Bringing the Background to the Fore in Sexual History Evidence

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The Court of Appeal's decision in *Evans*[1] has renewed interest in reforming section 41 of the Youth Justice and Criminal Evidence Act 1999. This provision allows leave to be given for the defence to adduce evidence of, or cross-examine any witness about, 'any sexual behaviour or other sexual experience, whether or not involving any accused or other person' (hereinafter, 'sexual history evidence') relating to the complainant in a sexual offences case.[2] One proposal for reform, introduced by Harriet Harman MP into the Prison and Courts Bill before the dissolution of Parliament, would have removed the possibility of leave: section 41 would have become an absolute bar on the admissibility of evidence of the complainant's sexual history.[3] This proposal, which may conceivably reappear during the next Parliament, was presumably intended to legislate in violation of the right to a fair trial. There is no need to go that far, but there is fresh cause for reflection: *Evans* indicates (once again) that section 41's wording and structure obscures more than it clarifies. The legislation also does not quite mean what it says, because of the House of Lords' decision in *A (No 2)*.[4] Reform would be useful, and a suggested starting point would be to refocus attention on the oft-neglected section 41(2)(b) of the Act, which has the potential to strike an appropriate balance between the competing interests at stake in this area.

***Evans*: facts**

Although the facts of *Evans* are well known, their key importance to analysing the Court's decision, and establishing if there is a need for reform, requires them to be laid out fully.

The allegation was that E and M had raped X who, due to her intoxication, lacked the capacity to consent.[5] Crucially, X could not remember what had happened.

E's evidence was that he had entered the hotel room in which M and X were having consensual sex. M gave evidence that he invited E to join in, with X's consent. E engaged in sexual intercourse with X, her adopting the 'doggie' position and saying 'fuck me harder'.

M was acquitted, and E convicted. E's second appeal against conviction[6] arose from a reference from the Criminal Cases Review Commission that concerned evidence from O and H.[7] O had gone home with X on three previous occasions, but no sexual intercourse had taken place. X could not, however, remember that the morning after. This surprised O, who did not

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[1] [2016] EWCA Crim 452, [2016] 4 W.L.R. 169.

[2] Behaviour that is part of the alleged offence is excluded: YJCEA 1999, s. 42(1)(c). The list of sexual offences in s. 62.

[3] https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html.

[4] [2002] 1 A.C. 45.

[5] As required by Sexual Offences Act 2003, s. 74.

[6] E's first appeal is reported as *Evans* [2012] EWCA Crim 2559.

[7] O's mother's evidence corroborated parts of his account.

think that X had been that drunk. On the fourth occasion O and X had met, they had had sex. This was approximately two weeks after the alleged rape. X adopted the 'doggie' position and said something like 'fuck me harder'.

H's evidence was that he had communicated with X via social media and text messages, before meeting her and going back to H's home. No sexual intercourse took place. The next day, X returned to H's home and they had sexual intercourse. The two had had sex on a casual basis five or six times thereafter, often after X had been drinking. H corroborated O's account of X instigating sexual activity whilst heavily intoxicated, including in the 'doggie' position whilst saying 'go harder'.

The primary question for the Court was whether this evidence could properly have been admitted under section 41.[8]

Relevance

The starting point is logical relevance: does a specific piece of sexual history evidence increase or decrease the probability of the existence of a disputed fact in proceedings? Two points should be made before proceeding. First, logical relevance does not exist in a vacuum – it depends on other evidence in a case, and how a case is argued – and this makes general claims about relevance and irrelevance (although common in this area) of dubious value.[9] Secondly, 'the word "relevant", particularly in this context, is socially constructed, with a nebulous and shifting definition, rather than being an objective, analytically derived creation of pure logic'.[10] The best that can be said, then, is that decisions about relevance and sexual history evidence are genuinely very difficult, even within the factual framework of a concrete case. [11]

With these caveats in mind, the correct question is at least in view: does O and H's evidence have probative value regarding an issue contested between the prosecution and the defence in *Evans*?

Relevance and reasonable beliefs in consent

Could O and H's evidence raise a reasonable doubt over the proposition that E lacked a reasonable belief in X's consent? The CCRC referred E's case based on this ground, and it was one basis upon which the Court concluded that admissibility of O and H's evidence could have been founded.[12]

At first, this argument appears odd: E did not know of X's behaviour with O and H at the time of the alleged rape.[13] Even if E *had* known of X's behaviour with O and H, it can legitimately be questioned whether this helps decide whether E's belief was a reasonable one to hold.[14]

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[8] With a view to establishing whether the conviction was unsafe based on fresh evidence – Criminal Appeal Act 1968, s. 23.

[9] P. Roberts and A. Zuckerman, *Criminal Evidence*, 2nd edn. (2010), 446.

[10] P. Duff, 'The Scottish "Rape Shield": As good as it gets?' (2011) 15 Edin. L.R. 218, 236.

[11] See M. Redmayne, 'Myths, Relationships and Coincidences: The new problems of sexual history' (2003) 7 E&P 75.

[12] *Evans*, at [13], [16], [50], [72].

[13] Cf. McKeown's commentary on *Evans* at [2017] Crim. L.R. 410.

[14] L. Kelly, J. Temkin and S. Griffiths, *Section 41: An evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office Online Report 20/06) 76.

An answer (though one not given expressly in such terms by the Court) is that E was arguing that he reasonably believed that, although intoxicated, X still had the capacity to consent, and the credibility of this account is heavily reliant on how visibly drunk X was at the time. The evidence of O (at least) suggests that, even whilst intoxicated to the extent that she claimed to have memory loss the next morning, X would not appear to be too drunk to possess the capacity to consent. That others have miscalculated a person's state of intoxication makes it more likely that the defendant miscalculated that person's state of intoxication at the time of the alleged offence, which makes it more likely that E (reasonably?) believed X was capable of consenting, which might secure reasonable doubt.

Relevance and consent

Moving beyond beliefs about consent, consideration can be given to whether consent itself existed. *Evans* is perhaps 'unusual',[15] as it is not a case where the complainant gave evidence of non-consent, which was countered by the defendant's evidence. X's evidence was that she could not remember what happened. This is not the same as saying there was no consent. In *Bree*,[16] it was held that the relevant question is not whether the complainant has a 'very poor recollection of precisely what happened',[17] but instead whether the capacity to make the choice to engage in the relevant sexual activity existed.[18] It was confirmed that the capacity to consent 'may evaporate well before a complainant becomes unconscious'.[19] In short: being conscious at the time of sexual activity can be consistent with having not consented; having memory loss can be consistent with having consented.

The prosecution case was that X was *incapable* of doing what E and M claimed she had done.[20] Evidence that, whilst in a similar state of intoxication, X had managed to do what E and M alleged she did (and later claimed memory loss, at least with O) gives their defence more credibility.[21] This suggests that evidence of sexual activity with third parties *can* sometimes (but not often)[22] be relevant to the question of whether the complainant consented to sexual activity with the defendant. Importantly, O and H's evidence was relevant not because it showed she had simply engaged in sex with other men (and was thus more likely to consent with E), or simply to suggest X is simply less capable of belief because of her sexual history.[23] Those who are (rightly or wrongly) universally against *those* arguments for the logical relevance of sexual history evidence can (not must) thus accept that logical relevance was present in *Evans*.[24]

Admissibility

[15] *Evans*, at [70].
[16] [2007] EWCA Crim 804, [2008] Q.B. 131.
[17] *Bree*, at [26].
[18] *Bree*, at [34].
[19] *Bree*, at [34].
[20] *Evans*, at [71].
[21] *Evans*, at [39].
[22] *A (No 2)*, at [30]; *White* [2004] EWCA Crim 946, [35]; *Evans*, at [74].
[23] *Evans*, at [71].
[24] It is assumed here that the comments in *A (No 2)* about evidence of the complainant's specific mindset towards the defendant being what is relevant merely restate a similar propensity inference.

The generalisations relied upon to establish logical relevance in the previous section are at least controversial, and there are difficulties in O and H giving evidence about how X acted in distinct scenarios without having seen X on the night in question. Added to this, there is good reason to think that admitting sexual history evidence is highly prejudicial to the interests of complainants.[25] Consideration must thus be given to whether logically relevant sexual history evidence should nevertheless be inadmissible.

One might object that excluding *any* logically relevant evidence on the part of the defendant is unjustified: the defendant has 'more to lose', and so should not be so constrained by concerns of prejudice to witnesses for the prosecution. This view has quite clearly been rejected by the legislature in passing section 41, is not the effect of *A (No 2)*, and pays insufficient regard to the competing interests at stake in this context. It will be assumed here that the legislature is right to attempt to strike a balance between the interests of defendants and complainants in relation to sexual history evidence.

This balance is struck in section 41 through applying specific grounds for admissibility (following the recent trend, these will be called 'gateways' to admissibility) subject to an overriding test. The analysis here will proceed along these lines.

The 'gateways' to admissibility

It is necessary to once again distinguish between the issues of consent and reasonable belief in consent.

First, section 41(3)(a) allows the admissibility of sexual history evidence that relates to an issue *other* than consent. Section 42(1)(b) states that the issue of the defendant's beliefs about consent is *not* an issue of consent.[26] Thus, a 'gateway' is got through in *Evans*, at least in relation to O's evidence.[27]

The second issue, consent, is more complicated, and brings up section 41(3)(c). This allows trial judges to grant leave to adduce evidence of the complainant's sexual behaviour where it relates to 'an issue of 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.'

Much is unclear about section 41(3)(c), but it has affinities with the now-legislatively-superseded 'similar facts' evidence doctrine.[28] The language of coincidence, for example, harks back to *DPP v Boardman*, which required that 'the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused … The similarity would have to be so unique or striking that common sense makes it inexplicable on

[25] E.g. A. McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 O.J.L.S. 275.
[26] See J. McEwan, '"I Thought She Consented": Defeat of the rape shield or the defence that shall not run?' [2006] Crim. L.R. 969-980.
[27] For an argument that the non-consent issue was X's memory after drinking, see J. Rogers, 'No Case to Answer?' (2016) 180 C.L. & J.W. 797. This would still raise some concerns about H's evidence.
[28] *A (No 2)*, at [85].

the basis of coincidence'.[29] The courts have, however, not found section 41(3)(c) to set the bar this high, as 'striking similarity' is not required.[30] There is, however, apparently a need for more than a probative value exceeding the evidence's possible prejudicial impact[31] (another test for the admissibility of 'similar fact' evidence).[32] For instance, the bare existence of a sexual relationship between the parties will not be enough.[33] It is clear enough from *A (No 2)* that it will be a very rare case where *third party* sexual history evidence (such as that in *Evans*) is admissible through section 41(3)(c).[34]

Beyond that, not much is clear, particularly what the mention of 'coincidence' means, substantively. In most cases, coincidence or the absence of coincidence is asserted without explanation.[35] The plainest statement in *A (No 2)* explained that: 'the similarity [did not have] to be in some rare or bizarre conduct. … the language seems … to be looking for some characteristic or incident of the complainant's sexual behaviour which can reasonably be seen to have a significance beyond the fact that it is contemporaneous with the behaviour and which bears some kind of connection or relationship with the behaviour which on a reasonable view is not a mere matter of chance.'[36] Perhaps the best that can be made of this statement, following *Evans*, is that – if the sexual history evidence is to get through section 41(3)(c) – the alleged similarity must credibly arise from there being consent in each circumstance, rather than a different causal factor. That the complainant was in each reported incident of sexual activity wearing a tiara, although unusual, would fail this test: tiaras having nothing (normally) to do with consent to sex, it does not stretch incredulity to say that it is likely that the complainant's wearing of a tiara was simply a matter of chance, and coincidental, relative to the question of whether the complainant was consenting. It was much more likely just a fashion choice. It will only be very unusual cases (where a tiara-based fetish exists, for example) that the tiara will not seem coincidental relative to the question of consent. The more 'usual' similar activities in *Evans*, by contrast, have a clearer common sense connection with consensual sexual activity. People direct and encourage sexual partners usually because they are consenting; that is the most obvious causal explanation for the similarity in conduct. Although it is conceivable that a person might direct and encourage a sexual partner out of terror of what that partner would otherwise do, that is rare compared to cases where direction/encouragement are given by a consenting partner. If that were the complainant's evidence, the trial judge would need to consider whether that evidence credibly changes the apparent causal basis for the relevant similarity.

If this is right, then section 41(3)(c) is after all a relatively weak constraint on admissibility.[37] The often baffling examples of section 41(3)(c) in action typically *do* involve unusual behaviour, which hides this point: re-enacting the balcony scene from Romeo and

[29] [1975] A.C. 421, 462. See P. Rook and R. Ward, *Rook and Ward on Sexual Offences: Law and Practice*, 5th edn (Sweet & Maxwell, 2016), para. 26.86.
[30] See *A (No 2)*, at [158]-[159].
[31] *A (No 2)*, at [84].
[32] *DPP v P* [1991] 2 A.C. 447.
[33] *A (No 2)*, at [86], [105], [135].
[34] *A (No 2)*, at [77], [89], [125], [127], [130], [148].
[35] See, recently, *Guthrie* [2016] EWCA Crim 1633, [2016] 4 W.L.R. 185, at [12].
[36] *A (No 2)*, at [135].
[37] For various readings of the subsection, see Redmayne, *supra*, 95-99.

Juliet;[38] blackmailing a sexual partner with threats of a false report of rape;[39] using an unusual word (that would not be said in non-consensual situations) to refer to private parts;[40] having sex in a climbing frame and other 'unusual' locations[41] (apparently an 'easy' case).[42] The veil of unusualness is apparently lifted by *Evans*: section 41(3)(c) cannot keep out similar, 'usual' sexual behaviour where that similarity is plausibly non-coincidental relative to the question of whether the complainant was consenting on each occasion. This is problematic, insofar as there is good reason, on the grounds of policy mentioned earlier, to require alleged similarities in conduct to be *significant*, rather than just causally related, before sexual history evidence is admitted.

The unappreciated significance of section 41(2)(b)

Even if the conclusion regarding section 41(3)(c) in the previous subsection were to be accepted, getting through a 'gateway' is not a guarantee of admissibility. Section 41(2)(b) – a provision that is rarely discussed in any depth – provides that evidence of sexual behaviour may be admitted only where 'a refusal of leave 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'. Section 41(2)(b) seems akin (but not identical) to the old rule of admissibility regarding 'background' evidence:[43] i.e. evidence necessary to ensure that a rational, complete or comprehensible understanding of the other evidence in the case can be undertaken by the finder of fact.[44] Under the Criminal Justice Act 2003's successor concept of 'important explanatory evidence', what is required is that, without the (bad character) evidence 'the court or jury would find it impossible or difficult properly to understand other evidence in the case, and [the evidence's] value for understanding the case as a whole is substantial'.[45]

Section 41(2)(b)'s language is less demanding than the idea of background or important explanatory evidence ('might… unsafe'), and it would be foolish to assume that it is not susceptible to varying interpretations/applications.[46] It is submitted, however, that its proper function is to avoid 'disembodying the case before the jury'[47] by keeping them in the dark about evidence that genuinely might show *other* evidence in the case in a significantly different light. In *A (No 2)*, the defendant's story that the complainant and he had consensual sex on the way to visit the complainant's boyfriend in hospital is seen in a meaningfully distinct light if there is cogent evidence that the defendant and the complainant had been engaged in a clandestine sexual relationship for some weeks before the alleged rape.[48] In *T (Abdul)*,[49] the defendant's claim that consensual sex took place in a child's climbing frame in

[38] Hansard, 8 Feb 1999, Col 45 (Baroness Mallalieu).
[39] *A (No 2)*, at [42].
[40] Redmayne, *supra*, 98.
[41] *T (Abdul)* [2004] 2 Cr. App. R. 32. Cf. *Hamadi* [2007] EWCA Crim 3048.
[42] *Harris* [2009] EWCA Crim 434, at [19].
[43] For discussion of sexual history and 'background' evidence, see D. Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] Crim. L.R. 531.
[44] *Sawoniuk* [2000] 2 Cr. App. R. 220.
[45] Criminal Justice Act 2003, s. 102.
[46] Cf. J. Temkin, 'Sexual History Evidence – Beware the backlash' [2003] Crim. L.R. 217, 238.
[47] *A (No 2)*, at [32].
[48] J. McEwan, 'The Rape Shield Askew?' (2001) 5 E&P 257, 262. The complainant in A denied the relationship existed, which is reason for caution.
[49] [2004] 2 Cr. App. R. 32.

a public park is similarly seen in a new light when cogent evidence is presented that the defendant and the complainant had previously engaged in sexual activity in public (including in that climbing frame). What unifies these cases is not similarity (as section 41(3)(c) requires), or temporal connection (as section 41(3)(b) requires), or more generalised arguments about the relevance of sexual history. Rather, it is the idea that the defendant's story, absent the relevant sexual history evidence being admitted, would sound so unusual as to be incredible, and thus there is a significant risk that, without that relevant sexual history evidence, the defendant has no real defence at all.[50]

In the light of this, there is something in the prosecution's argument in *Evans* that there was nothing particularly unusual about what E was claiming, or what X had apparently done on other occasions, to render O and H's evidence particularly important in establishing whether there was consent and/or a reasonable belief in consent. This argument was simply misdirected at section 41(3)(c), instead of section 41(2)(b).

Perhaps there is a worry that juries will not countenance the possibility that someone *could* reasonably believe someone in X's state of intoxication to have been consenting, and that hearing that others have mistaken X's state of intoxication helps avoid an unfair result. It is not clear why the jury's assessment of E's evidence on belief and consent is changed markedly, however, particularly when O and H did not see X on the evening in question, and O and H would obviously have significant reason to say that X was sober enough to consent.

Maybe another fear is that juries might assume that a person who has memory loss after a night's drinking simply cannot have done what E and M alleged X did, and their defence is incredible until we learn that X has on other occasions seemingly consented whilst drunk enough to apparently suffer memory loss. It is submitted, however, that it is more likely that the jury does not require assistance to establish that, sometimes, very drunk people can consent to sex (in line with the guidance in *Bree*), and to assess the credibility of E and M's evidence in that light. It is noteworthy that the original jury received expert evidence for the defence to the effect that X's assertion of memory loss was surprising given what she (thought she) had drunk,[51] so E and M's case was already readily graspable without O and H's evidence.

It is difficult to tell what the Court thought about section 41(2)(b), and thus impossible to say that the decision in *Evans* was *wrong*. Section 41(2)(b) was merely cited, and the predominant focus was section 41(3)(c) and similarity. *Evans* suggests that section 41's drafting means similarity (or temporal closeness, in other cases) risks becoming *the mark* of admissibility and sole focus of attention, when it is simply *a potential indicator* of admissibility to be considered in the round. That result could have been avoided had a list of criteria for applying section 41(2)(b) (including similarity and temporal closeness, and other markers of logical relevance) been preferred over the drafting technique employed in 1999.[52] Before a proposal for reform is made, however, it is necessary to engage with another aspect of the debate over sexual history evidence.

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[50] Cf. *B* [2012] EWCA Crim 1235, where alternative evidence was available to assist the jury in assessing the defence argument.

[51] [2012] EWCA Crim 2559, at [17].

[52] Cf. N. Kibble, 'The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammeled judicial discretion?' [2000] Crim. L.R. 274, 292.

A (No 2)

Until now, attention has focussed on the wording in section 41, but the statutory text became less important after *A (No 2)*, when it was concluded that it must be read compatibly with Article 6, which sometimes means 'reading down' (or ignoring!) the legislative language under section 3 of the Human Rights Act 1998.

Evans is far from clear if the licence granted by *A (No 2)* was utilised. At one point in the judgment, *A (No 2)*'s 'ECHR gloss' was deemed unnecessary because the parties accepted that ordinary canons of statutory interpretation could cover the case.[53] Ultimately, however, the Court concluded that: 'The requirements of section 41 must give way, as was held in *R v A (No 2)*, to the requirements of a fair trial. Relevant and admissible evidence cannot be excluded. For those reasons we have concluded that this appeal must be allowed.'[54]

Suppose that the Court in *Evans* relied on *A (No 2)*. Lord Steyn's formulation of the ultimate decision was adopted by four of the five Lords: 'the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6'.[55] This was a comment about section 41(3)(c), but the Lords were bound (to an extent) by section 41's structure. Lord Steyn's formulation, expanded beyond consent to include beliefs about consent, is consistent with reading section 41(2)(b) as a general test of admissibility for logically relevant sexual history evidence. The question would then become: without admitting the logically relevant sexual history evidence, is the defendant left with a case the jury might (unsafely) think incredible? Section 41(2)(b)'s vitally important question would be thrust from the background to the fore, and the considerations in the 'gateways' would, instead of core, confusing foci would become more flexible indicators of logical relevance and probative value, that are certainly germane to the question posed in section 41(2)(b). It is submitted that this refocusing, rather than the removal of the opportunity to give leave to admit sexual history evidence, is the appropriate way forwards. Indeed, strictly no revision of the statute itself is required to achieve this result, if *A (No 2)* is read to allow it, although section 41 would be much clearer if it was redrafted along the following lines (changes in italics):

41. Restriction on evidence or questions about complainant's sexual history

(1) 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.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and *may only* give such leave *if* it is satisfied *[omit subsection (2)(a)]* that a refusal of leave 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.

(3): In deciding whether the refusal of leave might result in an unsafe conclusion, the court must have regard to the following factors (and to any others it considers relevant):

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[53] *Evans*, at [48].

[54] *Evans*, at [74].

[55] *A (No 2)*, at [46]. See, also, at [110], [163].

(a) the time between the relevant sexual behaviour and the activities that form the basis of the offence being tried; and
(b) any significant similarities between the relevant sexual behaviour and the activities that form the basis of the offence being tried.
[Section 41 would continue as at present, and amendments to section 42 could be made accordingly.]

Unless evidence collected by the Government's review of section 41, promised in the wake of *Evans*, suggests that such legislative reform would be utterly ineffective, it is submitted that it, rather than the Harman amendment, represents the most sensible way forwards. This reform is not, however, presented as a panacea. It is the case that more research is needed into how to improve *reasoning* with sexual history evidence, particularly once it is admitted, and reduce the potential for biases to cause undue harm to the interests of complainants in cases involving sexual offending.