Myths, relationships and coincidences: The new problems of sexual history

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Abstract. This article reviews recent developments in the law governing the admissibility of sexual history evidence in England and Wales. After the decision of the House of Lords in R v A (No. 2), the law reflects a consensus that the complainant’s sexual history with third parties is generally irrelevant to the issue of consent in rape trials. In the first part of this article, the justifications for this conclusion are questioned; it is suggested that the relevance of sexual history is a more complex issue than it is usually acknowledged to be. The second part of the article uses points made in the first to question the way in which concepts drawn from the law on similar fact evidence have been used as the admissibility framework for sexual history. Aspects of the decision in R v A are examined in detail.

CRIMINAL EVIDENCE AND PROCEDURE

The last few years have seen important developments in the law governing the admissibility of sexual history evidence in rape trials in England and Wales. First came the introduction, in the Youth Justice and Criminal Evidence Act 1999 (the YJCEA), of new provisions on this topic. These met long-standing criticisms of the previous law with a much more restrictive approach to the admissibility of rape complainants’ sexual histories. In the eyes of some, however, this reform went too far, and it was not long before the YJCEA was challenged under the Human Rights Act 1998 for incompatibility with the European Convention on Human Rights, Article 6 of which guarantees defendants a fair trial. The outcome of this challenge was the decision of the House of Lords in R v A (No. 2). While this decision avoided a declaration of incompatibility, it is controversial in its own right for its very strained interpretation of the YJCEA provisions.

The argument in this article is that there is much that is wrong in both the legislation and the judicial response to it (though what is wrong does not have much to do with human rights). One of the principal problems is that both Parliament and the House of Lords were influenced by concepts drawn from the law on similar facts when trying to develop a workable approach to the admissibility of sexual history evidence. The concepts chosen, however, are the wrong ones. That argument is developed in the second half of this article. In order to understand where the law has taken a wrong turning, we need to start by considering the fundamental question in this area: whether, in general, sexual history evidence is relevant. This is the issue addressed in the first half of the article. To set the scene for this discussion, it will be helpful at this point to note a proposition, which has been very influential in the recent developments, and with which we will take issue.

Although the decision in R v A was unanimous, it is not notable for its consensus. Various issues provoked disagreement. On one point, however, all of the judges agreed: it is a myth that ‘unchaste women [are] more
The relevance of sexual history

Let us begin by focusing on a simple scenario. A defendant is on trial for rape. He claims that the complainant consented. Is evidence of the complainant's sexual history with other men relevant to judging that claim? This is not quite the scenario which was at issue in R v A -- that case involved sexual history with the defendant -- but we need to understand it in order to tackle the more complex facts in R v A. To keep the issues clear, we will analyse relevance in terms of logical relevance: evidence is relevant if it makes the fact it is being adduced to prove more or less probable.

Aileen McColgan's thorough analysis of sexual history evidence provides a useful starting point for the discussion. McColgan would answer 'no' to our relevance question. She explains her conclusion thus:

In order that evidence of sexual activity is to be admitted under the general rules of evidence, it must be accepted that the group of women who have sexual intercourse with men to whom they are not married is sufficiently small, in comparison with the group which does not, to render the complainant's membership of the former group probative of the issue of consent. ... [T]he proportion of women who engage or have engaged in sexual contact outside marriage is overwhelming in relation to the proportion who have not. This being the case, the complainant's membership of the group of sexually active women does not place her in a group of women distinguishable from the norm. Evidence that she belongs to that group is not, therefore, relevant to the issue of consent.

McColgan supports this argument with statistics taken from the British National Survey of Sexual Attitudes and Lifestyles (Natsal). These show, for example, that around 98 per cent of women aged between 25 and 34 had experienced sexual intercourse, and that only around 5 per cent of this age group had been married at the time of their first experience. The argument against relevance, then, runs as follows. Presume -- quite reasonably -- that if the complainant did consent, as the defendant claims, then she is one of the 93 per cent who have previously experienced sexual intercourse outside marriage. Revealing this sexual history to the jury merely tells it that the complainant, like the vast majority of the female population, is prepared to have sex outside marriage. Hence the irrelevance of sexual history. This argument, however, does not quite establish logical irrelevance. Suppose a parallel situation, where a defendant is on trial for assault, and evidence is offered that his blood matches that found at the scene of the crime. It is known that 93 per cent of the population would also match the blood. Such evidence may not be very impressive, but it is probative. In simple terms, that is because it rules out the defendant's being one of the 7 per cent who would not match. The initial conclusion, then, must be that sexual history evidence is relevant. However, given its minimal probative value it would not be difficult to justify its exclusion on grounds of potential prejudice.

In most rape trials where the admissibility of sexual history evidence becomes an issue, however, the evidence in question is not simply that the complainant has had sex outside marriage. In R v Brown, for example, the defence wished to adduce what was termed 'evidence of sexual promiscuity'. An example of this sort of evidence can be found in the claims made by the defence in R v Bogie that the complainant had had sex with three different men, two of them 'shortly before the incident in question'. What can be said about...
the relevance of this sort of evidence? Sexual behaviour is thought to be much less conservative than it once was: as we have seen, it is now uncommon for a woman's sexual experience to be confined to marriage. At the same time, Natsal found multiple sexual partnerships to be rare. Focusing on the heterosexual experiences of women aged between 25 and 34, 51 per cent report having had two or fewer partners in their lifetime; 71 per cent report one or no partners in the last five years; 94 per cent one or fewer in the last year. Monogamy and serial monogamy dominate the picture of women's sexual lifestyles and, while attitudes may not be a sound guide to behaviour, 76 per cent consider 'one-night stands' to be always or mostly wrong. As for non-average behaviour, the authors draw attention to:

the marked variability between individuals in the number of partners reported, and the extreme skewness of the distribution. For example, over the last 5 years ... 76.5% of women reported 0 or 1 sexual partner. At the other end of the scale, ... 1% of women reported more than 8 partners. The maximum reported lifetime partners exceeded ... 1000 for women. The corresponding 5-year estimate was 100 for women; and in the last year ... 25 for women.

It seems, then, that it is rare for women to have large numbers of sexual partners and—though the term 'relationship' is terribly vague—uncommon for women to have sex outside the context of a relationship. This implies that, where sexual history evidence places a woman in one of these rarer categories, it has a reasonable degree of probative force on the issue of consent.

There are various objections to this argument, and we will spend the remainder of this section exploring them. At the outset, it must be acknowledged that surveys of sexual behaviour face considerable methodological problems, so one should be wary of putting too much weight on the data reported in them. All that will be assumed for the purposes of our argument is that different women have different propensities to consent to sex with new partners, and that sexual history evidence might show this. This will allow us to probe some broadly theoretical objections to the argument that sexual history is relevant to consent.

**The specificity of consent**

'The fact that a woman has had intercourse on other occasions', it has been said, 'does not in itself increase the logical probability that she consented to intercourse with the accused.' On this view, consent is always given in the context of a specific and unique factual situation; consent in the past, therefore, has no bearing on whether it will be given in the future. To argue otherwise 'assumes women are bundles of dispositions rather than autonomous human beings'. Arguments of this sort echo a view once held by personality psychologists: that human behaviour is determined by situational factors rather than by personality or character.

There are obvious problems with this argument. The idea that a person's being autonomous is incompatible with her having a propensity to behave in a certain way is surely mistaken. In addition, the view implicit in the above quotations, taken to its extreme, implies that no one has a particular propensity to engage in sex. Sex, it would seem, occurs because of situations, not because of people. It is difficult to reconcile this with the empirical findings, noted just now, that sexual experience is not evenly, nor even randomly, distributed across the population. Some women consent to new partners more often than do others. It could of course be argued that the differing sexual propensity which this appears to indicate is epiphenomenal. It may be that instead of there being variation in sexual propensity, it is just that some women are more likely than others to find themselves in situations conducive to their consenting to sex. There is an obvious response to this, however, which is that it does not really matter whether the driving factor is a sexual propensity or a propensity to get into consent-conducive situations. Whichever it is, sexual history would still be probative of consent.

There is an objection to this response. If the situationist view is correct—if it really is the case that what appears to be evidence of sexual propensity is merely evidence that the complainant has a propensity to get into consent-conducive situations—then in a trial there may be little need to dredge up sexual history. This is because the trial may already reveal that the complainant has a propensity to get into what the situationist would presumably regard as consent-conducive situations. If the trial shows that the complainant has gone out to a pub, or a nightclub, or a singles bar, and there flirted with and accepted a lift home from a man, then the jury will know that the complainant has found herself in what, on the situationist view, is presumably a
consent-conducive situation. Given that, on this view, it is the situation which is all powerful when it comes to consent, what can sexual history add?

The situationist explanation of variation in sexual experience is sufficiently extreme to be implausible. But the arguments generated by considering it are nevertheless instructive, even if a more moderate view of personality is adopted. It seems likely that one’s attitude towards sexual relationships is not an isolated part of one’s character. It is presumably bound up with other aspects of personality and therefore lifestyle. We should bear in mind that rape trials are likely to reveal information about those other aspects of personality, and this means that there will be less reason to reveal information about the complainant's sexual history.

A slightly different objection to the use of sexual history evidence can be developed from the quotation which opens this subsection. This is the argument from hidden variables. A woman who has consented to large numbers of partners in the past might not be more likely than other women to consent to this particular man. There might be hidden variables which explain her past decisions but which do not apply in the present case—perhaps the previous men were all witty and attractive whereas this one is humourless and ugly. Taking this argument to its extreme will again suggest problems with it. Any inductive inference is open to a hidden variables objection. There may be a hidden variable which explains why the sun has always risen in the past but which does not apply to tomorrow. Plainly, that possibility does not prevent us from concluding that it is immensely likely that the sun will rise tomorrow. With sexual history evidence, of course, we are dealing with a much lower level of probability, and a far wider set of variables may suggest themselves. In a particular case, obvious variables—the degree of relationship with the previous partners might be an example—could lead to the conclusion that sexual history evidence is irrelevant. But there is no reason why case-specific variables should always undermine relevance: they might instead lead to the conclusion that the evidence is particularly relevant (a similar facts argument would be an example). So when we are arguing—as we are—at a general level about the relevance of sexual history, the possibility of case-specific variables, which might point in either direction, does not seem to be a convincing objection to the relevance argument.

The arguments developed here are beginning to reveal some of the problems involved in talking about the relevance of sexual history. The relevance question is a complex one. Just because some women are more likely to consent to new partners than are others, it does not follow that sexual history evidence is relevant. This is because the admissibility question arises in a particular context—a trial—and the implications of this context need to be taken into account. This insight prompts further reflections on the relevance of sexual history.

**A correlation**

Questions about the relevance of sexual history arise in a context where an allegation of rape has been made. If there are factors which are likely to lead to women who have had more than the average number of sexual partners being over-represented in the pool of rape victims, then sexual history will be correlated with being raped, and this will diminish its probative value as evidence of consent where an allegation of rape has been made. It is in fact likely that such a correlation exists. The most obvious illustration involves prostitutes. Prostitutes lead a lifestyle which renders them vulnerable to rape. And this vulnerability is caused by the very factors—meeting large numbers of men, often in isolation; working in public spaces, often late at night—which explain why prostitutes have particular sexual histories. This lesson can be generalised. Women who have had relatively large numbers of sexual partners must live a lifestyle which enables them to meet prospective sexual partners, and any such lifestyle is likely to make them comparatively vulnerable to rape.

A slightly different illustration of the correlation between sexual history and vulnerability to rape can be seen in *Bogie*. When asked why he had thought that the complainant would consent to sex, Bogie explained that she had slept with his friends and was an ‘easy lay’. One of the witnesses he called also described her as a ‘tart and an easy lay’. Women who are viewed in these terms may be especially likely to be the victims of non-consensual sex: not only because their lifestyles may bring them into contact with large numbers of men; not only because men are likely to pursue them and to misconstrue their signals; but also because their sexual history makes them, in the eyes of certain men, a legitimate target for rape.
Another correlation

It was suggested in the previous subsection that, to some extent, we can expect rape victims to have a sexual history. That makes sexual history a much weaker indicator of consent than it might otherwise appear. There is another correlation which might have a similar effect. In a rape case, if the complainant did consent she has made a false complaint of rape. It is possible that women who have had relatively large numbers of sexual partners will be under-represented in the pool of false complainants. It is sometimes suggested that women will make false rape complaints because they are ashamed of a particular sexual experience. But a woman who has had a number of sexual partners in the past is perhaps not likely to be ashamed of a further sexual encounter. So if sexual history makes it more likely that the complainant consented, it makes it less likely that she would lie about it. A more general form of the argument goes like this: if the complainant has not lied about sexual encounters in the past, why should she lie about this one?

There are two reasons for dealing with this correlation separately from those described in the previous subsection. First, the argument it generates looks to be weaker, telling less strongly against the relevance of sexual history. In its narrow form, it speaks only to one possible reason for making a false complaint: shame. A second reason for drawing the distinction is that--especially in its general form--the argument may be un-endorseable for policy reasons. In any case where there is a factual dispute between defendant and complainant--in a theft case, say--we can ask why the complainant would lie. It will frequently be difficult to think of answers to this question. As many commentators have pointed out, there is evidence that false accusations of rape are rare. The vast majority of defendants in consent-defence rape cases are, therefore, very probably guilty. But to use this fact as the basis for evidentiary policy comes close to striking at the presumption of innocence (if this point is obscure, imagine a policy of instructing juries that, because false allegations of rape are rare, they should view consent defences sceptically). Perhaps, ultimately, rape trials are so problematic that the application of the presumption of innocence to them needs to be rethought. But to get to that conclusion would require considerable argument: a path we will not go down here. The position, then, is that one should be wary of arguing that sexual history is irrelevant on the basis of a presumption that complainants--even certain categories of complainant--are likely to be truthful.

Cognition and categorisation

"[H]ow we categorise and then generalise is not very well understood." This may seem a rather abstract observation to bring up in a discussion of sexual history evidence. To see how it fits in, recall our initial discussion of McColgan's argument. It was suggested that evidence that a woman had previously consented to sex outside marriage would be relevant (albeit minimally so) to the issue of consent, because it would rule out the complainant's being one of the small minority of women who will not have sex outside marriage. To this it may be objected that the jury is unlikely to categorise the complainant in the first place as being one of that minority, and that therefore evidence that she is not tells them nothing that they are not already thinking. This argument, of course, cuts both ways. The jury may also be unlikely to think that the complainant is one of the minority who have consented to multiple partners, in which case evidence that she is will be relevant. The general point is that, without knowing how jurors categorise rape complainants before they hear any evidence about sexual history (the 'default categorisation'), any argument we make about the relevance of sexual history will be shaky.

We can pursue this line of thought further. In R v Seaboyer, L'Heureux-Dubé J referred to a number of 'rape myths' supposedly common among the public. One of these was the 'Madonna-Whore Complex', under which women ... are categorized into one-dimensional types. They are maternal or they are sexy. They are good or they are bad. They are madonnas or they are whores. L'Heureux-Dubé J's point was that this makes sexual history evidence very prejudicial. Yet it may also make it crucial. If jurors do categorise rape complainants as either women who will never consent to sex or women who are only too ready to consent to sex, then the defendant is in trouble if the jury places a complainant in the former category. He is bound to be convicted. Now it is doubtful that jurors really do cognise in such black and white terms. But unless jury reasoning operates on a smooth continuum, so that every piece of evidence suggesting consent causes a corresponding increase in a juror's degree of belief in consent, the point still has some force. If jurors who categorise complainants as unlikely to consent simply ignore evidence of consent unless it has reasonable
force, then it will be important for defendants to be able to adduce evidence which will lead jurors to recate-
gorise complainants. To use a metaphor: we have probably all come across gas cookers which resist
fine-tuning. The flame on the hob can be set so that a pan of water boils furiously, but turning the dial down
just a fraction produces a weak splutter of flame which risks blowing out. It is important to bear in mind the
possibility that juror cognition works something like that. A burnt dinner or a prejudiced jury is not a good
thing; but neither is cold soup or a convicted innocent.

**The relevance of relationship evidence**

The situation considered so far has been one where the sexual history evidence involves people other than
the defendant. *R v A* involved evidence that the complainant had had a sexual relationship with the defen-
dant, so it is important to consider this situation. The phrase 'non-third party sexual history evidence' being
a bit of a mouthful, we will refer to such evidence as 'relationship evidence', even though the evidence may
involve an isolated sexual encounter, rather than a full-blown relationship. In *R v A* the Court of Appeal and a
majority of the House of Lords thought such evidence to be generally relevant.

The argument for the relevance of relationship evidence is relatively simple. If we have slept with someone
before, we are more likely to sleep with them than we would otherwise be. In *R v A* Lord Hutton gave a 'ro-
mantic' explanation of this dynamic, seeing previous sexual encounters as evidence of affection. But there
is no need to go this far; the relevance argument works even if we ignore affection. The people we are most
likely to sleep with are probably those we already know. And since previous sexual partners fall into this
category, we are more likely to consent to sex with one of them than with a particular person among the vast
group of people we do not know. As with third party sexual history, however, we cannot rest with a simple
relevance argument such as this. We need to take into account the context of a trial where certain informa-
tion will already be apparent to the jury and an allegation of rape has been made against the defendant. This
is a fairly simple process: the arguments of the previous subsections of this article simply need to be adapted
to the relationship context.

First of all, the 'more likely to sleep with people we know' argument carries little weight in the rape trial co-
text. The trial will usually make it apparent that defendant and complainant are acquainted, so their sexual
history will not need to be introduced to show this. Sexual history might show the sort of affection to which
Lord Hutton refers, and might therefore appear to secure its relevance on this footing. But just as third party
sexual history can be evidence of vulnerability to rape, so can a previous, or ongoing, sexual relationship be
evidence of vulnerability to rape by the other person in the relationship. One of the key messages of re-
search on rape, after all, is that acquaintance rape is far more common than stranger rape. It may well be
that women are most at risk of rape from their partners, in which case an ongoing relationship would be both
evidence of consent and evidence of rape. In *R v A* the relationship at issue was not ongoing, but the sce-
nario there may well have been of a man who thought that, if the complainant had consented to him before,
she would again, or that it did not matter whether or not she did, or that forced sex was an appropriate pun-
ishment for her having ended the relationship. Because these will usually be plausible possibilities, evidence
of a previous sexual relationship between defendant and complainant will generally be evidence of
non-consent at the same time that it is evidence of consent. Finally, we should not forget that if the com-
plainant did consent, then she has made a false complaint against an ex-partner. Given that the defendant's
use of the relationship evidence to prove consent is likely to depend on an inference that the complainant
continues to feel some affection for him, the false complaint will be even harder to explain than in third party
cases. What all of this means is that, contrary to common assumptions, relationship evidence may in
general be less probative of consent than is third party sexual history evidence.

**Relevance: some conclusions**

Our analysis suggests that sexual history evidence--whether it concerns third parties or not--is evidence both
of consent and of non-consent. It points in two directions at once. This may help to explain why the relevance
question is so controversial. We have conflicting intuitions about it. And unless we break down the rele-
vance question, to highlight the competing generalisations which underlie it, it is easy to get confused, to
think that sexual history has some significance yet that at the same time it is uninformative as to whether this particular complainant consented.

But does this mean that sexual history evidence is generally irrelevant? Quite simply, there does not seem to be any good way to answer this question. To say that competing inferences can be drawn from evidence is not to say that it is irrelevant. That would only follow if we thought the inferences equally strong. It is not in the least bit easy to say whether they are. We would be on slightly firmer ground if we concluded that though sexual history evidence may be relevant, it is probably of little probative value, and should therefore be excluded on policy grounds.\textsuperscript{41} But even this vague conclusion is vulnerable to the objection that we do not know enough about juror cognition to be able to say that excluding sexual history evidence poses no threat to defendants.

Another way out of this impasse would be to say that it all depends on the facts of the case. That tends to be a rather unsatisfactory way of answering questions about the relevance of categories of evidence. All evidential inference depends on generalisation,\textsuperscript{42} so generalised conclusions about categories of evidence must have some legitimacy. All the same, it is probably right that in some cases a complainant's sexual history may have particular probative value, and that in others it will have almost none.

To return now to the issue of myths, we can say this. If sexual history evidence is irrelevant, it is not because 'it is a myth that unchaste women are more likely to consent to intercourse'; it is in spite of its being true. To put the point another way, the general question about whether some women are more likely than others to consent to new sexual partners is not the most pertinent one to ask in the context of a rape trial. There, an allegation of rape has been made, and that changes things.

**Sexual history and similar facts**

A very significant trend in the regulation of sexual history evidence in common law jurisdictions has been the use of similar facts concepts to police the admissibility line. This is not surprising, for there are obvious parallels between the two areas. With similar facts, the law's aim is to rule when evidence of the defendant's previous misconduct can be adduced to prove his commission of the offence for which he is being tried. Evidence of previous misconduct is generally thought to be prejudicial. Many think that it is usually of low probative value. So the similar facts rule, in its various formulations, is intended to exclude evidence of a defendant's previous misconduct unless it has significant probative force in a particular case. The parallel with sexual history is clear: evidence of the complainant's past conduct is being adduced to show that she consented on a particular occasion. Such evidence may well be prejudicial, in that it might lead the jury to take a dim view of the complainant; it also invades her privacy. Many think it to have little probative value. Drawing this parallel, the Heilbron Committee proposed an inclusionary rule for sexual history evidence based on 'striking similarity',\textsuperscript{43} while Canadian rape shield legislation adopts an approach based on 'forbidden reasoning'.\textsuperscript{44} Some United States' jurisdictions allow sexual history evidence which establishes a 'pattern'.\textsuperscript{45} The YJCEA took the similar facts approach too. Section 41 lays down a general rule excluding sexual history evidence on the issue of consent, whether the sexual history is with the defendant or with third parties. There are exceptions to this general rule.\textsuperscript{46} The one of interest to us is found in s. 41(3)(c). This allows sexual history evidence to be introduced if:

\begin{quote}
... the sexual behaviour of the complainant to which the evidence ... relates is alleged to have been, in any respect, so similar--

(i) to any sexual behaviour of the complainant which ... took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which ... took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.\textsuperscript{47}
\end{quote}

The 'coincidence' test here is a similar facts concept. It echoes statements to be found in leading similar facts cases such as \textit{DPP v Kilbourne}\textsuperscript{48} and \textit{DPP v Boardman}.\textsuperscript{49} Although the coincidence test has never been
widely applied in England and Wales, it has proved quite popular in similar facts cases involving drug dealing and importation.\(^{50}\)

There are two reasons for drawing attention to the similar facts approach to sexual history evidence. The first is that similar facts is a notoriously complex area, and one in which there is a fair degree of contention about the core concepts. Right from the outset there must therefore be some doubts about the wisdom of using a similar facts test as a template for the admissibility of sexual history. A close analysis of s. 41(3)(c) and its interpretation in \(R v A\) will only confirm these misgivings. A second reason for dwelling on similar facts involves asking why particular similar facts concepts have proved popular. The leading English case on similar facts suggests that evidence of previous misconduct should be admitted when it is more probative than prejudicial.\(^{51}\) Before this decision, an admissibility test based on ‘positive probative value’ had some support.\(^{52}\) But the similar facts concepts--noted in the previous paragraph--which have been used to govern sexual history evidence are not ones which refer to probative value. They use proxies for probative value: patterns, similarities, non-coincidences. Why should this be? One possible answer leads back to the ‘myth’ myth. If you are convinced that unchaste women are no more likely than other women to consent to intercourse, then you will be loath to sign up to an admissibility test which refers to probative value, because it might suggest that sexual history generally does have probative value on the issue of consent. It would, in other words, undermine the ‘myth’ myth. Closely connected to this, if the admissibility test were in the simple terms of ‘admit if more probative than prejudicial’, it would make it clear that evidence probative of the defendant’s innocence was being excluded in order not to prejudice the jury, or to protect the complainant’s privacy. This sort of trade-off can probably be justified,\(^{53}\) but it is one which many are not comfortable with. The proxy tests conveniently disguise the fact that such a trade-off is being made.

Similar concerns no doubt explain why proxy tests have been so popular where the defendant’s previous misconduct is concerned. Lord Hailsham, for example, went to quite tortuous lengths in \(Boardman\) to deny the general relevance of bad character.\(^{54}\) Concepts such as forbidden reasoning and striking similarity enabled him to do this, while still recognising a point at which bad character became admissible.

Both of these reasons for drawing attention to the similar facts parallel are relevant as we proceed to consider \(R v A\). The coincidence test will be seen to be as difficult to apply--perhaps more so--as any other similar fact test. And the way in which the ‘myth’ myth and the coincidence test deny that sexual history evidence has probative value will turn out to be one reason for disagreement among the judges in \(R v A\).

**\(R v A\) and forbidden reasoning**

As we have seen, in \(R v A\) the House of Lords agreed that the statement ‘unchaste women are more likely to consent to intercourse’ is a pernicious myth. One thing the House did not agree on was whether relationship evidence is generally relevant to the issue of consent in a rape case. Lord Steyn clearly thought that the fact that ‘the complainant and the accused had sexual relations on several occasions in the previous month’ will be relevant.\(^{55}\) For him, as it was for the Court of Appeal,\(^{56}\) this was just a matter of common sense. Lord Hutton was likewise very troubled by the possibility that the YJCEA would exclude relationship evidence. In contrast, Lord Hope would not allow that the mere fact of a relationship was relevant. Why this disagreement?

Our earlier analysis of the relevance issues suggests one reason. Relationship evidence points in two directions: both towards rape and towards consent. Unless the issues are analysed carefully, and the context--a rape trial--borne in mind, it is easy to focus on one set of factors at the expense of the other. It is likely that the resulting subtlety of the relevance question has something to do with the difference between the judges. But a comparison of Lord Hope and Lord Hutton’s analysis reveals another reason for it. The disagreement is connected to the ‘myth’ myth and to similar facts concepts.

In the previous section it was observed that the Canadian courts have taken an approach to sexual history evidence which draws on the similar facts concept of ‘forbidden reasoning’. Where the previous misconduct of the accused is concerned, forbidden reasoning is reasoning which attributes to the defendant a propensity to commit crime. A difficulty with this approach to previous misconduct is that careful analysis shows that there are few uses of character evidence which do not in fact engage propensity reasoning.\(^{57}\) Although judges are often able to describe the use of character evidence in terms which avoid mentioning propensity,
such as when the evidence is said to rebut a defence, or prove identity, propensity will almost always be a crucial link in the inferential chain. One way round this problem—recently endorsed by the Canadian Supreme Court—is to refine the propensity interdiction so that it applies only to general propensity, not to specific propensity. Needless to say, the difference between the two is not easy to delineate.

It is this distinction between general and specific propensity, or at least its equivalent in sexual history, which lies at the heart of the disagreement between Lord Hope and Lord Hutton about the relevance of relationship evidence. With sexual history, forbidden reasoning is reasoning which involves the proposition that ‘unchaste women are more likely to consent to intercourse’. It is for this reason that Lord Hutton latches on to an influential point made by Harriet Galvin. Galvin argues that relationship evidence is relevant to consent, and that ‘its probative value rests on the nature of the complainant’s specific mindset towards the accused rather than on her general unchaste character’. What Galvin’s argument offers is a way of accepting the intuition that relationship evidence is relevant while at the same time rejecting the ‘myth’ that unchaste women have a particular propensity to consent to sex. As Lord Hutton put it, relationship evidence is relevant ‘not to advance the bare assertion that because she consented in the past she consented on the occasion in question, but for the reason given by Professor Galvin, which is that evidence of such a relationship will show the complainant’s specific mindset towards the defendant, namely her affection for him’. In contrast, Lord Hope argued that:

The respondent’s allegations [i.e. that relationship evidence is relevant] seem to me to invite the criticism that they are based on one of the two evils which lie at the heart of the mischief which the section seeks to address: the myth that simply because the complainant consented to sexual intercourse on previous occasions she was more likely to have consented to sexual intercourse on this occasion. ... In my opinion, the application fails on the ground that no similarity other than the bare fact of alleged previous consensual intercourse with the respondent has been demonstrated.

For Lord Hope, something more than the relationship was needed, some further similarity, though just what this might be he was not prepared to say.

It is no surprise to find this disagreement. Just as it is with bad character, the forbidden reasoning model is indeterminate when applied to sexual history. For Lord Hutton, an affection-based inference is permitted, but this provokes several questions. Just what is affection? Can there be sexual attraction without affection? If so, is an inference based on sexual attraction permitted? (Note that if it is, very little relationship evidence will be excluded.) And might third party sexual history get in through a ‘mindset’ argument akin to Galvin’s? We might imagine a defendant arguing that the complainant has a specific mindset towards witty and attractive men. For his part, Lord Hope took the view that the mindset argument is just another instance of forbidden reasoning. Certainly, if the reason for rejecting the unchaste ‘myth’ is that it treats women as non-autonomous, the affection argument seems equally tainted.

Whatever one’s views on these questions, one thing is obvious: the forbidden reasoning approach is as unsatisfactory a basis for the admissibility of sexual history evidence as it is for the similar fact rule. In either area, to base the law on forbidden reasoning is to invite conceptual confusion and doctrinal ambiguity.

**R v A and the meaning of s. 41(3)(c)**

It is slightly odd that it is the forbidden reasoning approach which underpins key parts of the arguments in *R v A*. This seems to ignore the wording of s. 41(3)(c) which, we saw, involves a coincidence test: sexual history evidence should only be admitted if its similarity to the complainant’s behaviour on the occasion in question cannot reasonably be explained as a coincidence. In fact, the sideling of the statutory language is not too surprising, because s. 41(3)(c) is very difficult to make sense of. Nevertheless, this is our next task.

The judgments in *R v A* do little to tell us what, in ordinary terms, s. 41(3)(c) might mean. Lord Steyn, for example, paid scant attention to the central concept in the section—coincidence. Instead, he suggested that the section might be interpreted in terms of other similar fact concepts, such as striking similarity or high probative force, but rejected this on broader policy grounds. Lord Clyde confronted the provision more directly: ‘the language seems to me to be looking for some characteristic or incident of the complainant’s sex-
ual behaviour which can reasonably be seen to have a significance beyond the fact that it is contemporaneous with the behaviour which on a reasonable view is not a mere matter of chance. This seems right, but it is too abstract to take us very far. Lord Hutton's analysis is more enlightening. He approached s. 41(3)(c) by way of an example:

A defendant wishes to give evidence that for a number of months prior to the date of the alleged offence he had had a close and affectionate relationship with the complainant and that he had had frequent consensual intercourse with her during that period. Before intercourse he would kiss her and she would return his kisses. At the time of the alleged offence, before having intercourse, affectionate behaviour took place between them. ... Is this evidence admissible under section 41(3)(c)? It can be argued that the similarity between the sexual behaviour of the woman on the earlier occasions and on the occasion in question cannot reasonably be explained as a coincidence: there is a causal connection which is that the woman was fond of the defendant and attracted to him and that is why intercourse has taken place on all occasions. ... I think there is an argument that such evidence would be admissible under section 41(3)(c). However, I consider that some weight must be given to the word 'so', which I think was intended to emphasise that mere similarity was not sufficient. Moreover having regard to ... the mischief at which the section was directed ... I do not think that Parliament intended that evidence such as that which I have described in the hypothetical case can be admitted. ... Therefore I would hold that such evidence is not admissible under the paragraph.

What is interesting about this is the recognition that the coincidence test is potentially very wide. Interpreted literally, it will let in any evidence of similarities for which there is a causal explanation. The causal explanation in Lord Hutton's scenario is the complainant's attitude towards the defendant; this explains why she should kiss him on two different occasions. It is principally purposive considerations which held Lord Hutton back from the conclusion that this is what the coincidence test means: admitting such evidence cannot be what Parliament intended. It should be noted here that, in Lord Hutton's scenario, even had the first occasion been one where the complainant had kissed and then slept with a man other than the defendant, the similarity of the kissing would be no coincidence. The causal explanation would be the complainant's similar attitude towards the two different men. So, on the initial, very literal, interpretation of the coincidence test, this evidence could be admitted. Rather than tightening up the admissibility criterion for sexual history evidence--as was Parliament's intention--it looks as though this section has actually loosened it. How can this be?

The explanation is not simple. Coincidence, randomness, design and related concepts are difficult ones to understand. We can start to bring the issues into focus by returning to Lord Clyde's paraphrase: something is not a coincidence if it is 'not a mere matter of chance'. Human behaviour, however, is rarely, if ever, a matter of chance. We do not often act randomly. So it will be extremely uncommon to find instances of a person's similar behaviour on two occasions which can be explained as coincidental in the sense of 'resulting from a chance process'. Nevertheless, there does seem to be a less strict, perhaps more intuitive, understanding of coincidence which makes some sense of the coincidence test. Suppose the complainant in a rape case alleges that she asked the defendant to walk her home, but he then forced his way into her house and raped her. The defendant's case is that she invited him in and consented to sex. There is evidence that on some previous occasion a man walked the complainant home, was invited in, and consensual sex took place. It certainly sounds quite natural to describe the similarity of the earlier instance as being coincidental, even though the behaviour is not random. Why is that?

Here is one way of explaining this intuitive understanding. When we describe something as a coincidence, that description should be understood as being relative to a particular factor. A series of examples is the best way to show this. I once sat down in a reserved seat on a train; the person sitting next to me turned out to be someone I had gone to school with. It is natural to describe that as a coincidence. Yet the event was to some extent predetermined: my seat was reserved, so it was no coincidence that I sat there; we were both travelling to Dover, so it was no coincidence that we were on the same train. To preserve the 'coincidence' account of this event, we have to specify that it was a coincidence relative to our having gone to the same school. There is no causal factor to explain why our having gone to school together should lead to our sitting next to each other on a train many years later. We can now turn to similar fact examples. The coincidence test works quite naturally in cases like R v Smith. Smith had three different wives who all drowned in the bath; he was convicted of murder. What would it mean to say that the deaths were coincidental? Smith had tried to suggest that one of the wives was an epileptic; let us suppose there was some evidence that they all were. There might then be a causal factor--epilepsy--to explain the deaths. Relative to this causal factor, the deaths would be no coincidence. Yet they would be coincidental relative to Smith; in that sense, it would be
possible to describe the deaths as being coincidental, despite the epilepsy connection. Of course, it is extremely difficult to accept that description of the events in Smith, and that is why we conclude that Smith was a murderer. The coincidence test does not, however, work so neatly in similar fact cases where the similarities have to be established through disputed testimony, but with careful specification we can still apply it. In DPP v P,$^{71}$ two of P’s daughters accused him of sexually abusing them. What would it mean to describe this as a coincidence? There is an obvious causal factor which might explain the similar stories, and this is what makes the coincidence test difficult to apply here. The daughters may be colluding against P. We could say that the similarity is coincidental relative to P, but that will not quite do. There might be something to do with P—say his being a cruel and domineering father—to explain why the daughters should want to collude in making a false allegation of sexual abuse against him. More carefully, we could say that the similarities are coincidental relative to P’s (lack of) sexual behaviour towards his daughters. If P was not sexually abusing them, the allegations would be coincidental relative to that aspect of his behaviour, whether or not the daughters had colluded.

The next step is to apply this sort of analysis to sexual history evidence. If we return to Lord Hutton’s scenario of a woman kissing a man she has previously kissed and then consented to, we can now appreciate why the coincidence test initially goes awry. It needs to be relativised to some fairly specific factor. Just relativising to the complainant will not do, because it will be easy to find a causal story involving her affection that would let in any amount of behaviour with the defendant (or indeed with other men). It seems that we need to relativise the coincidence to whether or not the complainant consented on the occasion in question. In this scenario, then, if the complainant did not consent, it would be a coincidence relative to that that she had kissed and then consented to the defendant before. And it is not too much of a stretch to interpret things this way; the sheer improbability of this account does not drive us to the conclusion that she did consent (contrast Smith). Compare this to a situation where a coincidence explanation is hard to swallow. Suppose that the defendant alleges that, during consensual sex, the complainant used a particular, very unusual word to refer to her genitalia. It can be proved that she has used that word before with other partners. If she had not consented, it would be a coincidence, relative to that, that the defendant should report the word. But, if it is accepted that the word is one very unlikely to be used during non-consensual sex, this coincidence account is difficult to accept. The similarity cannot reasonably be explained as a coincidence.

It is not easy to find examples, like the one just given, which satisfy this interpretation of the coincidence test.$^{72}$ Consider a scenario suggested during the passage of the YJCEA through Parliament.$^{73}$ A woman meets a man at a party, and invites him to her flat in order to re-enact the balcony scene from Romeo and Juliet. She then alleges that non-consensual sex ensued; he insists she consented. It turns out that she has played Romeo and Juliet with other men prior to consenting to sex with them (the defendant did not know about those previous episodes). This example is so bizarre that it is not easy to interpret, but it does seem that we can say that if the complainant did not consent, it is just a coincidence, relative to that, that she has consented to other men after acting out Shakespeare. The problem is that playing Romeo and Juliet is not so intimately connected to consenting to sex that it stretches things to suppose that the complainant did so but was then raped. (Things might be different had the invitation been to re-enact Last Tango in Paris.)

This analysis of the coincidence test leaves some issues open. In P, one explanation of the similarity is that the daughters colluded. In some sexual history scenarios, it may be plausible to suppose that something similar has happened. If the complainant denies that the similar behaviour occurred at the time of the alleged rape, then one possibility is that the defendant is making up aspects of his story but basing them on things he has heard about the complainant. He may have heard of her penchant for acting out Shakespeare, or know that she has used the intimate word with others. In cases where there has been a prior relationship, the defendant will have considerable knowledge of the complainant’s sexual behaviour and will therefore find it easy to blend authenticating details into his story.$^{74}$ How might the possibility of fabrication be factored in to the admissibility test? Pursuing the parallel with similar facts, it might be thought that, as a credibility issue, it should be left to the jury.$^{75}$ But this could leave a fairly large hole in the exclusionary scheme. By echoing details, heard from acquaintances or known from his own previous sexual encounters, of any unusual sexual behaviour on the part of the complainant, a defendant could secure the admissibility of sexual history. The alternative would be to demand that, just as coincidence should be excluded, so should fabrication. This would make the admissibility test tremendously strict, though perhaps this was the legislator’s intent. Effectively, sexual history would only be admissible if the sole reasonable explanation of the evidence was that the complainant did consent.
We have attempted to show why s. 41(3)(c) is so difficult to interpret. If this provision is construed literally, it will let in large amounts of sexual history evidence; this cannot have been the intention behind it. But once a literal interpretation is abandoned, it becomes very hard to give any determinate meaning to the section. The approach we have taken is perhaps not a very simple one; but it seems to be the only way of giving some sensible meaning to the words actually used by the legislator. In \( R \ v \ A \), of course, s. 41 was challenged on the grounds that it was too strict and thus deprived the defendant of a fair trial. It is therefore understandable that the House of Lords should look for ways of loosening s. 41(3)(c). But this is an unstable approach: once the requirement that the coincidence be relativised to the complainant's (non-) consent is loosened, the section lurches back to unrestricted admissibility. Thus Lord Hutton--the only one of the judges to link his Human Rights Act interpretation of the section to its actual wording--went on to reverse the conclusion that we saw him come to above:

Pursuant to the obligation imposed by section 3(1) [of the Human Rights Act 1998] ... I consider that section 41(3)(c) should be read as including evidence of ... previous behaviour by the complainant because the defendant claims that her sexual behaviour on other occasions was similar, and the similarity was not a coincidence because there was a causal connection which was her affection for, and feelings of attraction towards, the defendant.\(^76\)

But, as we have emphasised, if the requirement is just that the causal mechanism of affection be in play, there does not seem to be any way of keeping out third party sexual history. None of the judges in \( R \ v \ A \) would appear to approve of this outcome.

\section*{Enter the Human Rights Act}

Although it is slightly tangential to our concerns, now that we have done the hard work of getting to grips with s. 41(3)(c), it is worth briefly considering the Human Rights Act issues raised in \( R \ v \ A \). We have already touched on Lord Hutton's approach. It is not, however, easy to know just how to read his interpretation of s. 41(3)(c). We might think of it as stressing the actual wording of the section, and fastening on the literal, very permissive reading. It seems, however, that Lord Hutton would not accept the implications of this (the admissibility of third party sexual history), so it may be better to understand his interpretation as only letting in relationship evidence. But if that is the case, it is a very strained construal of this provision. It is like reading into it the words 'admit relationship evidence'. That is not what Parliament said.

The radicalism of Lord Hutton’s interpretation is as nothing compared to Lord Steyn’s. Like Lord Hutton, he was troubled by the exclusion of relationship evidence; like him, too, he considered ordinary methods of interpretation unsatisfactory. Section 41, he concluded, ‘amounts to legislative overkill’.\(^77\) He then turned to the obligations imposed by the ‘emphatic adjuration’\(^78\) in s. 3 of the Human Rights Act. \(^79\) ‘It will’, he concluded, ‘sometimes be necessary to adopt an interpretation which linguistically may appear strained.’\(^80\) His solution to the admissibility problem was therefore to read words into the statute. Presuming that Parliament did not intend to violate Article 6, s. 41(3)(c) should be read ‘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’.\(^81\) Lord Steyn gave a summary of this position to which the whole House--with varying degrees of enthusiasm\(^82\)--was prepared to assent:

\begin{quote}
The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretive obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded.\(^83\)
\end{quote}

The effect is to read Article 6 of the European Convention into the wording of s. 41.

It is tempting to regard this aspect of the decision as indicating the extent of the constitutional shift effected by the Human Rights Act.\(^84\) No longer does legislation have determinate meaning; it is always subject to
radical judicial revision. No more is Parliament sovereign; instead, the judges are. An implication of our analysis, however, is that commentators should be cautious about using *R v A* as ammunition in the well-worn debates about the effect of the Human Rights Act.  

Section 41 is simply too exceptional to provide a representative illustration of post-Human Rights Act judicial practice. We have established 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. It is then not too surprising that, faced with this deeply obscure provision, the House of Lords should throw up its hands and simply read Article 6 into whatever s. 41 might mean.

**Conclusion**

The primary message of this article is not a happy one. 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. Things got off to a bad start with s. 41(3)(c). Although it is not difficult to see roughly what Parliament intended when it enacted this provision—it wanted to make the admission of sexual history evidence to prove consent exceptional—the coincidence test which it used to achieve this was an extremely unfortunate choice. The test works tolerably well in some similar fact cases (ones like *Smith*), but not when applied to sexual history. Even when a workable reading of the section, involving the relativisation of the coincidence to the issue of consent, is hit upon, the section leaves unanswered an important question about how it is to be applied: whether non-coincidences arising from the defendant's possible fabrication of similarities should count against admissibility. Quite what the House of Lords has now achieved with this section in *R v A* it is difficult to say: the judgments do not speak with a single voice. But the unanimous rejection of the unchaste 'myth' implies that one similar fact concept has now been replaced by another. Forbidden reasoning has supplanted coincidence as the touchstone of admissibility. That hardly improves things. Quite apart from the fact that it founds the law on a falsehood—what we have referred to as the 'myth' myth—this approach provides few clear answers to admissibility questions. The disagreement between Lord Hope and Lord Hutton over the status of relationship evidence makes that plain. Similar facts concepts are bad enough when confined to similar facts; we do not need them running amok in sexual history.

It is probably too much to hope that the law can now be set on a new course, where a realistic assessment of probative value replaces politically correct sloganeering. In any case, our analysis of the relevance issue suggests that there are no easy answers to the admissibility question. So this route would not offer an end to controversy. But it would allow us to focus on the real question: even if sexual history evidence is probative (and it is not clear that it often is, even where a relationship is involved), should it nevertheless be excluded because prejudicial? Difficult though that may be to answer, it is the question we need to address if we are ever to find a just solution to this perennial problem of evidence law.

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3 [2002] 1 AC 45 at [27] (Lord Steyn); see also at [3] (Lord Slynn), at [76] (Lord Hope), at [124] (Lord Clyde), at [147] (Lord Hutton). The proposition was adopted from the decision of the Canadian Supreme Court in *R v Seaboyer* (1991) 83 DLR (4th) 193.

4 See, e.g., the comments of Paul Boateng, Standing Committee E, 24 June 1999, and of Lord Williams, HL Debs, 8 February 1999, cols 58-59.
5 The YJCEA provisions apply to any sexual offence, not just rape. Throughout this article, the provisions are discussed in terms of rape only. This is intended to simplify the discussion. The same principles should apply, *mutatis mutandis*, to other sexual offences where consent is in issue. Male rape, however, is a more complex issue. Although the framework developed here is relevant to an analysis of the use of sexual history in cases involving male complainants, the conclusions might be rather different.


7 A. McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 OJLS 275 at 285-6 (footnotes omitted). A complication is that McColgan favours interpreting relevance in terms of legal relevance. However, the context in which the above passage appears suggests that it is intended as an analysis in terms of logical relevance.


9 Johnson *et al*., above n. 8 at 97, 115. McColgan gives the latter figure as 2.1 per cent—presumably a typo. For the age range 16-24, the figures are 79 per cent and 0.8 per cent. If we substitute 'steady relationship or engaged' for 'married' to describe the relationship with first partner, however, the figures are 70 per cent (aged 25-34) and 65 per cent (aged 16-24).

10 In more technical terms, the likelihood ratio P(E|G)/P(E|I) is 1/0.93 for the blood evidence. In the sexual history example, P(E|consent)/P(E|non-consent) is the same: 1/0.93. Because the numerator is larger than the denominator, the evidence is relevant, increasing the prior probability of guilt/consent by 1.08. In these terms, McColgan's assumption appears to be that the evidence is only relevant if the likelihood ratio at least doubles the prior probability. For more on likelihood ratios, see, e.g., R. D. Friedman, *The Elements of Evidence*, 2nd edn (West Group: St Paul, MN, 1998) 42-65. It should be pointed out, however, that the blood example is slightly different from the rape one, because jurors presumably have no default category for the defendant's blood type. See the discussion of juror cognition, below.

11 On the prejudice caused by sexual history evidence, see McColgan, above n. 7 at 278, 286-7.

12 (1989) 89 Cr App R 97 at 101. In that case, as Temkin notes, the Court of Appeal's definition of promiscuity was rather broad: there was evidence that the complainant had had 'a casual sex relationship' with her boyfriend, a child by another man six months earlier, and after the rape was found to be suffering from venereal disease. See J. Temkin, 'Sexual History Evidence--The Ravishment of Section 2' [1993] Crim LR 3 at 6.


14 Johnson *et al*., above n. 8 at 115. For those aged 16-24, the figures are 62 per cent, 54 per cent and 84 per cent.

15 Ibid. at 130-3.

16 Ibid. at 239-41. This was the lowest figure for any age range; 16-24-year-olds were marginally more censorious (see also Copas, above n. 8 at 29). Data from the United States do give some figures for 'one-time partners'. See E. O. Laumann, J. H. Gagnon, R. T. Michael and S. Michaels, *The Social Organization of Sexuality: Sexual Practices in the United States* (University of Chicago Press: Chicago, IL, 1994) 183. Seven per cent of the sample reported a one-time sex partner.


18 For a critical review of one study, see R. Lewontin, 'Sex, Lies, and Social Science' in *It Ain't Necessarily So: The Dream of the Human Genome and Other Illusions* (Granta: London, 2000). See also D. Wight and P. West, 'Poor Recall, Misunder-

19 Note, though, that sexual behaviour changes over time. It will only be recent sexual history which has much claim to relevance.


21 C. Boyle and M. MacCrimmon, ‘The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered’ (1998) 41 Crim LQ 198 at 223. The point is elaborated at 230-3, where the authors contrast the decision to consent with criminal behaviour, which they do regard as dispositional. It is very difficult to understand the reasons for this distinction. Women's autonomy was also a point of reference in R v A: [2002] 1 AC 45 at [27], [124].


23 Although it may not sound very nice to say that people are bundles of dispositions, that does seem to be a reasonable interpretation of our concept of personality. Personalities may be incredibly complex bundles of interacting dispositions, but it is not easy to see what they are in addition to this. If this is thought to be problematic because it denies free will, some argument against compatibilism—the view that causal accounts of behaviour are compatible with free will—is needed. For an account which finds space for free will by rejecting determinism, but nevertheless allows that human behaviour is patterned, see J. Dupré, Human Nature and the Limits of Science (Oxford University Press: Oxford, 2001) ch. 7.

24 Thinking in terms of a likelihood ratio (see above n. 10) is a useful way of seeing this. The denominator is P(E|non-consent), which reminds us to look for factors making the evidence—sexual history—more likely to occur if the woman was a victim of rape, because this will reduce the probative value of the evidence. In the next subsection, we turn our attention to P(E|consent), and note factors which diminish the numerator.


26 [1992] Crim LR 301. The complainant was of no fixed abode, which perhaps made her particularly vulnerable to rape, as well as to having a particular sexual history. One of the pieces of sexual history evidence concerned an incident in which she had gone home with a man and slept with him after being caught out with nowhere to stay.

27 Ibid. at 302.

28 See D. P. Bryden and R. C. Park, ‘“Other Crimes” Evidence in Sex Offense Cases’ (1994) 78 Minn L Rev 529 at 570.


30 For some steps in this direction, see R. C. Park, ‘Sexual Assault and the Rule Against Character Reasoning’ in J. F. Nijboer and J. M. Reijntjes (eds), Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence (Koninklijke Vermande: Lelystad, 1997) at 333.


33 There is some evidence suggesting that it might. Research on character evidence has found that when jurors are told that a defendant has a previous conviction for a crime different than the one now charged, they rate guilt as less probable than those who are given no information about previous convictions. See S. Lloyd-Bostock, ‘The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study’ [2000] Crim LR 734. The category 'burglar' is possibly making
jurors resistant to interpretations of the evidence consistent with 'violent man'. Other studies have found that character evidence affects the interpretation of non-character evidence against defendants: see V. P. Hans and A. N. Doob, 'Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries' (1975) 18 Crim LQ 235 at 246.

34 For a review of the issues, see N. Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 Cambrian L Rev 27.

35 [2002] 1 AC 45 at [152].


37 See A. Myhill and J. Allen, Rape and Sexual Assault of Women: the Extent and Nature of the Problem, Findings from the British Crime Survey, HORS 237 (2002) at 30; 45 per cent of rapes reported to the survey were committed by partners. See also Kelly, above n. 36; D. E. H. Russell, Rape in Marriage, rev'd edn (Indiana University Press: Bloomington, IN, 1990) ch. 5.

38 See also Kelly, above n. 36 at 22. Kelly refers to research suggesting that false accusations 'are invariably accusations of assaults by unidentified strangers'.

39 See, e.g., J. Spencer, 'Rape Shields and the Right to a Fair Trial' (2001) 60 CLJ 452; Birch, above n. 2. Birch puts considerable weight on an argument that relationship evidence functions as 'explanatory' or 'background' evidence, a description which appeals to something other than probative value (at 540-3). The idea that character evidence sometimes has a particular explanatory role is also endorsed by the Law Commission, in Evidence of Bad Character in Criminal Proceedings, Law Com No. 273 (2001) 129-33. Most examples of explanatory value, however, when carefully analysed are simply cases of probative value; see, e.g., the Law Commission's examples at 132 and R v M and Others [2000] 1 All ER 148. It does not seem, then, that this notion adds anything to our discussion in terms of probative value.


41 See n. 11 above. Our discussion does underline a new way in which sexual history evidence is prejudicial: jurors--like most commentators--are unlikely to realise that sexual history evidence is probative both of consent and non-consent. If they think simply that it is evidence of consent, then this is a form of reasoning prejudice.


44 See Criminal Code, s. 276(1); 'evidence that the complainant has engaged in sexual activity ... is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief'. Also its interpretation in R v Darrach [2000] 2 SCR 443 esp. at [2], [35].


46 Sexual history evidence may be admitted to rebut evidence adduced by the prosecution (s. 41(5)), or if it relates to behaviour 'at or about the same time' as the alleged rape (s. 41(3)(b)). Under this latter provision, there is a further hurdle: leave to cross-examine may only be given if a refusal might render the jury's verdict unsafe. See R v Mokrecovas [2002] 1 Cr App R 226.

47 As with s. 41(3)(b) (see previous note), leave to cross-examine may only be given if a refusal might render the jury's verdict unsafe. However, once the evidence has cleared the hurdle in s. 41(3)(c), it is unlikely that this remaining barrier will be difficult to surmount.
[1973] AC 729 at 758, *per* Lord Simon (‘something which would cause common sense to revolt at a hypothesis of mere coincidence’).

[1975] AC 421 at 462, *per* Lord Salmon (‘the similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence’). See also at 444, 452.

See, e.g., *R v Willis* (1979) unreported, quoted in *R v Peters* [1995] 2 Cr App R 77 at 81; *R v Groves* [1998] Crim LR 200. There are good reasons for the unpopularity of the coincidence test: as we will see, it works poorly in many situations. Notwithstanding this, coincidence has come to play a wider role in other jurisdictions. For example, in Canada, the unlikelihood of coincidence is said to be what gives similar fact evidence its probative force: see *R v Arp* [1998] 3 SCR 339; *R v Handy* [2002] SCC 56. However, the admissibility threshold is then explicated without reference to coincidence.

*DPP v P* [1991] 2 AC 447.


This issue needs further analysis than can be given to it here. But an argument justifying the trade-off might proceed along the following lines: suppose a defendant demands that, at great pain to the victim of the shooting with which he is charged, a bullet be removed from her leg in order to see whether it matches his gun. Intuitively, it seems that the defendant could still receive a fair trial, even if access to the bullet were denied him, just as he could still receive a fair trial if his key witness dropped dead before giving evidence. For discussion of this sort of issue under the European Convention on Human Rights, see *Oyston v United Kingdom* [2002] Crim LR 497.


[2002] 1 AC 45 at [105]. See also his analysis at [30-33].


See Lempert, Gross and Liebman, above n. 58.


Ibid. at [86].

This is not necessarily a ground for criticism. Lord Hope argued that the evidential background to the appeal had not been sufficiently developed to allow him to answer such questions.

On the autonomy point, see above n. 23. Predictably, a debate similar to that between Lord Hope and Lord Hutton has been played out in the Canadian literature on sexual history. See Boyle and MacCrimmon, above n. 21; D. M. Paciocco, ‘The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge’ (1993) 21 CR (4th) 224; H. Schwartz, ‘Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection’ (1994) 31 CR (4th) 232; D. M. Paciocco, ‘Tech-
niques for Eviscerating the Concept of Relevance: A Reply and Rejoinder to "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1995) 33 CR (4th) 365. See also Birch, above n. 2 at 539-40.

The provision has been described as 'perplexing' and 'obscure': see J. McEwan, 'The Rape Shield Askew' (2001) 5 E & P 257 at 260; Birch, above n. 2 at 548. Further evidence of its difficulty is that, in R v A, Lord Clyde and Lord Hutton both opined that the coincidence test was less stringent than the criterion of striking similarity ([2002] 1 AC 45 at [133] and [158]). Yet the legislative history is that the coincidence test replaced an earlier one, based on striking similarity, for the very reason that the former was thought more stringent. See the comments of Paul Boateng in HC Standing Committee E, 24 June 1999.

[2002] 1 AC 45 at [43].

Ibid. at [135].

Ibid. at [159]. Our analysis of s. 41(3)(c) will place no emphasis on the word 'so'. This is because the dominant phrase appears to be 'cannot reasonably be explained as a coincidence'; 'so' adds nothing to this. The relevant words could be rewritten 'is similar, and the similarity cannot reasonably be explained as a coincidence', thus removing 'so' without loss of meaning.


(1915) 11 Cr App R 229.


Lord Steyn ([2002] 1 AC 45 at [42]) suggested one, a variation on a well-worn example from the rape literature. The defendant claims that the complainant tried to extract money from him after consensual sex by threatening to allege rape, and it turns out that she had done this before. This example, however, seems to be borderline: it might reasonably be supposed a coincidence, relative to the complainant's non-consent, that the defendant should make this (none too inventive) allegation when it has happened before.

The example was given by Baroness Mallalieu, HL Debs, 8 February 1999, col. 45. It was in response to this scenario that s. 41(3)(c) was included in the legislation.

It is also worth noting the problems fabrication causes with respect to a literal interpretation of the coincidence test. If the defendant has made up his story, his choice of authenticating detail will be no coincidence: it will be deliberately chosen to sound plausible. Again, relativising the coincidence to the complainant's (non-) consent appears to be the only way to avoid this problem.

See R v H [1995] 2 AC 596.

[2002] 1 AC 45 at [163].

Ibid. at [43].

Ibid. at [44].

Section 3(1) reads: 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'
82 Lord Hope’s agreement with this passage is carefully hedged. He found it ‘difficult to accept that it was permissible’ to construe s. 41(3)(c) as Lord Steyn did, and stated that the trial judge should construe it in this manner only ‘so far as it is possible to do so’. Ibid. at [108-110].

83 Ibid. at [46].
