July 2017).

107. A search of the most popular commercial pornography website, Pornhub, in March 2017, produced 1259 results for 'f.k me harder' with many more for 'harder', and 6964 videos tagged for the 'doggy' position. There are echoes here of the warning given by Carol Smart decades ago that the 'more an account of rape has resonances with the standard pornographic genre, the less it will be regarded as rape': 'Law's Truth/Women's Experiences' in R. Graycar (ed), *Dissenting Opinions* (Allen and Unwin: Sydney, 1990) 16.

108. Above n. 7 para. 71.

109. This information about people's sexual habits raises questions as to how, if at all, such evidence might be considered in the context of a sexual offence trial. It is possible that expert evidence could be considered at a hearing to determine admissibility. The larger concern, however, is whether courts and judges are adequately placed to determine questions of the commonplace, or not, nature of people's private sexual habits, as identified by V. Baird, above n. 80. Nonetheless, this is only a real issue if, following *Evans*, ordinary everyday activity becomes central to questions of 'similarity'. If this is to be the case, a mechanism will be required to consider whether, in fact, what is being claimed as 'similar' could instead, due to it being commonplace, reasonably be explained as a coincidence.

Nonetheless, in holding that the similarity did not need to be unusual, the ordinary nature of the sexual activity was not regarded as relevant. This underlines the problematic nature of this exception and how it has been understood. First, the court relied on the comments of Lord Clyde in *R v A* to hold that nothing unusual was required to satisfy the test. Notwithstanding that these comments were obiter, and contrary to parliamentary intention, they also produce a test which is difficult to apply. If the requirement is for conduct that cannot (reasonably) be explained as a coincidence, there must therefore need be a meaningful connection, plan or pattern. Therefore, we must ask how such a connection or pattern is to be demonstrated (thereby showing the conduct not to be a coincidence). One way would be to require the conduct to be unusual and rare such that it is more likely to be part of a pattern, or connected (and not a coincidence). If, however, the conduct does not have to be unusual or bizarre, and can be ordinary and commonplace, how can we tell whether there is in fact a pattern or connection? If the conduct is so ordinary as to be commonplace, it can easily be explained as a coincidence. Therefore, if we are looking for activity that cannot (reasonably) be explained as a coincidence, but we do not have to show that something is unusual or bizarre, it is difficult to see how it can be established. Indeed, the factual situation in *R v Evans* gives a very good example of this problem. The Court of Appeal said that unusual conduct was not required, so the commonplace activities in *Evans* were sufficient to satisfy the exception. But if the activities are commonplace, how can this also be evidence of non-coincidence? Surely, the everyday nature of the activities point towards coincidence.

The logical conclusion post-*Evans* is that the more ordinary the sexual activity, the more it might be used in evidence against a complainant, as it will be easier to characterise it as 'similar' and not coincidental: the sex took place on a bed, in a bedroom, late at night, after consuming alcohol and in the missionary position. None of these elements are unusual or bizarre and so presumably identifying (even a few of) them may be sufficient to constitute the similarity required to satisfy the s. 41 exception. If so, in almost every case involving partners or former partners, evidence of their sexual behaviour could be admitted on this basis due to the similarities of ongoing sexual conduct. And, in relation to sexual activity with third parties, as in *Evans*, the more ordinary the activities and the more sexual partners the complainant has had, the more the complainant is at risk of any previous sexual activity being admitted and claimed 'similar'.

The Court of Appeal concluded by acknowledging that the circumstances in which evidence of sexual behaviour with third parties is admitted should be rare, but that *R v Evans* is a 'rare case'.<sup>110</sup> This means that we end up in a situation whereby for the evidence to be admitted it does not have to be rare or unusual, yet such evidence is only to be admitted in 'rare' cases. If the sexual activity can be commonplace, what is it that makes it a 'rare' case? How does having sex doggy style, after drinking alcohol, even using the word 'harder', with men other than the accused, produce a 'rare' case?

Further, what if there is evidence of other sexual activity with the complainant not sharing the same 'similarities'? In *Evans*, one of the defence witnesses, whose experience with the complainant was supposedly 'similar', referred to a number of other instances of sexual activity between them but did not claim the specific similarities for those occasions.<sup>111</sup> What is the import of there being many incidences of sexual activity with this witness, but only one that bore the 'similarities' to activity with the accused?<sup>112</sup> Could this, instead, suggest coincidence? One potentially unintended consequence of the *Evans* ruling may be that the prosecution feel obliged to seek to admit *more* sexual history evidence of the complainant, to rebut similarity claims, for example, evidence of 'non-similar' sexual activity.<sup>113</sup>

110. Ibid. para. 74.

111. Ibid. para. 35.

112. Raised and considered by Baird, above n. 80.

113. Baird also points out that trial judges will be obliged to take applications to admit third-party sexual history evidence, particularly based on similarity, more seriously in light of the judgment in *Evans*. This, she rightly argues, runs the risk of more of this form of evidence being admitted. See Baird, above n. 80.

One further reason for the case being considered ‘rare’ by the Court of Appeal is that the complainant had no recollection of the events at issue and therefore did not give evidence of non-consent. The defence case was based on the testimony of Evans and the claim that if the similarity evidence was true and admitted, his account might be more credible. It is possible to argue, therefore, that the evidence was being admitted not to contest the complainant’s credibility but to bolster the defendant’s. In practice, however, the admission of evidence relating to the complainant’s sexual past, including evidence of casual sex, excessive drinking and other salacious details of her lifestyle, is more than likely to have challenged her ‘moral credibility’ in the eyes of the jury, influencing the decision-making process. Her ‘sexual character’ was put in issue (implicitly), inviting the jury to allow this evidence to influence their decision. In addition, in admitting the evidence to support the credibility of the defence case, this necessarily means the evidence was adduced to demonstrate consent.

In sum, the *Evans* case does not simply open the ‘floodgates’ but risks a tsumani. Common, everyday sexual activity is at risk of being admitted, with an open invitation to the defence to trawl through a complainant’s sexual history seeking ‘similarities’.<sup>114</sup> It focuses attention on the complainant’s lifestyle and character, rather than on the defendant’s actions at the time of the alleged offence.<sup>115</sup> Further, by inferring consent from prior sexual activity with third parties, the *Evans* case fundamentally challenges an understanding of consent based on individual autonomy and free choice.

### ‘Not an Issue of Consent’: Reasonable Belief and ‘False’ Allegations

The second most significant exception permitting sexual history evidence is where the evidence is deemed ‘not an issue of consent’ (s. 41(3)(a)). This is a potentially broad exception, with creative defence teams reframing evidence to admit it under this provision. While there are good examples of the courts robustly rejecting some of these more inventive applications,<sup>116</sup> there are other cases where sexual history evidence with third parties is more commonly introduced. As well as including the reasonable belief in consent defence, this provision has been held to permit evidence of motive to lie and supposedly false allegations.<sup>117</sup>

**Reasonable Belief in Consent.** Section 42(1)(b) specifically states that belief in consent is ‘not an issue of consent’. This exception rides roughshod over the protections in s. 41 by permitting evidence to support a defence of reasonable belief which is otherwise excluded. In particular, if consent is recognised as being person-specific, it is difficult to see how any knowledge of sexual activity with third parties should be relevant to a defendant’s belief in consent. Is it really reasonable to believe in consent on the basis that a complainant has consent to sexual activity *with someone else*? Indeed, research into the operation of s. 41 found ‘considerable criticism’ among barristers and judges regarding the belief in consent exception

114. As identified by the Women’s Parliamentary Labour Party in an open letter to the Attorney General following this case: Rowena Mason, ‘Female Labour MPs call for legal change following Ched Evans retrial’, *The Guardian*. Available at: <https://www.theguardian.com/society/2016/oct/23/female-labour-mps-write-to-attorney-general-over-ched-evans-case> (accessed 27 July 2017).

115. Echoing the experiences of victim-survivors over decades, the father of the victim in *Evans* said of his daughter’s experience that ‘it was like she was the one on trial’: Sanchez Manning, ‘Father of Ched Evans’s accuser slams lawyers for “raping” his daughter by trawling through her private life’, *Mail on Sunday*. Available at: <http://www.dailymail.co.uk/news/article-3840045/They-said-daughter-asking-Father-Ched-Evans-s-accuser-slams-defence-lawyers-raping-daughter-trawling-private-life.html> (accessed 27 July 2017).

116. For example, defence counsel’s application in *R v Barrington White* to admit evidence of prostitution as not being an ‘issue of consent’, rejected by the Court of Appeal as ‘untenable’: *R v Barrington White* [2004] EWCA Crim 946, para. 23.

117. On false complaints, see *R v T and H* [2001] EWCA Crim 1877. On motivated by malice, see *R v F* [2005] 2 Cr App R 13. In addition, there is no consent requirement in sexual offences against young children and, therefore, prima facie, sexual history evidence is admissible where relevant. The danger here is that few safeguards are included, or procedures followed, to ensure only limited and exceptional use of such evidence.

on the basis that it was ‘too wide and “illogical”’.<sup>118</sup> Further, the Court of Appeal in *R v A* was of the view that requiring a judge to sum up on the basis that evidence must go only to belief in consent, but not actual consent, owes more to ‘Lewis Carroll than to sensible jurisprudence’.<sup>119</sup> While Lord Clyde was open to the possible need to admit evidence relating to sexual activity with the accused in these circumstances, he took a contrary view regarding evidence with third parties: ‘That evidence of sexual behaviour with other persons than the defendant should be so allowed seems questionable’.<sup>120</sup> Not surprisingly, therefore, many other jurisdictions do not have an exception of such breadth.<sup>121</sup>

This issue was raised in the *Evans* case, with the Court of Appeal suggesting that the ‘similarity’ evidence may also have been relevant to a defence of reasonable belief.<sup>122</sup> It is, however, difficult to see how this defence could be raised if the evidence was unknown to the defendant at the time of the events in question and one of the two sexual acts deemed to satisfy the similarity test occurred after the alleged rape. Further, even had he known of the one example of the complainant’s sexual activity with another person, is that a suitable or sufficient basis for a reasonable belief in consent? If so, this would be stating that a defendant can form reasonable belief in consent from his knowledge of one sexual act between the complainant and a different person that took place weeks prior to the alleged offence. This is surely an untenable basis for the law.

**‘False’ Allegations.** Restrictions on admitting sexual history evidence have often been resisted on the basis that they might exclude allegedly false complaints. Accordingly, when enacting s. 41, the government sought to reassure doubters by casting such evidence as relevant to credit and honesty, and either fell outside of the s. 41 scheme entirely, or was ‘not an issue of consent’.<sup>123</sup> Kelly et al.’s 2006 study into s. 41 found that searching for information about any previous complaints was a common practice for police, prosecutors and the defence.<sup>124</sup> Scottish research has similarly suggested that the ‘defence routinely constructed false allegation scenarios from almost any detail of sexual history’.<sup>125</sup> The problem here is that an unproven complaint does not equate to a ‘false allegation’. While this distinction may be noted, in some cases little attempt has been made to distinguish between these two different situations.<sup>126</sup> There is some evidence of better practice, with the court in *R v H* examining the supposed evidence of false complaints and, in this case, finding no evidence of falsehood and therefore excluding the evidence.<sup>127</sup> This approach should be mandated, as is the case in Michigan where evidence that an allegation is demonstrably false is required before admission.<sup>128</sup> By ensuring reliability and relevance, this approach has significant advantages over the English practice which simply requires a judge to seek assurances from defence counsel.

118. Kelly et al., above n. 34 at 59. Further, there was evidence that it had led to a change in defence practice, with belief in consent being put forward in more cases to enable the strategic admission of sexual history evidence.

119. Above n. 5 para. 7.

120. Above n. 5 para. 130.

121. Michigan does not permit evidence on this ground, with New South Wales only allowing it where it is based on conduct that took place at or about the same time as the conduct in question: see above n. 56 at 226–7.

122. Above n. 7 para. 72.

123. An analysis endorsed by the Court of Appeal in *R v T* [2001] EWCA Crim 1877. On the parliamentary debates, see above n. 56 at 225–6.

124. Kelly et al., above n. 34 at 14.

125. Above n. 42 at 203.

126. For example, *R v B* [2001] EWCA Crim 3042 and *R v T* [2001] EWCA Crim 1877.

127. *R v H* [2003] EWCA Crim 2367. See also *R v C and B* [2003] EWCA Crim 29.

128. See further Kelly et al., above n. 34 at 14 and above n. 56 at 225–6.

## Sexual Activity ‘At or About the Same Time’ as the Alleged Rape

The third exception to the general rule of exclusion is for evidence of sexual behaviour taking place ‘at or about the same time’ as the alleged sexual offence (s. 41(3)(b)). In Parliament, it was suggested that the time frame allowed should be no longer than 24 hours, and the House of Lords in *R v A* declined to interpret the provision more widely.<sup>129</sup> While this does provide some limitation on the exception’s scope, there is unfortunately no requirement that the evidence has a connection to the events at issue, meaning that entirely unrelated activities could be admitted as long as within this time frame.<sup>130</sup> Unfortunately, therefore, entirely disconnected sexual activity with third parties can be adduced in evidence, as happened in *R v Mukadi*.<sup>131</sup>

In this case, the Court of Appeal upheld an appeal against a rape conviction on the basis that evidence had been excluded at trial which rendered the conviction unsafe. The excluded evidence related to an incident earlier in the day where the complainant got into a car and exchanged phone numbers with a man other than the accused. Later the same day, the complainant met the appellant and the alleged rape took place. The trial judge had excluded the evidence with the third party stating quite rightly that ‘this kind of evidence is exactly that which the statute is designed to exclude’.<sup>132</sup> In particular, he continued that the fact that a person may be prepared to consent to sexual activity with someone else does not assist on the issue of whether she consented to sexual activity later in the day with the accused.<sup>133</sup> Further, the evidence sought to be adduced was ‘potentially character blackening’.<sup>134</sup> The Court of Appeal disagreed, holding that excluding this evidence rendered the conviction unsafe. Di Birch was rightly trenchant in her criticism, suggesting that the effect of the judgment is that many women ‘run the risk’ of being ‘assumed open to the advances of all and sundry the minute she admits that she is prepared to contemplate the prospect of sex with someone she finds attractive’.<sup>135</sup> While some might argue that this is a ‘rogue’ decision,<sup>136</sup> it remains a worrying example of the approach of the Court of Appeal permitting the use of third-party evidence. It underlines not just the specific problem with this exception not requiring a relevant connection to the events at issue, but the broader question of sexual history evidence with third parties being considered relevant to consent.

## Admitting Evidence to Rebut the Prosecution

The final exception allows sexual history evidence to be adduced where it is necessary to rebut prosecution claims, so long as it goes ‘no further than necessary’ (s. 41(5)). While this is a largely uncontroversial provision, vigilance is required as this provision is not subject to s. 41(4) which prohibits evidence if the only or main reason is to impugn the credibility of the complainant.<sup>137</sup> Further, Scottish research revealed that a similar exception was being used by the defence to challenge evidence such as the source of injuries, with little or no evidential basis supporting the need for sexual history evidence.<sup>138</sup>

129. Above n. 5 para. 40.

130. The legislation in New South Wales, for example, does allow evidence at or about the same time, but only where there is a connection to the sexual behaviour that is the subject matter of the charge. See further, above n. 56 at 229.

131. *R v Mukadi* [2003] EWCA Crim 3765.

132. *Ibid.* para. 15.

133. *Ibid.*

134. *Ibid.*

135. D. Birch (2004) *Criminal Law Review* 373–6, at 375.

136. Philip Mott QC, ‘Section 41 Youth Justice and Criminal Evidence Act 1999’ presentation to Western Circuit RASSO, 28 February 2015. Note also that this guidance refers to the need for a similarity to be ‘particular and unusual’ to satisfy the s. 41 test.

137. As emphasised in *R v Rooney* [2001] EWCA Crim 2844.

138. Brown et al., above n. 34 at 32.



## Reforming the Law on Sexual History Evidence

In the aftermath of the *Evans* judgment and consequent public furore, the government announced a review of s. 41 which is currently ongoing.<sup>139</sup> In addition, a private members bill was introduced and separate amendments put forward in the Prison and Courts Bill, both of which aimed to strengthen the restrictions on the use of sexual history evidence.<sup>140</sup> Due to the legitimate public concerns over the current state of the law, it is highly likely that further attempts will be made to change the law. In this light, this section proposes a number of reforms, most of which apply equally to sexual history evidence with the accused as well as with third parties.

### *Clarity of Purpose and Principle: Challenging the ‘Twin Myths’*

The Canadian provisions on sexual history evidence begin with clear statements of principle which seek to delineate the scope of the provisions. In particular, the Criminal Code states that sexual history evidence may not be admitted to support inferences supporting the ‘twin myths’, namely, that by reason of that sexual activity, it is more likely that the complainant consented or is less worthy of belief.<sup>141</sup> An equivalent provision would significantly strengthen English law and restore the notion of consent as being person and situation specific, rather than capable of being inferred from previous conduct. While such a change should apply equally to evidence with the accused and third parties, a reform in relation to the latter would at least shift current understandings and undermine the impact of *Evans*.<sup>142</sup> Such a legislative reform, therefore, would exclude any sexual history evidence with third parties which was seeking to infer consent. This would bring English law closer to other jurisdictions, such as Michigan, where all third-party sexual history evidence is excluded other than evidence of specific instances to show the source or origin of semen, pregnancy or disease.<sup>143</sup> Any amended legislation could also state that, as a matter of principle, evidence should only be admitted in exceptional cases, helping to counter current practice.<sup>144</sup>

### *Judicial Guidance on Reasons for Decisions*

Decision-making could also be improved by specifying the issues to be considered when determining an application, again following the Canadian practice.<sup>145</sup> This approach provides clarity regarding the varied purposes of the legislation and aims to ensure as thorough an examination of the issues as possible. Such a provision is recommended, coupled with a procedural requirement that a written

139. As reported in N. Lester, ‘Government to Review the Law on Protection of Rape Complainants in the Light of the Ched Evans Case’, *The Independent*, 17 November 2017.

140. Liz Saville-Roberts MP introduced a private member’s bill, Sexual Offences (Amendment) Bill (HC Bill 137). Available at: [https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0137/cbill\\_2016-20170137\\_en\\_2.htm#11g1](https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0137/cbill_2016-20170137_en_2.htm#11g1) (accessed 27 July 2017). Harriet Harman MP proposed an amendment to the Prison and Courts Bill. Available at: [https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons\\_rm\\_pbc\\_0323.1-2.html](https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html) (accessed 27 July 2017).

141. Section 276(1) Criminal Code. For a detailed discussion, see Craig above n. 77.

142. No reform is a panacea, with all provisions open to creative interpretation or being ignored. On the Canadian experience, see Craig, above n. 77.

143. Michigan Penal Code, 750.520j. For a discussion, see above n. 56.

144. As recommended by Kelly et al., above n. 34 at 76.

145. The Canadian criteria are as follows (s. 276(3) Canadian Criminal Code): ‘(a) the interests of justice, including the right of the accused to make a full answer and defence; (b) society’s interest in encouraging the reporting of sexual assault offences; (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant’s personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant’.

explanation is provided of the grounds adopted, not just a reference to the criteria or, even worse, just a citation of the relevant section of the Act.<sup>146</sup>

### **Significant Probative Value Not Substantially Outweighed by Risk of Prejudice**

As well as clarifying the rationales for restricting sexual history evidence, legislation should raise the threshold of admission before potentially highly prejudicial and distorting material is admitted. Section 41 currently requires that evidence is only admissible if the 'refusal might have the result of rendering unsafe a conclusion of the jury' or court, on 'any relevant issue' (s. 41(2)(b)). This is a low threshold given the highly prejudicial nature of sexual history evidence and when compared with alternatives in other jurisdictions.<sup>147</sup> Canadian law, for example, provides that evidence may only be admitted if it has 'significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice' (s. 276(2)(c)). This is an important qualification as the thresholds are high: note the requirements of *significant* probative value, not *substantially* outweighed by risks.<sup>148</sup> Further, this provision rightly emphasises that the risk of admitting such evidence is to the proper administration of justice, not only the privacy and dignitarian rights of the complainant. The inclusion of such a provision, properly recognised and utilised, might go some way towards enabling judges to take a more robust approach without fear of appeals.

### **Legal Representation for Complainants**

Another measure which would support judges to determine cases according to the principles set out in any revised legislation would be the granting of legal representation to complainants. When considering how to improve rape trials, a common recommendation is to extend legal representation and standing to complainants.<sup>149</sup> Controversial due to its perceived risk to the adversarial process, a compromise suggestion has been to grant standing to complainants where an application to admit sexual history evidence is made, as is the case in Ireland.<sup>150</sup> Such a measure would have the benefit of guaranteeing complainants a voice in the decision-making process, as well as questioning agreements between the prosecution and defence which may not be in the best interests of the complainant. Nonetheless, as the Irish experience demonstrates, any such measure can only have effect if financial support is available to exercise such rights and procedural safeguards are assiduously followed.<sup>151</sup>

### **Extending Restrictions to Prosecution Evidence**

A further safeguard would be to extend s. 41 to the prosecution, following the example of other jurisdictions.<sup>152</sup> At present, the prosecution are free to introduce evidence of the complainant's sexual behaviour, often providing the necessary background and context to the case. However, research suggests that the prosecution's approach can often undermine the aims of sexual history restrictions by

146. As has happened in Canada, see Craig, above n. 77.

147. For example, s. 275(1)(c) of the Criminal Procedure (Scotland) Act 1995 (as amended in 2002) provides that evidence may only be admitted if 'the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice'.

148. Comparisons may be made with the test of 'substantive probative value' in the bad character provisions of the Criminal Justice Act 2003, s. 100. Whatever language might be chosen, the key element is that the threshold, in practice, must be a high.

149. See for example: F. Raitt, 'Independent Legal Representation for Complainants in Rape Trials', in C. McGlynn and V. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge: London, 2010) 267–80; K. Braun, 'Legal Representation for Sexual Assault Victims—Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819–7.

150. Criminal Law (Rape) Act 1981, s. 4A.

151. Rape Crisis Network Ireland, above n. 53.

152. For example, Scotland and New South Wales include the prosecution within the scope of restrictions.

introducing evidence (without challenge or judicial oversight) which, in fact, may be prejudicial to the complainant and adversely impact on the truth-seeking function of the trial.<sup>153</sup>

### *Improving Definition of ‘Sexual Behaviour’*

The scope of any restrictions is dependent on the definitions used, specifically here the meaning of ‘sexual behaviour’. Currently defined as ‘any sexual behaviour or other sexual experience’ (s. 42(1)(c)), this provision is potentially broad. And, in the context of seeking to limit the use of sexual history evidence, this is positive. For example, the trial judge in *R v Mukadi* excluded evidence of the complainant talking to and exchanging phone numbers with a third party where the defence had sought to imply this was preliminary sexual behaviour and/or prostitution.<sup>154</sup>

However, the somewhat opaque nature of the definition, together with a lack of clear rationale behind the legislative regime, engenders ambiguity. For example, in one case, cross-examination was allowed regarding two relationships with third parties, and held to be outside of the s. 41 restrictions, on the basis that these were questions about the ‘relationships’ and not ‘sexual behaviour’.<sup>155</sup> Similarly, evidence of text messages showing a 12-year-old girl participating in ‘risqué conversations’ were held to be outside of s. 41, and therefore not subject to restrictions, though they also could be used to infer sexual activity.<sup>156</sup> A definition, therefore, which at least included such implied sexual behaviour, may go some way towards strengthening the restrictions on these forms of evidence.<sup>157</sup>

### *Exclude Evidence Supporting Reasonable Belief in Consent*

As noted above, there is widespread concern that sexual history evidence is permitted to demonstrate reasonable belief in consent, even where excluded on the grounds of actual consent. Another necessary reform, therefore, is to amend s. 42(1)(b) such that belief in consent no longer comes within ‘not an issue of consent’, particularly in relation to third parties.

### *Removing or Reforming the Similarity Exception*

The most suitable reform regarding the current similarity exception is to remove it entirely on the dual grounds of the irrelevance of this form of evidence and its prejudicial effects. If the evidence is sufficiently probative and germane to a relevant issue in the trial, it will come within one of the other exceptions such as rebuttal evidence. The justification for this position was given long ago by Canadian Justice L’Heureux-Dube:

The exclusion of ‘pattern’ evidence and ‘habit’ evidence is not unconstitutional; the mythical basis of these arguments denies their relevance. ‘Pattern of conduct evidence’ usually occurs where the complainant has had consensual sexual relations in circumstances that look much like those supporting the assault allegation. Such evidence is almost invariably irrelevant. It is highly prejudicial to the integrity and fairness of the trial process and, in any event, is nothing more than a prohibited propensity argument. Arguments in its favour depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in.<sup>158</sup>

153. See, for example, Brown et al., above n. 34 and Kelly et al., above n. 34 at vii.

154. Albeit that this ruling was overturned on appeal: above n. 131.

155. Above n. 34 at 39–40. Kelly et al. suggest that this cross-examination was used to undermine the credibility of the complainant.

156. Kelly et al., above n. 34 at 40.

157. Ibid. at viii.

158. Above n. 11 at 685–6.

The less satisfactory option, but still better than the current position, is to strengthen the current exception, ensuring that only conduct indisputably unusual, and therefore highly unlikely to be coincidental, be admitted.<sup>159</sup> Even in such cases, the approach in Canadian law should be taken, such that similarity evidence is not permissible to demonstrate consent (or belief in consent). What should be required is a demonstrable *pattern of highly distinctive and unusual sexual behaviour*. A pattern requires a significant number of incidents, more than one or two, to be sufficient to demonstrate consistent and characteristic behaviour. The behaviour must be highly distinctive and unusual, and therefore closely resembling the activities which form the subject matter of the charge.<sup>160</sup> For the pattern to have any relevance or significant probative value, it would need to have a close temporal connection to the incidents alleged. Such an approach would return to the original parliamentary intention of the 1999 Act and should avoid the *Evans* trap whereby the more ordinary the behaviour, the easier it is to satisfy the similarity condition.

### Strengthening Procedural Requirements

Finally, while all of the above recommendations would create a significantly fairer and better law than the current s. 41, the enforcement of stronger procedural rules may have an even greater impact.<sup>161</sup> Indeed, even just requiring the existing rules to be followed would improve considerably the impact and effectiveness of the current law. The current rules do require written applications in advance, together with justifications and specifics of the evidence to be adduced.<sup>162</sup> A hearing is required if the prosecution is to challenge an application, where the judge so demands or the application is made less than 14 days before the trial. If there is to be a hearing, it is to be in private, which sounds sensible though as this means excluding the public, the complainant is also excluded.<sup>163</sup>

However, there is no requirement that late applications need be in writing, nor the reasons for granting or refusing the application. Nor are there any sanctions laid down for late applications.<sup>164</sup> Kelly et al.'s review s. 41 found that, contrary to the requirements of advance and written notice, the 'vast majority' of s. 41 applications took place on the first day of the trial.<sup>165</sup> Worryingly, the majority of applications related to a previous relationship with the accused which is evidence that could easily have been considered in advance of the trial.<sup>166</sup> This failure to follow the procedures demonstrates a worrying disregard for rules designed to ensure appropriate and effective scrutiny of applications. It suggests that the risks to the administration of justice are not sufficiently recognised, nor is there sufficient respect for the complainant who deserves advance notice of evidence being adduced about her or his sexual behaviour.

159. This would follow the original government intention behind the similarity exception in the 1999 Act, as discussed in Baird, above n. 80.

160. Some US states permit 'pattern evidence' (requiring more than single instances of conduct), for example, North Carolina permits (subject to other admission criteria) evidence of 'a pattern of sexual behaviour so distinctive and so closely resembling' earlier conduct: Kessler above n. 22 at 82. The Heilbron Report recommended an exception based on: 'strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following, the alleged offence' (above n. 4 para 137). While 'striking similarity' may represent a higher threshold than the current law, it still risks permitting *Evans*-style examples, hence the suggestion of specifying a highly distinctive and unusual pattern.

161. As also recommended by Baird et al., above n. 49.

162. Criminal Procedure Rules, Part 36.

163. Discussed in Kelly et al., above n. 34 at 20.

164. Note that Michigan's strict procedural rules, and particularly the risk of exclusion when not followed, have been upheld as constitutional by the US Supreme Court where it was held that the provision 'serves legitimate state interests: protecting rape victims against surprise, harassment, and unnecessary invasions of privacy and protecting against surprise to the prosecution. This court's decisions demonstrate that such interests may justify even the severe sanction of preclusion in an appropriate case': *Michigan v Lucas* 500 US 145; 111 S Ct 1743; 114 L Ed2d 205 (1991).

165. Kelly et al., above n. 34 at 23. A similar disregard for procedural provisions has been found in research in Scotland.

166. *Ibid.* at 24.

Suggested reforms therefore include an obligation for applications to be made pre-trial and in writing, with the prosecution required to respond to each application.<sup>167</sup> A hearing should be mandatory to ensure a careful scrutiny of applications, with the complainant permitted to attend.<sup>168</sup> Requiring a hearing will help to ensure that the prosecution actively consider (and challenge) the use of sexual history evidence.<sup>169</sup> There must be stricter scrutiny of any late applications (which should still be in writing) with them only being accepted where the evidence was demonstrably not available at an earlier stage. Judges should be required to give reasons for their decision in writing and the prosecution (and complainant if granted additional rights) should have a right to appeal a decision to introduce evidence.<sup>170</sup>

## Conclusions

Until *Evans*, there was a common assumption that third-party sexual history evidence was irrelevant in modern day rape trials: an assumption that back in the 1970s, the Heilbron Report had effectively dealt with this issue and that while allowance was made for ‘Romeo and Juliet’ scenarios, in practice any dispute regarding sexual history now only concerned the relevance of evidence between the complainant and accused. The judgment in *Evans* and ensuing public furore reveals that no such consensus exists. Indeed, in reviewing the case law and research on the use of third-party sexual history evidence, the approach in *Evans* perhaps should not have come as such a surprise. The elastic nature of some of the concepts used in s. 41, together with an expansive interpretation of *R v A*, provides room for a permissive, *Evans*-style interpretation of the law which holds that sexual history evidence, even with third parties, may be relevant to consent.

However, this approach undermines the principles of autonomy and free choice which should underpin any notion of consent to sexual activity. Consent is to a particular person, not a situation or circumstance. Consent should also be sought and given afresh on each occasion of sexual activity. To hold otherwise, is to suppose that women will consent to sexual activity in the right set of circumstances, or that having once consented, it can be assumed that they will likely do so again. Further, in permitting sexual history evidence in a significant number of cases and often in highly prejudicial circumstances, the current law is failing to protect witnesses from unnecessary humiliation and distress which, in turn, hinders them from giving their best evidence and securing the truth-seeking function of the trial. In encouraging defence applications to adduce sexual history evidence (albeit implicitly), the law is risking discouraging complainants from reporting cases to the police and supporting prosecutions. In sum, the administration of justice is being adversely affected.

Further law reform is, therefore, urgently required. A comprehensive revision of the current law would enable reform from first principles, as well as bringing greater clarity and precision to unnecessarily complicated statutory provisions. Nonetheless, even in the absence of such wholesale reform, important amendments can be made to the current regime which would bring about valuable

167. One reason identified in Scotland for the increase in sexual history evidence is the requirement for written applications which have become routine and extensively set out any possible evidence potentially admissible (above n. 25 at 394). Nonetheless, if the success rate of applications were not so high, the impetus to make an application may be reduced. See also the procedural recommendations contained in the Northumbria Court report which focus, particularly, on the judiciary and prosecution being pro-active in challenging applications (Baird et al., above n. 49 at 9).

168. Much sexual history is currently introduced following agreement between the defence and prosecution, without a hearing or prosecution challenge, often due to what in Scotland was found to be a ‘shared presumption of relevance’ (Brown et al., above n. 42 at 393).

169. As recommended in Baird et al., above n. 49. The 2006 study into the operation of s. 41 found that challenges by the prosecution were made more difficult due to the failures of the defence to follow the proper procedures (and concomitant failure by judges to insist on the rules being followed). The study concluded that, overall, the ‘prosecution were reluctant to pursue cases which require grappling’ with the ‘complex and contested’ area of sexual history evidence (Kelly et al., above n. 34 at 77).

170. Kelly et al., *ibid.* at viii.

improvements. However, even if further reforms are enacted, vigilance will be required to identify and tackle any unintended consequences. For example, following the introduction of new measures to restrict sexual history evidence in Scotland, the volume of evidence admitted substantially increased.<sup>171</sup> Bouyed by high success rates for applications to admit sexual history evidence, extensive written applications have become routine which, together with shared assumptions about relevance, have undermined the aims of the legislation. In a similar vein, international experience demonstrates that restrictions on sexual history evidence often lead to an increase in the use of other forms of potentially prejudicial evidence, such as medical or counselling records.<sup>172</sup>

Ultimately, therefore, as well as legislative reform, it is wider societal change that is required. We need to challenge deeply embedded practices, prevalent across society and therefore also within the legal profession and judiciary, that result in women's sexual history and character influencing determinations of responsibility, blame and guilt for alleged sexual offending. We must redouble our efforts to focus investigations and trials on the defendant's actions and choices, rather than seeking excuses for their behaviour in the sexual history, character or lifestyle of complainants.

### Acknowledgements

The author would like to thank Neil Cobb, Liz Campbell and the anonymous referees for their helpful comments and suggestions on an earlier version of this article, and to Tara Beattie for her research assistance.

### Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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171. Above n. 25 at 388–389.

172. S. Bronitt and B. McSherry, 'The use and abuse of Counselling Records in Sexual Assault Trials: Reconstructing the Rape Shield?' (1997) 8 *Criminal Law Forum* 259; L. Gotell, 'The Ideal Victim, the Hysterical Complainant and the Disclosure of Confidential Records: The Implications of the Charter for sexual Assault Law' (2002) 40 *Osgoode Hall Law Journal* 252. See also L. Ellison, 'The use and Abuse of Psychiatric Evidence in Rape Trials' (2009) 13 *Evidence and Proof* 28–49.