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Rape Trials and Sexual History Evidence

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If Tom is on trial for the rape of Alice, should evidence that she flirted with Dick and Harry earlier in the evening be allowed? If she previously had consensual sex with both Dick and Harry, does that show she is more likely to have consented to sex with Tom? Would it make a difference if on each occasion she'd been drinking, picked up the men in the same circumstances, even had sex in the same way?

These are the sorts of issues that come up when debating the scope of laws restricting the use of sexual history evidence in rape and other sexual offence trials. This evidence is often highly prejudicial and rarely relevant. Allowing sexual history evidence leads to unnecessary trauma for complainants and risks diverting juries from the key issues in the trial. The current law is too permissive and this is adversely affecting the administration of justice. Urgent reform is needed.

What is Sexual History Evidence?

'Sexual history evidence' covers information about specific sexual acts, as well as more general sexual behaviour (such as flirting or sending sexual messages). It can also include activity taking place after an alleged rape or other sexual offence. Most controversial is when it is used to prove consent: she consented before, so she is more likely to have consented this time. It is also introduced to support a defence of reasonable belief in consent, to provide a motive to lie or to challenge a claim made by the prosecution.

> *It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.*
>
> **Lady Hale, *R v C* [2009] UKHL 42 at 27**

How common is sexual history evidence?

Data shows that applications to use sexual history evidence were made in 1/3 of cases, with this evidence being raised (without following procedures) in 2/3 of trials (Kelly et al 2006). Researchers also found a strong link between applications and acquittals. In Northumbria in 2017 it was found that sexual history evidence was admitted in 1/3 of trials, (with half of those cases involving 3rd party evidence).

More data is needed. But we do know that there is no comprehensive evidence supporting Government claims that the use of sexual history evidence is 'exceptional'.

Sexual activity with the accused

This sort of evidence is commonly admitted, often without challenge, as it provides background to a case, for example that the parties were married. But evidence with the accused can also be contentious, such as where the complainant disputes a claim by the accused that they had a previous consensual sexual relationship. There is more agreement that this form of evidence can be relevant, but strict controls are still required to limit questioning and focus on the issues.

Sexual activity with third parties

The most controversial type of evidence is called 'third party evidence' which is about sexual activity with people other than the accused. For example, in the Ched Evans case, evidence about the complainant's sexual activity with two other men was allowed. This material can be highly prejudicial (such as evidence of casual sexual activity or sex outside an established relationship) and should have no relevance to questions of consent.

What is the law on sexual history evidence?

The current law is set out in sections 41-43 of the Youth Justice & Criminal Evidence Act 1999 and covers all sexual offences. Section 41 provides that the defence may not admit evidence or questioning about any 'sexual behaviour' of the complainant, whether with the accused or third parties, without the leave of the court. A judge may only permit the evidence or questioning if:

- it relates to 'specific instances' of sexual behaviour;
- a refusal might render unsafe a conclusion of the court or jury;
- the purpose or main purpose must not be to impugn the credibility of the complainant; and
- it falls within one of the 4 exceptions which are:
  - the issue to be proven is 'not an issue of consent' (eg defence of reasonable belief in consent, motive to lie, alleged previous 'false' complaints); or
  - it is about consent and the evidence relates to sexual behaviour at or about the same time as the sexual activity in question; or
  - it is about consent and the sexual behaviour is 'so similar' that the 'similarity cannot reasonably be explained as a coincidence';
  - or to rebut the evidence of the prosecution.

Why are limits on sexual history evidence needed?

Defending sexual autonomy

The key issue in most sexual offence trials is whether or not the sexual activity was consensual. Sexual history evidence is often admitted to try to infer consent: the complainant consented in the past, and so is more likely to have consented this time. The problem is that this diminishes the individual's right to choose on every occasion whether or not to consent to sexual activity. Restrictions on sexual history evidence defend our sexual autonomy and choice.

Highly prejudicial evidence

Sexual history evidence is often highly prejudicial. It challenges the 'moral credibility' of a complainant, painting her in a negative light, due to her sexual habits or experiences, and often making her seem less worthy of protection or belief, and/or the accused as less deserving of punishment. As the influential Heilbron Report identified many years ago, 'unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial' [91].

Distorts the truth-seeking function of the trial

Because of its highly prejudicial and often salacious nature, sexual history evidence can adversely impact on the function of the trial. Lord Hutton made this clear in *R v A* where he said restrictions were necessary because 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' ([2001] UKHL 25, [142]). Limits on sexual history evidence can also help to secure the best evidence from complainants by reducing distress and anxiety.

Preventing a 'second rape' or 'judicial rape'

Where sexual history evidence is admitted, complainants report being distressed by the trial process. The feeling that it is they who are put on trial has been described by some as a 'second rape' or 'judicial rape'. Restrictions on sexual history evidence, by limiting evidence and cross-examination to only highly probative material, reduces the humiliating and traumatising nature of cross-examination, as well as protecting a complainant's right to privacy.

Encouraging police reports and supporting prosecutions

Many rape cases never get near a court. One reason for this is a complainant's fear that their sexual past will be used during the trial. Effective restrictions on sexual history evidence encourage victims to go to the police, and support prosecutions. Ultimately, a fairer trial process will go some way towards securing complainants' justice interests which are not limited to convicting the guilty, but extend to being treated with dignity and having a 'voice' through meaningful participation in the trial process.

R v Ched Evans

In 2016 the footballer Ched Evans had his conviction for rape quashed when the Court of Appeal held that evidence relating to the complainant's sexual activity with two other men may be relevant to his case. Evans' subsequent acquittal, following a second trial where the sexual history evidence was admitted, provoked considerable public debate and the Government announced a review of this area of law. The most controversial aspect of the *Evans* case is that it involved third party sexual history evidence. Indeed, it was the notorious use of this form of evidence that had led to restrictions being introduced in the late 1990s.

'so similar' sexual activity that cannot be explained as a coincidence?

The case centred on whether the complainant's sexual activity with two other men could be said to be 'so similar' to the sexual activity of the alleged rape, that the similarity could not reasonably be explained as a coincidence. If so similar, the evidence could be admitted and her consent to sex with Evans could be inferred. The Court of Appeal identified the following 'similar' elements: the complaint 'had been drinking'; she 'instigated certain sexual activity'; she 'directed her sexual partner into certain positions' ('doggy style'); and 'used specific words of encouragement' ('harder'). The Court held that the alleged conduct fell within the similarity exception as there was no requirement for the behaviour to be bizarre or strikingly similar. It said this was a 'rare' case where the evidence would be admissible.

Why the Court of Appeal in Evans got it wrong

First, not requiring the conduct to be unusual to fall within this exception goes against the original parliamentary intention behind the 1999 Act. The Government had said that only evidence that was 'so unusual' should be admissible. Instead, the Court of Appeal followed the suggestion of Lord Clyde in the influential case *R v A* [2001] that the similarity exception did not require 'rare or bizarre conduct'. However, Lord Clyde was ruling on sexual history evidence with the accused and therefore his comments are not binding on a case involving third party evidence.

Secondly, this ruling makes the similarity exception difficult and confusing to apply. If we are to demonstrate that conduct is not a coincidence, some sort of pattern or connection needs to be found: easier to do where activity is rare or bizarre. Also, if all that is required is commonplace conduct (as in *Evans*), this can easily be explained as a coincidence.

The logical conclusion after *Evans* is that the more ordinary the sexual activity, the more it may be used in evidence against a complainant, as it will be easier to characterise it as 'similar'. If so, evidence may well be admissible in many cases involving former and current partners. And, in relation to sexual activity with third parties, the more ordinary the activities and the more sexual partners the complainant has had, the more the complainant is at risk of any previous sexual activity being claimed to be 'similar'.

Impact of Evans case

The *Evans* case does not simply open the 'floodgates' to the use of sexual history evidence, but risks a tsunami. It threatens to become an open invitation to the defence to trawl through a complainant's sexual history seeking 'similarities'. And it focuses attention on the complainant's lifestyle and character, rather than on the defendant's actions at the time of the alleged offence.

How should the law be reformed?

Prevent sexual history evidence being used to prove consent

It must be made clear that sexual history evidence cannot be used to infer consent, or belief in consent. Evidence that someone has consented to sexual activity in the past cannot be used to show s/he has consented on the occasion in dispute. Consent must be given afresh each time. This would follow the example of Canadian law which states that sexual history evidence may not be used to support the 'twin myths', namely that because of their sexual behaviour, it is more likely that the complainant consented or is less likely to be telling the truth.

Strengthen restrictions on third party sexual history evidence

Excluding all third party evidence, particularly to prove consent, would prevent evidence being admitted in cases such as *Ched Evans* and restore the idea of consent as being person specific. Such a reform would bring English law closer to other jurisdictions, such as Michigan in the US, where all third party sexual history evidence is excluded other than evidence of specific instances to show the source or origin of semen, pregnancy, or disease.

Remove the 'similarity' exception

There should be no similarity exception, particularly for third party evidence. This evidence is irrelevant and prejudicial. As Canadian Supreme Court Justice L'Heureux-Dubé notes: 'Arguments in its favour depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in.' (*R v Seaboyer* [1991] 2 SCR 577 at 685-686)

Reform the 'similarity' exception

The less satisfactory alternative is to strengthen the current exception, only admitting evidence of conduct that is indisputably unusual and as such highly unlikely to be coincidental. What should be required is a demonstrable pattern of highly distinctive and unusual sexual behaviour, and a close temporal connection to the incidents alleged.

Legal representation for complainants

Serious consideration must be given to granting greater legal rights to complainants to be represented during trials, for example when the defence plan to introduce sexual history evidence. This would give complainants a voice in proceedings, ensuring greater scrutiny of defence applications. Legal aid is vital if any such rights are to be realised.

Extend restrictions to the prosecution

The current law only restricts the defence from admitting sexual history evidence, even though sometimes the prosecution leads this evidence. Requiring the prosecution to make an application to admit evidence, as in Scotland, will help reduce inadvertent use of often highly prejudicial sexual history evidence and enhance scrutiny of applications.

Raise the threshold for admitting evidence

In many other countries, such as Canada and Scotland, sexual history evidence can only be admitted where it has *significant* probative value that is not *substantially outweighed* by the risk of prejudice to the administration of justice. This is a higher standard than in English law and rightly emphasises the dangers of introducing these forms of evidence. New legislation should also be explicit that sexual history evidence should only be admitted in exceptional cases.

Strengthening and enforcing procedural requirements

Existing procedural rules must be strengthened and robustly enforced by judges. All applications (including late applications) to admit evidence, and judicial decisions, must be in writing. A hearing must be held on each occasion to properly examine the relevance and potential prejudice of any evidence, with the complainant (and any legal representative) permitted to attend.

Further reading and references

Clare McGlynn (2017)
'Rape Trials and Sexual History Evidence: reforming the law on third party evidence', Journal of Criminal Law available from author's websites below.

Clare McGlynn
'R v A (No 2): a feminist judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) Feminist Judgments: from theory to practice (Hart, 2010).

Vera Baird QC et al
Seeing is believing: the Northumbria Court Observers Panel Report on 30 Rape trials 2015-2016 (Northumbria Police and Crime Commissioner).

Liz Kelly et al (2006)
Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials (London: Home Office Report 20/06, 2006).

About the author

Clare McGlynn is a Professor of Law at Durham University and an expert on laws relating to sexual violence, pornography regulation and image-based sexual abuse. Her research with sexual violence survivors has investigated their ideas of justice, developing the concept of kaleidoscopic justice, and has examined the possibilities of restorative justice in cases of sexual violence (with Nicole Westmarland). She has written a feminist judgment, challenging the House of Lords ruling in *R v A* (2001) which relaxed the rules on admitting sexual history evidence in rape trials. She has worked closely with politicians, policy-makers and voluntary organisations to improve legal and policy responses to violence against women, including shaping new laws on extreme pornography and image-based sexual abuse (with Erika Rackley). She is the co-editor of *Rethinking Rape Law: international and comparative perspectives* and *Feminist Judgments: from theory to practice* and author of *Families and the European Union: law, politics and pluralism* (Cambridge University Press 2006) and *The Woman Lawyer - making the difference* (1998).

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