SWEET & MAXWELL

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Archbold Review

Cases in Brief

Air navigation offences—acting in a disruptive manner while in an aircraft—mens rea

ASLAM [2017] EWCA Crim 717; May 17, 2017

Where Air Navigation Order 2009 Art.142 (with Art.241(7) and Part C of Sch.13) made it an offence to "intentionally interfere with the performance by a member of the crew of the aircraft of the crew member's duties", the ordinary and natural meaning of the language used was that it was the interference, not merely whatever act or omission has the effect of causing an interference, which had to be intentional. This construction followed from the language of the provision itself as well as from the general presumption against strict liability offences. A close analogy was provided by *Wilmott v Atack* [1977] QB 498, in which "wilfully obstructs a constable" (Police Act 1964 s.51(3)) was found to require an intention to obstruct, not merely an intent to commit an act which had the effect of obstructing, "wilful obstruction of X in the execution of his duties" being simply an archaic way of expressing the same as "intentional interference with X's performance of his duties".

Assaulting a police officer in the execution of duty—arrest for breach of injunction—belief of officer in lawful basis sufficient

AHMED v CPS [2017] EWHC 1272; May 4, 2017

Where A assaulted an officer, she was acting in the execution of her duty when she purported to arrest him for breaching an invalid injunction to which a power of arrest had (purportedly) been attached (the injunction was granted under the repealed Housing Act 1996, ss.153A(3) and 155, not the similar provisions in force under the Anti-social Behaviour, Crime and Policing Act 2014 ss.1 and 4). A police officer who (a) genuinely and reasonably believed that he or she was authorised by a court order to arrest a person for breach of an injunction and (b) genuinely and reasonably believed that the person in question was in breach of the injunction would be acting in the course of duty if he or she decided to arrest the person. Were it otherwise, officers would be placed in difficulties – an officer was not to be expected to check on the validity of an order before acting on it. It would be unfortunate if the mere fact that a court order had been issued without jurisdiction inevitably led to the conclusion that an officer acting upon it was acting outside the scope of his or her duties. The court derived support for this approach from *McCann v. CPS* [2015] EWHC 2461 (Admin), [2016] 1 Cr.App.R 6.

Homicide—gross negligence manslaughter—reasonable foreseeability of serious and obvious risk of death—nature of test—whether assessment required taking into account knowledge that would have been available had duty of care not been breached

ROSE [2017] EWCA Crim 1168; July 31, 2017

In the trial of R, an optometrist, the question arose whether in assessing reasonable foreseeability of a serious and obvious risk of death in cases of gross negligence manslaughter, it was appropriate to take into account what a reasonable person in the position of the defendant would have known but for his or her breach of duty. R was under a statutory duty of care to a patient (Sight Testing (Examination and Prescription) (No. 2) Regulations 1989), and the evidence was that, had she failed to conduct a proper investigation of the inner eye of the patient, it would have been a serious breach of that duty. Such an examination would have led a competent optometrist to see symptoms which would have resulted in a medical referral, which would have prevented the patient's death. Her appeal was allowed.

(1) The offence of gross negligence manslaughter required breach of an existing duty of care which it was reasonably

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foreseeable gave rise to a serious and obvious risk of death and did, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to go beyond the requirement of compensation but to amount to a criminal act or omission. There were, therefore, five elements which the prosecution must prove: (a) duty of care; (b) negligent breach of duty of care; (c) reasonable foreseeability that the breach gave rise to a serious and obvious risk of death; (d) causation of death by the breach; and (e) the severity of the circumstances of the breach (so bad as to be criminal).

(2) The question of whether there was a serious and obvious risk of death must exist at, and was to be assessed with respect to, knowledge at the time of the breach of duty. A recognisable risk of something serious was not the same as a recognisable risk of death. A mere possibility that an assessment might reveal something life-threatening was not the same as an obvious risk of death: an obvious risk was a present risk which was clear and unambiguous, not one which might become apparent on further investigation.

(3) None of the authorities suggested that, in assessing either the foreseeability of risk or the grossness of the conduct in question, the court was entitled to take into account information which would have been available to the defendant had he or she not breached the duty in question. The test was objective and prospective. The inherently objective nature of the test of reasonable foreseeability did not turn it from a prospective into a retrospective test. The judge in R's case erred by, in effect, applying a retrospective test.

(4) Thus in assessing reasonable foreseeability of serious and obvious risk of death in cases of gross negligence manslaughter, it was not appropriate to take into account what the defendant would have known but for his or her breach of duty. Were the answer otherwise, it would fundamentally undermine the established legal test of foreseeability in gross negligence manslaughter which required proof of a serious and obvious risk of death at the time of breach. The implications for medical and other professions would be serious because people would be guilty of gross negligence manslaughter by reason of negligent omissions to carry out routine eye, blood and other tests which in fact would have revealed fatal conditions notwithstanding that the circumstances were such that it was not reasonably foreseeable that failure to carry out such tests would carry an obvious and serious risk of death.

(5) The court reviewed and considered the following authorities: *Adomako* [1995] 1 AC 171; *Singh (Gurphal)* [1999] Crim L.R. 582; *A-G's Reference (No. 2 of 1999)* [2000] 2 Cr.App.R 207; *Lewin v. Crown Prosecution Service* [2002] EWHC 1049; *Alan James Mark Nationwide Heating Services Ltd* [2004] EWCA Crim 2490; *Misra and Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr.App.R 21; *Rudling* [2016] EWCA Crim 741, [2016] 7 *Archbold Review* 1; and *Sellu* [2016] EWCA Crim 1716, [2017] 1 Cr.App.R. 24.

Public order—Public Order Act 1986 s.5—private garden—whether "dwelling"—Public Order Act 1986 s.8—whether "structure" or "part of structure"—whether "occupied as a person's home or as other living accommodation"

DPP v DISTILL [2017] EWHC 2244 (Admin); 8 September 2017

A private garden was, generally, not part of a "dwelling" for the purposes of Public Order Act 1986 s.5(2) (offence "may be committed in a public or private place" except where words etc used "inside a dwelling", and the other is in that or another dwelling), and accordingly the offence in s.5(1) was capable of being committed where words were spoken in one private garden directed at a person in an adjoining private garden. The court must concentrate on the particular statutory context, rather than be informed by the use of "dwelling" or similar terms in other statutory contexts (e.g. Housing Act 1985 s.623(2) or Housing Act 1995 s.63(1)). The s.5 offence could be committed in a "private place", and the "dwelling" exception to that was narrowly drawn. The definition of "dwelling" in s.8 ("any structure or part of a structure occupied as a person's home or as other living accommodation…") also excluded "any part" of a structure "not so occupied" and extended the meaning of structure to "tent, caravan, vehicle or vessel". The question was whether a domestic garden could truly be regarded as a "structure" or "part of a structure". The OED definition of "structure" as "[that] which is built or constructed … A building or edifice of any kind" was appropriate. It was possible to envisage cases where a roof garden or winter garden or some other form of garden contained within a residential building would be, as a matter of fact, an integral part of that building, but the garden to the front or rear of a suburban detached, semi-detached or terraced house could not normally be so described (albeit it could *contain* a structure, such as a greenhouse or summer house). Although the means of enclosure of a garden (e.g. a wall) may be a structure, that did not render the garden itself a structure. Further, even if a garden could properly regarded as a "structure" or "part of a structure", it would not normally be regarded as one that was being "occupied as a person's home or as other living accommodation". The court considered *Edwards and Roberts* (1978) 67 Cr.App.R. 228; *Francis* [2006] EWCA Crim 3323, [2007] 1 Cr.App.R. 36; *Hudson v CPS* [2017] EWHC 841 (Admin), [2017] 4 W.L.R. 108; *Atkin v DPP* (1989) 89 Cr.App.R. 199; *Rukwira v DPP* (1994) 158 J.P. 65; and *Le Vine v DPP* [2010] EWHC 1128 (Admin), (2010) 174 J.P. 337.

Trade mark offences—Trade Marks Act 1994 s.92(1)—construction of offences—application to "grey market" goods

M, C and T [2017] UKSC 58; August 3, 2017

(1) A company and two managers were charged with offences under the Trade Marks Act 1994 s.92(1) ("A person commits an offence who … without the consent of the trade mark proprietor – (a) applies to goods or packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or (c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b)." The appellants contended that the offences in (b) and (c) could not be made out where the goods were "grey market" goods – that is, where the trade mark had been applied with the permission of the proprietor, but the proprietor had not consented to their sale (e.g. because too many of the goods had been manufactured), because "such

a sign" in (b) referred back to (a), with the effect that (b) applied only to goods where the relevant sign (i.e. trade mark) had been applied without the consent of the proprietor. In respect of grey market goods, it was only the sale, not the application that was without the consent of the proprietor. This construction involved reading "such a sign" as incorporating the words "without the consent of the proprietor" which appear in the first few lines of the section *before* (a), and also the requirement, in (a), that the sign has been applied to the goods (without such consent). This was simply not a possible construction of s.92(1). While there was no difficulty, on the ordinary reading of paragraphs (a) and (b), in seeing what the reference back to "such a sign" in (b) imports from (a), "such a sign" in (b) plainly meant a sign such as was described in (a), that is, a sign which was "identical to, or likely to be mistaken for, a registered trade mark". The offences set out in paragraphs (a), (b) and (c) were, as a matter of plain reading, not cumulative, but separate.

(2) Rejecting "consequentialist" (and unnecessary) arguments by the Crown, Lord Hughes noted, *obiter*, that it was doubtful that (absurdities or impossibilities apart) difficulties in assembling evidence could ordinarily affect the construction of a criminal statute.

Trial—late introduction of alternative basis of prosecution case

ACHEAMPONG [2017] EWCA Crim 1289; 16 August 2017

A was charged with two counts of doing an act tending to pervert the course of justice, on the basis of the false completion of Notices of Intending Prosecution forms relating to two speeding offences. His defence, disclosed in the defence statement, was that he was out of the country at the time all, or most, of the forms had been filled in. It appeared that the trial proceeded on the basis that all the forms had been signed in the same hand, although there had been no expert evidence. On the day of trial, confirmation was received from the Border Agency that A had been out of the country as he claimed. It became apparent to defence counsel during Crown counsel's concluding submissions that the case, for the first time, was being put additionally on the alternative basis that A had organised others to fill in the forms in his absence. A's appeal was allowed. The case had proceeded in a way generously described as unfortunate. It was disappointing that defence counsel had not been put on notice of the alternative basis for the prosecution's case. It was an insufficient answer to rejoin that she knew how the case had been put, she knew her lay client was out of the jurisdiction and must have understood what was coming: it was not her job to assist the Crown by intuiting what was about to be said and thus to assist it in proving its case. There was force in the submission that in meeting the original basis, counsel had damaged A's case in relation to the new basis. Had counsel been properly informed, she could have invited the recorder to preclude the alternative basis in a submission that would have been likely to have succeeded.

SENTENCING CASE

Drug Dealing; Sentencing Guidelines

AJAYI; LIMBY [2017] EWCA Crim 1011 (13 July, 2017)

The court gave guidance on how the practice known as "cuckooing" should be addressed by judges in their application of the drug supply sentencing guideline. Cuckooing involves retail drug dealers from large metropolitan centres travelling to a smaller provincial community to sell drugs and establishing local premises from which they will operate (the practice is explained further in para [2] of the judgment).

The court stated that those organising such an operation from the metropolitan centre appear to fall clearly within a leading role in the drug supply guideline. It may be that a person who operates as a local manager or enforcer of a drug supply operation of this sort will also fall within a leading role. Judges must also consider factors consistent with a leading role such as expectation of substantial financial gain, substantial links to, and influence on, others in the chain, and directing or organising buying and selling on a commercial scale.

Those who do not fall within a leading role, but who are involved in the process of cuckooing will ordinarily fall into a significant role. Where others are involved in the operation by pressure, influence, intimidation or reward, that should be given particular weight in the assessment of culpability and in determining whether a move upward from the starting point is appropriate. Cuckooing operations carry the hallmarks of professional crime above and beyond that in ordinary street dealing, and judges should pay particularly close attention to the assessment of role and the offender's place within a category range. Equally, those who work within such an operation and seek to have a lesser role ascribed to them should expect those claims to be examined with care.

Traditional forms of local street dealing should continue to be recognised as a pernicious crime, but the added sophistication of cuckooing operations reflects a further degree of criminality, which judges should recognise and reflect in a particularly careful examination of the three roles by which culpability in drug supply offending is assessed.

If the offence clearly establishes a cuckooing operation, the court should reflect that, where appropriate, in the assessment of role or by treating it as an aggravating feature at step 2 of the guideline. It may also operate so to mitigate the position of a vulnerable recruit who has been exploited. The court should be alive to the dangers of double counting and the sentence should remain just and proportionate. Considerations of prevalence in a locality will only arise if the conditions identified in *Bondzie* [2016] EWCA Crim 552, are established.[1]

1 The report of *Kitchener* [2017] EWCA Crim 937 in Issue 7 incorrectly stated that the applicant had been sentenced to 14 years and eight months' imprisonment. He had been sentenced to four years and eight months' imprisonment.

Features

Bringing the Background to the Fore in Sexual History Evidence

By Findlay Stark[1]

The Court of Appeal's decision in *Evans*[2] has renewed interest in s.41 of the Youth Justice and Criminal Evidence Act 1999.[3] This provision allows leave to be given for the defence to adduce evidence of, or cross-examine any witness about,[4] "sexual behaviour or other sexual experience, whether or not involving any accused or other person" (hereinafter, "sexual history evidence") relating to the complainant in a sexual offences case.[5]

One proposal for reform, introduced by Harriet Harman MP into the Prison and Courts Bill before the dissolution of the previous Parliament, would have removed the possibility of leave: s.41 would have become an absolute bar on the admissibility of evidence of the complainant's sexual history.[6] This proposal, which may conceivably reappear, was presumably premised either on the basis that the House of Lords' decision in *A (No 2)*[7] (which held that s.41, if applied literally/narrowly, was incompatible with Art.6) was wrong, or was intended to legislate in violation of the right to a fair trial. There is no need to go that far, but *Evans* indicates (once again) that s.41's wording and structure is unhelpful, particularly following the decision in *A (No 2)*. Reform would be useful, and a suggested starting point would be to refocus attention on the oft-neglected s.41(2)(b) of the Act, which has the potential to strike an appropriate balance between the competing interests at stake.

Evans: facts

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

The allegation was that E and M had raped X who, due to her intoxication, lacked the capacity to consent.[8] Crucially, X could not remember what had happened.

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

M was acquitted, and E convicted. E's second appeal against conviction[9] arose from a reference from the Criminal Cases Review Commission that concerned evidence from O and H.[10] O claimed to have gone home with X on three previous occasions, but no sexual intercourse had taken place. X could not, however, remember that the morning after. This surprised O, who did not think that X had been that drunk. On the fourth occasion O met X, they had sex. This was approximately two weeks after the alleged rape. X adopted the "doggie" position and said things similar to "fuck me harder". H's evidence was that he had communicated with X via social media and text messages, before meeting her and going back to H's home. No sexual intercourse took place. The next day, X returned to H's home and they had sexual intercourse. The two had sex on a casual basis five or six times thereafter, often after X had been drinking. H corroborated O's account of X instigating sexual activity whilst heavily intoxicated, including in the "doggie" position whilst saying "go harder".

The primary question for the court was whether this evidence could properly have been admitted under s.41.[11]

Relevance

The starting point, as s.41(3) notes, is logical relevance: does a specific piece of sexual history evidence increase or decrease the probability of the existence of a disputed fact in proceedings? Two points should be made before proceeding. First, logical relevance does not exist in a vacuum – it depends on other evidence in a case, and how a case is argued – and this makes general claims about relevance and irrelevance (although common in this area) of dubious value.[12] Secondly, "the word 'relevant', particularly in this context, is socially constructed, with a nebulous and shifting definition, rather than being an objective, analytically derived creation of pure logic".[13] The best that can be said, then, is that decisions about relevance and sexual history evidence are genuinely very difficult, even within the factual framework of a concrete case.[14]

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

Relevance and reasonable beliefs in consent

Could O and H's evidence raise a reasonable doubt over E's lacking a reasonable belief in X's consent? The CCRC

1 University Lecturer in Law, University of Cambridge. Thanks to the editor, James Chalmers, Nicky Padfield and HHJ Peter Rook QC for helpful comments on earlier drafts.
2 [2016] EWCA Crim 452, [2016] 4 W.L.R. 169.
3 For another analysis of this issue, see N. Dent and S. Paul, "In Defence of Section 41" [2017] Crim. L.R. 613.
4 Admitting evidence will be focused on, but the points made below should be read so as to apply equally to the asking of questions in cross-examination.
5 Behaviour that is part of the alleged offence is excluded: YJCEA 1999, s.42(1)(c). The list of sexual offences is set out in s.62.
6 https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0145/amend/prisons_rm_pbc_0323.1-2.html. A different proposal, by Liz Saville-Roberts MP, is discussed briefly in Dent and Paul, supra, 626.
7 [2002] 1 A.C. 45.
8 As required by the Sexual Offences Act 2003, s.74.
9 E's first appeal is reported as *Evans* [2012] EWCA Crim 2559.
10 O's mother's evidence corroborated parts of his account.
11 With a view to establishing whether the conviction was unsafe based on fresh evidence – Criminal Appeal Act 1968, s.23.
12 P. Roberts and A. Zuckerman, *Criminal Evidence*, 2nd edn. (2010), 446.
13 P. Duff, "The Scottish 'Rape Shield': As good as it gets?" (2011) 15 Edin. L.R. 218, 236.
14 See M. Redmayne, "Myths, Relationships and Coincidences: The new problems of sexual history" (2003) 7 E&P 75.

referred E's case based on this ground, and it was one basis upon which the court concluded that O and H's evidence could have been admitted.[15]

At first, this argument appears odd: E did not know of X's behaviour with O and H at the time of the alleged rape.[16] Even if E *had* known of X's behaviour with O and H, it is questionable whether this helps decide whether E's belief was held reasonably.[17]

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

Relevance and consent

Moving beyond beliefs about consent, consideration can be given to whether consent itself existed. *Evans* is perhaps "unusual",[18] because it is not a case where the complainant gave evidence of non-consent, which was countered by the defendant's evidence. X's evidence was that she could not remember what happened. This is not the same as saying there was no consent. In *Bree*,[19] it was held that the relevant question is not whether the complainant has a "very poor recollection of precisely what happened",[20] but instead whether the capacity to make the choice to engage in the relevant sexual activity existed.[21] It was confirmed that the capacity to consent "may evaporate well before a complainant becomes unconscious".[22] Being conscious at the time of sexual activity can be consistent with having not consented. Having memory loss can be consistent with having consented.

The prosecution case was that X was *incapable* of doing what E and M claimed she had done.[23] Evidence that, whilst in a similar state of intoxication, X had managed to do what E and M alleged she did (and later claimed memory loss, at least with O) gives their defence more credibility.[24] This suggests that evidence of sexual activity with third parties *can* sometimes (but not often)[25] be relevant to the question of whether the complainant consented to sexual activity with the defendant. Importantly, O and H's evidence was relevant not because it showed she had simply engaged in sex with other men (and was thus more likely to consent with E), or simply to suggest X is less capable of belief because of her sexual history.[26] Those who are universally against *those* arguments for the logical relevance of sexual history evidence can (not must) thus accept that logical relevance was, again, present in *Evans*.

Admissibility

The generalisations relied upon above to establish logical relevance are controversial, and there are difficulties in O and H giving evidence about how X acted in distinct scenarios without having seen X on the night in question. Added to this, there is good reason to think that admitting sexual history evidence is highly prejudicial to the interests of complainants.[27] Consideration must thus be given to whether logically relevant sexual history evidence should nevertheless be inadmissible.

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

This balance is struck in s.41 through applying specific grounds for admissibility (hereinafter, "gateways" to admissibility) subject to an overriding test. The analysis here will proceed along these lines.

The "gateways" to admissibility

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

First, s.41(3)(a) allows the admissibility of sexual history evidence that relates to an issue *other* than consent. Section 42(1)(b) states that the issue of the defendant's beliefs about consent is *not* an issue of consent.[28] Thus, a "gateway" is got through in *Evans*, most clearly in relation to O's evidence.[29]

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

> "an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence".

Much is unclear about s.41(3)(c), but it has affinities with the now-legislatively-superseded "similar facts" evidence doctrine.[30] The language of coincidence, for example, harks back to *DPP v Boardman*, which required that:

15 *Evans*, at [13], [16], [50], [72].
16 Cf. McKeown's commentary on *Evans* at [2017] Crim. L.R. 410.
17 L. Kelly, J. Temkin and S. Griffiths, *Section 41: An evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office Online Report 20/06) 76.
18 *Evans*, at [70].
19 [2007] EWCA Crim 804, [2008] Q.B. 131.
20 *Bree*, at [26].
21 *Bree*, at [34].
22 *Bree*, at [34].
23 *Evans*, at [71].
24 *Evans*, at [39].
25 *A (No 2)*, at [30]; *White* [2004] EWCA Crim 946, at [35]; *Evans*, at [74].
26 *Evans*, at [71].
27 E.g. A. McColgan, "Common Law and the Relevance of Sexual History Evidence" (1996) 16 O.J.L.S. 275.
28 See J. McEwan, "'I Thought She Consented': Defeat of the rape shield or the defence that shall not run?" [2006] Crim. L.R. 960.
29 For an argument that the non-consent issue was X's memory after drinking, see J. Rogers, "No Case to Answer?" (2016) 180 C.L. & J.W. 797. This argument would still raise some concerns about H's evidence.
30 *A (No 2)*, at [85].

> "the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused … The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence".[31]

The courts have, however, found s.41(3)(c) to set a lower bar: "striking similarity" is not required.[32] There is, however, apparently a need for more than a probative value exceeding the evidence's possible prejudicial impact[33] (another test for the admissibility of "similar fact" evidence).[34] For instance, the mere existence of a sexual relationship between the parties will not be enough.[35] It is clear enough from *A (No 2)* that it will be a very rare case where *third party* sexual history evidence (such as that in *Evans*) is admissible through s.41(3)(c).[36] Beyond that, not much is clear, particularly what "coincidence" means, substantively. In most cases, coincidence or the absence of coincidence is asserted without explanation.[37] The plainest statement in *A (No 2)* explained that:

> "the similarity [does not have] to be in some rare or bizarre conduct … the language seems … to be looking for some characteristic or incident of the complainant's sexual behaviour which can reasonably be seen to have a significance beyond the fact that it is contemporaneous with the behaviour and which bears some kind of connection or relationship with the behaviour which on a reasonable view is not a mere matter of chance."[38]

Perhaps the best that can be made of this statement, following *Evans*, is that – if the sexual history evidence is to get through s.41(3)(c) – the alleged similarity must credibly arise from there being consent in each circumstance, rather than there being a reasonable likelihood of a different explanatory factor. That the complainant was in each reported incident of sexual activity wearing a tiara, although unusual, would fail this test: tiaras having nothing (normally) to do with consent to sex, so it does not stretch incredulity to say that it is likely that the complainant's wearing of a tiara was simply a matter of chance, and coincidental, relative to the question of whether the complainant was consenting. It was much more likely just a fashion choice. It will only be very unusual cases (where a tiara-based fetish exists, for example) that the tiara will not seem coincidental relative to the question of consent. The more "usual" similar activities in *Evans*, by contrast, have a clearer common sense connection with consensual sexual activity. People direct and encourage sexual partners usually because they are consenting; that is the most obvious, causal explanation for the similarity in conduct. Although it is conceivable that a person might direct and encourage a sexual partner out of terror of what that partner would otherwise do, that is rare compared to cases where direction/encouragement are given by a consenting partner. If that were the complainant's evidence, the trial judge would need to consider whether that evidence credibly changes the apparent causal basis for the relevant similarity.

If this is right, then s.41(3)(c) is after all a relatively weak constraint on admissibility.[39] The often baffling examples of s.41(3)(c) in action typically *do* involve unusual behaviour, which hides this point: re-enacting the balcony scene from Romeo and Juliet;[40] blackmailing a sexual partner with threats of a false report of rape;[41] using an unusual word (that would not be said in non-consensual situations) to refer to private parts;[42] having sex in a climbing frame and other "unusual" locations[43] (apparently an "easy" case).[44] The veil of unusualness is lifted fully by *Evans*: s.41(3)(c) cannot keep out similar, "usual" sexual behaviour where that similarity is plausibly non-coincidental relative to the question of whether the complainant was consenting on each occasion. This is problematic, insofar as there is good reason, on the grounds of policy mentioned earlier, to require alleged similarities in conduct to be *significant*, rather than just non-coincidental, before sexual history evidence is admitted.

The under-appreciated significance of section 41(2)(b)

Even if the conclusion regarding s.41(3)(c) in the previous subsection were to be accepted, getting through a "gateway" is not a guarantee of admissibility. Section 41(2)(b) – a provision that is rarely discussed in any depth – provides that evidence of sexual behaviour may be admitted only where:

> "a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case".

Section 41(2)(b) seems akin (but not identical) to the old rule of admissibility regarding "background" evidence:[45] i.e. evidence necessary to ensure that a rational, complete or comprehensible understanding of the other evidence in the case can be undertaken by the finder of fact.[46] Under the Criminal Justice Act 2003's successor concept of "important explanatory evidence", what is required is that, without the (bad character) evidence:

> "the court or jury would find it impossible or difficult properly to understand other evidence in the case, and [the evidence's] value for understanding the case as a whole is substantial".[47]

Section 41(2)(b)'s language is less demanding than the idea of background or important explanatory evidence ("might… unsafe"), and it would be foolish to assume that it is not susceptible to varying interpretations/applications.[48] It is submitted, however, that its proper function is, as in the 2003 Act, to avoid "disembodying the case before the jury"[49] by keeping them in the dark about evidence that genuinely might show *other* evidence in the case in a *significantly* different light. In *A (No 2)*, the defendant's story that the complainant and he had consensual sex on the way

31 [1975] A.C. 421, 462. See P. Rook and R. Ward, *Rook and Ward on Sexual Offences: Law and Practice*, 5th edn (Sweet & Maxwell, 2016), para. 26.86.
32 See *A (No 2)*, at [158]-[159].
33 *A (No 2)*, at [84].
34 *DPP v P* [1991] 2 A.C. 447.
35 *A (No 2)*, at [86], [105], [135].
36 *A (No 2)*, at [77], [89], [125], [127], [130], [148].
37 See, recently, *Guthrie* [2016] EWCA Crim 1633, [2016] 4 W.L.R. 185, at [12].
38 *A (No 2)*, at [135].
39 For various readings of the subsection, see Redmayne, supra, 95-99.
40 Hansard, 8 Feb 1999, Col 45 (Baroness Mallalieu).
41 *A (No 2)*, at [42].
42 Redmayne, supra, 98.
43 *T (Abdul)* [2004] 2 Cr.App.R. 32. Cf. *Hamadi* [2007] EWCA Crim 3048.
44 *Harris* [2009] EWCA Crim 434, at [19].
45 For discussion of sexual history and "background" evidence, see D. Birch, "Rethinking Sexual History Evidence: Proposals for Fairer Trials" [2002] Crim. L.R. 531.
46 *Sawoniuk* [2000] 2 Cr.App.R. 220.
47 Criminal Justice Act 2003, s.102.
48 Cf. J. Temkin, "Sexual History Evidence – Beware the backlash" [2003] Crim. L.R. 217, 238.
49 *A (No 2)*, at [32].

to visit the complainant's boyfriend in hospital is seen in a meaningfully distinct light if there is cogent evidence that the defendant and the complainant had been engaged in a clandestine sexual relationship for some weeks before the alleged rape.[50] In *T (Abdul)*,[51] the defendant's claim that consensual sex took place in a child's climbing frame in a public park is similarly seen in a new light when cogent evidence is presented that the defendant and the complainant had previously engaged in willing sexual activity in public (including in that climbing frame). What unifies these cases is not similarity/non-coincidence (as s.41(3)(c) requires), or temporal connection (as s.41(3)(b) requires), or more generalised arguments about the relevance of sexual history. Rather, it is the idea that the defendant's story, absent the relevant sexual history evidence being admitted, would sound so unusual as to be incredible, and thus there is a significant risk that, without that relevant sexual history evidence, the defendant has no real defence at all;[52] that it would be "impossible or difficult properly to understand other evidence in the case" where the evidence's "value for understanding the case as a whole is substantial".

In the light of this, there is something in the prosecution's argument in *Evans* that there was nothing particularly unusual about what E was claiming, or what X had apparently done on other occasions, to render O and H's evidence particularly important in establishing whether there was consent and/or a reasonable belief in consent. This argument was simply misdirected at s.41(3)(c), instead of s.41(2)(b). Perhaps there is a worry that juries will not countenance the possibility that someone *could* reasonably believe someone in X's state of intoxication to have been consenting, and that hearing that others have mistaken X's state of intoxication helps avoid an unfair result. It is not clear why the jury's assessment of E's evidence on belief and consent is changed markedly, however, particularly when O and H did not see X on the evening in question, and O and H would obviously have significant reason to say that X was sober enough to consent.

Maybe another fear is that juries might assume that a person who has memory loss after a night's drinking simply cannot have done what E and M alleged X did, and their defence is incredible until we learn that X has on other occasions seemingly consented whilst drunk enough to apparently suffer memory loss. It is submitted, however, that it is more likely that the jury does not require assistance to establish that, sometimes, very drunk people can consent to sex (in line with the guidance in *Bree*), and to assess the credibility of E and M's evidence accordingly. Notably, the original jury received expert (defence) evidence that X's assertion of memory loss was surprising given what she (thought she) had drunk:[53] so E and M's case was already readily graspable without O and H's evidence.

It is difficult to tell what the court thought about s.41(2)(b) (it is merely cited), and thus impossible to say that the decision in *Evans* was *wrong*. The predominant focus was s.41(3)(c) and similarity/non-coincidence. *Evans* suggests that s.41's drafting means similarity (or temporal closeness, in other cases) risks becoming *the mark* of admissibility and sole focus of attention, when it is simply *a potential indicator* of admissibility to be considered in the round. That result could have been avoided had a list of criteria for applying s.41(2)(b) (the most important, from the legislation, being similarity and temporal closeness) been preferred over the drafting technique employed in 1999.[54] Before such a proposal for reform is made, however, it is necessary to engage with a final aspect of the debate over sexual history evidence.

A (No 2)

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

Evans is far from clear if the licence granted by *A (No 2)* was utilised. At one point in the judgment, *A (No 2)*'s "ECHR gloss" was deemed unnecessary because the parties accepted that ordinary canons of statutory interpretation could cover the case.[55] Ultimately, however, the court concluded that:

> "The requirements of section 41 must give way, as was held in *R v A (No 2)*, to the requirements of a fair trial. Relevant and admissible evidence cannot be excluded. For those reasons we have concluded that this appeal must be allowed."[56]

Suppose that the court in *Evans* relied on *A (No 2)*. Lord Steyn's formulation of the ultimate decision was adopted by four of the five Lords:

> "the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6".[57]

This was a comment about s.41(3)(c), but the Lords were bound (to an extent) by s.41's structure. Lord Steyn's formulation, expanded beyond consent to include beliefs about consent, is consistent with reading s.41(2)(b) as a general test of admissibility for logically relevant sexual history evidence. The question would then become: without admitting the logically relevant (and substantially probative) sexual history evidence, is the defendant left with a case the jury (or court) will find it difficult or impossible to assess properly? Section 41(3)'s criteria, instead of being confusing foci, would become more flexible indicators of logical relevance and probative value, whilst remaining germane to the vital question posed in s.41(2)(b). It is submitted that this refocusing of s.41, rather than the removal of the opportunity to give leave to admit sexual history evidence, could be an appropriate way forwards. Indeed, strictly no revision of the statute itself is required to achieve this result, if *A (No 2)* is read to allow it.

Section 41 would, however, be much clearer if it was redrafted along the following lines, which incorporate the arguments made above (changes in italics):

50 J. McEwan, "The Rape Shield Askew?" (2001) 5 E&P 257, 262. The complainant in *A (No2)* denied the relationship existed, which is reason for caution.
51 [2004] 2 Cr.App.R. 32.
52 Cf. *B* [2012] EWCA Crim 1235, where alternative evidence was available to assist the jury in assessing the defence argument.
53 [2012] EWCA Crim 2559, at [17].
54 Cf. N. Kibble, "The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammeled judicial discretion?" [2000] Crim. L.R. 274, 292.
55 *Evans*, at [48].
56 *Evans*, at [74].
57 *A (No 2)*, at [46]. See, also, at [110], [163].

41. Restriction on evidence or questions about complainant's sexual history
(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court:
(a) no evidence may be adduced, and
(b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and *may only* give such leave *if* it is satisfied […] that*, if the evidence were not admitted or the question not asked, the jury or (as the case may be) the court would find it impossible or difficult properly to understand other evidence in the case, and the evidence or question's value for understanding the case as a whole is substantial.*
(3) In deciding whether to give leave, the court must have regard to the following factors (and to any others it considers relevant):
(a) the time between the relevant sexual behaviour and the activities that form the basis of the offence being tried; and
(b) any significant similarities between the relevant sexual behaviour and the activities that form the basis of the offence being tried.
[Section 41 would then continue as at present, and amendments to s.42 could be made accordingly.]
Unless evidence collected by the Government's review of s.41 (promised in the wake of *Evans*) suggests that such legislative reform would be utterly ineffective, it is submitted that it, rather than the Harman amendment, represents the best way forwards. This reform is not, however, presented as a panacea. It is the case that more research is needed into how to improve *reasoning* with sexual history evidence once it has been admitted, and reduce the potential for biases to cause undue harm to the interests of complainants in cases involving sexual offending.

Another Royal Anniversary

By J.R.Spencer

It was 35 years ago, in July 1982, that Michael Fagan secured his position in the hall of fame by scaling the wall of Buckingham Palace and entering Her Majesty's bedroom at 7 a.m. as an unexpected and uninvited visitor.[1]
Though the public seems to have found the incident hilarious, the funny side of it is unlikely to have struck those who were on the receiving end of it at the time. Fagan, apparently high on alcohol and drugs, was in a state of agitation and entered the royal bedroom clutching a broken glass ashtray, which he later claimed he was intending to use to slash his wrists. And although the incident elevated him to a short-lived stardom that included a disc with a Punk Band called (appallingly) the Bollock Brothers, he was not a person most people would wish to welcome to their bedroom: a petty criminal, whose growing record eventually spread to embrace drug-dealing, indecent exposure and assaulting the police. His intrusion into the royal bedroom must have been extremely frightening.
Two months later, Fagan's visit to the Palace led to his appearance in the dock at the Old Bailey. Surprisingly – at least to those unversed in the oddities of English criminal law – it was not for his early morning visit to The Queen that he was prosecuted, because his behaviour on that occasion was a mere civil trespass, and hence no criminal offence. However, in the rambling interview he gave the police on that occasion he told them that this was in fact his second break-in at the Palace, and that on the first he had found an opened bottle of wine, from which he drank before breaking out and going home. His drinking the wine appeared to turn his earlier visit into an offence of burglary contrary to the Theft Act 1968 s.9(1)(b), in that having entered as a trespasser he had stolen; and so it was over this earlier visit, and not the later and much more famous one, that he faced trial.
In court Fagan admitted entering the Palace as a trespasser and also his appropriation of the wine, but through counsel argued that his act of drinking it was not dishonest: which meant there was no theft, and because there was no theft, no burglary. On hearing this defence the jury – no doubt to the astonishment of everyone in court, including the defendant and his counsel – acquitted him, and after a retirement of only 14 minutes.
With juries anything is possible and nothing is explained, so why this jury chose to return what looks like a perverse verdict is anybody's guess. Possibly they were amused by Fagan's antics in the dock (which included removing his false teeth and winking at women in the court) and took exception to the judge's sternly reprimanding him. But it seems more likely that they felt that prosecuting Fagan for burglary on the back of the half-drunk wine bottle was abusive and oppressive. His real misdeed was his outrageous and highly-publicised intrusion into the Royal bedroom, for which he could not be prosecuted; and because the authorities were determined to get him for something, they had prosecuted him on a risibly technical charge of burglary related to his earlier visit – a matter preposterously trivial by comparison. And if that is what the jury thought of it, their reaction was understandable.
This incident led to calls for trespass in residential premises to be made a criminal offence. In response to this the Home Office issued a consultation paper, the yellowing pages of which are on my desk as these lines are written.[2] Its tone was very cautious. In the style of Sir Humphry when erecting insuperable obstacles to some obviously needful course, it warned readers that such a new offence might "stray unacceptably widely into areas which are unsuitable for the

1 This account of the incident is based on Scotland Yard's report on the 9 July Intrusion into Buckingham Palace, as reported by the New York Times on 22 July 1982 (and available on their website at http://www.nytimes.com/1982/07/22/world/text-of-scotland-yard-s-report-on-july-9-intrusion-into-buckingham-palace.html?pagewanted=all) - supplemented by an article by Emily Dugan, based on an interview with Fagan, which appeared in *The Independent* on 19 February 2012. The account of the trial is based on an article by Nick Davies, entitled "From the Archive, 24 September 1982: Buckingham Palace Intruder Cleared of Burglary", published in *The Guardian* on 24 September 2012.

2 *Trespass on Residential Premises – a Consultation Paper*. The paper is undated, but responses were requested by 3 May 1983.

criminal law", create "difficulties of interpretation for the courts" and "undue difficulties of enforcement". However it did suggest, rather gingerly, the creation of a new offence of trespassing into such properties of the Crown as might be designated for this purpose by the Secretary of State.

Thirteen years and a string of other royal intrusions[3] later, the Blair government took up this suggestion by promoting s.128 of the Serious Organised Crime and Police Act 2005. Among the first properties to be designated under this provision were of course the Royal palaces; but successive Home Secretaries have used their power of designation liberally, and the current list includes not only Chequers and No 10 Downing Street but also GCHQ headquarters, various military establishments and the Atomic Energy Establishment at Winfrith Heath. Nor is this the full extent of successive governments' piecemeal extensions of criminal liability for trespass. Mindful of the problems caused by homelessness, in 2012 the Cameron government promoted legislation to make squatting in residential premises a criminal offence.[4]

But despite these piecemeal changes it is still the case that "merely" trespassing into someone else's home, however intrusively or offensively, is still no criminal offence. An Englishman's home is said to be his castle: but as far as criminal law is concerned this is true only if he is the Prime Minister or a member of the Royal Family. So it is no offence, as such, for a tabloid journalist or private detective to enter another person's home to read his private correspondence; or for a pervert to enter a woman's home in order to fondle her underclothes (as against to steal them). Nor is it a criminal offence for a rejected lover to terrify the object of his desire with an unwanted nocturnal visit, unless he does so more than once.[5]

Trespassing into other people's homes is surely much more harmful and upsetting than much of what now falls within the scope of the criminal law, and in many or most other countries it is a criminal offence. So given the general willingness of successive governments to extend the criminal law it seems odd that this remains a purely civil matter here. As Glanville Williams wrote nearly 40 years ago, "Considering the wide scope of modern penal law, there is no obvious reason why such conduct should remain in England without notice from the criminal courts."

At the time of the Fagan incident I suspect there *was* a reason, and it was one the Home Office chose not to mention in its consultation paper: the fear that criminalising trespassory entry into people's homes would inhibit information-gathering by the security services and the police – an activity it approved of, whether carried out lawfully or not.

Indeed, fifteen years after the Fagan incident it came to light in the case of *Khan*[6] that the Home Secretary had issued instructions to the police which (in effect) encouraged them to use Watergate-style break-ins when they could not obtain vital evidence in other ways. At Khan's prosecution for importing heroin, crucial evidence against him were incriminating conversations recorded by a "bug" which the police had planted on the wall of his house. This they had done in reliance on a document, emanating from the Home Office, entitled "Guidelines on the use of Equipment in Police Surveillance Operations". But as the Home Secretary had no power to issue directions of this sort their reliance on this document did not make the actions of the police any less a civil trespass, and *Khan* appealed against his conviction on the ground that the evidence should have been excluded as unlawfully obtained.

Rejecting Khan's appeal, the House of Lords held that the evidence was properly admitted, even if unlawfully obtained. But in so holding, they described the current state of affairs as "astonishing" and said that police conduct of this sort, if necessary to combat serious crime, should be regulated by statute; a view later endorsed by the European Court of Human Rights when it upheld Khan's complaint under Art. 8 of the Convention.[7]

The Government's reaction to the *Khan* case was, predictably, a Bill to give the police the power to bug and burgle when they wanted to; and the House of Commons, in "tough on crime" mode, passed it in that form. But the Upper House showed more concern for civil liberties and, as eventually enacted, Part III of the Police Act 1997 made it legal for the police to bug and burgle houses, but only when authorised by a Surveillance Commissioner – a scheme which, though much amended, is still in force today.[8]

Meanwhile, Parliament had also passed legislation to regulate these sort of activities by the security services. Section 5(1) of the Intelligence Service Act 1994 provides that: "No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section," and goes on to set out the circumstances in which such warrants may be granted.

And as clandestine intrusions by the police and the security and intelligence services are now regulated by statute, it is hard to see that there is now any reason – even a bad reason – why behaviour like Michael Fagan's should not be made a general offence.

3 For a catalogue, see "Royal Intrusions Over the Years", BBC News, 15 February 2006.
4 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.144.
5 On this see *Qosja* [2017] 1 WLR 311.
6 [1997] AC 588.
7 *Khan v UK* (2001) 31 EHRR 45.
8 Since 1997 s. 93, the crucial provision, has been amended no less than 18 times (!) The changes made to Part III of the Police Act 1997 include, among other things, a change of name for Surveillance Commissioners, who are now called Judicial Commissioners.

All Change at the Top

On 2 October Sir Ian Burnett became the Lord Chief Justice. We congratulate him and wish him well in his new assignment; and we wish his predecessor, Lord Thomas, a long and happy retirement.

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