

## **Sexual behaviour evidence and evidence of bad character in sexual offence proceedings: Proposing a combined admissibility framework.**

**Keywords:** Sexual behaviour evidence; s.41 Youth Justice and Criminal Evidence Act 1999; rape shield; bad character; cross examination; consent.

### **Abstract:**

This article critically evaluates whether the “rape shield” legislation in England and Wales, as currently contained in s.41 Youth Justice and Criminal Evidence Act (YJ&CEA) 1999, is fit for purpose. The article addresses the impact of the case of *R v Evans (Chedwyn)* [2016] EWCA Crim 452 which received a disproportionately high amount of media scrutiny and led to subsequent calls for greater restrictions on sexual behaviour evidence. The article examines possible reform proposals by Findlay Stark and Matt Thomason and the results of empirical research conducted by Laura Hoyano before proposing the introduction of a “combined admissibility framework” for evidence of a complainant’s previous sexual behaviour and bad character. The proposed framework seeks to retain the high threshold for the admissibility, in particular, of evidence relating to a complainant’s previous sexual behaviour whilst introducing a more holistic and straightforward model moving away from the strict categories approach adopted by s.41 YJ&CEA 1999.

### **Introduction**

The decision of the Court of Appeal in *R v Evans (Chedwyn)*<sup>1</sup> (*Evans*), and the subsequent acquittal of the appellant following retrial in October 2016, received extensive press

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<sup>1</sup> *R v Evans (Chedwyn)* [2016] EWCA Crim 452.

coverage<sup>2</sup> and caused a great deal of public concern. The judgment provoked significant and high profile criticism and led to unsuccessful attempts to introduce legislative measures, comprising, respectively, a Private Member's Bill<sup>3</sup> introduced on the 8<sup>th</sup> February 2017, and an amendment to the Government's Prisons and Courts Bill introduced on the 23<sup>rd</sup> March 2017<sup>4</sup>.

The proposed legislation would have introduced significant amendments to section 41 Youth Justice and Criminal Evidence Act (YJ&CEA) 1999. The Private Member's Bill would have further restricted the admission of evidence of the complainant's sexual behaviour with third parties. The proposed amendment to the Prisons and Courts Bill would have made sexual behaviour evidence inadmissible under any circumstances.<sup>5</sup> The Attorney General's Office and Ministry of Justice subsequently conducted a review into the use of sexual behaviour evidence in over 300 cases<sup>6</sup>. Ultimately the review concluded that a change in the law was unnecessary and that "section 41 is working as intended"<sup>7</sup>. This finding was subsequently supported by empirical research undertaken by Laura Hoyano on behalf of the Criminal Bar Association. The research revealed that out of 179 responses from CBA members "[n]ot a single respondent (0%) considered that section 41 should be reformed to make it *more* restrictive."<sup>8</sup>

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<sup>2</sup> Sandra Laville, 'The Ched Evans Trial Showed How Rape Complainants are still Put In The Dock' *The Guardian* (London, October 14 2016) <[www.theguardian.com/society/2016/oct/14/ched-evans-trial-showed-how-complainants-are-still-put-in-the-dock](http://www.theguardian.com/society/2016/oct/14/ched-evans-trial-showed-how-complainants-are-still-put-in-the-dock)> accessed 10 October 2019.

<sup>3</sup> Sexual Offences (Amendment) HC Bill (2016-17) [137].

<sup>4</sup> Prisons and Courts Bill, Notice of Amendments NC1, 23 March 2017 <[www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons\\_rm\\_pbc\\_0323.1-2.html](http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html)> accessed 10 October 2019.

<sup>5</sup> Ibid.

<sup>6</sup> Ministry of Justice, *Limiting the use of complainants' sexual history in sex cases* (Cm 9547, 2017).

<sup>7</sup> Ibid. 3.

<sup>8</sup> Laura Hoyano, *The Operation of YJCEA 1999 section 41 in the Courts of England & Wales: views from the barristers' row* (Oxford University, 2018) 8; Laura Hoyano, *Cross-examination of sexual assault complainants on previous sexual behaviour: views from the barristers' row*. *Crim. L.R.* 2019, 2, 77-114.

The decision of the Court of Appeal in the *Evans* case also prompted significant academic debate, including exchanges between McGlynn and Dent & Paul in the *Criminal Law Review*<sup>9</sup> and other key contributions including by Stark<sup>10</sup> and Thomason<sup>11</sup>. Dent & Paul call for recognition of the “progressive and pragmatic nature of s.41”<sup>12</sup> and for proposed amendments to “be based on evidence, rather than assumptions...”<sup>13</sup>. By contrast, McGlynn opines that reform of this area of law is “urgently required” and that, ideally, a “comprehensive revision of the current law...from first principles”<sup>14</sup> is necessary. Despite this, the consensus appears to be that the law on sexual behaviour evidence is both a “highly controversial” and “extremely (and unnecessarily) complicated area of law.”<sup>15</sup>

This article will provide critical insight into the admissibility of evidence of a complainant’s previous sexual behaviour under s.41 YJ&CEA 1999. Specific consideration will be given to issues raised in *Evans* to determine whether the case provides an appropriate basis on which to propose reforms to the law in this area. The article will also address the broader question of whether s.41 strikes an appropriate balance between the protection of complainants from unfair and unnecessary cross examination regarding their previous sexual behaviour, and the Article 6 ECHR rights of the defendant to a fair trial. The *Evans* case has been selected for particular consideration, in part, because of the disproportionate attention that this case

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<sup>9</sup> See, Clare McGlynn, 'Rape trials and sexual history evidence: reforming the law on third-party evidence' [2017] 81(5) *Journal of Criminal Law* 367-392; Nick Dent and Sandra Paul, 'In Defence of Section 41' [2017] 8 *Criminal Law Review* 613-627; Clare McGlynn, 'Challenging the law on sexual history evidence: a response to Dent and Paul' [2018] 3 *Criminal Law Review* 216-228.

<sup>10</sup> Findlay Stark, Bringing the background to the fore in sexual history evidence [2017] *Arch Rev*, 8, 4.

<sup>11</sup> Matt J Thomason, Previous sexual history evidence: a gloss on relevance and relationship evidence' [2018] *E&P* 22(4) 342

<sup>12</sup> Dent and Paul (n 9) 627.

<sup>13</sup> *ibid.*

<sup>14</sup> Clare McGlynn, 'Rape trials and sexual history evidence: reforming the law on third-party evidence' [2017] 81(5) *Journal of Criminal Law* 367, 391.

<sup>15</sup> Clare McGlynn, 'Challenging the law on sexual history evidence: a response to Dent and Paul' [2018] 3 *Criminal Law Review* 216, 228.

received in the context of proposed reforms of s.41 but also because, factually, it has exposed some of the deficiencies within the existing s.41 framework.

Finally, a case will be made for the adoption of an alternative statutory framework which departs from the “strict categories” approach to admissibility currently adopted by s.41 YJ&CEA 1999. The new statutory regime proposes the creation of a combined admissibility framework encompassing both sexual history evidence and evidence of the complainant’s bad character in sexual offence proceedings. The framework draws not only on the lessons learned following the introduction of s.41 but also comparatively on the experiences of other jurisdictions in which “rape shield” legislation has been enacted. Further, it seeks to add to the contribution made by commentators such as Stark<sup>16</sup> and Thomason<sup>17</sup> in developing a balanced legislative approach to the admissibility and restriction of sexual behaviour evidence.

### ***The Evans case***

In April 2012 Chedwyn “Ched” Evans (Evans) was convicted of rape, and sentenced to 5 years’ imprisonment. His co-accused Clayton McDonald (McDonald) was acquitted. The allegation arose following sexual activity between the complainant, McDonald and Evans which took place at a hotel on the 29<sup>th</sup> May 2011 whilst the complainant was heavily intoxicated. The following day the complainant awoke “naked, alone and confused”,<sup>18</sup> with no recollection of how she arrived at the hotel. After attempting “to piece together with friends what had happened”,<sup>19</sup> she eventually contacted the police. The complainant did not allege that she

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<sup>16</sup> Findlay Stark, Bringing the background to the fore in sexual history evidence [2017] Arch Rev, 8, 4.

<sup>17</sup> Thomason (n 11).

<sup>18</sup> *R v Evans (Chedwyn)* (n 1)[10].

<sup>19</sup> *R v Evans (Chedwyn)* (n 1)[10].

had been raped, “Her evidence was simply that she did not remember what happened in room 14...”<sup>20</sup> All “evidence as to sexual activity in room 14 came solely from [Evans] and McDonald themselves.”<sup>21</sup> The prosecution case at trial was that, by virtue of her level of intoxication, the complainant was not able to give a valid consent to sexual activity with Evans, nor could he have formed a reasonable belief in her consent.

After an unsuccessful appeal in 2012<sup>22</sup>, in 2016<sup>23</sup> the Criminal Cases Review Commission (CCRC) referred the case back to the Court of Appeal following “an in-depth, ten-month long investigation”,<sup>24</sup> on the basis that fresh evidence had been obtained, “which was not raised at trial, and which in the view of the Commission, could have added support to Mr Evan’s defence at trial...”<sup>25</sup> The evidence in question related to statements from two witnesses, a Mr Owens (O) and a Mr Hughes (H), both of whom described engaging in sexual activity with the complainant in May and June 2011, which counsel for the appellant described as having “striking detail”<sup>26</sup> in common with the account given by the appellant. The CCRC considered that the evidence of O and H might have been admissible under s.41(3)(c)(i) YJ&CE Act 1999 because it was relevant to the issue of consent, and was so similar to the sexual behaviour of the complainant which took place as part of the subject matter of the charge that the similarity could not reasonably be explained as coincidence. The defence sought to adduce the evidence on the basis that it supported the veracity of Evans’ account that the

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<sup>20</sup> *R v Evans (Chedwyn)* (n 1)[10].

<sup>21</sup> *R v Evans (Chedwyn)* (n 1)[11].

<sup>22</sup> *R v Evans* [2012] EWCA Crim 2559.

<sup>23</sup> *R v Evans (Chedwyn)* (n 1).

<sup>24</sup> Criminal Cases Review Commission, 'Commission refers the rape conviction of Ched Evans to the Court of Appeal' (5 October 2015); <[www.ccrc.gov.uk/commission-refers-the-rape-conviction-of-ched-evans-to-the-court-of-appeal/](http://www.ccrc.gov.uk/commission-refers-the-rape-conviction-of-ched-evans-to-the-court-of-appeal/)> accessed 11 October 2019.

<sup>25</sup> *ibid.*

<sup>26</sup> *R v Evans (Chedwyn)* (n 1) [39].

complainant, whilst heavily intoxicated, retained the capacity to consent to the sexual activity, despite the fact that she retained no memory of it the next day.

The CCRC further opined that the evidence of the two witnesses might also have been admissible under s.41(3)(a) (i.e. that the evidence was relevant to an issue other than consent) on the basis that it was relevant to establishing whether the defendant had a reasonable belief in consent at the material time. Although this avenue was not seriously pursued on appeal, consideration will be given to the relevance of this gateway below.

It is noted at this early stage that significant criticism may be levelled against the way in which the sexual behaviour evidence was obtained, namely following the instruction of “professional investigators”,<sup>27</sup> and through the offer of a financial reward for anyone who could provide evidence relevant to the defence.<sup>28</sup> Aside from potential questions about the veracity of such evidence, there are three further issues which arise in the context of evidence obtained in this manner, in particular in sexual offence cases. First, it is inexplicable how such a general, public request for information of this nature is compatible with the complainant’s right to anonymity.<sup>29</sup> Secondly, a question arises regarding the weight of such evidence where, as in the *Evans* case, the evidence was obtained by the promise of a reward. In a different context, Parliament has already recognised that hearsay evidence of a complainant is not admissible, ‘if the complaint...was made as a result of a threat or a promise’.<sup>30</sup> Thirdly, it is unlikely that most defendants would possess the financial resources to take such action which may lead to forms of what Baird refers to as “do-it-

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<sup>27</sup> *R v Evans (Chedwyn)* (n 1) [21].

<sup>28</sup> Holly Baxter, ‘Justice should never be done like it was in the Ched Evans rape trial’ *The Independent*, (London, 14 October 2016); <<https://www.independent.co.uk/voices/ched-evans-footballer-rape-trial-acquitted-justice-woman-misogyny-consent-prison-walk-free-a7362276.html>> accessed 10 October 2019.

<sup>29</sup> Sexual Offences (Amendment) Act 1992, s.1.

<sup>30</sup> Criminal Justice Act 2003, s 120(7)(e).

yourself sleuthing”,<sup>31</sup> and which could have a seriously deleterious effect on complainants.

This concern is supported by the fact that the complainant in *Evans* was subject to disgraceful treatment including receiving significant online threats and abuse, with nine people convicted in November 2012 of offences under s.5 of the Sexual Offences (Amendment) Act 1992 in respect of publishing the complainant’s identity on social media.<sup>32</sup>

Notwithstanding these issues, the Court of Appeal was faced with the existence of potentially relevant evidence. Absent an exclusionary discretion,<sup>33</sup> the court was therefore required to determine the admissibility of such evidence against the existing statutory framework, s.41 YJ&CE Act 1999.

### ***The admissibility of sexual behaviour evidence under s.41 YJ&CEA 1999***

The admissibility of sexual behaviour evidence gives rise to competing interests in sexual offence proceedings. Sexual offence complainants should not be subject to unnecessary questioning or cross-examination about their previous sexual conduct. Equally the defence must be able to adduce cogent evidence to assist its case particularly where such evidence is central to the jury’s understanding of a key element of the case. The enactment of section 41 of the YJ&CEA 1999 followed extensive criticism of its predecessor, s.2 of the Sexual Offences

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<sup>31</sup> Vera Baird, ‘We cannot allow the courts to judge rape by sexual history’ *The Guardian* (London, 17 October 2016); <[www.theguardian.com/commentisfree/2016/oct/17/courts-judge-rape-sexual-history-ched-evans-case](http://www.theguardian.com/commentisfree/2016/oct/17/courts-judge-rape-sexual-history-ched-evans-case)> accessed 10 October 2019.

<sup>32</sup> Steven Morris, ‘Social media naming of Ched Evans’s accuser raises legal questions’ *The Guardian* (London, 14 October 2016); <[www.theguardian.com/law/2016/oct/14/social-media-naming-of-ched-evans-accuser-raises-questions-law](http://www.theguardian.com/law/2016/oct/14/social-media-naming-of-ched-evans-accuser-raises-questions-law)> accessed 10 October 2019

<sup>33</sup> Unlike prosecution evidence which might be excluded under the operation of s.78 Police and Criminal Evidence Act 1984 the court possesses no discretion to exclude admissible defence evidence on the basis of (un)fairness or impropriety in the way in which it was obtained.

(Amendment) Act 1976<sup>34</sup>, itself introduced following sustained criticism of the common law position, near universally condemned for its perceived failure to regulate effectively the introduction of sexual behaviour evidence. Often, questions or evidence concerning previous sexual conduct served little purpose other than to besmirch the moral character of the complainant in the eyes of the jury.<sup>35</sup>

The 1976 Act's replacement, marked a radical departure from its predecessor in two respects. First, s.41 of the 1999 Act makes no distinction between evidence of previous sexual behaviour between the complainant and the accused and that occurring between the complainant and a third party.<sup>36</sup> Secondly, the 1999 Act, unlike the 1976 Act, all but eradicated judicial discretion to admit sexual behaviour evidence other than that permitted through four narrow exceptions. Admissibility is determined through strict gateways that have the effect of excluding evidence that does not reach the threshold of admissibility under one or more of the exceptions in s.41. This is so even if the evidence is otherwise relevant and potentially cogent.<sup>37</sup> Like its predecessor, s.41 provoked considerable controversy. Initially, however, the criticisms levelled at s.41 were that it swung the balance too far in the opposite direction. Where s.2 attracted heavy criticism for being too generous to defendants, s.41 was initially described as having surpassed its legislative aim of protecting complainants from harassment in the courtroom by excessively curtailing the defendant's right to adduce potentially vital cogent evidence. Indeed, the severity of the

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<sup>34</sup> Section 2(2) of the 1976 Act provided that evidence of previous sexual behaviour concerning the complainant and a third party could be heard in circumstances in which 'it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.'

<sup>35</sup> Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 443.

<sup>36</sup> YJ&CEA 1999, 42(1)(c). Evidence of previous sexual behaviour with the accused escaped the clutches of the 1976 Act.

<sup>37</sup> Lord Steyn exemplified the type of scenario that may give rise to evidence which does not activate s.41 but may be relevant; *R v A (No.2)* [2002] 1 AC 45, 67.



restrictions imposed by s.41 became the focus of an almost immediate challenge in the House of Lords in 2001<sup>38</sup> (discussed further below). The result was a requirement that s.41 be interpreted in a manner compliant with Article 6 ECHR. Writing at the time, McEwan observed that, 'it was a fair bet that the amendments to the rape shield comprised in section 41 would be an early target for a challenge under Article 6(1)',<sup>39</sup> but for some reformers the interpretation of s.41 by their Lordships has rendered the provision difficult to apply in practice.<sup>40</sup>

### ***Key Gateways to Admissibility***

Section 41(1) sets out the basic prohibition on introducing sexual behaviour evidence:

If at a trial a person is charged with a sexual offence, then, except with the leave of the court –

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination:

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

The four exceptions to this basic prohibition are: (i) 'the issue is not an issue of consent',<sup>41</sup> (ii) issues relating to consent and the sexual behaviour to which the question or evidence relates took place 'at or about the same time as the event forming the subject matter of the charge',<sup>42</sup> (iii) issues relating to consent and the sexual behaviour occurred in circumstances

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<sup>38</sup> *R v A (No 2)* [2002] 1 AC 45.

<sup>39</sup> Jenny McEwan, 'The Rape Shield Askew?' [2001] E & P 5(4) 257, 257.

<sup>40</sup> Temkin forecast that the decision in *R v A (No.2)* would be likely 'to engender a degree of uncertainty'; Jennifer Temkin, 'Sexual history evidence – beware the backlash' [2003] Apr Crim LR 217, 240.

<sup>41</sup> Youth Justice and Criminal Evidence Act 1999, s 41(3)(a).

<sup>42</sup> *ibid* s 41(3)(b).

that are so similar to the sexual behaviour which took place as part of the event,<sup>43</sup> or any other sexual behaviour which took place at or about the same time as that event<sup>44</sup> that the similarity cannot reasonably be explained as a coincidence; and (iv) a gateway which affords the defendant an opportunity to rebut assertions made by the prosecution.<sup>45</sup>

Only (iii) – and to a lesser extent (i) – were relevant in the context of the *Evans* decision. The relevance of both (i) and (iii) will, therefore, be considered below. It is important to stress that having satisfied one (or more) of the s.41 exceptions, this does not, on its own, guarantee that the evidence will be admitted. Additional restrictions or ‘hurdles’ must be surmounted. The evidence or questioning must constitute a specific instance of the complainant’s previous sexual behaviour;<sup>46</sup> must not be adduced where the purpose (or main purpose) is to impugn the complainant’s credibility as a witness’<sup>47</sup> and finally, the judge must not allow the evidence to be heard unless a refusal to do so ‘might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.’<sup>48</sup> Collectively and on a literal interpretation, the s.41 exceptions and restrictions constitute very difficult hurdles to negotiate before evidence of the complainant’s sexual behaviour can be heard.

McGlynn acknowledges that, whilst it might occasionally be necessary to adduce sexual history evidence, ‘it has been demonstrated that many unnecessarily intrusive questions have been asked of complainants, often as a matter of routine; potentially therefore, in

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<sup>43</sup> *ibid* s 41(3)(c)(i).

<sup>44</sup> *ibid* s 41(3)(c)(ii).

<sup>45</sup> *ibid* s 41(5).

<sup>46</sup> *ibid* s 41(6).

<sup>47</sup> *ibid* s 41(4).

<sup>48</sup> *ibid* s 41(2)(b). A relevant issue in the case is defined in s 42(1)(a) as ‘any issue falling to be proved by the prosecution or defence in the trial of the accused’.

breach of the complainant's Article 8 rights'.<sup>49</sup> This echoes the comments of Lord Hutton in *R v A (No.2)* itself, which, whilst not specifically framed in terms of Article 8 rights, highlights additional considerations in rape trials which go beyond ensuring that the guilty are convicted and the innocent are not. He makes reference to a 'third objective'<sup>50</sup> to ensure that complainants are treated with dignity in court and that irrelevant evidence or question is prohibited. It is clear that complainants in sexual offence cases are not only asked to recount, but are also scrutinised about, traumatic experiences that they otherwise might not choose to share, particularly in the public environment of a courtroom. As Baird observes, 'complainants in sexual violence cases give evidence as a public duty in the interests of the community [but] sexual violence cases are often treated as if they are trials between the complainant and defendant personally'.<sup>51</sup>

Whilst it is not disputed that complainants have endured appalling treatment in the form of irrelevant and excessive cross-examination about their sexual histories, some of the humiliation and distress suffered in court may be unavoidable if the questioning can be attributed to *relevant* evidence which, if excluded, would affect the defendant's rights under Article 6 ECHR.<sup>52</sup> The need for a careful balance to be struck between the legitimate protection of complainants and the right of the accused to a fair trial is therefore paramount. After all, Temkin suggested that, 'the primary purpose of rape shield legislation

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<sup>49</sup> Clare McGlynn, 'Commentary on *R v A (No 2)*' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010).

<sup>50</sup> *R v A (No.2)* (n 38) 98 (Lord Hutton).

<sup>51</sup> Vera Baird, Sir John Gillen Review of Sexual Offences in Northern Ireland: Consultation Response of Dame Vera Baird QC, Northumbria PCC (23 January 2019) <<http://www.northumbria-pcc.gov.uk/v2/wp-content/uploads/2019/02/Northumbria-OPCC-response-to-Sir-John-Gillen-Review-of-Sexual-Offences.pdf>> accessed 10 October 2019.

<sup>52</sup> In particular, Article 6(3)(d) provides that '[e]veryone charged with a criminal offence has the right [...] to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

is not to save the blushes of the complainant. It is to exclude evidence that is of little or no relevance and which serves only to distract the jury from the issues in the trial'.<sup>53</sup> In *R v A (No.2)*, Lord Steyn suggested that, in drafting s.41 of the 1999 Act, 'the legislature would not [...] have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material'<sup>54</sup> recognising that some evidence may "nevertheless [be] so relevant to the issue of consent that to exclude it would endanger the fairness of the trial'.<sup>55</sup>

### ***The application of the s.41 gateways in R v Evans***

Two s.41 exception(s) aroused particular controversy in *Evans* – the 'similarity' exception contained in s.41(3)(c) of the 1999 Act and the non-consent gateway in s.41(3)(a) which, despite not being given detailed consideration in *Evans*, was recognised as a potential route to admissibility. Section 41(3)(c) of the 1999 Act applies where the issue is consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event:

that the similarity cannot reasonably be explained as a coincidence.

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<sup>53</sup> Temkin, 'Sexual History Evidence: Beware the Backlash' [2003] Apr Crim LR 217, 239.

<sup>54</sup> *R v A (No.2)* (n 38) [68] (Lord Steyn).

<sup>55</sup> *R v A (No.2)* (n 38) [69] (Lord Steyn).

McGlynn has objected to the inclusion of a 'similar facts' exception based on the same principles that govern the admissibility of the defendant's bad character, arguing that 'such principles cannot be extrapolated to situations of sexual activity and consent, where consent is given afresh to each person and on each occasion'.<sup>56</sup> On this point, it is difficult to disagree with Lord Steyn in *R v A (No.2)* who remarked:

It is true that each decision to engage in sexual activity is always made afresh. On the other hand...[w]hat one has been engaged on in the past may influence what choice one makes on a future occasion.<sup>57</sup>

Although some appeals, *Evans* being an example, arise due to the availability of fresh evidence, cases are still reaching the Court of Appeal on the back of alleged misapplications of s.41.<sup>58</sup> The test outlined by Lord Steyn in *R v A (No.2)*<sup>59</sup> has provided guidance to judges where unfairness might otherwise result, but problems with the application of the legislative provisions nevertheless remain. The amended Criminal Practice Directions 2015<sup>60</sup> should help to ensure that the correct process is followed when applications are made to adduce sexual behaviour evidence.<sup>61</sup> However, controversy still surrounds the restrictive

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<sup>56</sup> McGlynn, 'Commentary on *R v A (No 2)*' (n 49)

<sup>57</sup> *R v A (No.2)* (n 38) 62 (Lord Steyn).

<sup>58</sup> See for example: *Armando Andrade v R* [2015] EWCA Crim 1722 in which the trial judge appeared to favour a strict interpretation of s.41 without recourse to the considerations raised in *R v A (No 2)* (n 38); *R v RP* [2013] EWCA Crim 2331 concerning the meaning of 'sexual behaviour' in s.42(1)(c) of the 1999 Act; *T v R* [2012] EWCA Crim 2358 in which the court made no reference to the 'unsafe conclusion test' contained in s.41(2)(b) which provides that evidence falling within s.41(3) or (5) can be admitted only if a refusal to do 'might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case'; *R v Gjoni (Kujtim)* [2014] EWCA Crim 691 concerning s.41(3)(a) pertaining to the defendant's 'reasonable belief' that the complainant consented; *R v W* [2014] EWCA Crim 545 concerning the credibility of the complainant in relation to previous false allegations and the overlap between s.41 and s.100 of the Criminal Justice Act 2003; *R v Salaam David All Hilly* [2014] EWCA Crim 1614, concerning the application of the evidential basis test as it applies in the context of false allegations. These examples represent only a fraction of the appeals concerning s.41 since it was enacted.

<sup>59</sup> *R v A (No.2)* (n 38) 69 (Lord Steyn).

<sup>60</sup> Criminal Practice Directions 2015: (Amendment No.6) [2018] EWCA Crim 516.

<sup>61</sup> The sixth amendment to the Criminal Practice Directions (CPD) 2015, supplementing the Criminal Procedure (Amendment) Rules 2018 SI 2018/132 came into force on 2nd April 2018. CPD 22A provides detailed guidance concerning the handling of applications under s.41 of the Youth Justice and Criminal Evidence Act 1999.

nature of the legislation itself, reinforcing Birch's view that, 'it was always on the cards that [s.41] amounted to "legislative overkill"'.<sup>62</sup>

A key objection raised by McGlynn about the *Evans* decision concerns the perceived liberal interpretation of the similarity exception where, arguably, the complainant's behaviour did not amount to conduct that was deemed to be 'so' similar as to be not coincidental.<sup>63</sup> The evidence was that C had consumed alcohol; instigated sexual activity; directed her partner into certain position and used specific words of encouragement and, according to Evans, at the original trial was 'enthusiastic, awake and gave no indication that she was not capable of consenting'.<sup>64</sup> When considered in isolation it is difficult to disagree with McGlynn who suggests that 'the everyday can constitute sufficiently similar behaviour'<sup>65</sup> A more forceful argument *could* be advanced for admissibility when a holistic approach to the evidence is taken. With this in mind it was, perhaps, a culmination of similarities, each in themselves unlikely to satisfy the threshold for admissibility but together able to surpass it.<sup>66</sup> Moreover, the Court of Appeal acknowledged that, whilst 'it may be a rare case, as Lord Steyn envisaged in *A (No.2)* in which it will be appropriate to indulge in...forensic examination of sexual behaviour with others',<sup>67</sup> this was 'potentially such a rare case'<sup>68</sup>

### ***Sexual behaviour evidence and reasonable belief in consent***

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<sup>62</sup> Dianne Birch, 'Rethinking Sexual History: Proposals for Fairer Trials' [2002] Jul Crim LR Jul 531, quoting Lord Steyn in *R v A (No.2)* (n 38) 67.

<sup>63</sup> Clare McGlynn, (n 15) 218.

<sup>64</sup> *R v Evans (Chedwyn)* (n 1) [13].

<sup>65</sup> Clare McGlynn, (n 15) 218.

<sup>66</sup> Dispelling the Rape Myths: An Evaluation of S.41 of the Youth Justice and Criminal Evidence Act 1999 in Light of Recent Reform Proposals, 6 UK L. Student Rev. 1 (2018) 13.

<sup>67</sup> *R v Evans (Chedwyn)* (n 1) [74].

<sup>68</sup> *Ibid.*

In *Evans*, it was suggested by the CCRC that the evidence could potentially have been admitted under s.41(3)(a) on the basis that it was relevant to E's reasonable belief that X consented.<sup>69</sup> Section 41(3)(a) of the 1999 Act isolates the relevant issue as one that does not involve 'consent'. Section 42(1)(b) defines 'issue of consent' as:

any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented).

Temkin has criticised this distinction as having the potential to 'create a substantial loophole in the law',<sup>70</sup> arguing that 'on one view, whenever consent is in issue in a sexual case, it is accompanied by that of belief in consent'.<sup>71</sup> Although concerns have been raised that s.41(3)(a) 'is a potentially broad exception, with creative defence teams reframing evidence to admit it under this provision',<sup>72</sup> the Court of Appeal has displayed reluctance to depart from a strict interpretation of the exception. For example, in *Bahador*,<sup>73</sup> the appellant argued that his belief in consent arose from the complainant's earlier sexually explicit behaviour on a nightclub stage but the Court adhered to a strict interpretation of the s.41 leave requirements and in particular the 'unsafe' test in s.41(2)(b).<sup>74</sup> The Court highlighted the significance of further evidence in the form of a positive response given by the appellant's friend when asked by the appellant if the complainant 'was up for it'.<sup>75</sup> This, the Court observed, had far more impact on the appellant's mind-set and belief regarding the

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<sup>69</sup> Ibid [50].

<sup>70</sup> Jennifer Temkin, 'Rape and the Legal Process', (2<sup>nd</sup> Edn, Oxford 2003) 227.

<sup>71</sup> Jenny McEwan, 'I Thought She Consented: Defeat of the Rape Shield or the Defence That Shall Not Run' [2006] Nov Crim LR 969, 970.

<sup>72</sup> McGlynn, (n 14) 384.

<sup>73</sup> *R v Bahador* [2005] EWCA Crim 396.

<sup>74</sup> This provides that the court may not grant leave unless it is satisfied that a refusal to do so might have the effect of 'rendering unsafe a conclusion of the jury [...] on any relevant issue in the case'.

<sup>75</sup> *R v Bahador* (n 73) [14].

complainant's willingness to consent than that made by the complainant's earlier conduct in the nightclub. In this respect, *Bahador* appears to support the contention that the courts will not give leave readily under the subsection, and that judges 'approach the question of relevance and admissibility thoughtfully'.<sup>76</sup> However, what makes the potential application of s.41(3)(a) unusual in *Evans* is the fact that at the time of engaging in the relevant sexual activity Evans was unaware of X's sexual behaviour with H or with O, with one such instance taking place after the sexual activity which formed the basis of the complaint in *Evans*. As the decision of the Court of Appeal in *Bahador* indicates, it is usually knowledge of the complainant's previous sexual behaviour which the defendant will (attempt to) argue has informed his reasonable belief in the complainant's consent at the time of the alleged sexual activity.

McGlynn and Thomason both argue that sexual behaviour evidence could never be relevant to the reasonableness of a defendant's belief in consent if the defendant had no prior knowledge of the evidence.<sup>77</sup> Thomason further suggests that lack of knowledge means that the evidence 'logically could have had no bearing whatsoever on their state of mind at the time of the sexual contact in question.'<sup>78</sup> Whilst the evidence provided by O and H could not have affected Evans's state of mind because it was fresh evidence and not available at the original trial, its significance derives from the fact that two independent witnesses came forward to provide similar accounts of sexual activity with C that mirrored Evans's account, an account which, as a result of her impaired memory, was not subject to a contrary

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<sup>76</sup> Neil Kibble, 'Judicial perspectives on the operation of s41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1' [2005] Mar Crim LR 190-205, 204.

<sup>77</sup> Clare McGlynn, (n 14) 384. Thomason also suggests, '...that for a complainant's [previous sexual history] to have any relevance to the defendant's belief in consent, the defendant must have had knowledge of that history'; Matt J Thomason (n 11) 351.

<sup>78</sup> Thomason (n 11) 350.



account given by C. As Stark suggests, whilst the evidence of O and H does not confirm whether Evans's belief in consent was reasonable - this relied on his appreciation of C's capacity to consent - O's evidence, at the very least, demonstrates that C could give an impression to sexual partners that she was capable of consenting to sexual activity which she later had no recollection of.<sup>79</sup> The question posed is thus: in the absence of a contrary account offered by C, does C's previous sexual behaviour with O, which to O's surprise C had no recollection of, support Evans's account that he reasonably believed that C was consenting? This is of particular relevance given that the reasonableness or otherwise of Evans's belief appears to depend on the jury's acceptance of the veracity of his account.

In the context of s.41(3)(c), Thomason makes a strong case for suggesting that '*Evans* should be considered as an ECHR gloss case, rather than a similarity one'.<sup>80</sup> This approach should allay fears that the *Evans* decision opens the 'floodgates'<sup>81</sup> for the admissibility of sexual behaviour evidence through the similarity gateway. As Mirfield noted, 'what can be done to section 41(3)(c) can also be done to any other element of section 41 deemed capable of denying the accused his fair trial right'.<sup>82</sup> Thus, given the absence of a contrary account to the version of events presented by Evans, it is not difficult to see how exclusion of O's evidence, as it relates to E's reasonable belief in consent, 'might have the result of rendering unsafe a conclusion of the jury'<sup>83</sup>

### ***Admissibility of third party sexual behaviour evidence***

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<sup>79</sup> Stark, (n 16) 5.

<sup>80</sup> Thomason (n 11) 358.

<sup>81</sup> McGlynn, (n 14) 384.

<sup>82</sup> Peter Mirfield, 'Human Wrongs?' [2002] LQR 118 (Jan) 20, 24.

<sup>83</sup> Section 41(2)(b).

Section 41 does not discriminate between third party sexual behaviour evidence and that occurring between the complainant and defendant.<sup>84</sup> Whilst Thomason suggests that this represents an ‘unintended oversight’<sup>85</sup> by the legislators, the specific wording, ‘*whether or not involving any accused or other person*’ clearly implies a deliberate intention by Parliament that both categories should be subject to the admissibility framework created by s.41. McGlynn cites *Mukadi*<sup>86</sup> as an example of the ‘entirely disconnected sexual activity with third parties [that] can be adduced in evidence’<sup>87</sup> The evidence in *Mukadi*, which had been refused by the trial judge, consisted of an earlier incident which involved the complainant standing on Oxford Street before getting into a car and driving off with an unknown man who was much older than her, and with whom she had exchanged phone numbers. It is not disputed that this decision demonstrated a liberal interpretation of s.41 and is ‘hard to justify’.<sup>88</sup> As Page and Birch suggest, even if the complainant was open to the idea of engaging in sexual activity with a third party in the earlier incident, ‘it by no means follows that she found M an equally pleasing prospect’.<sup>89</sup> There are suggestions that the complainant’s earlier conduct did not amount to ‘sexual behaviour’<sup>90</sup> and therefore should not have engaged s.41. The Court of Appeal merely commented that that the evidence

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<sup>84</sup> Kibble observes that ‘no proper foundation has been laid for the Government’s position on excluding evidence of the complainant’s prior sexual history with the defendant’; Neil Kibble, ‘The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases’ [2001] 32 Camb LR 27, 58. Birch gives credence to this point by arguing that, ‘[t]he Heilbron Report did not see the necessity for any special rule shielding the complainant from evidence or questions about a sexual relationship between the parties, and neither do I’; Dianne Birch, ‘Untangling sexual history evidence: a rejoinder to Temkin’, [2003] Jun Crim LR 370, 376.

<sup>85</sup> Thomason (n 11) 355.

<sup>86</sup> [2003] EWCA Crim 3765.

<sup>87</sup> Clare McGlynn, (n 14) 386.

<sup>88</sup> Adriane Keane and Paul McKeown, *The Modern Law of Evidence* (11<sup>th</sup> edn, OUP 2016) 225.

<sup>89</sup> Flora Page and Diane Birch, ‘Evidence: Rape-Youth Justice and Criminal Evidence Act 1999, s.41’ [2004] May Crim LR 373, 375.

<sup>90</sup> Section 42(1)(c) defines sexual behaviour as ‘any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.’

should have been admitted 'whatever label one attaches to the conduct',<sup>91</sup> because its exclusion may have led the jury to take a different view of the complainant's evidence on the issue of whether she had consented to full intercourse with the defendant. This leaves open the question of what types of behaviour can or cannot be labelled as 'sexual' so as to engage s.41 and serves as another example of s.41's vagueness and complexity. However, as discussed above, to suggest that *Mukadi* sets a benchmark for s.41's conventional application is misleading. In his comprehensive review of the law and procedure which governs the prosecution of sexual offences in Northern Ireland, Sir John Gillen disagreed that third party sexual behaviour evidence should never be admitted,<sup>92</sup> suggesting instead that, 'stricter scrutiny should be applied for applications for such third party evidence and it should be considered admissible only in relatively few cases.'<sup>93</sup>

Section 41 departs significantly from its predecessor by subjecting sexual behaviour evidence to strict categories of admissibility. This approach stands in stark contrast to the approach of the 1976 Act, which afforded wide discretion to trial judges to admit evidence, not merely based on similarity. It is perhaps for this reason that Lord Steyn posited:

Evidence or questions about sexual behaviour with third parties is likely to be much harder to justify on grounds of relevancy than evidence about sexual behaviour with

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<sup>91</sup> Ibid [18].

<sup>92</sup> The Gillen Report has described the interplay of sexual behaviour evidence and character evidence as a 'troublesome overlap', Sir John Gillen, 'Preliminary report into the law and procedures in serious sexual offences in Northern Ireland: Part 1' (2018) 253 < [https://www.lawsoc-ni.org/DatabaseDocs/new\\_8655264\\_gillen-review-report-into-the-law-and-procedures-in-serious-sexual-offences-in-.pdf](https://www.lawsoc-ni.org/DatabaseDocs/new_8655264_gillen-review-report-into-the-law-and-procedures-in-serious-sexual-offences-in-.pdf)> accessed 11.10.2019.

<sup>93</sup> Ibid. The Criminal Evidence (Northern Ireland) Order 1999, s.28, governs the admissibility of sexual behaviour evidence in Northern Ireland and is identical to s.41.

the defendant. *Nevertheless I think that the draftsman was right to avoid laying down an absolute rule on this point.*<sup>94</sup>

Viewed as such, the value of the evidence adduced in *Evans* derives from the fact that two independent witnesses – unconnected to Evans (and of whose behaviour Evans had no knowledge) subsequently provided similar accounts of consensual sexual activity with C and of which C retained no memory afterwards. McGlynn argues that previous instances in which consent was given are not indicative of future consent. This is compounded by the emergence of “rape myths” which, in many common law jurisdictions, have required statutory intervention to attempt to prevent their proliferation and to switch the focal point of the trial from the character of the complainant to the alleged wrongful conduct of the accused.<sup>95</sup>

Birch had previously warned against the dangers of excluding potentially probative material, and remarked that, ‘we need to think of ways of taking the jury into the light, rather than deliberately keeping them in the dark’.<sup>96</sup> Sexual behaviour evidence might, therefore, have considerable value as explanatory evidence, and should, therefore, be made available to assist juries so that the potential for wrongful convictions can be avoided. This, of course, assumes that sexual behaviour evidence is adduced for ‘legitimate purposes’,<sup>97</sup> and not

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<sup>94</sup> *R v A (No.2)* (n 38) (Lord Steyn) (emphasis added).

<sup>95</sup> In the Canadian case of *R v Seaboyer*, [1991] 2 SCR 577, 604 it was suggested that: ‘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>96</sup> Birch (n 84) 383.

<sup>97</sup> Apart from the relevance gateways, s.41 contains certain restrictions which must also be satisfied before the evidence can be adduced. Section 41(4), for example, provides that evidence will not be heard ‘if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.’

merely deployed as a mechanism through which to tarnish the complainant's moral character in the eyes of the jury.<sup>98</sup> In the context of *Evans*, as Dent and Paul make clear:

...it was not suggested that the evidence of the complainant's sexual behaviour meant that she could not be believed. Instead, it was simply suggested that the evidence in question was relevant as to whether she had consented to the intercourse—and the reasonableness of the defendant's belief that she had consented to the intercourse. The complainant's evidence was that she could not remember what had happened and the prosecution's case was that she did not consent. The complainant's credibility was not in question.

As the Court of Appeal identified "When the defendant was first asked what happened in room 14, he described in graphic detail the sexual behaviour of a woman who, on the prosecution case, would have been incapable of behaving in that way."<sup>99</sup> Thus, the veracity, or otherwise, of Evans' account became a central question for a jury being asked to determine whether the complainant retained sufficient capacity to consent, whether she in fact consented, and the reasonableness (or otherwise) of Evans' belief in the complainant's consent. The relevance of the third party sexual behaviour evidence was therefore in respect of the veracity of the defendant's account, and not the complainant's credibility. It is contended that without reference to the evidence of O and H the jury would have been unable to reach safe conclusions on these issues.

### ***Does the decision in Evans set a dangerous precedent?***

The *Evans* decision has been described as a 'throwback to the last century when women who reported rape were assumed to be lying and their sex life was on trial'.<sup>100</sup> In the

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<sup>98</sup> Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2<sup>nd</sup> edn, OUP 2010) 443.

<sup>99</sup> *R v Evans (Chedwyn)* (n 1) [71].

<sup>100</sup> Olivia Blair, 'Ched Evans not guilty: Women's groups criticise decision to allow complainant's former lovers to give evidence in court' *The Independent* (London, 14 October 2016)

aftermath of the decision, particular concerns were voiced that the decision sets a precedent, paving the way for future courts to adopt a more defendant-generous interpretation of s.41. Dent and Paul have attempted to allay fears, arguing that 'the floodgates have not – and will not be opened',<sup>101</sup> however, McGlynn suggests that the decision 'does not simply open the "floodgates" but risks a tsumani (sic).'<sup>102</sup> As discussed above, *Mukadi*<sup>103</sup> is often cited as evidence to support claims that sexual behaviour evidence, 'continues to be admitted in a considerable number of trials.'<sup>104</sup> Several recent empirical studies undertaken in this area appear to have reached contrary conclusions.<sup>105</sup> These findings, including that that the introduction of sexual behaviour evidence by the defence is exceptional,<sup>106</sup> seem to provide cogent evidence that s.41 sets a high bar for defendants to surmount. As the Court of Appeal in *Evans* observed:

It was an unusual case. The only witnesses as to sexual activity and the only evidence as to sexual activity came from the accused. Unlike McDonald, the defendant [Evans] could rely on little more than his own account of events in the bedroom to advance his defence of capacity to consent and actual consent. X could not assist; she said she remembered nothing.<sup>107</sup>

It is, therefore, difficult to support an argument that the *Evans* determination holds much in the way of precedent value, given the particular facts of the case, and the specific relevance of the sexual behaviour evidence being adduced.

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<https://www.independent.co.uk/news/people/ched-evans-not-guilty-rape-womens-group-criticise-decision-former-love-evidence-court-a7362051.html> accessed 20<sup>th</sup> May 2019.

<sup>101</sup> Dent and Paul (n 9) 622.

<sup>102</sup> McGlynn (n 14) 384.

<sup>103</sup> *R v Mukadi* (n 86).

<sup>104</sup> McGlynn (n 14) 368.

<sup>105</sup> Ministry of Justice (n 6); Hoyano (n 8)

<sup>106</sup> Ministry of Justice, *ibid.* 11.

<sup>107</sup> *R v Evans (Chedwyn)* (n 1) [70].

### ***Does the decision in Evans provide a case for legislative reform?***

Despite that fact that the decision in *Evans* appears to have limited precedent value, the case clearly highlights concerns that the current approach to the restriction (and admission) of sexual behaviour evidence is not fit for purpose. McGlynn's criticism that this is "an extremely (and unnecessarily) complicated area of law"<sup>108</sup> appears to be a valid one. The rigidity of the 'strict categories' approach to admissibility, the uncertainty of how to read the categories in a convention compliant manner (as required by the decision in *R v A (No.2)*), combined with the application of the unsafe conclusion test make the provisions of s.41 difficult to apply with any degree of certainty, thus leaving the provisions vulnerable to criticism from both sides of the argument.

The challenge for any new legislative approach (for example based on a departure from the strict categories approach to sexual behaviour evidence) is to successfully balance the interests of sexual offence complainants and defendants. This is demonstrated by the criticism of the current s.41 regime, simultaneously lambasted for being both too restrictive<sup>109</sup> and not restrictive enough.<sup>110</sup> The difficulty encountered by various jurisdictions has been achieving the correct balance. Given the polarising views in this area of the law, it is clear that 'what one sees as common sense, another sees as nonsense'.<sup>111</sup> It is surely axiomatic that complainants must not be unduly harassed in the courtroom, and should be able to give their best evidence, however a strict categories approach for assessing relevance is flawed if, as is the case with s.41, such an approach has the potential

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<sup>108</sup> McGlynn (n 14) 228.

<sup>109</sup> Dianne Birch, 'Rethinking Sexual History: Proposals for Fairer Trials' [2002] Jul Crim LR 531, 532

<sup>110</sup> Temkin (n 40) 224.

<sup>111</sup> Neil Kibble 'Uncovering Judicial Perspectives on Questions of Relevance and Admissibility in Sexual Offence Cases' [2008] JL & Soc 35 91, 93.

to violate the defendant's right to a fair trial. Similarly, it is flawed in equipoise if it allows the admission of the very type of evidence it was enacted to restrict.

Against this backdrop, Canada experienced similar problems after amendments were made to its first 'rape shield' statute.<sup>112</sup> The changes incorporated a pigeonholed approach to admitting sexual behaviour evidence.<sup>113</sup> The Canadian rape shield legislation was redrafted in light of the decision in *Seaboyer*,<sup>114</sup> however the UK Parliament decided to persevere with s.41 in England and Wales despite it being subject to a similar challenge, shortly after its enactment, in the form of *R v A (No.2)*.<sup>115</sup>

The Scottish Government, when undertaking a review of its rape shield laws, published a pre-legislative consultation document in 2000,<sup>116</sup> which put forward a number of recommendations in which the rape shield might be strengthened. This exercise resulted in the replacement of ss.274 and 275 of the Criminal Procedure (Scotland) Act 1995 by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. This was an example of, 'second wave of rape shield legislation sweeping the world in response to the perceived failure of most initial attempts to operate as intended'.<sup>117</sup> It is interesting, however, that Scotland decided not to follow the s.41 model, considering it to be 'too inflexible'.<sup>118</sup>

### ***Options for reform***

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<sup>112</sup> The Criminal Code (Canada) 1976, s.142.

<sup>113</sup> *ibid.* s.276.

<sup>114</sup> *R v Seaboyer* [1991] 2 SCR 577.

<sup>115</sup> *R v A (No.2)* (n 38).

<sup>116</sup> Scottish Executive, 'Redressing the Balance: Cross Examination in Rape and Sexual Offences' Trials (Scottish Executive 2000).

<sup>117</sup> Peter Duff, 'Human Rights, Cosmopolitanism and the Scottish "Rape Shield"' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing 2012) 219-220.

<sup>118</sup> *Ibid.*



Stark has proposed a replacement for s.41 that would provide for the admissibility of sexual behaviour evidence only where *'if the evidence were not admitted or the question not asked, the jury or (as the case may be) the court would find it impossible or difficult properly to understand other evidence in the case, and the evidence or question's value for understanding the case as a whole is substantial.'*<sup>119</sup> A number of further factors are then listed which the court should consider before the evidence is heard such as: *'the time between the relevant sexual behaviour and the activities that form the basis of the offence'* and *'any significant similarities between the relevant sexual behaviour and the activities that form the basis of the offence...'*<sup>120</sup> Stark recognises the potential significance of sexual behaviour evidence in terms of its explanatory value in much the same way bad character evidence is admissible through s.100(1)(a) and s.101(1)(c) of the Criminal Justice Act 2003.<sup>121</sup> McGlynn might criticise such an approach, based on the assumption that consent is made afresh on each occasion of sexual activity, though it is difficult to disagree with Birch who observed, 'logically, evidence of sexual history may have explanatory value, in just the same way as evidence of the bad character of the accused or of a witness'.<sup>122</sup>

Whilst sexual behaviour evidence can be indirectly relevant to an issue in the proceedings - which, in the context of evidence concerning a non-defendant's character, is the approach taken by s.100(1)(a) of the CJA 2003 in terms of its value as important explanatory evidence - it can also be *directly* relevant. It is on this basis that Thomason identifies an apparent gap in Stark's proposed provision. Section 41(3) YJCEA 1999 stipulates that the 1999 Act applies 'if the evidence or question relates to a relevant issue in the case', which s.42(1)(a) defines

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<sup>119</sup> Stark (n 16).

<sup>120</sup> Ibid.

<sup>121</sup> Thomason (n 11) 359.

<sup>122</sup> Birch (n 84) 381. See for example s.101(1)(c) of the Criminal Justice Act 2003 provides that evidence of the defendant's bad character may be admitted because it constitutes 'important explanatory evidence'.

as ‘any issue falling to be proved by the prosecution or defence in the trial of the accused.’ Thus, the relevant issue can be consent under ss.41(3)(b) and (c) or, as provided for by s.41(3)(a), an issue other than consent (which includes evidence of the defendant’s reasonable belief in consent). So, whilst Stark’s provision would remove many of s.41’s complexities, it appears that only evidence which is capable of providing context to the jury would be admissible. As Thomason suggests, perhaps the best answer is a wholesale rewrite of s.41;<sup>123</sup> however, no substantive alternative is suggested to address the omissions in Stark’s proposal. What is needed is a new provision which not only remedies that gap but also departs from the model upon which s.41 is based which has rendered it an inherently complex piece of legislation, with ambiguous terminology.<sup>124</sup> The new statutory framework, proposed herein, draws upon the experiences of a number of common law jurisdictions including Scotland which decided not to adopt the s.41 model during subsequent reforms of its rape shield laws.

Thomason draws parallels between the admissibility of sexual behaviour evidence under s.41 and bad character evidence under s.100 of the CJA 2003 on the basis that both involve the admissibility of evidence concerning past conduct to infer some aspect of present behaviour. Although Thomason acknowledges that the complex machinery of the s.41 gateways and restrictions do not compare favourably with the more flexible ‘substantial probative value’ exception in s.100(1)(b) of the 2003 Act, further difficulties would potentially arise if the test for admitting sexual behaviour evidence mirrored the admissibility threshold provided by the “character model” in s.100 CJA 2003. Section 112(3)(b) of the CJA 2003 expressly provides that nothing in the Act ‘affects the exclusion of

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<sup>123</sup> Thomason (n 11) 359.

<sup>124</sup> Pamela Radcliffe et al., *Witness Testimony in Sexual Assault Cases* (OUP 2016) 87.

evidence' under s.41 of the YJ&CEA 1999. Similarly, s.41(8) of the 1999 Act provides that, '[n]othing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section'. Using the 'enhanced relevance test' contained in s.100(1)(b) as an example, this test amounts to a less onerous threshold for admissibility than the 'unsafe conclusion test' in s.41(2)(b) of the 1999 Act.<sup>125</sup> Indeed, where both s.41 and s.100 apply, for example, where there is evidence that the complainant has falsely claimed previous sexual behaviour was non-consensual, and thereby potentially amounting to evidence of the complainant's character, the more burdensome obstacle confronting any application to adduce the evidence will be s.41.<sup>126</sup> Indeed, the Law Commission has said, if s.41 is satisfied then it is inconceivable that the evidence will not satisfy the requirements of s.100.<sup>127</sup>

Thomason suggests that it would be simpler if each admissibility regime at least used the same operative concepts,<sup>128</sup> however there would be serious concerns about applying the same test for the admissibility of sexual behaviour evidence as that applied for character evidence under s.100 of the 2003 Act. By moving to the s.100 model, admissibility of sexual behaviour evidence would be assessed by way of its, 'substantial probative value' rather than the higher hurdle faced by defendants under s.41. Given that the current law is castigated for allowing too much sexual behaviour evidence into the courtroom under the higher test in s.41 - despite recent empirical evidence suggesting the contrary<sup>129</sup> – there is clearly little appetite for moving to the s.100 admissibility threshold such as that advanced by Stark. Thomason has explored the possibility of adding a new gateway to s.41, akin to

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<sup>125</sup> (n 74)

<sup>126</sup> Richard Card, Alisdair Gillespie and Michael Hirst, *Sexual Offences* (Jordan Publishing 2008) 369.

<sup>127</sup> Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001) para 9.45.

<sup>128</sup> *Ibid*

<sup>129</sup> Hoyano (n 8).

s.100(1)(a), to accommodate relationship evidence, but recognises that additional gateways would merely compound s.41's complexity.<sup>130</sup> Kibble noted the possibility of adding further exceptions to s.41, such as providing for motive to fabricate; prior false allegations; and evidence of prior sexual history with the defendant.<sup>131</sup> However, he also observed that while open-ended rules are not the answer, neither are rules which permit only mechanical application and do not permit trial judges to exercise judgment'.<sup>132</sup> Rather than move the admissibility threshold of sexual behaviour evidence to a s.100 type model, any new legislative framework should retain the same higher test of admissibility that currently exists under s.41, but which operates in a way that is easier to apply in practice.

### ***The overlap between s.41 of the 1999 Act and s.100 of the 2003 Act***

The spectre of false allegations of sexual assault has given rise to a number of rape myths that are based on a general distrust of sexual offence complainants. Section 41(4) of the 1999 Act is designed to protect complainants from irrelevant and humiliating questioning, and to safeguard against the twin myths which might suggest that previous sexual behaviour was indicative both of consent and lack of credibility.<sup>133</sup> But whilst section 41 places heavy restrictions on the defendant's freedom to ask questions about the complainant's previous sexual behaviour, a distinction is currently drawn between questions about previous sexual behaviour, which fall under the Act, and questions relating to the

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<sup>130</sup> Thomason (n 11) 359.

<sup>131</sup> Neil Kibble, 'Judicial discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2' [2005] Apr Crim LR 263, 274.

<sup>132</sup> Ibid.

<sup>133</sup> During the debates it was remarked that 'the main purpose of the evidence must not be to undermine the victim's credibility'. HC Deb 08 July 1999, vol 334, c1270 (Julia Drown MP).

complainant's lies about sexual matters, which do not. Unlike rape shield legislation enacted in some other jurisdictions,<sup>134</sup> section 41 does not cater for the admissibility of evidence concerning the complainant's character.<sup>135</sup> Rather, where the defence wishes to adduce evidence of or question the complainant about previous false allegations, leave will be required under s.100 of the Criminal Justice Act 2003 if this amounts to evidence of the complainant's bad character.<sup>136</sup> However, there is potential for s.41 and s.100 to overlap where the previous complaint, which is allegedly false, involves an allegation concerning the complainant's sexual behaviour.

It was decided in *R v T; MH*,<sup>137</sup> that as far as s.41 is concerned, questions or evidence regarding a sexual offence complainant's previous false statements are not questions about the 'sexual behaviour' of the complainant because they relate not to the complainant's previous sexual behaviour but to past statements regarding such behaviour.<sup>138</sup> Moreover, the courts have concluded that where the defendant does not have such an evidential basis for the suggestion that a previous complaint was false, the proposed evidence or questioning will be regarded as a cynical attempt to elicit sexual behaviour evidence.

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<sup>134</sup> Such as the Criminal Procedure (Scotland) Act 1995, ss.274-275 and the Evidence Act 2006, s.44 (New Zealand).

<sup>135</sup> Section 98 of the 2003 Act defines bad character as 'evidence of, or of a disposition towards, misconduct' and s.112 elaborates that "'misconduct" means the commission of an offence or other reprehensible behaviour'. For the purposes of s.98, evidence of 'bad character' does not include evidence which: (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence. Thus, where the alleged false complainant relates to the events concerned, the bad character provisions will have no application due to the operation of s.98.

<sup>136</sup> This provides: 'In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—(a) it is important explanatory evidence, (b) it has substantial probative value in relation to a matter which—(i) is a matter in issue in the proceedings, and (ii) is of substantial importance in the context of the case as a whole, or (c) all parties to the proceedings agree to the evidence being admissible.

<sup>137</sup> [2002] 1 WLR 632.

<sup>138</sup> Indeed, the Explanatory Notes to the 1999 Act made it clear that, 'it is not envisaged that evidence that seeks to do no more than show that the complainant has a history of making unproved complaints of sexual offences would be treated as evidence of sexual behaviour', Youth Justice and Criminal Evidence Act 1999, Explanatory Notes [150].

Essentially, this means that the evidence or questioning will fall foul of s.41(4) of the 1999 Act. It is for this reason that defence counsel must obtain a ruling from the judge that s.41 does not prohibit questions put to a complainant regarding alleged previous false complaints. As Keene LJ observed in *R v T; MH*, the judge is entitled to seek assurances from the defence that it has a proper basis for asserting that the statement was made and was untrue'.<sup>139</sup>

Of course, such evidence is now subject to an enhanced relevance test in s.100 of the 2003 Act which would not have applied at the time of the *R v T; MH* decision. Thus, if the defence does not have sufficiently probative material to satisfy an evidential basis for suggesting that the previous complaint is false, the material will not have 'substantial probative value in relation to a matter which [...] is a matter in issue in the proceedings and [...] is of substantial importance in the context of the case as a whole'.<sup>140</sup>

It is conceivable that in a sexual offence trial where the complainant has made false allegations in the past, either s.41 (if the evidential basis test is not satisfied) or s.100 (if the evidence amounts to evidence of the complainant's bad character) might be brought into play, or the circumstances of the case might require the deployment of both provisions, or, indeed, as will be demonstrated below, of neither. In *R v V Crane* J suggested that 'cross-examination about an allegedly false sexual offence allegation may require a ruling in relation to section 41 as well as leave under s.100. In many cases *section 41 will be the more formidable obstacle to overcome*'.<sup>141</sup> Further support for the proposition that s.41 constitutes a more onerous provision is provided by the Court of Appeal's interpretation of

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<sup>139</sup> [2002] 1 WLR 632, 640.

<sup>140</sup> Criminal Justice Act 2003, s.100(1)(b).

<sup>141</sup> [2006] EWCA Crim 1901 [25] (emphasis added).

s.100(1)(b) in *R v Brewster*.<sup>142</sup> This has been described as a ‘significant but unsatisfactory judgment’<sup>143</sup> because the court gave a liberal interpretation concerning the types of previous convictions having ‘substantial probative value’ for the purpose of s.100(1)(b).

Pitchford LJ remarked that:

[t]he question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness’s creditworthiness.<sup>144</sup>

Notwithstanding the relaxed approach in *Brewster*, where the imputation is that the complainant has made false allegations in the past, defence counsel should be cautious that the line of questioning does not engage the leave requirements of s.41 of the 1999 Act.

Where issues of credibility arise in circumstances in which s.41 applies it must be remembered that, in line with Parliament’s intended aim of not perpetuating the myth that unchaste women are less likely to constitute credible witnesses, s.41(4) provides for a ban on attacking the complainant’s credibility where this is ‘the purpose (or main purpose)’ of the cross-examination. Thus, unless the accused can show that the purpose or main purpose of the cross-examination was not to discredit the witness, which might be difficult for the court to determine in a sexual assault trial where the distinction between issue and credibility can become blurred, the evidence will be deemed inadmissible under section 41(4). This assumes that the questioning relates to the complainant’s previous sexual behaviour and not merely that the complainant’s lies, which would engage only s.100.

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<sup>142</sup> [2010] 2 Cr App R 20.

<sup>143</sup> Andrew Roberts ‘Evidence - Non Defendant’s Bad Character’ [2011] 1 Crim LR 58, 60.

<sup>144</sup> [2010] 2 Cr App R 20, [20].

The following scenario illustrates one possible approach that may be taken by the courts. The defendant (D) wishes to cross-examine the complainant (C) about a previous allegation of rape made by C, which D has some evidential foundation for suggesting was false in circumstances in which the 2003 Act's definition of bad character is engaged. Keene LJ laid down a requirement in *R v T;MH* that, "[t]he defence, wishing to put questions about alleged previous false complaints, will need to seek a ruling from the judge that section 41 does not exclude them."<sup>145</sup> Given Crane J's interpretation of *R v T;MH* in *R v V* that s.41 does not apply if the questioning 'goes to the lies rather than to the sexual behaviour itself',<sup>146</sup> it is conceivable that the court could grant leave under s.100 on the credibility issue on the basis that C has made previous false allegations, but refuse D's application under s.41 to cross-examine C on the sexual behaviour aspects surrounding the lie. This seems a logical approach given the effect of s.41(4) in restricting D's ability to discredit the complainant, and s.100 allowing D to discredit C on the alleged lie. Aside from the obvious dissonance, the way in which the two sections can potentially overlap is unsatisfactory, and arises because of s.41's inability to cater for the various contexts in which false allegations might be made. Thus any statutory replacement for s.41 should cater for the admissibility of evidence concerning the complainant's character, as well as evidence concerning the complainant's sexual behaviour.

Since the enactment of the Criminal Justice Act 2003, the extent to which complainants can be questioned about false allegations is determined by an awkward overlap of provisions in the 2003 and 1999 Acts (s.100 of the 2003 Act also, effectively, incorporating an evidential basis test). As has been identified the s.100 admissibility test will, potentially, be the

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<sup>145</sup> [2002] 1 WLR 632, 640.

<sup>146</sup> [2006] EWCA Crim 1901 [21].



governing provision in false allegation scenarios in which the evidential basis test is satisfied, whereas in circumstances where cross-examination is concerned with the complainant's sexual behaviour, s.41 is likely to determine whether the accused is granted leave, whether or not the more generous s.100 test is applicable. What is clear is that the overlap between these two provisions continues to cause confusion. The unsatisfactory state of affairs surrounding the overlap between the two provisions is illustrated by the following commentary:

Although bad character evidence strictly falls outside the ambit of the YJCEA, in the context of trials of sexual offences it will *normally constitute material of the kind with which section 41 is primarily concerned: sexual behaviour having an adverse bearing upon the complainant's credibility*. This is, of course an ambiguous area since the circumstances will naturally vary from one case to the next. However, statutory reform to remedy this issue could fall foul of the same criticism as met section 41: that *trying to fit particular cases into predetermined, exhaustive categories of relevancies is not feasible*. The problems cast up by the provision are capable of being remedied, therefore, *not by statutory revision but rather by additional guidelines*.<sup>147</sup>

Three observations can be made in light of these remarks. First, whilst recognising the differing circumstances in which false allegations might arise, the authors of the quotation assume that 'normally' bad character evidence in sexual offence trials will encompass the type of material that s.41 was designed to exclude, namely sexual history evidence. This

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<sup>147</sup> Nevada McEvoy-Cooke, David Wolchover and Anthony Heaton-Armstrong, 'Two Aspects of the Statutory Restriction on Introducing a Complainant's Sexual History' in Radcliffe et al. (eds) *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (OUP 2016) (emphasis added).

assertion seems erroneous, because it appears that s.41 will not bite where the rationale for adducing the evidence is to elicit the falsity of a previous complaint and nothing else. This has seemingly been confirmed by the Court of Appeal in its interpretation of *R v T;MH* and in *R v V* where it was suggested that s.41 would not be engaged if the cross-examination 'goes to the lies rather than to the sexual behaviour itself'.<sup>148</sup>

Second, the authors refer to a fundamental criticism of s.41 that 'trying to fit particular cases into predetermined, exhaustive categories of relevancies is not feasible'. On this point, however, a strict categories approach to admitting evidence is just one of a number of statutory models. This article advocates it is possible to cater for the admissibility of both sexual history and character evidence through more logical means than those which are provided for at present in the cumbersome overlap between the 1999 and 2003 Acts, namely in the form of a combined admissibility framework.

Finally, it is submitted that the implementation of a new rape shield statute, which departs from a strict categories approach to admitting evidence, is not necessarily bound to suffer the same criticism as s.41. Thus, the proposition that the present law can only be remedied 'not by statutory revision but rather by additional guidelines' is not accepted.

### ***An alternative legislative framework?***

The proposed legislative framework, below, incorporates good practice from the Scottish, New Zealand and Canadian rape shield statutes.<sup>149</sup> The new framework would depart from the strict categories approach to sexual behaviour evidence adopted by s.41, but would

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<sup>148</sup> *V* [2006] EWCA Crim 1901 [21] (Crane J).

<sup>149</sup> The rationale for which is explained below.

retain some of the important restrictions contained therein. The new provision aims to address the primary flaw with s.41, which is not the threshold at which sexual behaviour evidence is admitted, but rather s.41's *complexity* of application in practice. The new provision would thus read as follows:

**1 Restrictions on evidence about the sexual behaviour and character of the complainant in sexual offence proceedings.**

(1) If at a trial a person is charged with a sexual offence,<sup>150</sup> [no evidence can be given and no question can be put to a witness relating directly or indirectly to]<sup>151</sup>

(a) [any sexual behaviour of the complainant];<sup>152</sup> or

(b) the character of the complainant (whether in relation to sexual matters or otherwise),<sup>153</sup>

except with leave of the court.

(2) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) if:

(a) the evidence or question relates to a specific instance (or instances) of the complainant's sexual behaviour<sup>154</sup> [or to specific facts<sup>155</sup> demonstrating the complainant's character]<sup>156</sup> and

(b) exclusion of the evidence might have the effect of rendering unsafe a conclusion of the jury (or as the case may be) the court.<sup>157</sup>

(3) In determining whether leave should be given under subsection (1), above, the

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<sup>150</sup> From s.41(1) of the 1999 Act. Types of offences which engage the subsection are unchanged and as prescribed by Part 1 of the Sexual Offences Act 2003.

<sup>151</sup> Section 44(1) of the Evidence Act 2006 (New Zealand).

<sup>152</sup> Section 41(1) of the 1999 Act.

<sup>153</sup> Compare with s.274(1)(a) of the Criminal Procedure (Scotland) Act 1995.

<sup>154</sup> Analogous to s.41(6) of YJCEA 1999.

<sup>155</sup> The term 'specific facts' is taken from The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s.275(1)(a).

<sup>156</sup> Ibid.

<sup>157</sup> Retention of the unsafe conclusion test (s.41(2)(b) of the 1999 Act.

court must have regard to –

(a) the right of the accused to make a full answer and defence <sup>158</sup> and

(b) society's interest in encouraging the reporting of sexual [...] offences. <sup>159</sup>

(4) Subject to the requirements of s.1(2)(a), the court may admit evidence to rebut or explain evidence under subsection (1) above [if the evidence or question, in the opinion of the court, would go no further than is necessary to enable the evidence adduced [...] to be rebutted or explained].<sup>160</sup>

(5) [Where cross examination of a sexual offence complainant is allowed under this section, the court] <sup>161</sup> must, [notwithstanding the terms of its decision under subsection (1) above limit the extent of questioning to be allowed] <sup>162</sup> to that which is necessary to comply with the requirements imposed by s.1(2)(b) above.

(6) No agreement between parties to criminal proceedings may render admissible [any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section].<sup>163</sup>

(7) [Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section].<sup>164</sup>

### ***A “combined admissibility framework” for sexual behaviour and character evidence***

The legislative provisions proposed above would act as a combined admissibility framework, dealing both with the admissibility of sexual behaviour evidence and evidence of character in sexual offence proceedings. Under the new approach, s.100 of the 2003 Act would not apply to evidence or questioning concerning the bad character of sexual offence

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<sup>158</sup> Section 276(3)(a) of the Canadian Criminal Code.

<sup>159</sup> Section 276(3)(b) of the Canadian Criminal Code.

<sup>160</sup> Wording adapted from s.41(5) of the 1999 Act.

<sup>161</sup> This wording is taken from s.275(9) of the Criminal Procedure (Scotland) Act 1995.

<sup>162</sup> This wording is adapted from the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s.276(9).

<sup>163</sup> Adapted from s.41(8) of the 1999 Act.

<sup>164</sup> Section 41(8) of the 1999 Act.

complainants. Section 100 would have no application where the complainant's character is in issue and, as currently provided for by s.41, 'the person is charged with a sexual offence'. This would require an amendment to the bad character provisions of the 2003 Act. Section 112 (3)(b) of the 2003 Act,<sup>165</sup> which applies to s.41, would be repealed and a new subsection to s.100 would be inserted, which would provide that, 'nothing in this section authorises any evidence to be adduced or any question to be asked about the bad character of a witness where the witness is a sexual offence complainant in proceedings relating to that offence.' Section 100(3) of the 2003 Act, which identifies a number of factors that must be considered to assess the probative value of the evidence, such as the 'nature and number of the events, or other things, to which the evidence relates', and, 'when those events or things are alleged to have happened or existed' would have no application. This is because the 'unsafe conclusion test' adopted from s.41 would apply to both sexual behaviour evidence and character evidence, thereby providing an adequate safeguard by imposing a higher admissibility threshold than that imposed by s.100. The judge must not admit either type of evidence (sexual behaviour or character) unless refusing to do so might have the effect of rendering unsafe a conclusion of the jury. Restrictions on evidence relating to *specific instances* of sexual behaviour or character evidence,<sup>166</sup> and the *purpose* for adducing that evidence,<sup>167</sup> could be retained, and thereby reinforcing the position that the new approach would impose a higher test of admissibility. Along with strong adherence to the Criminal Procedure Rules<sup>168</sup> and the Criminal Practice Direction,<sup>169</sup> which provides more detailed

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<sup>165</sup> Which provides '[n]othing in this Chapter affects the exclusion of evidence...under section 41 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (restriction on evidence or questions about complainant's sexual history'.

<sup>166</sup> Section 41(6).

<sup>167</sup> Section 41(4).

<sup>168</sup> Crim PR 22.

<sup>169</sup> Criminal Practice Directions 2015: (Amendment No.6) [2018] EWCA Crim 516.

guidance to judges and advocates for adducing sexual behaviour evidence, this should assist in the prevention of direct and covert attacks on the complainant's character that had long been an unfortunate feature in sexual offence proceedings. This approach to admitting evidence of the complainant's sexual behaviour and character provides a more logical basis for admitting both types of evidence than that provided for at present which may require the interplay of s.41 and s.100.<sup>170</sup> It would also remedy a potential problem which the court implicitly identified in *R v V*<sup>171</sup> when it suggested that cross-examination about an allegedly false sexual allegation may require a ruling in relation to section 41 as well as leave under section 100.<sup>172</sup> Under a revised version of s.41, the judge could give leave to admit some evidence of the complainant's character, but refuse admission of false complaint or sexual behaviour evidence if it fails to satisfy other restrictions in s.41. Likewise, in the context of the complainant's bad character, the exclusion of evidence concerning a previous false allegation or a previous conviction might not 'render unsafe a conclusion of the jury' if it amounted to an isolated episode which had occurred some years previously.

***Explanation of key provisions:***

***Section 1(1): The exclusionary rule: sexual behaviour evidence and/or evidence to show that the complainant is 'not of good character'***

The exclusionary rule restricts both evidence of the complainant's sexual behaviour and character. The wording 'relating directly or indirectly' is taken from the New Zealand rape shield,<sup>173</sup> and is included to prevent covert attacks on the complainant's character. Scottish

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<sup>170</sup> The Gillen Report (n 92) p.253

<sup>171</sup> [2006] EWCA Crim 1901

<sup>172</sup> *ibid.* [25] (Crane J)

<sup>173</sup> Evidence Act 2006, s.44(1) (New Zealand).

legislators were also mindful of subtle character attacks, and this is reflected in the use of very similar language in s.274 of the Criminal Procedure (Scotland) Act 1995. This places restrictions on evidence which 'shows or tends to show that (a) the complainant is not of good character [...] or (b) has at any time, engaged in sexual behaviour not forming part of the subject matter of the charge.' Scottish legislators were also mindful of such character attacks wherein complainants might be quizzed about their social habits such as whether they regularly take drugs, get drunk or visit nightclubs. For this reason, s.1(1) governs the admissibility of evidence concerning the complainant's character 'whether in relation to sexual matters or otherwise'.

***Sections 1(2)(a) and (b): retention of the 'specific instance' and 'unsafe conclusion' tests***

The new framework would import two key restrictions and safeguards contained in s.41 – the specific instance requirement in s.41(6), and also the s.41(2)(b) leave requirement that imposes a duty on the trial judge to permit evidence or questioning only when a refusal to do so 'might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case'. In the case of the former, it would not be possible under the new statute to adduce evidence or ask questions about the general character of the complainant, whether in relation to sexual matters, or otherwise. For example, evidence that the complainant was promiscuous or engaged in prostitution would not be permitted unless, subject to other restrictions imposed by the statute, the accused could point to specific instances or facts about the complainant's work as a prostitute.<sup>174</sup> This moves away from the previous approach taken to the 'specific instance requirement' imposed by s.41(6) of the 1999 Act in merely relating to the form of the evidence. The new

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<sup>174</sup> Confirming the decision of the court in *R v White* [2004] EWCA Crim 946.

provision reflects the approach taken by the Court of Appeal in *White* in that the argument for admitting the evidence:

only possesses intellectual coherence if it is taken to require that there must be something about the circumstances of a specific episode of alleged sexual conduct by a complainant which has *potential probative force*.<sup>175</sup>

The mere fact that the complainant working as a prostitute would not be sufficient to meet the requirements of the subsection. However, evidence that the complainant and the defendant had engaged in certain fact specific activity, for example, role play involving rape fantasy and which were similar to the alleged facts of the facts giving rise to the current charge may satisfy the requirements of this section subject also to the application of the 'unsafe conclusion' test.

The addition of a 'specific facts' criterion does potentially allow for the adduction of evidence that would not otherwise satisfy the 'specific instance requirement'. As Ward and Fouladvand identify in the context of *White*:

Evidence that the complainants' sex work in Hungary had been freely chosen would have probative force in rebutting their accounts of being trafficked to England against their will and compelled to work under the control of the defendants. Nevertheless, it is difficult to see how such questions could be confined to *specific instances* of sexual behaviour, unless the defence were in a position to ask about individual clients.<sup>176</sup>

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<sup>175</sup> Ibid [16] (Emphasis added).

<sup>176</sup> Tony Ward and Shahrzad Fouladvand, *Human trafficking, victims' rights and fair trials*. J. Crim. L. 2018, 82(2), 138-155, p.151



Despite this, the retention of the ‘unsafe conclusion’ test under s.41(2)(b) (and replicated at s.1(2)(b) (above)) prevents the admission of evidence used solely or mainly for the purposes of discrediting or undermining the complainant. The ‘unsafe conclusion’ test also imposes a higher hurdle in relation to bad character evidence than the enhanced relevance test in s.100 of the 2003 Act.

***Section 1(3): factors to be considered by the court***

The judge must direct his or her attention to two important factors contained in subsection (3) before leave can be given under s.1. The Canadian rape shield lists eight factors which the judge must consider when determining whether the evidence can be admitted.<sup>177</sup>

Included here are the two most important factors which have troubled the courts for centuries, and which should be at the forefront of a judge’s mind when assessing relevance: (a) the right of the accused to make a full answer and defence; and (b) society’s interest in encouraging the reporting of sexual assault offences.<sup>178</sup>

Consideration might be given to the inclusion of a third criterion; whether the way in which the evidence was obtained is capable of undermining the probative value of that evidence.

As was noted in earlier discussion a salient criticism arising from the *Evans* case was the way in which the evidence of previous sexual behaviour was obtained. In respect of defence

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<sup>177</sup> Section 276(3) of the Canadian Criminal Code provides: In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (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.

<sup>178</sup> Section 1(3).

evidence the court cannot avail itself of an exclusionary discretion such as s.78 PACE 1984 or the ability to exclude defence evidence on abuse of process grounds. Requiring the court to consider the impact of the way evidence was obtained on the probative value of the evidence could go some way to addressing concerns about evidence obtained on the promise of a financial reward (as in the *Evans* case) or as a result of the type of “do-it-yourself sleuthing”<sup>179</sup> envisaged by Baird.

### ***Section 1(4): rebuttal evidence***

This relates to the admissibility of evidence in rebuttal of assertions made by *either* the defence or the prosecution. The leave requirements of the new provision would apply to both the prosecution and defence because, as noted by Temkin, sexual behaviour evidence can cause embarrassment to the complainant regardless of which party seeks its introduction.<sup>180</sup> The rebuttal exception will apply to both. The wording of the rebuttal exception has essentially been adopted from s.41(5) of the 1999 Act, but specific reference is made to the requirement that the evidence must satisfy a ‘specific instance’ or ‘specific facts’ test *and* the ‘unsafe’ conclusion test which is replicated in the proposed s.1(2).<sup>181</sup> This requirement will guard against the admission of impermissible generalisations about the complainant’s sexual past or character, which should in any event be excluded by s.1(3). Under the new proposal, before evidence can pass through the rebuttal exception it would have to satisfy the cumulative leave requirements imposed by s.1(2).

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<sup>179</sup> Baird (n 31)

<sup>180</sup> Jennifer Temkin (n 40), 225.

<sup>181</sup> As would have been the case under s.41(5) of the 1999 Act.

### ***Section 1(5): discretion to limit extent of questioning***

This would provide scope for the judge to limit questioning so as to protect complainants from prolonged and unnecessary cross-examination. This would reinforce existing good practice as time-limits can already be imposed on cross-examination of witnesses.

### ***Section 1(6): prohibition of agreed evidence between the parties***

It had been suggested that ‘the majority of section 41 applications are settled in a common-sense way through negotiation and ultimately by agreement’.<sup>182</sup> Concerns were raised by the Home Office Report that it was not uncommon for prosecution and defence counsel to agree between themselves to adduce sexual behaviour evidence which, in turn, could then be cross-examined under s.41(5) by the defence.<sup>183</sup> This could give rise to a situation wherein, if such “deals” are regularly being struck between counsel, then a provision which is designed to restrict sexual history evidence has the opposite effect by permitting more evidence via agreement between the parties. In doing so, this practice bypasses the safeguards contained within s.41 which would otherwise need to be satisfied before the evidence is heard. It is for this reason that s.1(6)<sup>184</sup> of the proposed statute prohibits evidence or questioning which could otherwise have been smuggled into the court in consequence of prior agreement between the parties.

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<sup>182</sup> Pamela Radcliffe and others, *Witness Testimony in Sexual Assault Cases* (OUP 2016) 77.

<sup>183</sup> Liz Kelly, Jennifer Temkin and Sue Griffiths, ‘Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials’ (Home Office Online Report, 20/06) 55.

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf>> accessed 11 September 2019.

<sup>184</sup> Section 1(6) provides: No agreement between parties to criminal proceedings may render admissible [any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section]. Wording in square brackets is taken from s.41(8) of the 1999 Act.

***Section 1(7): exclusive control of evidence relating to the bad character of sexual offence complainants***

Section 1(7) confirms the position that s.100 of the 2003 Act, which deals with the admissibility of evidence concerning the non-defendant's bad character, does not apply to evidence or questioning concerning the bad character of sexual offence complainants.

***Conclusion***

The *Evans* case is both unusual and challenging in equal measure. The prosecution of a high profile defendant, the manner in which the evidence of the complainant's sexual behaviour came to light and the deplorable treatment of the complainant (in particular via social media) was compounded by the media storm following the defendant's successful appeal and subsequent acquittal. This complex factual background is precisely the reason that a dispassionate assessment of the effect of the Court of Appeal's decision in *Evans* is imperative.

In respect of the evidence of the complainant's previous sexual behaviour, acknowledging the potential difficulties created by the way in which the evidence was gathered, the court, in possession of that evidence, was nevertheless faced with a series of clear questions. Was the evidence of the complainant's previous sexual behaviour relevant to the issues of consent; was it sufficiently "similar" so as to pass through the gateway in s. 41(3)(c)(i) YJ&CEA 1999 (as read in the context of the decision of the House of Lords in *R v A (No.2)*), and, if so, would exclusion of the evidence have had the potential to render unsafe any conclusion of the jury? Alternatively, the court may have considered admitting the evidence on the basis that it was relevant to an issue other than consent, namely the reasonableness of the defendant's belief, under s.41(3)(a) of the 1999 Act.

To answer these questions consideration must be given to the purpose of the defence in seeking to adduce the evidence of the complainant's previous sexual behaviour. No attempt was made by the defence to undermine the credibility of the complainant. In fact, this is a rare case in which the complainant offered no opposing account of what occurred; she simply had no memory of the incident in question. Absent a contrary narrative the jury were faced with a stark question; was the defendant telling the truth when he asserted that the complainant, "was perfectly capable of exercising her choice as to whether to engage in sexual activity and took the lead in most of what took place",<sup>185</sup> or did they accept the prosecution version of events that the complainant's level of intoxication meant that she was, "incapable of behaving in that way"<sup>186</sup>? Acknowledging the case of *Dougal*<sup>187</sup> in which evidence of the complainant's lack of memory due to intoxication appears to have proved fatal to the prosecution, the complainant's lack of memory could be seen as a somewhat damning piece of evidence against the defendant's account that the complainant "was enthusiastic, awake and gave no indication that she was not capable of consenting."<sup>188</sup> That is, unless the jury were able to hear that, whilst in a similarly intoxicated state the complainant engaged in consensual sexual activity of which she retained no memory the next day. Criticisms have been levelled against the determination that the complainant's behaviour (for example words of encouragement used and/or sexual positions adopted) were sufficiently similar so as to meet the requirements of s.41(3)(c)(i). However, as identified above, the level of similarity must be read in light of the decision of the House of Lords in *R v A (No.2)*, and therefore, in a manner consistent with the defendant's fair trial rights under Article 6 ECHR.<sup>189</sup>

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<sup>185</sup> *R v Evans (Chedwyn)* (n 1) [13].

<sup>186</sup> *R v Evans (Chedwyn)* (n 1) [71].

<sup>187</sup> *R v Dougal* (Swansea CC, 1 November 2005)

<sup>188</sup> *R v Evans (Chedwyn)* (n 1) [13].

<sup>189</sup> *R v A (No.2)* (n 38) 45.

An unusual aspect of the *Evans* case was that the evidence of previous sexual behaviour related to sexual activity with third parties rather than with the complainant. It is arguable that the veracity of Evans' account was strengthened by corroborative third party evidence, of which he had no knowledge, when that account was offered. Given the specific peculiarities of the facts of the *Evans* case, including its position as one of Lord Steyn's "rarest cases"<sup>190</sup> in which evidence of sexual behaviour with a third party is relevant, it is hard to avoid the conclusion that *Evans* was a case decided on its own facts, and which, therefore, sets no precedent, other than to provide a rare example of admissible third party sexual behaviour evidence.

The review of cases involving applications to admit evidence of a complainant's sexual behaviour conducted by the Attorney General's Office and the Ministry of Justice and the acknowledgement that cases such as *Mukadi*,<sup>191</sup> and latterly *Evans*, are "outliers" tend to suggest that s.41 YJ&CEA 1999 is operating as intended. On that basis the *Evans* case does not appear to provide a sound basis on which to pursue legislative reform in this area. In addition, the newly implemented Practice Direction,<sup>192</sup> which provides more detailed guidance to judges concerning decisions to admit sexual behaviour evidence - dispels the notion that such evidence will be easily admitted. This view is affirmed by research undertaken on behalf of the Criminal Bar Association,<sup>193</sup> the findings of which were highly critical of previous empirical studies on s.41's application.<sup>194</sup> The Report, which considered

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<sup>190</sup> *R v A (No.2)* (n 388) 60 (Lord Steyn).

<sup>191</sup> *R v Mukadi* (n 86).

<sup>192</sup> Criminal Practice Directions 2015: (Amendment No.6) [2018] EWCA Crim 516.

<sup>193</sup> Hoyano (n 8)

<sup>194</sup> The Report concludes that 'the previous empirical studies are entirely or largely unreliable as a picture of section 41, because they are very outdated, or unduly restricted in their scope (to rape and/or female complainants), or rely upon shallow dip sampling of paper files, or rely upon lay observers watching open court proceedings (or having extremely limited access to court proceedings in the case of ISVAs) and guessing what

the responses of 144 barristers, indicated that there was no support for amendments which would render s.41 even more restrictive than its current position.<sup>195</sup>

Much of the damage to the public perception of how the criminal justice system deals with allegations of serious sexual offences in general, and with complainants specifically, arose not from the decision of the Court of Appeal in *Evans*, but from the reporting of it. The way in which the judgment was presented by some elements of the news media (including social media) lacked clarity, nuance and understanding, and likely achieved the opposite of what s.41 YJ&CEA 1999 was designed for; to encourage victims of sexual offences to come forward, and give evidence. Ensuring the accuracy of media narratives appears to be a consistent challenge in respect of sexual offence proceedings. This has again been highlighted by CPS, referring to the “serious inaccuracies”<sup>196</sup> in media reports about the use of complainant’s mobile phone data in sexual offence investigations.

As established, the *Evans* decision does not appear to be representative of the normative operation of s.41. On the other hand, although the decision does not provide a rationale for wholesale reform of s.41, it serves a useful purpose by highlighting the practical difficulties of applying the legislation. It is the complexity of s.41 that is problematic rather than the standard at which sexual behaviour evidence is considered sufficiently relevant to warrant its admission, which, according to recent research,<sup>197</sup> is correct. The logical approach is to maintain the higher hurdle already provided by s.41, rather than to impose a lower threshold of admissibility as would result from the introduction of a model based on s.100 CJA 2003 as

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has happened. None of them can be relied upon to reflect current practice in the courtrooms of England and Wales’; Hoyano (n 8) 46.

<sup>195</sup> Hoyano, (n 8).

<sup>196</sup> CPS, Handing over mobile phone data in rape prosecutions, <<https://www.cps.gov.uk/cps/news/handing-over-mobile-phone-data-rape-prosecutions>> accessed 28<sup>th</sup> October 2019.

<sup>197</sup> Hoyano (n 8).

proposed by Stark, but to simplify the operation of the legislative provisions in practice. This could be achieved by the enactment of a combined admissibility framework for both sexual behaviour and character evidence based on the proposals advanced herein.

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