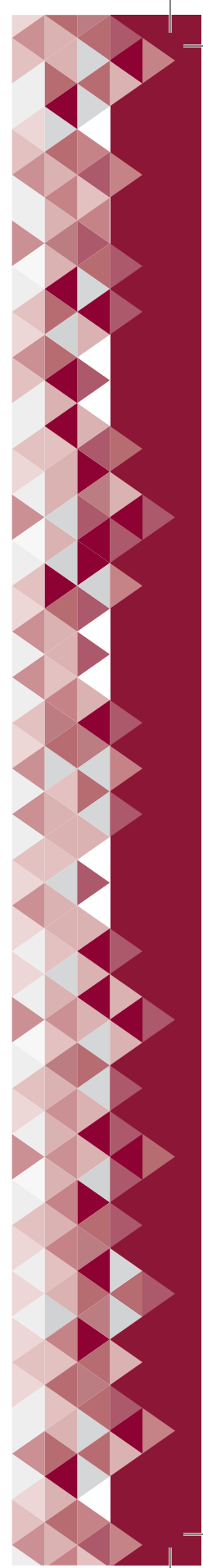


The Use of a Complainant's Sexual History in Sexual Offences' Trials

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مُلَخَّصُ البَحْثِ

تعالج هذه الدراسة بالبحث والتحليل المادة ٤١ من قانون العدالة للأحداث والإثبات الجنائي لسنة ١٩٩٩ الصادر في بريطانيا. تنظم هذه المادة استخدام الدليل المتعلق بالتاريخ الجنسي للمجني عليه (المشتكي) في المحاكمات الجنائية المتعلقة بالجرائم الجنسية، ويستهدف النص تقييد استعمال الدليل الخاص بالتاريخ الجنسي للضحية وشخصيته في جرائم الاغتصاب.

مما لا شك فيه، فقد تم صياغة هذه المادة لإحداث تغييرات جذرية تتعلق بقبول الدليل المتعلق بالماضي الجنسي للمشتكي ووضع القيود اللازمة على استخدام هذا النوع من الأدلة، وذلك عندما يتعلق الأمر بجريمة من الجرائم الجنسية. وتعتبر هذه المادة تطوراً مهماً، وإصلاحاً جذرياً في الإثبات الجنائي من جهة ومعاملة ضحايا هذه الجرائم في نظام العدالة الجنائية في المملكة المتحدة من جهة أخرى.

ولكن التطبيقات القضائية للمحاكم الإنجليزية في هذا المجال قد أظهرت بأن المادة ٤١ قد حققت نجاحاً محدوداً بصورة لم تتحقق معها الأهداف المرجوة من استحداث هذا النص. ففي ضوء الأحكام القضائية التي صدرت بخصوص هذا الموضوع؛ فقد تبين أن ضحايا الجرائم الجنسية لم يتمتعوا بالحماية اللازمة من الأسئلة التي تتعلق بالماضي أو التاريخ الجنسي الخاص بهم مع المتهم عندما تُثار مسألة الرضا في المحاكمات الجنائية. وهذا يستدعي إعادة النظر بصورة جذرية بنص المادة ٤١ من القانون وإجراء التعديلات اللازمة حتى يحقق القانون الغاية من إصداره.

Abstract

This research examines section 41 of the Youth Justice and Criminal Evidence Act 1999. This section regulates the use of a complainant's sexual history in trials for sexual offences, and aims to 'curb the use' of sexual history and sexual character evidence in rape trials. Section 41 was undoubtedly designed to effect significant changes to the law of evidential admissibility of a complainant's sexual past, where a sexual offence is charged. It is a significant development and radical reform in the law of evidence and treatment of sexual offence victims in the criminal justice system. However, this section proved to be of limited success. In the wake of the English case law dealing with this issue, complainants can expect very little protection from questioning about prior sexual experience with an accused when the defence of consent is raised. The remarkable effect of the English case law is to require a radical reconsideration of section 41, and changes to the legislation should be made.

Keywords:

Sexual history evidence, Rape complainants, Cross-examination, Admissibility, Sexual experience, Youth Justice and Criminal Evidence Act 1999.

1. Introduction

Extensive research into the treatment of victims of sexual offences has shown the ordeal of complainants during sexual offence trials.⁽¹⁾ The Victim Support study on the treatment of the sexual offence victims described their experiences of cross-examination within the criminal justice system as “patronising”, “humiliating” and “worse than the rape”. Defence counsel was criticized for asking intrusive and inappropriate questions about whiteness’s private lives.⁽²⁾ In a research study conducted by Sue Lees, the author described the extent to which the private life of complainants is scrutinised and revealed during cross-examination in sexual offence trials. She argued that such questions concentrated on whether the victim had had previous sex with men other than the defendant; whether she was a single mother; whether the man she was living with was the father of her children; the colour of her present and past boyfriends; whether the defendant ‘had used her

1 - Ellison, L., ‘Cross-Examination in Rape Trials’ [1998] Criminal Law Review 605; Lees, S., *Carnal Knowledge: Rape on Trial* (London: Penguin, 1996); McColgan, A., *The Case for Taking the Date out of Rape* (Pandora, London, 1996); Victim Support, *Woman, Rape and the Criminal Justice system* (London: Victim Support, 1996); Adler, Z., *Rape on Trial* (London: Routledge & Kegan Paul, 1989); Temkin, J., *Rape and the Legal Process* (London: Sweet & Maxwell, 1987).

2 - Victim Support, *Woman, Rape and the Criminal Justice system* (London: Victim Support, 1996) at 39

previously'; details of her menstrual flow; whether she had a vibrator in her drawer wrapped in a purple sock.⁽¹⁾

Aileen McColgan argued that sexual history evidence is irrelevant, in all but the most exceptional cases, to the issue of the defendant's guilt. "And even where such evidence may be relevant to counter the possible presumption that the complainant would not have consented to sexual contact of the type at issue of consent, its relevance will be insufficient to counter the damage flowing from its admission. The danger is not simply that the complainant will be embarrassed and humiliated but also her private life paraded before strangers and other women discouraged from complaining of rape."⁽²⁾ Professor Jennifer Temkin argued that it is often claimed that in sexual offence trials "the complainant rather than the defendant is on trial". She indicated that there are other tactics commonly employed by the defence counsel against the complainants which are oppressive and invidious. These tactics includes continual questioning about the details of rape, rehearsal of pre-existing sexual relationship in court where the victim and

1 - Lees, S., *Carnal Knowledge: Rape on Trial* (London: Penguin, 1996) at 134. See also Burman, M., "Evidencing Sexual Assault: Woman in the Witness Box" (2009) 56(4) *Probation Journal* 1-20.

2 - McColgan, A., 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 *Oxford Journal of Legal Studies* 275 at 302.

accused were known to each other and, finally, challenge to the general character of the witness.⁽¹⁾

Furthermore, these strategies include use of complex and inappropriate language, coercive questioning and intimidating tactics. They have often been used by defence lawyers during cross-examination to distract the jury from the central issue in a case or to suggest a possible motive for the complainant making a false allegation and that this sort of woman is quite reasonably to be taken to be consenting.⁽²⁾ 27 In this way, evidence of a complainant's sexual proclivities can distract jurors' attention from the consideration of "rape", directing them towards that of "sex".⁽³⁾

The Royal Commission on Criminal Justice Report has stated that the experience of victims of rape and other sexual crimes in a criminal trial is "a daunting (and sometimes even dangerous) task and one that they may come to

1 - Temkin, J., *Rape and the Legal Process* (Oxford: Oxford University Press) at 8-11.

2 - See for example, Brereton, D., 'How Different are Rape Trials? A Comparison of the Cross-examination of Complainants in Rape and Assault Trials' (1997) 37 *British Journal of Criminology* 250; Rumney, P., 'Male Rape in the Court: Issues and Concerns' [2001] *Criminal Law Review* 205; Temkin, J., 'Prosecuting and defending rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219.

3 - L. Ellison and V. Munro, "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49 *British Journal of Criminology* 202-219.

regret having undertaken". The Royal Commission called for improvement of the way in which victims and other witnesses are treated at the various stages of the criminal justice process.⁽¹⁾ It recommended that the judge should act firmly to control bullying and intimidatory tactics on the part of counsel⁽²⁾ and they should be particularly vigilant to check unfair and intimidatory cross-examination of witnesses who are likely to be distressed or vulnerable.⁽³⁾

The principles that the witness is entitled to be treated with respect and dignity, entitled to security and protection from harassment and intimidation and entitled to have his or her privacy respected are central objectives that the criminal justice system now seeks to accomplish. In *R v A*,⁽⁴⁾ the House of Lords held that:

In a criminal trial there are two principal objectives of the law. One is that a defendant should not be convicted of the crime with which he is charged when he has not committed it. The other is that a defendant who is guilty of the crime with which he is charged should be convicted.

But where the crime charged is that of rape, the law must

1 - Royal Commission on Criminal Justice, Report of Royal Commission on Criminal Justice, Cm.2263, (London: HMSO, 1993), para 44 at 79.

2 - Ibid, para 182.

3 - Ibid, para 201.

4 - [2001] UKHL 25; ; [2002] 1 A.C. 45.

have a third objective which is also of great importance: it is to ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant. The need to protect a witness against unfair questioning applies, of course, to all trials but it is of special importance in a trial for rape. Linked to the third objective is the further consideration that allegations relating to the sexual history of the complainant may distort the course of the trial and divert the jury from the issue which they have to determine.⁽¹⁾

“[I]t should be acknowledged that ‘rape is an experience which shakes the foundations of the lives of its victims’ and therefore the foundations of our society. Embarrassment of a complainer at a rape trial is a ‘genuine social problem’ and steps must be taken to protect her from further victimisation after experiencing ‘the most humiliating, distressing and cynical of crimes’. There exists a positive obligation under Article 8 ECHR to protect the physical and moral integrity of any individual, including his or her sexual life, and ‘a

1 - Ibid, at para. 143.

legal system that allows extensive examination might one day be contrary to Article 8”.⁽¹⁾

It has been argued that “admitting evidence of a complainant’s sexual experience has long been criticised as perpetuating the “twin myths” that by reason of her past sexual behaviour a complainant is (a) more likely to have consented to the sexual activity in question and (b) less credible as a witness”.⁽²⁾ In *R v A(No.2)*, ⁽³⁾ Lord Slynn said:

“... in recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape. That such questioning about sex with another or other men than the accused should be disallowed without the leave of the court is well established ... Such a course was necessary in order to avoid the

1 - Leanne M. Bain, “The Failures of ‘Shield Legislation’: Sexual History Evidence, Feminism and the Law” (2010) 1(1) *Aberdeen Student Law Review* 96 at 109-110.

2 - Gerard Murphy, “The admissibility of sexual experience in Ireland” (2006) 16 *Irish Criminal Law Journal* 15

3 - [2001] UKHL 25; [2002] 1 A.C. 45.

assumption too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a promiscuous woman is less credible. Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent. That is far from being necessarily true and the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances.”⁽¹⁾

Regina Schuller and Patricia Hastings have examined the impact of complainant sexual history evidence on mock jurors' judgements in a sexual assault trial.⁽²⁾ Their research findings suggest that the prejudicial impact of the prior history information is most damaging to the complainant when sexual intercourse has occurred. It indicated that the sexual history evidence was used by the participants to assess the complainant's creditability and likelihood that she has consented and that these perceptions were directly related to their judgements of guilt. The introduction of complainant sexual history evidence was not utilized to

1 - [2002] 1 A.C. 45, 54

2 - Schuller, R. A. & Hastings, P. A. (2002). Complainant sexual history evidence: It impact on mock jurors' decisions. *Psychology of Women Quarterly*, 26, 252-261.

support the defense of an honest but mistaken belief in consent but rather was used in a legally inappropriate manner.⁽¹⁾ The research study clearly suggests that sexual history evidence involving a complainant's prior consensual history evidence with the defendant may have little probative value for the jurors and instead may be used by jurors in a biased and prejudicial manner. Moreover, the inclusion of judicial limiting does not ameliorate the prejudicial impact of such evidence. The impact of what the courts have referred to as the "twin myths" may still prevail in jurors' decisions when complainant sexual history evidence is admitted at trial. ⁽²⁾

2. Historical Background

In 1990 the Home Office published the Victim's Charter.⁽³⁾ It represented the first attempt in England and Wales to convey an appearance of a commitment to victims' rights, including the right to privacy from the media, within the criminal justice system. An academic commentator at the time pointed out that the Victim's Charter "fails to address a number of concerns and provides minimal, inexpensive and

1 - Ibid, at 259.

2 - Ibid, at 260.

3 - Home Office, Victim's Charter: A Statement of the rights of Victims of Crime (London: Home Office, 1990).

enforceable entitlement”.⁽¹⁾ A substantially revised Victim’s Charter was published by the Home Office in 1996.⁽²⁾ It set out 27 standards of services which victim could expect to receive. Although some of these standards were clear and reflect new benefits for victims, others were vague, more peripheral or not easily evaluated. In February 2001 the Government announced its intention to improve the Victim’s Charter to take into account “developments over the past five years both domestically and internationally, and to show the increasing commitment the government is giving to helping victims and witnesses”.⁽³⁾

In July 1975 the Home Secretary set up a committee led by Mrs Justice Heilbron⁽⁴⁾ to give urgent consideration to the law of rape in the light of public concern and to advise the Home Secretary whether early changes in the law were desirable as a result of the House of Lords judgment in DPP v Morgan.⁽⁵⁾ The Committee considered the extent to

1 - Fenwick, H., ‘Rights of Victims in the Criminal Justice System: Rhetoric or Reality?’ [1995] Criminal Law Review 843 at 852. See also Fenwick, H., ‘Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?’ (1997) 60(3) Modern Law Review 317;

2 - Home Office, The Victim’s Charter: A Statement of the Services standards for Victims of Crime (London: Home Office, 1996).

3 - Home Office, A Review of the Victim’s Charter (London: Home Office, 2001).

4 - Home Office, Report of the Advisory Group on the Law of Rape, Cmnd. 6352 (London: HMSO, 1975). For the discussion Advisory Group Report see Smith, C. S., ‘Helibron Report’ [1976] Criminal Law Review 97.

5 - (1975) 61 Cr. App. R. 136. The House of Lords held that if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape.

which the personal history and character of a rape victim can be raised in sexual trials.⁽¹⁾ The Committee found that the ordeal of rape complainants was exacerbated by their experience of the criminal trial proceedings since it involved delving into the complainant's private life and sexual history. It concluded that the existing law was not satisfactory and that "some general restriction needs to be placed on the introduction of the complainant's private sexual history."⁽²⁾ The Committee stated that the aim in recommending a restriction was to reduce the ordeal of the genuine victim of rape by restricting the extent to which her private life was canvassed in court proceedings and, secondly, to make it easier for juries to arrive at a true verdict by excluding irrelevant evidence at the trial.⁽³⁾

The Committee recommended that evidence of the complainant's prior sexual history with the defendant should be regarded as relevant to the issues involved in a trial for rape, subject always to the power of the judge to control improper questioning.⁽⁴⁾ It also recommended that the previous sexual history of the complainant with men

1 - Home Office, Report of the Advisory Group on the Law of Rape, Cmnd. 6352 (London: HMSO, 1975), para 92 at 16.

2 - Ibid, para 132 at 22.

3 - Ibid, para 133 at 22.

4 - Ibid, para 134 at 23.

other than the accused should be inadmissible, except with leave of the trial judge on application made to him in the absence of the jury.⁽¹⁾ The trial judge's discretion would be guided by and based on principles set out in legislation. This should permit him to admit cross-examination and allow evidence in rebuttal dealing with the complainant's previous sexual history with persons other than the accused in two situations. First, where the evidence related to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately proceeding or following, the alleged offence. Secondly, the degree of relevance of that evidence to issues arising in the trial is such that it would be unfair to the accused to exclude it.⁽²⁾

The Advisory Group's recommendations were enshrined in section 2 of the Sexual Offences (Amendment) Act 1976.⁽³⁾ An extensive body of literature criticised the 1976 Act.⁽⁴⁾ It was argued that the 1976 Act failed

1 - Ibid, para 134-135 at 23.

2 - Ibid, para 137 at 23.

3 - For discussion, Elliott, W.D., 'Rape Complainants' Sexual Experience With third Parties' [1984] Criminal Law Review 4.

4 - Adler, Z., Rape on Trial (London: Routledge & Kegan Paul, 1989); Adler, Z., 'Rape: the Intention of Parliament and the Practice of the Courts' (1982) 45 Modern Law Review 664; Adler, Z., 'The Relevance of Sexual History Evidence In Rape: Problems of Subjective Interpretation' [1985] Criminal Law Review 769; Temkin, J., 'Regulating Sexual History Evidence: The Limits of Discretionary Legislation' (1984) 22 International & Comparative

to achieve its objectives to control illegitimate use of previous sexual history evidence in sexual offence trials.⁽¹⁾ It also failed to lay down guidelines for section 2 exercises. “Experience of judicial approach to section 2 of the 1976 Act and, elsewhere, to other attempts by legislatures to restrict the admission of sexual history evidence by means of discretionary legislation, suggest that this approach is wholly inadequate”.⁽²⁾ “Empirical studies into the operation of section 2 revealed that irrelevant questions about sexual history were continuing to be asked in cross-examination and that for barristers defending in rape cases, questioning about sexual history in order to discredit the complainant was frequently part of the repertoire”.⁽³⁾ Evidence of prior sexual history with the defendant was left outside the scope of the Act.⁽⁴⁾ Furthermore, section 2 was given

Law Quarterly 942; Temkin, J., ‘Sexual History Evidence: the Ravishment of Section 2’ [1993] Criminal Law Review 3; Temkin, J., *Rape and the Legal Process* (London: Sweet & Maxwell, 1987); Lees, S., *Carnal Knowledge: Rape on Trial* (London: Penguin, 1996); Baird, V., ‘Changes to Section 2 of Sexual Offences Act 1976’ (1999) 39(3) *Medicine, Science and Law* 198; Aileen McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ (1996) 16 *Oxford Journal of Legal Studies* 275. Cf The Criminal Law Revision Committee, *Report of Committee on Sexual Offences*, Fifteen Report, Cmnd. 9213 (London: HMSO, 1984).

- 1 - Kibble, N., ‘The Sexual History Provisions: Charting A Course Between Inflexible Legislative Rules And Wholly Untrammelled Judicial Discretion’ [2000] *Criminal Law Review* 274 at 275.
- 2 - McColgan, A., ‘Common Law and the Relevance of Sexual History Evidence’ (1996) 16 *Oxford Journal of Legal Studies* 275 at 307.
- 3 - Home Office, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials*, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 12.
- 4 - Kibble, N., ‘The Relevance and Admissibility of prior Sexual History with the

a narrow interpretation and its value was limited.⁽¹⁾ In *R. v Viola (Michael)*,⁽²⁾ the Court of Appeal held that in applying the provisions of section 2 of the Sexual Offences Act 1976 the first question for the judge is whether the proposed questions are relevant according to the ordinary common law rules: if not, then he need not consider any application further. In considering further whether to allow cross-examination the judge should consider whether the jury are more likely than not to take a different view of the complainant's evidence if the questions are asked than if they are not. If the jury's view could reasonably be expected to be affected the judge has no discretion to refuse the cross-examination.

As result of the failure of 1976 Act, the Home Office published its report: *Speaking Up For Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* in June 1998.⁽³⁾ The Working Group concluded that there was "overwhelming evidence that the present

Defendant in Sexual Offences Cases' (2001) 32 *The Cambrian Law Review* 27 at 30.

1 - Temkin, J., 'Sexual History Evidence: the Ravishment of Section 2' [1993] *Criminal Law Review* 3.

2 - 1982] 3 All ER 73; (1982) 75 Cr. App. R. 125.

3 - Home Office, *Speaking Up For Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London: Home Office, 1998).

practice in the courts is unsatisfactory and that the existing law is not achieving its purpose. The Group then went on to consider possible options to improve the situation to maintain the Heilbron report's objectives".⁽¹⁾ The Working Group recommended that in cases of rape and other serious sexual offences the law should be amended to provide a more structured approach and to set out clearly when evidence on a complainant's previous sexual history may be admitted in evidence. It was highlighted that possible models could be found in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, or the New South Wales legislation. The Scottish approach was preferred but it was stated that the precise formulation should be the subject of consultation.⁽²⁾ This recommendation was implemented in Part II of the Youth Justice and Criminal Evidence Act 1999 which sought to offer a more structured approach to decision-making.⁽³⁾

This research paper examines the statutory controls and restrictions on the admissibility of sexual history evidence under section 41 of the 1999 Act.

1 - Ibid. para 9.64 at 69.

2 - Ibid. Para 9.72 at 69. For discussion see, Baird, V., 'Changes to Section 2 of Sexual Offences Act 1976' (1999) 39 (3) *Medicine, Science and the Law* 198.

3 - Hereinafter the 1999 Act.

3. Section 41 of the 1999 Act

Mr Paul Boateng in the House of Commons Standing Committee indicated the main objectives of the 1999 Act:

The intention of the Bill is to keep as much evidence of complainants' sexual behaviour out of trials as possible. That is vital if complainants are to pursue their complaints through to trial and not to feel that their privacy is being invaded to discredit and humiliate them. We must ensure that victims have faith in the criminal justice system and believe that their attacker will be on trial, not them and their history. Sexual history should be admitted only in very limited circumstances where it is really relevant to an issue at trial ... Research evidence shows that sexual history evidence has been introduced in cases where it cannot be considered relevant, partly because the case law that the courts have built up in the absence of any statutory guidance permits it... The purpose of the Bill is to overturn that case law. No one should doubt that. We aim to overturn existing case law and impose a new statutory test on the relevance of previous sexual behaviour, especially to consent.⁽¹⁾

The 1999 Act is a significant development and radical

1 - Mr Paul Boateng speaking in the House of Commons, Standing Committee E on the Youth Justice and Criminal Evidence Bill, Eighth Sitting, June 24, 1999.

reform in the law of evidence and treatment of sexual offence victims in the criminal justice system. The new Act provides a rule of exclusion and includes extensive statutory controls and new restrictions on the admissibility of evidence of the complainants' sexual behaviour. The Act also imposes restrictions on the discretionary power of trial judges to introduce evidence or allow questioning concerning such behaviour.⁽¹⁾

The rule of exclusion and these restrictions and controls are contained in section 41 of the 1999 Act. Section 41 provides that where a person is charged with a sexual offence, no evidence may be adduced and no question asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant except with the leave of the court. This section restricts the circumstances in which evidence or questions about a complainant's sexual behaviour outside the circumstances of the alleged offence can be introduced in rape or certain sexual offence cases. This includes sexual behaviour or experience with the defendant. If the defence wishes to introduce evidence or ask questions about the complainant's

1 - Kibble, N., 'The Sexual History Provisions: Charting A Course Between Inflexible Legislative Rules And Wholly Untrammelled Judicial Discretion' [2000] Criminal Law Review 274.

sexual behaviour, it will have to make an application to the court. The prosecution will be warned of the general grounds of the application and will have an opportunity to oppose it. The court will then consider whether or not to grant leave.

Section 41 of the 1999 Act provides for a blanket exclusion of prior sexual history of the complainant. Where an accused claimed that the complainant had consented, evidence of her previous sexual behaviour is inadmissible whether with a third party or with the accused himself. The exclusionary rule is subject to four exceptions listed in subsection 2. Section 41(2) provides that the court may give leave⁽¹⁾ in relation to any evidence or question only on an application made by or on behalf of an accused in the following situations:

1 - Evidence relating to a relevant issue in the case which is not an issue of consent

This exception to the rule of exclusion contained in section 41(3)(a) of the 1999 Act. The evidence or questioning relates to any issue that has to be proved in the case other than whether the complainant consented. The

1 - Section 43 of the 1999 Act sets out the leave application procedure.

defendant's honest but mistaken belief in consent falls into the category of a relevant issue in the case other than consent. The evidence or questioning falls within section 41(3) or (5). According to section 41(2) the court may give leave if it is satisfied that subsection (3) or (5) applies. Subsection (3) applies if the evidence or question relates to a relevant issue in the case and the issue is not an issue of consent. "Relevant issue in the case" means "any issue falling to be proved by the prosecution or defence in the trial of the accused".⁽¹⁾ Section 41(3)(a) of the 1999 Act permits sexual history evidence in a number of different situations: belief in consent, evidence relating to identity, motive to lie and Sexual offences where consent is not the issue. Arguably, where the complainant's motivation to lie was an issue in the case, it would be possible to question the complainant about her previous sexual behaviour if this was relevant to it.⁽²⁾ In *R. v Martin (Durwayne Nathan)*,⁽³⁾ the Court of Appeal held that section 41(4) sought to prevent questions or evidence if their purpose was to impugn credibility, even if otherwise the court would regard such questions or evidence as relevant. In the instant case, the effect of

1 - Section 42(1)(a) of the 1999 Act.

2 - Temkin, J., *Rape and the Legal Process* (Oxford: Oxford University Press, 2002) at 212.

3 - [2004] 2 Cr. App. R. 22.

the proposed questioning would have been to impugn the credibility of the complainant but the defendant also wished to lay the basis for his explanation of the falsity of her allegation. On ordinary principles of interpretation, it was one purpose but not “the purpose” or “the main purpose” of the questions to impugn the credibility of the complainant. In the circumstances, the judge was wrong and should have permitted the questions to be asked. Notwithstanding that, on the evidence the conviction was safe despite his refusal. “If the Court of Appeal’s approach is followed, this will result in a considerable attenuation of section 41(4)”.⁽¹⁾

In *R v Singh*,⁽²⁾ the defence sought leave to adduce evidence of the previous lie and, if necessary, to call the man with whom it was said she first had intercourse. There was no way of introducing such evidence under any of the exceptions contained in section 41(3). The trial judge therefore refused leave. The Court of Appeal upheld this decision on the ground that the only purpose of such cross-examination would have been to impugn her credibility and that section 41(4) ruled this out.

1 - Home Office, Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 15.

2 - [2003] EWCA Crim 485.

2 - Evidence of sexual behaviour at or about the same time as the sexual activity in question

The issue that is being argued in the case is whether the complainant consented and the evidence or questioning relates to behaviour that took place as part of the alleged offence, or at or about the same time. It is expected that “at or about the same time” will generally be interpreted no more widely than 24 hours before or after the offence. Under section 41(3)(b) leave may be given if the complainant’s sexual behaviour to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused. It has been argued that this subsection is too broad and it makes irrelevant evidence of prior sexual history to consent relevant merely because it occurred at or about the same time.⁽¹⁾ Moreover, this subsection “was flawed because it did not give a judge any discretion to admit evidence that fell outside the time frame (unless the issue was belief in consent)”.⁽²⁾

In R v Mukadi,⁽³⁾ the Court of Appeal held that that the

1 - House of Lords Debate, December 15, 1998, Vol. 595, Col. 1272.

2 - Kibble, N., ‘The Sexual History Provisions: Charting A Course Between In flexible Legislative Rules And Wholly Untrammelled Judicial Discretion’ [2000] Criminal Law Review 274 at 285.

3 - [2003] EWCA Crim 3765; [2004] Crim. L.R. 373.

judge had been wrong to conclude that the car incident had no bearing on the issue of consent. It would have been a possible and a proper inference for the jury to conclude that when C got into the man's car she anticipated that some form of sexual activity might ensue. By contrast, she had said that when she went up to M's flat she merely intended getting to know him with a view to becoming friends. If the jury had heard evidence about the car incident it would have been relevant when assessing this part of her evidence, and as a consequence it could have influenced their conclusions on the crucial issue of consent. It was immaterial whether C's earlier behaviour was "sexual". If it was, as the judge had found it to be, then section 41(2) (b) applied, such that refusing leave to cross-examine on this incident might render unsafe the jury's conclusions on the issue of consent. If it was not "sexual" behaviour, then section 41 did not apply, but in any event the cross-examination would be relevant and admissible.⁽¹⁾ "The Court is employing precisely the reasoning which the Act was intended to forbid".⁽²⁾

1 - See Flora Page and D.J. Birch, "Evidence: rape - Youth Justice and Criminal Evidence Act 1999 s.41" [2004] Criminal Law Review 373-376.

2 - Home Office, Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 16.

3 - Similar behaviour

The issue is whether the complainant consented and the evidence or questioning relates to behaviour that is so similar to the defence's version of the complainant's behaviour at the time of the alleged offence (whether as part of the alleged offence or at or about the same time) that it cannot reasonably be explained as a coincidence.⁽¹⁾ According to section 41(3)(C) leave may be given where the sexual behaviour of the complainant is alleged to have been so similar to any sexual behaviour of the complainant which took place as part of the event which is the subject matter of the alleged offence. This section was enacted in response to the "Romeo and Juliet" scenario recounted by Baroness Mallalieu.⁽²⁾ The main aim of this subsection is "to deal with cases in which the complainant's conduct on other occasions appears so similar to the one in issue as to be almost inexplicable on the basis of coincidence"⁽³⁾ It has been argued that it is difficult to distinguish between sexual behaviour of the complainant which is alleged to have taken place at or about the same time as the event which

1 - See *R. v S* [2010] EWCA Crim 1579; [2011] Crim. L.R. 671 (CA (Crim Div)).
For case's comment see, N. Kibble [2011] Criminal Law Review 671-675.

2 - House of Lords Debate, February 8, 1999, Vol. 597, Col. 45.

3 - Andrews, J. and Hirst, M., *Andrews & Hirst on Criminal Evidence* (Bristol, Jordans, 2001) at 213.

is the subject matter of the charge and sexual behaviour which is part of event which is the subject matter of the charge.⁽¹⁾ “Its basis is questionable and it provides an open invitation to an interpretation which could fundamentally undermine the very purpose of this type of legislation”.⁽²⁾ Furthermore, such provision has been heavily criticised on the grounds that it is very difficult to interpret,⁽³⁾ perplexing and obscure.⁽⁴⁾

Interpretation and application of Section 41(3)(c) has remained difficult since its examination by the House of Lords in A(No.2). Some reported cases dealing with section 41(3)(c) merely serve to underline the awkwardness of the provision. This has been acknowledged by the Appeal Court in R. v Harris (Wayne Lee).⁽⁵⁾ In this case, Lord Justice Thomas stated that:

The issue that therefore arises on this appeal is whether we should uphold the ruling made by the judge at the outset of the trial. Judgements on what is similar for the purposes

1 - Temkin, J., Rape and Legal Process (Oxford: Oxford University Press, 2002) at 213.

2 - Ibid, at 216.

3 - Redmayne, M., ‘Myths, relationships and Coincidences: The New Problems of Sexual History’ (2003) 7 International Journal of Evidence and Proof 75 at 93-99.

4 - McEwan, J., ‘The Rape Shield Askew? R v A’ (2001) 5 The International Journal of Evidence and Proof 257.

5 - [2009] EWCA Crim 434; [2010] Crim. L.R. 54 (CA (Crim Div)).

of s.41 are not always easy; some cases are, where the similarity was so clear that it was not disputed – but some, such as this, are not. In this case we consider that the judge adopted a view on similarity which was open to him within that margin of judgement open to a decision maker. We consider that he was entitled to conclude that what was set out in the letters was not sufficiently similar to what was alleged by the appellant to have happened on the night in issue. He was also entitled to conclude that cross-examination on the basis of what was set out in the two letters would have brought into play matters in relation to her general sexual behaviour and not the similarity of the two occasions. We therefore consider that the ruling was one that cannot be successfully challenged in this court.⁽¹⁾

Professor Redmayne has forcefully criticised the use of similar facts concepts in arguments about the admissibility of sexual history evidence and the “coincidence” test in section 41(3)(c).⁽²⁾ Redmayne has indicated that there are two reasons for drawing attention to similar facts approach to sexual history evidence. The first reason is that a similar fact is an extremely complex area and there

1 - Ibid, at para. 19.

2 - Redmayne, M., “Myths, Relationships and Coincidences: the New Problems of Sexual History” (2003) 7 International Journal of Evidence and Proof 75.

is a fair degree of contention about the core concepts. The second reason is particular similar facts concepts have proved popular. The House of Lords analysis of s. 41(3) (c) and its interpretation in *R v A* suggests that evidence of previous misconduct should be admitted when it is more probative than prejudicial. This might suggest that sexual history generally does have probative value on the issue of consent, which would undermine the ‘myth’ myth.⁽¹⁾ Redmayne concluded “that s. 41(3)(c)--which has a literal interpretation about as far from the Act’s purpose as can be imagined--is incredibly difficult to construe. Even without Human Rights Act considerations this section would have caused immense difficulty”.⁽²⁾ “The law governing sexual history evidence is in a mess. Parliament and the judiciary have hitched it up to a set of similar facts concepts which are at best confusing, at worst wrongheaded”.⁽³⁾ “Similar facts concepts are bad enough when confined to similar facts; we do not need them running amok in sexual history”.⁽⁴⁾

1 - Ibid, at 90.

2 - Ibid, at 101.

3 - Ibid.

4 - Ibid.

4- Evidence to rebut prosecution evidence

The evidence or questioning that the defence wishes to introduce is intended to dispute or explain evidence that the prosecution have introduced about the complainant's sexual behaviour, whether it was alleged by the prosecution to have taken place as part of the alleged offence or at some earlier or later date. Such evidence must go no further than to directly contradict or explain claims made by or on behalf of the complainant.

Section 41(5) applies if the evidence or question relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant, and in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused. Where the evidence concerning the complainant's sexual behaviour has been adduced by the prosecution, the defence counsel has the right to challenge it under subsection (5) provided that two conditions are satisfied. The first condition is the defence counsel must obtain leave from the court. Secondly, the defence may go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or

explained by or on behalf of the accused.⁽¹⁾ This provision is also subject to section 41(6) restrictions which provides the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant. Evidence admitted under this exception is not subject to section 41(4).⁽²⁾ However, concerns have been raised regarding the application of section 41(5) to sexual behaviour with other men other than the accused. It has been argued that this “provision, allowing for rebuttal of any positive claim by the prosecution regarding the complainant’s sexual behaviour may, however, open the gates to some very unpleasant and irrelevant questioning”.⁽³⁾

Before allowing any evidence of sexual behaviour to be introduced, the court must be satisfied not only that one of the above criteria is met but also that, if the evidence were not heard, the jury or magistrate in the case might make an unsafe decision on an issue that had to be proved in the case. Subsection (6) requires any such evidence to relate to a specific instance, or instances, of sexual behaviour. If the defence seeks to introduce questioning or evidence purportedly under subsection (3) - by claiming that it

1 - Section 4 (5) of the 1999 Act.

2 - See R v Rooney [2001] EWCA Crim 2844.

3 - McEwan, J., ‘In defence of vulnerable witnesses: The Youth and Criminal Evidence Act 1999’ (2000) 4 International Journal of Evidence and Proof 1 at 29.

relates to an issue that has to be proved in the case - but the court considers that its real main purpose is to undermine or diminish the complainant's credibility, the court will not allow it. But 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.

Subsection (1) requires applications to the court for permission to introduce sexual history evidence to be made in the absence of the public, the press, the jury (if any) and all witnesses (other than the defendant). Any other parties to the trial will be allowed to be present when an application is being made so that they can make representations to the court about whether the application should be allowed. Subsection (2) requires courts to give reasons for allowing or refusing an application in open court, and specify the extent to which they are allowing evidence to be introduced into the trial or questions to be asked. This must take place in the absence of the jury (if there is one.) The intention behind this requirement is to ensure that it is clear to the defence, the prosecution and the witness exactly how far questioning can go, and in reference to which issues.

The last two exceptions are “vague enough and broad enough to permit almost limitless irrelevant and prejudicial evidence of a victim’s prior sexual history to be admitted into evidence”.⁽¹⁾ “One problem that has been identified is that s. 41 is based on a rape shield model that traditionally leads to uncertainty regarding the interpretation of the provisions”.⁽²⁾

It should be noted that the scope of the 199 Act is wider than that of the previous legislation in two significant respects. Firstly, section 41 applies to all kinds of sexual behaviour and sexual experiences on the part of the complainant. Section 42(1)(C) provides that “sexual behaviour” means “any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused”. Thus, unlike the previous regime, section 41 makes no distinction between prior sexual behaviour with the accused and prior sexual

1 - Julie A. Grohovsky, “Giving Voice To Victims--Why The Criminal Justice System In England And Wales Should Allow Victims To Speak Up For Themselves” (2000) 64(4) Journal of Criminal Law 416.

2 - Carol Withey, “Female Rape--an Ongoing Concern: Strategies for Improving Reporting and Conviction Levels” (2007) 71(1) Journal of Criminal Law 54 at 80.

behaviour with third parties.⁽¹⁾ The Act therefore ends the automatic presumption that the prior sexual behaviour of the complainant with the accused is relevant to consent”.⁽²⁾ Under the 1999 Act the rule of exclusion applies to sexual behaviour and sexual experience. The explanatory notes state that sexual behaviour includes sexual experience and “secondary evidence of sexual behaviour such as abortions”.⁽³⁾ Secondly, the 1999 Act applies to a wider range of sexual offences. Section 62 of the 1999 Act defines the term “Sexual offence” to include rape or burglary with intent to rape, unlawful intercourse, indecent assault, forcible abduction and other offences. Therefore, the 1999 Act is not restricted to the rape offences as was the 1976 Act.

Section 41(3) is subject to two restrictions set out in subsection (4) and (6). Subsection (4) provides that the court must consider such evidence or question irrelevant if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced

1 - House of Lords Debate, March 23, 1999, Vol. 598, col. 1216-1217 (Lord Williams of Myston).

2 - Kibble, N., ‘The Sexual History Provisions: Charting A Course Between Inflexible Legislative Rules And Wholly Untrammelled Judicial Discretion’ [2000] Criminal Law Review 276; Samuels, A., ‘The Previous Sexual Behaviour of the Victim in a Rape Case’ (2000) 64 Journal of Criminal Law 500.

3 - Explanatory Note, para. 145.

or asked is to establish or elicit material for impugning the credibility of the complainant as a witness. Subsection (6) provides that the evidence or question must relate to a specific instance, or specific instances, of alleged sexual behaviour on the part of the complainant. Accordingly, evidence of sexual reputation⁽¹⁾ and questions relating to general promiscuity are prohibited.⁽²⁾

According to section 41(2)(b). The court may give leave if it is satisfied 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. Andrews and Hirst have argued that one “might have supposed that the avoidance of a potential miscarriage of justice would be sufficient justification in itself, but no. The wording of section 41 suggests that the courts may sometimes be obliged to exclude evidence that would, if admitted undermine the prosecution case and the credibility of the complainant”.⁽³⁾

1 - Kibble, N., ‘The Sexual History Provisions: Charting A Course Between In flexible Legislative Rules And Wholly Untrammelled Judicial Discretion’ [2000] Criminal Law Review 278.

2 - John Andrews and Michael Hirst, Andrews & Hirst on Criminal Evidence (Bristol, Jordans. 2001) at 213; Temkin, J., Rape and the Legal Process (Oxford: Oxford University Press, 2002) at 207.

3 - Andrews, J. and Hirst, M., Andrews & Hirst on Criminal Evidence (Bristol, Jordans, 2001) at 212.

An application for leave shall be heard in private and in the absence of the complainant. Where such an application has been determined, the court must state in open court, but in the absence of the jury, its reasons for giving, or refusing, leave, if it gives leave, and the extent to which evidence may be adduced or questions asked in pursuance of the leave.⁽¹⁾ It should be noted that section 41 provides “a one-sided exclusionary rule” since the leave requirements do not apply to prosecution evidence and questions. Thus, the prosecution is free to adduce sexual history evidence of the complainant. Arguably, such an approach threatens the “equality of arms” principle enshrined in Article 6(3)(d) of the Convention.⁽²⁾

It can be argued that the Crown's opportunity to adduce relevant sexual history evidence will not render the process unfair because section 41 (5) will allow the defence adequate opportunity for rebuttal.⁽³⁾ However, Professor David Ormerod stated that:

Even where the defence are able to rebut the evidence

1 - Section 43 of the 1999 Act

2 - Birch, D., ‘Rethinking Sexual History Evidence: Proposals for Fairer Trials’ [2002] Criminal Law Review 531 at 534. Cf Temkin, J., ‘Sexual History Evidence-Beware the Backlash’ [2003] Criminal Law Review 217 at 225.

3 - See, R. v Soroya (Naveed) [2006] EWCA Crim 1884; [2007] Crim. L.R. 181 (CA (Crim Div)).

of the Crown, it might still be argued that s.41(5) does not provide a complete solution because the defence are not as free to adduce rebuttal evidence as the Crown are to lead it. First, the prosecution are not subject to the notice requirements as are the defence. Secondly, the defence must satisfy the judge as to the requirements of s.41(5) and 41(2). Thirdly, the defence must point to specific allegations within s.41(6). The defence position under s.41(5) is clearly restricted even though such rebuttal is not hedged in by s.41(4) and the defence may be allowed to impugn the complainant's credibility".⁽¹⁾

In view of the potential for the inequality to create unfairness in some rare cases, Professor Ormerod has submitted that the court is right to forestall the challenge by suggesting that the appellate courts are able to rely on the flexibility of section 78 of the Police and Criminal Evidence Act 1984 to ensure that diverse rules of evidence remain compatible with European Convention requirements.⁽²⁾

Two difficulties may rise under section 41 of the 1999 Act in relation to evidence of previous sexual history. There is no specific provision under section 41 where the

1 - Ormerod, D., "Sexual History Evidence" [2007] Criminal Law Review 181 at 183-184.

2 - Ibid, at 184.

accused “might argue that his previous or subsequent sexual relationship with the complainant makes it more likely that she consented on the occasion in question”.⁽¹⁾ It is also not clear whether evidence that the complainant made previous false complaints constitutes evidence of sexual behaviour. The explanatory notes assume 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”.⁽²⁾ Lord Williams of Mostyn in the House of Lords has argued that “false complaints about sexual behaviour are admissible because it goes to credibility. But it is not evidence about sexual behaviour; it is about untruthful conduct on prior occasions. There is a clear difference.”⁽³⁾ The Court of Appeal recently adopted this view in *R v T*.⁽⁴⁾ Furthermore, the judgement of the House of Lords in *R v A*,⁽⁵⁾ which is discussed below, “suggests that the courts will strive to ensure that highly relevant evidence of that kind is never excluded”.⁽⁶⁾ However, the

1 - Andrews, J. and Hirst, M., *Andrews & Hirst on Criminal Evidence* (Bristol, Jordans, 2001): 213. See also *R v Morgan* [1976] AC 182.

2 - Explanatory Notes, para 150.

3 - Parliament Debates, House of Lords, March 8, 1999, Vol. 598, Col. 34.

4 - [2002] 1 All ER 683.

5 - [2001] UKHL 25.

6 - Andrews, J and Hirst, M., *Andrews & Hirst on Criminal Evidence* (Bristol, Jordans, 2001) at 214.

English courts don't require 'concrete evidence' that any prior accusation was indeed false and relevant before the admission of such evidence.

The Court of Appeal decision in *R v M*⁽¹⁾ shows that "evidence of a prior allegation not only raises acute questions of reliability and credibility and of how complex, time-consuming and distracting it might be to inquire into the falsity of the allegation, but also raises acute questions of weight and probative value as well. It is therefore not surprising that judges in some cases have had serious misgivings about the admissibility of evidence of prior allegations".⁽²⁾

The new legislation has addressed the issue of the defendant's mistaken belief in consent and the relevance of previous sexual history to that belief. Section 42(b) provides that the "issue of consent," means any issue of whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged and does not include any issue as to the belief of the accused that the complainant so consented. Accordingly, evidence relevant to belief in consent falls outside the restrictions

1 - [2009] EWCA Crim 618; [2010] Crim. L.R. 792 (CA (Crim Div)).

2 - See case comment, D. A. Thomas, [2010] Criminal Law Review 792

of sections 41(3)(b) and (c).⁽¹⁾ However, the requirements of section 41(4) and (6) must be met if evidence is to be admitted on the grounds that it is relevant to the defendant's belief in consent. A loophole in the legislation would be created if the defendant's mistaken belief in consent is allowed. That is a loophole, which defendants and their representatives will try to use to allow a wider range of sexual history evidence to be put forward.⁽²⁾ In 2000 the Home Office published a consultation document on sexual offences.⁽³⁾ It recommended that defence belief in consent in free agreement should not be available where there was self induced intoxication, recklessness as to consent, or if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at that time.⁽⁴⁾ This recommendation, if enacted, would impose limitations on the defence of mistaken belief in consent and on the use of evidence of sexual history to support such belief.

1 - L. Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001) at 118.

2 - House of Commons, Standing committee E, Eighth Sitting, June 24, 1999 (Mrs Beverly Hughes).

3 - Home Office, *Setting the boundaries: Reforming the law on Sex offences* (London: Home Office, 2000). For discussion see Lacey, N., 'Beset By Boundaries: The Home Office Review of Sex Offences' [2001] *Criminal Law Review* 3. See also Home Office, *Protecting the Public: Strengthen Protection against Sex Offenders and Reforming the Law on Sexual Offences*, Cm 5668 (Home Office, 2002), at para 34; *Sexual Offences Bill 2003*.

4 - Home Office, *Setting the boundaries: Reforming the law on Sex offences* (London: Home Office, 2000), para 2.13.14 at 45.

Section 41 of the 1999 Act provisions provide for a “prohibition on what they regard as the illegitimate uses of prior sexual history evidence. They also avoided an exhaustive list of specific exceptions, identifying instead an open-ended category of evidence.”⁽¹⁾ Section 276 of the Canadian Criminal Code and section 275(1)(c) of the Criminal Procedure (Scotland) Act, as amended by section 8 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, stipulate a range of factors that the judges are required to take into account when determining the admissibility of the evidence.⁽²⁾ These factors include the potential prejudice to the complainant’s personal dignity and right of privacy. Moreover, the two pieces of legislation require the court to assess whether the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from it being admitted or elicited.⁽³⁾ None of these requirements

1 - Kibble, N., ‘The Sexual History Provisions: Charting A Course Between In flexible Legislative Rules And Wholly Untrammelled Judicial Discretion’ [2000] Criminal Law Review 274 at 284.

2 - Section 276(3) of the Canadian Criminal Code stipulates various factors that the court shall take into account when determining whether evidence is admissible.

3 - Section 276(2) of the Canadian Criminal Code stipulates to admit the evidence of sexual history that evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

has been contained in the 1999 Act. The absence of such requirements has attracted criticism.⁽¹⁾ The question should be whether the evidence is sufficiently relevant to counter any potential prejudice flowing from its admission.⁽²⁾ However, the “outcome of the balancing process may well vary depending on the judge’s background and outlook; leaving determinations of relevance and prejudice to the broad discretion of the trial judge therefore tends to incorporate a white male perspective in these areas”.⁽³⁾ Thus, “legislative amendment alone, without changes in judicial appointment and training, and without through monitoring of the operation of the legislation, is unlikely to achieve significant change”.⁽⁴⁾

4. House of Lords: Statutory Interpretation Post-Human Rights Act 1998

The question whether the exclusion of evidence of prior sexual history between the complainant and defendant is compatible with Article 6 of the European Convention

1 - Easton, S., ‘The use of sexual history in rape trials’ in Childs, M. and Ellison, L., (ed.), *Feminist Perspectives on Evidence* (London: Cavendish, 2000) at 186.

2 - Ellison, L., *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, (2001) at 121-122.

3 - Kinports, K., ‘Evidence and Procedure for the Future: Evidence Engendered’ [1991] *University of Illinois Law Review* 413 at 434.

4 - Kibble, N., ‘The Sexual History Provisions: Charting A Course Between Inflexible Legislative Rules And Wholly Untrammelled Judicial Discretion’ [2000] *Criminal Law Review* 274 at 288.

has been addressed by Kibble in his latest article.⁽¹⁾ He has examined the critical academic literature in the United Kingdom on the relevance of prior sexual history evidence and reviewed the parliamentary debates during the passage of the 1999 Act. He also considered legislation, case law, academic debate and reform proposals in several other jurisdictions. He has argued that in so far as the 1999 Act restricts the admissibility of prior sexual history between the complainant and the defendant it risks the exclusion of relevant evidence and consequently risks contravening the defendant's right to a fair trial. He has concluded no proper foundation has been laid for the Government's position on excluding evidence of a complainant's prior sexual history with the defendant. Neither the academic nor the reform literature that precede the debates supports the general prohibition of such evidence. Professor Birch has argued that section 41 of the 1999 Act has greatly restricted the use of sexual history evidence and in doing so created serious problems for the fairness of trials.⁽²⁾ She submitted that section 41 is "a poor substitute for an admission that it is theoretically flawed and inconsistent with good evidence

1 - Kibble, N., 'The Relevance and Admissibility of Prior Sexual History with Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27.

2 - Birch, D., 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531.

doctrine”.⁽¹⁾ From practical point of view, section 41 is “likely to reveal that it is more likely to consume court time, spawn inconsistent decisions, and confuse lawyers as to exactly what “myths” it is supposed to eradicate”.⁽²⁾

The House of Lords in *R v A (No.2)*,⁽³⁾ was invited to determine whether a prior sexual relationship between defendant and complainant is relevant to the issue of consent so as to render the exclusion of such evidence under section 41 of the 1999 Act a contravention of the defendant’s right to a fair trial.⁽⁴⁾ In this case, the defendant was charged with

1 - Ibid, at 553.

2 - Ibid.

3 - [2001] UKHL 25. See Jenny McEwan, “I thought she consented”: defeat of the rape shield or the defence that shall not run?” [2006] Criminal Law Review 969-980; Matt James Thomason, “Previous sexual history evidence: a gloss on relevance and relationship evidence” 2018, 22(4) International Journal of Evidence & Proof 342-362.

4 - For full discussion see Birch, D., ‘Rethinking Sexual History Evidence: Proposals for Fairer Trials’ [2002] Criminal Law Review 531; Temkin, J. ‘Sexual History Evidence: Beware the Backlash’ [2003] Criminal Law Review 217; Birch, D., ‘Untangling Sexual History Evidence: A Rejoinder to Professor Temkin’ [2003] Criminal Law Review 370; Redmayne, M., ‘Myths, Relationships and coincidences: The New Problems of Sexual history’ (2003) 7 The International Journal of Evidence and Proof 75. For case comments see Metcalfe, P. N. and Birch D., ‘Evidence: Rape -Statutory Provisions of Previous Sexual Relationship Between Complainant and Defendant’ [2001] Criminal Law Review 908-911; Samuels, A., ‘The Criminal Law and Incompatibility with Human Rights’ (2002) 66(5) Journal of Criminal Law 385-389; Mirfield, P., ‘Human Wrongs?’ (2002) 118 Law Quarterly Review 20-27; Spencer, R. J., ‘Rape Shields and the Right to a Fair Trial’ (2001) 60(3) Cambridge Law Review 452-455; Sandy, D., ‘R v A: The Death of the Declaration of Incompatibility’ (2001) 151 New Law Journal 1615-1616; Clare, A., ‘Statutory Interpretation Post-Human Rights Act 1998: Youth Justice and Criminal Evidence Act 1999 Must Be Read so As to Be Compatible with the European Convention on Human Rights’ (2001) 65 (5) Journal of Criminal Law 411-413; Cook, K., “Sexual history evidence: the defendant fights back” 2001 (151) New Law Journal 1133.

rape. His defence was that sexual intercourse had taken place with the complainant's consent; alternatively, that he had believed that she had consented. At a preparatory hearing, the defendant sought leave pursuant to section 41 of the 1999 Act to adduce evidence that he had been engaged in a consensual sexual relationship with the complainant over a three-week period prior to the rape. The trial judge considered section 41 and ruled that the complainant could be asked about an incident of sexual intercourse the day before the alleged rape with a third party as it had occurred at about the same time as the event which was the subject matter of the charge within the meaning of section 41(3) (b). The evidence as to any other prior relationship with the defendant would be inadmissible under section 41, unless the court was satisfied that subsections (3) and (4) applied, and that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or the court on any relevant issue. The judge granted leave to appeal to the Court of Appeal. The Court of Appeal allowed the appeal and reversed the judge's ruling relating to the third party's activity with the complainant. It held that the questioning and evidence in relation to the complainant's alleged prior sexual activity with the defendant was admissible

under section 41(3)(a) of the 1999 Act in relation to the defendant's belief in the complainant's consent; but that such material was inadmissible on the issue of consent. The court was of the view that it might result in a breach of A's right to a fair trial under Article 6 of the European Convention. Leave to appeal was granted by the House of Lords to the Director of Public prosecution.

The House of Lords dismissed the appeal and declined to make recourse to a declaration of incompatibility. It held that it is possible under section 3 of the Human Rights Act to read section 41, and in particular section 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). There will be cases where previous sexual experience between a complainant and an accused will be irrelevant, for example, an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of the trial judge. On that basis a declaration of incompatibility could be avoided. The excessive reach of section 41 could

be attenuated in accordance with the will of Parliament as reflected in section 3 of the Human Rights Act 1998 Act.⁽¹⁾

House of Lords held that section 41(3)(c) of the 1999 Act should be construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998 and by giving consideration to the importance of seeking to protect the complainant from indignity and humiliating questions. Evidence of a complainant's previous sexual history was admissible where that evidence, and questioning relating to it, was so relevant to the issue of consent that to exclude it would endanger the fairness of trial. The permissibility of questioning the complainant about the alleged sexual relationship between her and the defendant, and the admissibility of evidence on that point, were matters for the trial judge to rule at the resumed trial.⁽²⁾

This judgement indicates that the prior sexual relationship between the complainant and the accused may sometimes be relevant to consent.⁽³⁾ The “effect of its

1 - Brian Brewis, “The interpretation of s. 41 of the Youth Justice and Criminal Evidence Act 1999 and the impact of R. v A (No.2) ([2002] 1 A.C. 45) 2016, 80(3) Journal of Criminal Law 169-172.

2 - [2001] UKHL 25, Paras 45-47.

3 - See paragraph 31 of the House of Lords Judgement; Clare, A., ‘Statutory Interpretation Post-Human Rights Act 1998: Youth Justice and Criminal Evidence Act 1999 Must Be Read so As to Be Compatible with the European Convention on Human Rights’ (2001) 65 (5) Journal of Criminal Law 411-413; House of Commons, Standing Committee E, June 24, 1999, col. 222 (Mr Boating)

reasoning is to transform the apparently highly structured and restrictive regime of admissibility laid down by section 41 into essentially little different from the discretionary regime under the 1976 Act”.⁽¹⁾ The judgement of the House of Lords is indecisive and unhelpful since the trial judge is given no clear guidance on how he should exercise his discretion.⁽²⁾ Furthermore, taking into consideration the way trial judges have exercised their discretion in the past, in the wake of the House of Lords judgment in *R v A* complainants can expect very little protection from questioning about prior sexual experience with an accused when the defence of consent is raised.⁽³⁾ It made the law on sexual history evidence is uncertain.⁽⁴⁾ The judgment of the House of Lords in the *R v A* case concerning section 41(3)(c) should apply only in the case of a previous sexual relationship with the defendant. Where the judge take into consideration that an Article 6 of the European Convention breach could occur, there is obviously a risk

1 - Mirfield, P., ‘Human Wrongs?’ (2002) 118 *Law Quarterly Review* 20 at 23.

2 - Samuels, A., ‘The Criminal Law and Incompatibility with Human Rights’ (2002) 66(5) *Journal of Criminal Law* 385-389. See also Sandy, D., ‘*R v A*: The Death of the Declaration of Incompatibility’ (2001) 151 *New Law Journal* 1615-1616.

3 - Ellison, L., *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001) at 120-121; Temkin, J., *Rape and Legal Process* (Oxford: Oxford University Press, 2002) at 224.

4 - Home Office, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials*, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 20.

that this provision will be applied more broadly to admit sexual history evidence.⁽¹⁾ It has been argued that the the House of Lords judgment might create future problems because of the route taken by the courts. The appropriate route to deal with these problems would surely have been to declare the statute incompatible with Article 6. The House of Lords ruling means that section 41 is intact, and it may be assumed that the 41 section formulation will lead to a significant number of appeals.⁽²⁾

Section 41 of the 1999 Act appears to mean the opposite of what one would think it means since a rape victim might cooperate with the persecution in the belief that her previous sexual life will not be examined at trial. However, she will discover that the obvious statutory provisions which seemed to protect her could no longer be relied upon. This seems does not comply with the Legal certainty principle which is one of the persistent requirements of the European Convention of Human Rights.⁽³⁾

1 - Ibid, at 19.

2 - Clare, A., "House of Lords: Statutory Interpretation Post-Human Rights Act 1998; Youth Justice and Criminal Evidence Act 1999 Must Be Read So As to Be Compatible with the European Convention on Human Rights" (2001) 65(5) Journal of Criminal Law 405.

3 - Danny Nicol, "Statutory interpretation and human rights after Anderson" (2004) Public Law 274 at 279.

It is worth remarking that Kibble argued that the argument that section 41 is consistent with the Canadian legislation cannot be sustained. The 1999 Act is far wider than the prohibition in Canada. The 1999 Act provision would appear to constitute precisely the kind of blanket prohibition that the Canadian Supreme Court in Darrach⁽¹⁾ said would be unconstitutional.⁽²⁾ The House of Lords judgment supports this conclusion. It held that:

It will be observed that subsection (1) [of Canadian Criminal Code] is directed at impermissible uses of the evidence. It is not a blanket prohibition. It has an inbuilt flexibility as appears from the balancing provision of subsection (2) and particularly the words of paragraph (c). The Canadian model is therefore in substantially less restrictive terms than section 41.⁽³⁾

In *R. v White (Andre Barrington)*,⁽⁴⁾ the Court of Appeal held that that the judge had been right to refuse to allow cross examination on the fact that V was a prostitute. Whatever the position may have been in older cases, in the present day a prostitute was as entitled as any other person

1 - [2000] SCR 46. See also *R v Seaboyer* 83 DLR (4th) 193.

2 - Kibble, N., 'The relevance and Admissibility of Prior Sexual History with Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27 at 59.

3 - [2001] UKHL 25 at Para 33.

4 - [2004] EWCA Crim 946.

to refuse to have sex; the fact that a victim was a prostitute did not mean she was more ready than any other to agree to sex. Therefore there could be no contention that the bare fact that V was a prostitute was relevant to the issue of consent. It could not be accepted that information, contained by way of a list of previous convictions for prostitution, about V's current and past activities as a prostitute was capable of fulfilling the requirements of s.41(6) of the Act and to decide otherwise would be tantamount to saying that any encounter could fall under s.41(6) if it could be assigned a date and time. There had to be something about the specific circumstances that had probative force and was so similar to the conduct complained of as to be beyond coincidence. W's right to a fair trial had not been breached by the refusal to allow cross examination and the case of *R. v A* could be distinguished as that concerned the introduction of material of previous sexual activity between the defendant and the victim and not, as here, between the victim and others. Further, *R. v A* was not authority for any wider reading of s.41 of the Act by reason of the Human Rights Act 1998 s.3 . It would take a very special case to accommodate evidence of such acts in circumstances where it would not be accommodated by an ordinary reading of s.41. It has

been argued that this “decision should inject some certainty into this area”.⁽¹⁾

Aileen Kavanagh has argued that the approach to section 3(1) adopted by their Lordships in *A* was less radical than is commonly assumed, and does not differ substantially from the interpretative methodology employed in other cases applying section 3(1).⁽²⁾ The author has argued that the Court of Appeal decision gives the courts a wide discretion for sexual history evidence to be admitted in rape criminal trials, which ordinary reading of section 41 does not reflect. Section 41 does not preserve the position which was maintained by section 2 of the Sexual Offences Act 1976 as long as the test for admissibility is concerned. Section 2 did not contain guidelines or restrictions on the admissibility of sexual history evidence. However, such evidence could be admitted if its exclusion would be unfair to the defendant. While the Court of Appeal decision gives the judge a discretion power to admit sexual history evidence where he finds it is necessary for a fair trial, section 41 does not give the judge an entirely unrestricted

1 - Home Office, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials*, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 19.

2 - Aileen Kavanagh, “Unlocking the Human rights Act: the “radical” approach to section 3(1) revisited” (2005) 3 *European Human Rights Law review* 259.

discretion. The courts must exercise this discretion within the framework and limitations inaugurated by section 41 provisions.⁽¹⁾ Furthermore, the scope of the 199 Act is wider than that of the 1976 legislation, because it is not restricted to rape offences, and section 41 places tighter procedural requirements on the admissibility of sexual history evidence with the defendant.⁽²⁾

The test of admissibility as formulated in A case is deferent from that in section 2 of the 1976 Act because it emphasises that due regard must always be paid to the importance of seeking to protect the complainant from indignity and humiliating questions. “The question is then whether the evidence is “nevertheless so relevant to the issue of consent” that if excluded it would endanger the fairness of the trial under Art.6 ECHR. So, unlike the position under the Sexual Offences Act 1976, this test explicitly requires the trial judge to balance the interests of the complainant and the defendant when deciding whether to admit sexual history evidence, to be mindful of the concerns complainants may have and the dangers of admitting this kind of evidence”.⁽³⁾ The “most plausible

1 - Ibid, at 267.

2 - Ibid.

3 - Ibid, at 268.

way of reading *R. v A* is that it is restricted to evidence of sexual experience between the complainant and defendant. This makes it likely that trial judges will be wary of relying on sexual history evidence in third party cases".⁽¹⁾ "In conclusion whilst *R. v A* reads into s.41 a "residual discretion" to admit evidence which is relevant in the interests of a fair trial, it does not herald the return of the completely unregulated judicial discretion with respect to this evidence. It is still limited both by the context and framework of s.41 and the facts of the case in *A*".⁽²⁾ "Recent research on the operation of s.41 post-*R. v A*, indicates that the decision has not had the effect of eliminating the hurdles and gateways of s.41 and replacing them with a completely open-ended discretion".⁽³⁾

Jennifer Temkin has argued that a return to a "discretionary" system under section 2 of the 1976 Act would be ill-advised and all attempts to sabotage or replace the new regime with s.2 lookalikes should be strongly resisted.⁽⁴⁾ However, the "decision in *A* is likely to engender a degree of uncertainty. Strictly speaking, the rule of

1 - Ibid.

2 - Ibid.

3 - Ibid, at 270.

4 - Temkin, J., 'Sexual History Evidence-Beware the Backlash' [2003] Criminal Law Review 217,

precedent should ensure that the new formula which the House of Lords has tacked on to s.41(3)(c) applies only in the case of a previous sexual relationship with the accused. However, there is clearly a risk that it will be applied more broadly than this to admit evidence in any case where the judge takes the view that an Article 6 breach could otherwise result”.⁽¹⁾

Kibble has examined the operation of rape shield legislation and the debates over legislative reform in other jurisdictions.⁽²⁾ He argued that section 41 restored judicial discretion in relation to the consent issues, and there was a considerable consensus among the judges that s.41 was not a workable provision prior to the decision of the House of Lords in *R. v A (No.2)*. The judges were in favor of preserving judicial discretion due to the difficulty of framing legislative rules to regulate decision-making in this area. They believed that section 41 would be unjust if they adhered its provisions literally.⁽³⁾ Therefore, the non- discretionary approach is widely rejected.⁽⁴⁾ The

1 - Temkin, J., ‘Sexual History Evidence-Beware the Backlash’ [2003] Criminal Law Review 217 at 240.

2 - N. 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] Criminal Law Review 263.

3 - Ibid, at 264.

4 - Ibid, at 265.

Speaking up for Justice failed to give appropriate attention to the discretion issue and to take into consideration the experience of other jurisdictions. This may explain the main defects in section 41. Temkin's defence of s.41 concludes with the exhortation that the Home Office should "stick to its guns". Perhaps the Home Office should remember that sometimes when you stick to your guns you end up shooting yourself in the foot.⁽¹⁾

Birch described section 41 of the 1999 Act as "overly restrictive and potentially inimical to the interests of justice".⁽²⁾ She has argued that section 41 of the 1999 Act greatly restricted the use that defendants can make of evidence of complainants' sexual history and in so doing created serious problems for the fairness of trials. The decision of the House of Lords in *R. v. A*(2) has resolved some of the problems, but a better solution is to rethink the legislation.⁽³⁾ She states:

The problem with *A*(2) is that it provides no foundation for the argument for admitting explanatory evidence, and only an uncertain one for evidence of mindset. *A*

1 - Ibid, at 274.

2 - Birch, D., "Untangle sexual history evidence: a rejoinder to Professor Temkin" [2003] Criminal Law Review 370.

3 - Birch, D., 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] Criminal Law Review 531.

careful reading of the judgments does not warrant any reconstruction of the similar fact gateway for evidence relating to third parties, but the danger with reading down is always that the judicial interpolation (being invisible on reading the Act, a sort of lawyer's equivalent of platform nine and three-quarters in the Harry Potter stories) may be misunderstood (wilfully or not) in later proceedings. Better to amend the gateways so that they exactly pose the choice to be made, which neither section 41 nor A(2) succeeds in doing.⁽¹⁾

“However,... the narratives and discourses operating throughout the judgments are likely to have the effect of subverting the intention and policy behind the enactment section 41, of turning the provision completely on its head by inserting a condition of relevance subject judicial control and of re-introducing the possibility of sexual history evidence being routinely admitted in trials that do not conform to the ideal of “real rape”. This clearly has important implications for women who have had a sexual relationship with their alleged rapist in the past”.⁽²⁾

The analysis of the judgments in *R v A* shows that the

1 - Ibid, at 550.

2 - Firth, G., ‘The Rape Trial and Sexual History Evidence - *R v A* and the (Un)worthy Complainant’ [2006] 57 Northern Ireland Legal Quarterly (3) 452.

“downside of incorporation of fundamental rights is that they may undermine or restrict the protection afforded to complainants where this conflicts with the rights of the defendant”.⁽¹⁾

5. Recent Developments and Call for Reform

Despite repeated legislative attempts to restrict the use of sexual history evidence in rape trials, it continues to be admitted in many cases, causing considerable debate and leading to further attempts to reform the law. Such evidence was introduced in the recent controversial judgment of the Court of Appeal in *R v Ched Evans*⁽²⁾.

In this case, the defendant was charged with rape. He had admitted in a police interview that he had sexual intercourse with the complainant and, in support of an assertion that she had consented, or that he had had a reasonable belief that she had consented, he gave graphic detail of her behaviour. The complainant had no memory of the event and did not herself raise the complaint. The defendant was convicted. He appealed against conviction on various grounds but the appeal was dismissed. Subsequently the

1 - Ibid, at 462-463.

2 - *R. v Evans (Chedwyn)* [2016] EWCA Crim 452; [2016] 4 W.L.R. 169 (CA (Crim Div)).

Criminal Cases Review Commission referred the case to the Court of Appeal on the basis of fresh evidence said to undermine the safety of the conviction. Two of the individuals who gave fresh evidence described previous sexual behaviour on the part of the complainant which bore similarity to the detail given by the defendant during police interview. The defendant submitted that the fresh evidence was admissible under section 23 of the Criminal Appeal Act 1968 and that it afforded a ground of appeal by reason of being admissible under section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999. The court had to apply the criteria in the Criminal Appeal Act 1968 s.23 and determine whether (1) the fresh evidence was credible; (2) there was a reasonable explanation for the failure to adduce the evidence at trial; (3) the evidence was admissible under s.41 of the 1999 Act.

On the appeal, the Court of Appeal allowed the appeal and held that, for the purposes of section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999, the admissibility of evidence of previous sexual behaviour of a complainant was not confined to unusual or bizarre behaviour but depended only on the behaviour being sufficiently similar that it could not be explained reasonably

as a coincidence. In the circumstances, the fresh evidence was relevant and admissible evidence at trial and arguably satisfied the test of sufficient similarity in section 41(3) (c). Although it would be rare for forensic examination of sexual behaviour with persons other than the defendant to be appropriate the requirements of section 41 had to give way to the requirements of a fair trial so that, in particular, admissible and relevant evidence was not excluded. Accordingly, in the interests of justice there ought to be a retrial.⁽¹⁾

Clare McGlynn has argued that there was a common assumption that third-party sexual history evidence was irrelevant in modern day rape trials. She considered this as a common assumption which was available until Evans case. However, the judgment in Evans case shows that such consensus does not exist. This approach should not have come as such as a surprise because of the elastic nature of some concepts contained in section 41. The wide interpretation of R v A which holds that sexual history evidence, even with third parties, may be relevant to consent. She criticizes this approach since it undermines

1 - Findlay Stark, "Bringing the background to the fore in sexual history evidence" (2017) (8) Archbold Review 4-8; Paul McKeown, "Evidence: R. v Evans (Chedwyn)" [2017] Criminal Law Review 406-411.

the principles of autonomy and free choice which should underpin any notion of consent to sexual activity. Moreover, the current law failed to offer a protection to witnesses from unnecessary humiliation and distress in in permitting sexual history evidence in a significant number of cases and often in highly prejudicial circumstances. This hinders witnesses from giving their best evidence and securing the truth-seeking function of the trial. It also discourages complainants from reporting cases to the police and supporting prosecutions, and this approach adversely affects the administration of justice.⁽¹⁾

The Home Office commissioned a research study to assess “the impact of section 41 of the Youth Justice and Criminal Evidence Act on the prosecution of sex offence cases and the handling of such cases by the courts”.⁽²⁾ The research study presents findings from the evaluation of legislation intended to limit the admission of previous sexual history evidence in sexual offence cases in England and Wales. The research tracked nearly 240 rape cases coming before the Crown Courts in England and Wales in

1 - Clare McGlynn, “Rape trials and sexual history evidence: reforming the law on third-party evidence” 81 (5) *Journal of Criminal Law* 367-392 at 391.

2 - Home Office, Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials, 2006. Available at <http://www.homeoffice.gov.uk/rds>.

2003. The researchers, Kelly, Temkin and Griffiths, also looked at 170 Crown Prosecution Service (CPS) rape case files, observed over 30 rape trials, examined Home Office statistical data and analysed recent reported Court of Appeal decisions. They also interviewed judges, barristers, CPS lawyers, complainants, police officers and those involved with supporting victims. They found that the use of sexual history is still a feature of rape trials, despite changes to the law in 1999 to restrict its access. The study has highlighted the failure of legislation to prevent a rape complainant's previous sexual experience being used as evidence in rape court cases.

The research study found that out of rape cases coming before the Crown Courts in England and Wales in a three-month period in 2003. Section 41 applications occurred in just under a third of jury trials in the case-tracking sample and in the sample of observed trials. Two thirds of these applications in the case-tracking sample were successful. Sexual history was also introduced into trials without application being made, as required by the law. The new rules - that applications be made in writing and before the trial - were almost invariably broken. In addition to specific references to section 41, references to sexual behaviour/

sexual history were found in over a third of CPS files and observed trials. Sexual history material was included in more than three quarters of trials. The research also showed that judges and barrister were mainly in favour of legislation to control sexual history but most thought the present legislation was too restrictive and did not leave the judges with sufficient discretion. There was considerable criticism by both judges and barristers of the belief in consent exception on the ground that it was too wide and ‘illogical’.⁽¹⁾

The research has made the following recommendations to tighten the statute itself, and to make implementation more consistent. The research has recommended that changes to the legislation should be made. These recommendations address ways in which the intention of the legislation might be fulfilled and monitoring be improved. “Both ‘sexual behaviour’ and ‘sexual experience’ should be defined. Moreover, it should be made clear that these terms include implied as well as express behaviour. The embargo on sexual behaviour evidence should be applied to the prosecution as well, as is the case in some other jurisdictions. Consideration should be given to amending

1 - Ibid, at vi.

and substantially curtailing section 42(1)(b) (the belief in consent exception) to reflect both the Sexual Offences Act 2003 and the fact that it is not generally reasonable to formulate a belief in consent on the basis of past history. A new exception to the rule of exclusion should be inserted into section 41, allowing for evidence of previous or subsequent sexual behaviour with the accused. This exception could have a time limitation. There should be a clear statement in the legislation that sexual behaviour evidence is not to be admitted by trial judges other than in the exceptional circumstances set out in the legislation”.⁽¹⁾ It is important to open up debate and try to understand the perspectives of others and to learn from those with different professional and personal experiences. Indeed, it may be productive for us all to recognise in the debates to come that we mostly share the same aims: namely to ensure the effective administration of justice, to convict the guilty and to minimise the harm caused to complainants and witnesses in the process.⁽²⁾

1 - Ibid, at 76.

2 - Clare McGlynn, “Challenging the law on sexual history evidence: a response to Dent and Paul” [2018] Criminal Law Review 216-228. See also, N. Dent and S. Paul, “In defence of section 41” [2017] Criminal Law Review 613.

6. Conclusion

Section 41 provisions promise to give complainants more and greater protection from illegitimate attempts to malign their character by focusing on their previous sexual behaviour. Section 41 was a sincere attempt to deal with sexual history evidence and normalized gender bias. Although there is profound changes in social mores, changing of certain expectations and constructions of femininity and masculinity is resisted. Therefore, the legislation has been evaded and circumvented. Further, the prosecution is reluctant to pursue cases which require dealing with these complex and contested issues. The need to develop the jurisprudence for the necessary transformation is required. However, such process needs a wider social change so that women can exercise rights and freedoms without this rendering them less deserving or credible as witnesses. ⁽¹⁾

Much of the focus on section 41 of the 1999 Act in academic literature seems to have shifted away from the concerns which led to the legislation in the first place – namely the low conviction rate in rape cases and the

1 - Home Office, Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 77.

myths about women that led to this type of evidence being misused.⁽¹⁾ Furthermore, the House of Lords Judgment in *R v A* is likely has failed to give the trial judge guidance on how he should exercise his discretion to admit or exclude the evidence of sexual history. The effect of this ruling is to require a radical reconsideration of section 41 of the 1999 Act. This reconsideration should require the judge to take into account the significant probative value of sexual history evidence. It should also require the court to take into consideration factors when determining whether such evidence is admissible. In particular, the potential prejudice to the complainant's personal dignity and right to privacy.

It is clear that sexual history evidence remains a vital strategy to defend sexual assault perpetrators, and that defence lawyers are still having the chance to diminish the provisions of the 1999 Act.⁽²⁾ In modern times, it is hard to produce a rape accusation since it is easy to defend in the light of the prevalence of stereotypes, myths and prejudices against women. A much greater culture and social norms

1 - Firth, G., 'The Rape Trial and Sexual History Evidence - *R v A* and the (Un) worthy Complainant' [2006] 57 Northern Ireland Legal Quarterly (3) 442.

2 - Home Office, Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials, 2006. Available at <http://www.homeoffice.gov.uk/rds>, at 21.

shift are needed if real change is to be achieved.⁽¹⁾ Therefore, law reform is urgently required. The current law needs a comprehensive revision in order to bring greater clarity and precision to complicated statutory provisions. Deeply embedded practices, prevalent across society and within the legal profession and judiciary should be challenged. We should increase our efforts to focus investigations and trials on the accused's actions rather than seeking justifications for their behaviour in the sexual history, character or lifestyle of complainants.⁽²⁾

1 - Leanne M. Bain, "The Failures of 'Shield Legislation': Sexual History Evidence, Feminism and the Law" (2010) 1(1) Aberdeen Student Law Review 96 at 110.

2 - Clare McGlynn, "Rape trials and sexual history evidence: reforming the law on third-party evidence" 81 (5) Journal of Criminal Law 367-392 at 391-392.

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