

# Challenging the Law on Sexual History Evidence: a response to Dent and Paul

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*In an earlier edition of this journal, and in the aftermath of the controversial R v Ched Evans case, Nick Dent and Sandra Paul set forth a 'defence' of the current law on the use of sexual history evidence in sexual offence trials in England & Wales. They rejected arguments put forward by politicians and policy-makers - characterised as 'emotive rhetoric and misconceived hyperbole' - that the ruling opens the 'floodgates' to allowing sexual history evidence into trials, that the admission of sexual history evidence may perpetuate 'victim-blaming' and that allowing sexual history evidence may deter complainants reporting sexual offending. This article responds to Dent and Paul by challenging the current interpretation of the law and arguing that significant reform is urgently needed. It is written with the aim of encouraging a full debate, with all available evidence being considered, as well as differing approaches and perspectives being brought into the discussion.*

## Introduction

In an earlier edition of this journal, Nick Dent and Sandra Paul set forth a 'defence' of the current law on the use of sexual history evidence in sexual offence trials in England & Wales.<sup>1</sup> Their impetus was the media furore that greeted the acquittal of the footballer Ched Evans on charges of rape, and subsequent Parliamentary attempts to reform the law. Evans had been convicted of rape, but was acquitted following a retrial where new evidence of the complainant's sexual behaviour with third parties had been admitted. The retrial was held after the Court of Appeal in *R v Ched Evans* had ruled that the sexual history evidence that came to light after the conviction 'would have been relevant and admissible evidence at trial'.<sup>2</sup>

Dent and Paul first set out their understanding of the current law, suggesting it provides a suitable 'balancing act'<sup>3</sup> between a defendant's right to a fair trial and the need to prohibit irrelevant questioning of the complainant. This is followed by a rejection of what the authors identify as the main criticisms of the current legislative regime, namely: the argument that the judgment in *R v Ched Evans* opens the 'floodgates' to allowing sexual history evidence into trials; that the admission of sexual history evidence may perpetuate 'victim-blaming'; and that allowing sexual history evidence may act as a deterrent to complainants reporting sexual offending. The authors' aim overall is to challenge what they characterise as the 'emotive rhetoric and misconceived hyperbole'<sup>4</sup> in the current debate. Further, they are concerned that the views of 'commentators who either misunderstand or willingly misrepresent' the current law will influence the Government and Parliament when it comes to questions of reform.<sup>5</sup>

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<sup>1</sup> Nick Dent and Sandra Paul, 'In defence of section 41' (2017) 8 *Criminal Law Review* 613-627.

<sup>2</sup> *R v Evans* [2016] EWCA Crim 452 at [72].

<sup>3</sup> Dent and Paul above n 1 at 613

<sup>4</sup> Ibid.

<sup>5</sup> Dent and Paul above n 1 at 627.

The aim of this article is to respond to the specific arguments put forward by Dent and Paul.<sup>6</sup> Accordingly, it adopts the same structure and is written in the spirit of encouraging a full debate, with as much of the available evidence being considered, as well as differing approaches and perspectives being brought into the discussion.

## Setting the Scene: Section 41 and *R v Ched Evans*

Before going on to respond to the specifics of Dent and Paul's article, this section briefly sets out the current law, with a specific focus on the issue central to the *Evans* case, namely admitting sexual history evidence with people other than the accused (third parties) on the grounds of 'similarity'. The current law is to be found in sections 41-43 of the Youth Justice and Criminal Evidence Act which was introduced following sustained critique of the extensive and inappropriate use of sexual history evidence in sexual offence trials.<sup>7</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. Section 41, therefore, applies both to evidence relating to sexual activity with the accused and with third parties. Leave may only be given if the evidence falls within one of the four exceptions, relates to 'specific instances' of sexual behaviour (sec 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 (section 41(2)(b)) and the purpose or main purpose is not to impugn the credibility of the complainant (sec 41(4)).

The first exception is where the issue to be proven is 'not an issue of consent' (section 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 (section 41(3)(b)). Evidence of sexual behaviour 'so similar' that the 'similarity cannot reasonably be explained as a coincidence' is the third exception (section 41(3)(c)) and evidence is permitted under section 41(5) where it is necessary to rebut prosecution claims.

It is the scope of the similarity exception that was at issue in *Evans*. This exception was not included in the initial legislative drafts of the 1999 Act: it only being added following a successful intervention in the House of Lords legislative debates. It was argued that evidence should be permitted in situations such as where 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>8</sup> The argument was that such evidence would show some form of pattern of sexual acts of this peculiar nature and this might have a bearing on issues at trial.

The Government accepted the amendment, making clear its view that to be admitted, the behaviour at issue must be 'so unusual that it would be wholly unreasonable to explain it as coincidental'.<sup>9</sup> The requirement that activity is 'unusual' makes sense in that it enables a pattern to be identified and, if the conduct is unusual, it is less likely to be a coincidence. Such an approach also chimes with that taken in other jurisdictions such as North Carolina in the US which only permits evidence of 'a pattern of sexual behaviour so distinctive and so closely resembling' earlier conduct'.<sup>10</sup> This requires establishing a pattern, and so a number of acts, but also a pattern of

<sup>6</sup> For a more detailed examination of the current law and suggestions for reform, see Clare McGlynn, '[Rape Trials and Sexual History Evidence: Reforming the Law on Third Parties](#)' (2017) 81 *Journal of Criminal Law* 367-392.

<sup>7</sup> For a discussion, see Jennifer Temkin, 'Sexual history evidence – beware the backlash' [2003] *Crim LR* 217 and Vera Baird, 'Changes to Section 2 of Sexual Offences Act 1976' (1999) 39 *Medicine, Science and the Law* 198.

<sup>8</sup> Hansard vol 597(2) February 1999, col 45.

<sup>9</sup> Hansard, 23 March 1999, col 1218.

<sup>10</sup> As discussed in Elizabeth 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.

*unusual* behaviour. The justification is that unless the behaviour is unusual, it is more difficult to establish that there is indeed a pattern, and to ensure that ordinary, everyday activities are not included. 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, as exemplified in *Evans*.

Key to understanding the current law is Lord Clyde's comment in *R v A* when he stated that the similarity exception 'does not necessitate that the similarity has to be in some rare or bizarre conduct'.<sup>11</sup> However, the context to Lord Clyde's opinion is crucial. He was seeking to find a way to bring within section 41, sexual behaviour evidence between a complainant and defendant and to do so he gave an expansive interpretation of the 'similarity' exception. Thus, his focus 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>12</sup>

Nonetheless, Lord Clyde's words have been cited in subsequent cases involving third parties. The Court of Appeal in *Evans* said that Lord Clyde's words provided 'helpful guidance' and ruled that to come within the similarity exception, the behaviour in question does not have to be 'unusual or bizarre'.<sup>13</sup> Examining the particular facts, the Court of Appeal determined that the evidence that two men had had sex with the complainant, one before and one after the alleged rape, was 'arguably sufficiently similar' to come within section 41(3)(c)(i).<sup>14</sup> Further, had the evidence been available at the original trial, it would have been 'relevant and admissible'.<sup>15</sup> The Court 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>16</sup> Specifically, the sexual intercourse included the 'doggy style' sexual position and she allegedly used the phrase 'f..k me harder' with one man and 'harder' with another. The Crown argued that there are good grounds for suggesting that this behaviour is commonplace activity that could easily be explained as a coincidence.<sup>17</sup> However, the Court ruled that the test does not require unusual or bizarre conduct, so the everyday can constitute sufficiently similar behaviour for these purposes. The Court of Appeal did conclude by acknowledging that the circumstances in which evidence of sexual behaviour with third parties is admitted should be rare, but it maintained that *R v Evans* is a 'rare case', as discussed further below.<sup>18</sup>

## Floodgates and the impact of *R v Ched Evans*

### *Floodgates*

Dent and Paul first examine comments made by Vera Baird QC, and members of the Women's Parliamentary Labour Party, that the *Evans* case may lead to more questioning of complainants regarding their sexual history than has previously been the case – the 'floodgates' argument. The authors respond that a floodgates argument 'fails to recognise that the threshold for admitting evidence under section 41(3)(c)(i) is a high one which will rarely be satisfied'.<sup>19</sup>

<sup>11</sup> [2001] UKHL 25 at [135].

<sup>12</sup> [2001] UKHL 25 at [131].

<sup>13</sup> *R v Evans* [2016] EWCA Crim 452 at [51] and [73].

<sup>14</sup> *R v Evans* [2016] EWCA Crim 452 at [72].

<sup>15</sup> *R v Evans* [2016] EWCA Crim 452 at [72]. For a detailed discussion, see McGlynn above n 6.

<sup>16</sup> *R v Evans* [2016] EWCA Crim 452 at [71].

<sup>17</sup> For a discussion of the commonplace nature of both the sexual position at issue and language used, see McGlynn n 6.

<sup>18</sup> *R v Evans* [2016] EWCA Crim 452 at [74].

<sup>19</sup> Dent and Paul above n 1 at 621. The authors also challenge the reference by Baird and the Women's Parliamentary Labour Party to *Evans* setting a 'precedent'. While it seems unnecessary to engage further in a technical debate about the legal or other meaning of the term, the authors do claim that it is 'difficult to comprehend' how the Court of Appeal's ruling can set a legal precedent 'when the judgment was confined to the specific facts of the case' (at

It would be encouraging if the threshold was high and rarely satisfied. Unfortunately, however, it is difficult to make such a definitive claim. Dent and Paul are right to the extent that there are many cases in which it is *claimed* that the threshold is high, and the Court of Appeal in *Evans* referred to the ‘hurdle’ facing a defendant seeking to admit this form of evidence.<sup>20</sup> And there are cases where courts have met defence submissions to admit evidence with a robust rejection.<sup>21</sup> However, it is also possible to bring into the discussion other cases where the threshold does not appear to be so ‘high’.

*R v Mukadi* is one such case.<sup>22</sup> Upholding an appeal against a rape conviction, the Court of Appeal ruled that evidence of the complainant getting into a car and exchanging phone numbers with a man other than the accused, earlier on the day of the alleged rape, should have been admitted. The trial judge had excluded the evidence, suggesting it was ‘potentially character blackening’ and stating that ‘this kind of evidence is exactly that which the statute is designed to exclude’.<sup>23</sup> But the Court of Appeal disagreed. Another example is the equivocal case of *R v Hamadi*.<sup>24</sup> While the Court of Appeal upheld a refusal to admit general evidence of the complainant’s supposedly ‘promiscuous nature’, evidence was permitted at trial of the complainant having sex with a third party when she had ‘asked him to tie her to a bed’ (the rape allegation involved being tied), as well as evidence that earlier in the evening in a bar she had jumped into the arms of a male friend ‘simulating sexual movements’.<sup>25</sup> The admission of this evidence was not subject to an appeal, yet it is difficult to see how this third party evidence can be relevant to whether or not the complainant consented to an entirely different man later in the evening.

Dent and Paul go on to cite *R v Guthrie*<sup>26</sup> as a case that ‘helps demonstrate that Courts do not simply admit evidence under section 41 without careful scrutiny’.<sup>27</sup> In this case, decided after *Evans*, the Court of Appeal refused an application to admit previous sexual history alleged to have taken place about a year before the alleged rape and between the accused and complainant. It is welcome that the Court rejected the application in this case on the basis that the events were too remote to be of sufficient relevance. However, the judgment relates to evidence between the accused and complainant, and therefore stands on a different footing to third party evidence in terms of relevance. Therefore, while the temporal limit does provide some solace to those concerned about investigations into their sexual history, it is of far less help on the specific question of what sort of sexual behaviour will be deemed to have a ‘relevant similarity’.<sup>28</sup>

The authors also suggest that *R v Guthrie* demonstrates that the floodgates ‘have not and will not be opened’.<sup>29</sup> Aside from the fact that the case is not focussed on sexual history with third parties, in any event, one case cannot justify such a claim. We will have to wait to see the cumulative effect of not just a number of future appeal court judgments, but also evidence of the practice on the ground. It seems that the only case on which there appears to be general agreement is *R v T (Abdul)*, described by the Court of Appeal as an ‘easy’ case, involving previous consensual sex between the complainant and defendant in a children’s climbing frame in a park (where the alleged rape was said to have taken place).<sup>30</sup> The irony is that this factual scenario is surely one to

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621). However, the authors’ argument is not clear, as the Court makes a number of pertinent rulings on this area of law, as discussed below, which will no doubt be relied on in subsequent cases by defendants seeking to introduce sexual history evidence.

<sup>20</sup> *R v Evans* [2016] EWCA Crim 452 at [72].

<sup>21</sup> For example, defence counsel’s application in *R v Barrington White* to admit evidence of prostitution as not being an ‘issue of consent’ was rejected by the Court of Appeal as ‘untenable’: [2004] EWCA Crim 946 at [23].

<sup>22</sup> *R v Mukadi* [2003] EWCA Crim 3765.

<sup>23</sup> *Ibid* at [15].

<sup>24</sup> *R v Hamadi* [2007] EWCA Crim 3048.

<sup>25</sup> *R v Hamadi* [2007] EWCA Crim 3048 at [25].

<sup>26</sup> *R v Guthrie* [2016] EWCA Crim 1633.

<sup>27</sup> Dent and Paul above n 1 at 621.

<sup>28</sup> As described in *R v Guthrie* [2016] EWCA Crim 1633 at [10].

<sup>29</sup> Dent and Paul above n 1 at 622.

<sup>30</sup> The Court of Appeal in *R v Harris* ([19]) describing *R v T (Abdul)* [2004] 2 Cr App Rep 552.

be described as a bizarre and unusual; hence it being ‘easy’ to establish sufficient similarity and substantial relevance.

As well as claiming that the threshold to admit evidence is high, Dent and Paul argue that it will rarely be satisfied. Unfortunately, we cannot be sure that this is the case. As the authors themselves suggest, there is a need for up to date information on the use of sexual history evidence in trials. Nonetheless, from the evidence that we do have, it seems that sexual history evidence is adduced in around one third of trials, perhaps more (especially as material often appears to be introduced in circumvention of the procedural rules), with a high success rate for applications.<sup>31</sup> There is no currently available evidence, therefore, to substantiate Government claims that the use of these forms of evidence is ‘exceptional’; nor claims that it is ‘rarely’ used.<sup>32</sup>

### ***Impact on future defence strategies***

The authors’ next reject the argument made by Labour MP Jess Phillips that, following *Evans*, a defendant may be encouraged to engage in ‘crowd-sourcing information from a victim’s previous partners and using it against her in court’.<sup>33</sup> The authors suggest this constitutes an ‘implicit suggestion’ that defendants will collude with others and fabricate an account.<sup>34</sup> It is possible to read this into the comment. However, there is no requirement of collusion for this argument to be worth raising. Phillips may in fact be noting that as bizarre behaviour is not required, and that commonplace sexual activities from just two partners can be taken to satisfy the similarity test, then a defendant has little to lose in seeking information from a complainant’s previous sexual partners. Fabrication is not necessary: it may simply involve seeking out evidence that may be useful. Where conduct need not be unusual or bizarre, there is perhaps a greater likelihood that such ‘similarities’ may be found, and therefore a greater incentive to seek out such material. That this is a potential impact of *Evans* is perhaps not as far-fetched as the authors imply. Indeed, this very argument was raised in the Court of Appeal where Eleanor Laws QC for the Crown warned against admission of the evidence on the basis that the ‘court should not encourage this kind of post-trial investigation into the sexual behaviours of a complainant that has the potential for undermining the clear intent of Parliament in enacting section 41’.<sup>35</sup>

### **Victim-blaming, credibility and sexual history to prove consent**

Next, Dent and Paul turn their attention to another criticism of section 41, namely that ‘the admission of sexual behaviour evidence amounts to “victim-blaming” and that the admission of this evidence risks giving credence to the “twin myths”’.<sup>36</sup> They quote again from Vera Baird QC: ‘a rape defendant could bring Mr B and Mr C to testify that the complainant had had consensual sex with them. The argument would run, she consented to me as well because she’ll have sex with anyone. The two arguments – she’s a tart and you can’t believe a word she says – were what women, not surprisingly, feared. These were the “twin myths” that flowed from the use of previous

<sup>31</sup> The available evidence is discussed in McGlynn above n 6. See also Temkin et al who found that sexual history evidence with third parties was introduced in half (4 out of 8) of observed trials without any application under section 41: ‘Different Functions of Rape Myth Use in Courts’ (2016) *Feminist Criminology* <https://doi.org/10.1177/1557085116661627>

<sup>32</sup> Secretary of State for Justice, Liz Truss, ‘A Speech on criminal justice reform by the Secretary of State for Justice’, 13 February 2017, available <https://www.gov.uk/government/speeches/a-speech-on-criminal-justice-reform-by-the-secretary-of-state-for-justice> [accessed 29 September 2017].

<sup>33</sup> Jess Phillips, ‘Dredging up sexual history in court will deter rape victims – this must end now’ *The Guardian*, 24 October 2016.

<sup>34</sup> Dent and Paul above n 1 at 621.

<sup>35</sup> *R v Evans* [2016] EWCA Crim 452 at [64].

<sup>36</sup> Dent and Paul above n 1 a 623.

sexual history.’<sup>37</sup> Further, they quote the Women’s Parliamentary Labour Party who wrote that they did not want to see a ‘return to a culture of victim-blaming’ and that ‘the use of a complainant’s sexual history should never be used in our courts as evidence of consent’.<sup>38</sup> The authors’ respond by stating that these arguments demonstrate a ‘fundamental misunderstanding of the way the legislation works’.<sup>39</sup>

### *Victim-blaming and challenging credibility*

Dent and Paul state that in *Evans* the sexual history evidence was introduced not to challenge the complainant’s credibility, but as being relevant to the issue of consent, belief in consent and to bolster the defendant’s credibility. That is, it was not submitted to bolster one of the ‘twin myths’. This is technically true: the defence were not claiming that the complainant was lying about consent because, in fact, she could not remember the events of the evening and she did not, therefore, give evidence of non-consent. Such a scenario is not common at trial and required the defence to rebut the inference of incapacity; differentiating it from the ‘norm’ where there is a direct clash of evidence on consent. This is one aspect of the case that made it unusual in the eyes of the Court of Appeal and meant there was no direct attempt to challenge the credibility (truthfulness) of the complainant. It is difficult to know what the outcome would have been to an application to admit the evidence had the complainant herself given evidence that she did not consent.

Nonetheless, it is important here to note the broader impact of introducing sexual history evidence. In practice, 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’. Thus, while it is rarely suggested nowadays that sexually active women are less truthful, the focus of attention has shifted from such ‘probative credibility’ (ie truthfulness) to ‘moral credibility’.<sup>40</sup> Challenging the moral credibility of a complainant by introducing sexual history evidence invites the (often implicit) determination that the complainant either does not deserve the court’s sympathy or that there is not a suitable foundation for punishing the accused.<sup>41</sup> Often more nebulous evidence about ‘sexual character’ bolsters this effect, including references to women’s lifestyles, personal habits, dress and such like.<sup>42</sup>

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 (and ‘mock’ jurors) consider complainants less credible and more likely to have consented.<sup>43</sup> It seems that juries often focus on the ‘respectability’ of women complainants, with evidence of

<sup>37</sup> Dent and Paul above n 1 at 623, quoting Vera Baird, ‘We cannot allow courts to judge rape by sexual history’ 17 October 2016, *The Guardian* <https://www.theguardian.com/commentisfree/2016/oct/17/courts-judge-rape-sexual-history-ched-evans-case> [accessed 25 September 2017]. It should be noted that the quote from Baird given by the authors was not related to a claim that the evidence was used in *Evans* to challenge the complainant’s credibility. The selected quote was discussing the reasons behind the introduction of section 41 in 1999.

<sup>38</sup> Letter to Attorney General from Women Labour MPs, LabourList, 24 October 2016, available at: <https://labourlist.org/2016/10/womens-plp-demands-rape-case-reform-after-ched-evans-retrial/> [accessed 25 September 2017] quoted by Dent and Paul above n 1 at 623.

<sup>39</sup> Dent and Paul above n 1 at 623.

<sup>40</sup> See Aileen McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ (1996) 16 *Oxford Journal of Legal Studies* 275 and Michele Burman, ‘Evidencing sexual assault: women in the witness box’ (2009) 56 *Probation Journal* 379.

<sup>41</sup> McColgan, *ibid* at 281.

<sup>42</sup> As discussed in Burman above n 40.

<sup>43</sup> See, for example: Liz Kelly et al, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (London: Home Office Report 20/06, 2006); B Brown et al, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (Edinburgh: Scottish Office Central Research Unit, 1992); Regina Schuller and Patricia Hastings, ‘Complainant sexual history evidence: its impact on mock juror decisions’ (2002) 26 *Psychology of Women Quarterly* 252.

previous sexual activity, alongside drinking, drugs or other ‘risk-taking’ activities, reducing their ‘respectability’ which, in turn, reduces the assessment of credibility.<sup>44</sup> For example, in relation to drunkenness (one of the grounds of ‘similarity’ in *Evans*), research with mock jurors suggests a shifting of responsibility away from defendants and onto complainants where the complainants have been drinking.<sup>45</sup>

This idea of ‘moral credibility’, and 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 and responsibility from the defendant to the complainant.<sup>46</sup> Indeed, the father of the complainant in *Evans* said of his daughter’s experience that ‘it was like she was the one on trial’.<sup>47</sup>

Therefore, and returning to Dent and Paul’s argument, while it is the case that evidence about the complainant in *Evans* was not introduced to explicitly and directly challenge the complainant’s credibility, in practice there is a good chance that such evidence impacted on the trial process in ways which reflected negatively on the complainant and influenced decision-making. This exemplifies the challenge for the justice system in terms of balancing the need to permit relevant evidence, at the same time as reducing distorting impacts on the decision-making process by restricting highly prejudicial material.

## Using sexual history evidence to demonstrate consent

Dent and Paul next challenge the Women’s Parliamentary Labour Party recommendation that sexual history evidence should never be permitted to demonstrate consent. The authors claim this indicates ‘a misunderstanding of the concept of consent in rape cases’.<sup>48</sup> They point to the defence of reasonable belief in consent which requires a court to examine the beliefs of the defendant, taking into account ‘other pieces of objective evidence’, as required by section 1(2) of the Sexual Offences Act 2003 which states that whether a ‘belief is reasonable is to be determined having regard to all the circumstances’. They conclude that never permitting sexual history evidence to prove consent ‘is tantamount to viewing the offence of rape from the perspective of the complainant – and not from the perspective of the defendant which is what the jury is specifically required to do’.<sup>49</sup> They continue that evidence of the complainant’s previous sexual behaviour will be ‘relevant

<sup>44</sup> It is not just juries which appear to be influenced. For example, in a study into attrition in rape cases, Katrin Hold and Elisabeth Stanko found that: ‘As far as police decisions are concerned (but not the victim decision to withdraw), the intractable ‘respectable woman’ image is significant: voluntary alcohol consumption prior to the rape, a history of consensual sex with the perpetrator, mental health problems and learning difficulties, and a woman’s ‘misunderstanding’ of the meaning of consent explain police decisions to discontinue a case’: ‘Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales’ (2015) 12(3) *European Journal of Criminology* 324–341 at 336.

<sup>45</sup> Emily Finch and Vanessa Munro, ‘Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants’ (2005) 45 *British Journal of Criminology* 25.

<sup>46</sup> The *Evans* case provides a recent example of the enduring nature of negative attitudes towards sexually active women, with social media replete with disparaging references to the complainant as a ‘slag’ and far worse: discussed in Holly Baxter, ‘Justice should never be done like it was in the Ched Evans rape trial’, 14 October 2016, *The Independent*: <http://www.independent.co.uk/voices/ched-evans-footballer-rape-trial-acquitted-justice-woman-misogyny-consent-prison-walk-free-a7362276.html> [accessed 29 September 2017].

<sup>47</sup> Quoted in Sanchez Manning, ‘Father of Ched Evans’s accuser slams lawyers for ‘raping’ his daughter by trawling through her private life’, 15 October 2016, *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 29 September 2017].

<sup>48</sup> Dent and Paul above n 1 at 623.

<sup>49</sup> Ibid.

to an objective assessment as to whether or not the defendant held a reasonable belief in consent – and *Evans* is a paradigm example of this’.<sup>50</sup>

Addressing the more general point first, an argument that sexual history evidence should not be used to demonstrate consent is not a ‘misunderstanding’ of consent but simply a *different* approach to that of the authors. If consent is understood as person and situation specific, and cannot therefore be inferred from previous sexual history, then it makes sense to say that sexual history evidence should not be admissible to prove consent. Indeed, this is the position in Canadian law where sexual history evidence is not permitted to demonstrate consent, that being perceived as one of the ‘twin myths’ that the legislation is designed to challenge.<sup>51</sup> Even though English law permits the use of sexual history evidence to demonstrate consent, doing so is far less accepted in relation to third party evidence.<sup>52</sup> Indeed, Lord Clyde in *R v A* 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>53</sup>

Dent and Paul also raise the issue of using sexual history evidence to demonstrate a reasonable belief in consent. It is, however, difficult to see how the sexual history evidence in *Evans* could be used to support this particular defence, if it was (as Evans claimed) unknown to him at the time of the alleged rape. This is particularly so as one of the two sexual acts deemed to satisfy the similarity test occurred after the events at issue. Further, even had he known of the one example of the complainant’s sexual activity with another person, it is important to consider whether this is a suitable or sufficient basis for a reasonable belief in consent. If yes, this would mean that a defendant is permitted to form a 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. It is clearly arguable that such an approach does not accord with the intention of the change to reasonable belief in consent introduced in the 2003 Sexual Offences Act. Interestingly, research into the operation of section 41 found ‘considerable criticism’ amongst barristers and judges regarding the belief in consent exception on the basis that it was ‘too wide and “illogical”’.<sup>54</sup>

Dent and Paul next suggest that excluding sexual behaviour evidence ‘potentially infringes the right of a defendant to a fair trial’.<sup>55</sup> In particular, they refer to the judgment of Lord Steyn in *R v A* who ruled that the interpretative obligation under section 3 of the Human Rights Act 1998 required section 41 to be ‘subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible’.<sup>56</sup> This dicta has been the subject of extensive commentary, with differing views on its scope and implications, both in relation to human rights jurisprudence generally, and on the substantive issue of admission of sexual history evidence.<sup>57</sup> In the latter context, Dent and Paul endorse a more expansive approach to interpreting Lord Steyn’s dicta, arguing that the ‘protection of complainants cannot be at a cost to the defendant’s fundamental right to a fair trial’.<sup>58</sup>

<sup>50</sup> Ibid at 624.

<sup>51</sup> See further Elaine Craig, ‘Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions’ (2016) *Canadian Bar Review* 45.

<sup>52</sup> Many US states exclude entirely sexual history evidence with third parties on the basis of its irrelevance. For a discussion, see Kessler above n 10 at 82.

<sup>53</sup> [2001] UKHL 25 at [125].

<sup>54</sup> Kelly et al above n 43 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.

<sup>55</sup> Dent and Paul above n 1 at 624.

<sup>56</sup> [2001] UKHL 25 at [45].

<sup>57</sup> This should not come as a surprise: it is the essence of perennial debates over the nature and determination of precedent. See, for example, the discussion in Michael Zander, *The Law Making Process* (2004) on the ‘flexibility’ of precedent and acknowledgement that judges can ‘manipulate’ precedents, logic, social policy and ‘all other bases of argument’ in determining what constitutes a precedent. This underscores the often ‘unacknowledged’ flexibility of the concept of precedent.

<sup>58</sup> Dent and Paul above n 1 at 624.



However, it can alternatively be suggested, and this is the argument being made here, that *R v A* is better interpreted as confined to a narrower set of circumstances, specifically sexual history evidence between the accused and complainant. There is support for such an approach in the opinions of other Lords in *R v A*. Lord Hope specifically stated that it was not possible to read into section 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>59</sup> And while Lord Clyde was open to the possible need to admit evidence relating to sexual activity with the accused, 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>60</sup>

Arguments in favour of a narrower interpretation also arise when examining *R v A* in the context of Human Rights Act jurisprudence. It is now commonly accepted that *R v A* represents a ‘high water mark’ for the section 3 interpretative obligation, with such ‘activist’ uses of this power less evident in more recent decisions.<sup>61</sup> Indeed, as Lord Bingham argued in *Anderson*, to attribute a meaning to a legislative provision quite different from that which Parliament intended ... would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act’.<sup>62</sup> Avoiding such ‘judicial vandalism’<sup>63</sup> by favouring a narrow interpretation of the ratio of *R v A*, therefore, can be said to be preferable in that it more closely allows for the Parliamentary intent to restrict the use of sexual history evidence, while also accommodating fair trial concerns, particularly in an area of such public controversy. This is not to say that the defendant’s right to a fair trial is not to be given appropriate credence. But it is to say that the balance struck by Parliament, a necessary balancing exercise as recognized by the European Court of Human Rights<sup>64</sup>, does not necessarily require sexual history evidence with third parties to be admitted in these sorts of circumstances, due to its low probative value and highly prejudicial nature.<sup>65</sup>

## Sexual History Evidence as a Deterrent to Reporting

The final criticism of the *Evans* judgment to which the authors respond again comes from the Women’s Parliamentary Labour Party which suggested that the case will ‘deter victims from disclosing their abuse and will reduce the number of victims presenting their cases to the police for fear of having their private lives investigated and scrutinised’.<sup>66</sup> Dent and Paul respond that this ‘assertion is not supported by evidence’.<sup>67</sup> Unfortunately, to support their own assertion that prosecutions and convictions for rape are at the highest levels recorded, the authors cite Crown Prosecution Services statistics which relate to 2015-2016.<sup>68</sup> Such statistics, therefore, do not help us to decide whether or not *Evans* has or will make a difference to reporting and prosecutions.

<sup>59</sup> [2001] UKHL 25 at [109].

<sup>60</sup> [2001] UKHL 25 at [130].

<sup>61</sup> Roger Masterman and Colin Murray, *Exploring Constitutional and Administrative Law* (Pearson, 2013), pp 628-631. See also Danny Nicol, ‘Statutory Interpretation and Human Rights after *Anderson*’ [2004] Public Law 274.

<sup>62</sup> *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [30]

<sup>63</sup> Ibid.

<sup>64</sup> See, for example, *Doorson v the Netherlands* (1996) 22 EHRR 330 where it was held 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’ [70].

<sup>65</sup> For acknowledgement that courts should give ‘great weight’ to decisions of the legislature as to how competing rights/interests are to be balanced, see: *R (Animal Defenders International)* [2008] UKHL 15 at [33]: ‘A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.’

<sup>66</sup> Quoted in Dent and Paul above n 1 a 625.

<sup>67</sup> Ibid at 626.

<sup>68</sup> Ibid at 626 quoting ‘CPS prosecuting and convicting more cases of rape, domestic abuse, sexual offences and child abuse than ever before’, 6 September 2016. Available at [http://www.cps.gov.uk/news/latest\\_news/vawg\\_report\\_2016/](http://www.cps.gov.uk/news/latest_news/vawg_report_2016/) [accessed 27 September 2017].

It may be that Dent and Paul's argument is, alternatively, that the current law, pre-*Evans*, has not affected reporting and, therefore, neither will *Evans*. However, there is no evidence to support such an argument. While numbers of reports to the police of rape and other sexual offences have been increasing, it does not follow that victims have not been deterred by current legal practice. The latest evidence from the Crime Survey of England & Wales found that the equivalent of 645,000 people were victims of sexual assaults in 2015-2016 and the Office for National Statistics reported that there were 106,098 police recorded sexual offences.<sup>69</sup> These figures demonstrate the gap between experiences of sexual offending and decisions to report to the police. While there are a multitude of reasons why women (and it is mostly women), do not report sexual offences to the police, it is clearly plausible that fear of their sexual history being scrutinised in court could well be a relevant one.

Indeed, the research available suggests that the court process, including admission of sexual history evidence, does impact on complainants' decision-making. The most comprehensive study available on section 41 found that complainants 'did weigh the issue of sexual history evidence in their decisions to report and, later on, whether to withdraw' and that '[p]olice officers, SARC staff and support agencies agreed that sexual history evidence plays a part in attrition, especially, but not exclusively, in the early stages'.<sup>70</sup> This is why 'fear of court' has been identified as the most common reason for withdrawing support for a prosecution.<sup>71</sup> Victim Support similarly report that from their experience, they 'know that victims fear being questioned about their sexual history at court and that consequently it can be a barrier to reporting'.<sup>72</sup>

This is a longstanding concern of both those engaged in supporting victims and members of the judiciary. It was Lord Slynn who, in *R v A* acknowledged that: 'In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.'<sup>73</sup> It is also why Canadian law provides that 'society's interest in encouraging the reporting of sexual assault offences' is one of the grounds that a judge is required to take into account when determining applications to admit sexual history evidence.<sup>74</sup>

Accordingly, it is plausible that the current law on sexual history evidence deters complainants from reporting sexual offending and it is, therefore, clearly possible that *Evans* risks making this worse. We are not able to make definitive claims, either way, on this issue. Nonetheless, while the evidence already demonstrates reluctance to report, together with reports of sexual history rules impacting on such decisions, it is worth reflecting on how the law can be reformed to ensure minimal deterrence and maximum focus on relevance. Dent and Paul worry that it is the media publicity surrounding the *Evans* acquittal that may itself deter complainants from reporting, rather than the operation of the current law. It is indeed possible that the public discussion is adversely impacting on complainants. However, the authors' comment assumes that all had been well with the operation of the law and that it is the media surrounding the *Evans* case which is problematic. On the other hand, it can be suggested that it is the *Evans* case itself that is problematic and highlights a particular need to reform the laws relating to similarity and third party evidence.

<sup>69</sup> Office for National Statistics, *Overview of violent crime and sexual offences* (ONS: 9 February 2017), available <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/overviewofviolentcrimeandsexualoffences#what-do-we-know-about-sexual-offences> [accessed 27 September 2017].

<sup>70</sup> Kelly et al above n 43 at 69.

<sup>71</sup> See Olivia Smith, 'The practicalities of English and Welsh rape trials: observations and avenues for improvement' (2017) *Criminology and Criminal Justice* doi:10.1177/1748895817702508

<sup>72</sup> Victim Support, *Policy Statement on Sexual Violence*, 12 April 2017, available at: <https://www.victimsupport.org.uk/more-us/policy-and-research/reports> [accessed 29 September 2017].

<sup>73</sup> [2001] UKHL 25 at [1].

<sup>74</sup> Canadian *Criminal Code*, s 276(3). See further Craig above n 51.

*Evans* has shone a light on the legislative regime as a whole and ushered in a welcome public and political debate about the need to reform many aspects of the current regime. Indeed, a wholesale review, starting from first principles would be welcome.

## Conclusions

This article has examined Dent and Paul's defence of the current law on sexual history evidence, and their concerns about 'commentators who either misunderstand or willingly misrepresent the current provisions', by offering additional evidence, analysis and suggestions for reform, as well as challenging these serious allegations. The law on sexual history evidence is a highly controversial topic which gives rise to heated debate. It is also an extremely (and unnecessarily) complicated area of law. This unfortunate combination of controversy and complication provides a significant challenge for media reporting and political discussion. In such a context, it is important to open up debate and try to understand the perspectives of others and to learn from those with different professional and personal experiences. Indeed, it may be productive for us all to recognise in the debates to come that we mostly share the same aims: namely to ensure the effective administration of justice, to convict the guilty and to minimise the harm caused to complainants and witnesses in the process.