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Whether Rules or Discretion? Developing a Best Practice Model for Controlling the Admissibility of Sexual Experience Evidence in Sexual Offence Trials

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This article considers the controversial issue of the admission of sexual experience evidence in sexual offence trials. The discussion begins with an assessment of the shortcomings of the current Irish approach to the regulation of the admissibility of sexual experience evidence. It is argued that Irish discretionary approach, which allows trial judges a wide discretion to introduce such evidence, is not the most appropriate method of regulation in this area. The article thus examines English and Canadian rules in this area in order to determine which of these two jurisdictions differing approaches to the regulation of sexual experience evidence represents the most suitable advancement on discretionary regimes such as that which applies in Irish law. Having examined the approach of both of these jurisdictions, it is concluded that Canadian law epitomises the best practice model for controlling the admission of sexual experience evidence in sexual offence trials.

I – Introduction

The admission of sexual experience evidence in sexual offence trials is one of the more controversial aspects of sexual offences law. Historically, such evidence was freely admissible and was used in order to suggest that the complainant was unchaste and therefore likely to have consented or, alternatively that she was unworthy of belief. With the rape law reform efforts in the 1980s, most common law jurisdictions sought to curb the use of this category of evidence. The goal of these reforms was to make sure that such evidence was only admitted where it was logically relevant to the defence case and that it would no longer be used by the defence in order to besmirch the complainant's character and unfairly undermine her credibility. The typical model for regulation which was adopted at this time was a discretionary one. Under this type of regime, the defence must make a formal application to the trial judge in order to admit sexual experience evidence. Whether the application is to be granted is then left to the discretion of the trial judge.

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The discretionary approach to the regulation of the admission of sexual experience evidence still applies in Irish law. However, recent empirical evidence in Ireland has suggested that this model is problematic and does not offer complainants optimum protection from unnecessary introduction of such evidence. Having encountered similar problems with discretionary schemes, common law jurisdictions such as England and Wales and Canada have developed more sophisticated regimes in this area. This article assesses these alternative approaches in order to determine which represents a modern best practice model for the regulation of the admissibility of sexual experience evidence.

The article will use the current Irish law on the regulation of the admission of sexual experience evidence in order to demonstrate the shortcomings of the discretionary approach. The alternatives offered by English and Canadian law, respectively, will then be explored. It will be seen that these jurisdictions have adopted two quite different approaches. In English law, a strict rule-bound scheme dictates that sexual experience evidence may only be admitted if it fits within certain clearly defined categories or gateways. Contrarily, the Canadian legislature has opted to allow trial judges to retain their discretion but guided it in order to make sure that applications for admission are not made lightly. This article will argue that the Canadian structured discretion approach offers the optimum advancement on discretionary regimes such as that which continues to operate in Irish law.

II – The Irish Discretionary Model: An Inadequate Filter for the Unwarranted Admission of Sexual Experience Evidence

The current Irish rules regulating the admissibility of sexual experience evidence in sexual offence trials may be found in section 3 of the *Criminal Law (Rape) Act 1981*.¹ Section 3 provides that at a trial for a sexual assault offence,² the defence may

¹ As amended by the *Criminal Law (Rape) (Amendment) Act 1990*, s. 13.

² A “sexual assault” offence means “a rape offence” and any of the following, namely, aggravated sexual assault, attempted aggravated sexual assault, sexual assault, attempted sexual assault, aiding, abetting, counselling and procuring aggravated sexual assault, attempted aggravated sexual assault or attempted sexual assault, incitement to aggravated sexual assault or sexual assault and conspiracy to commit any of the foregoing offences. A “rape offence” means any of the following, namely, rape, attempted rape, burglary with intent to commit rape, aiding, abetting, counselling and procuring rape, attempted rape or

not pose questions or introduce evidence regarding the sexual experience (other than that to which the charge relates) of the complainant³ without leave from the trial judge.

The decision of *People (D.P.P.) v. G.K.*⁴ suggests that the Irish judiciary have taken the enactment of section 3 seriously and that trial judges should be very slow to permit sexual experience evidence to be adduced. The Court of Criminal Appeal held that, having regard to the severely restrictive terminology of section 3, in general, a decision to refuse to allow cross-examination as to sexual experience may more readily be justified in most cases than the converse.⁵ The Court also stated that where a form of questioning is allowed, it should be confined only to what is strictly necessary and should never be utilised as a form of character assassination of a complainant.⁶ However, whilst the judiciary have accepted the discretion to admit sexual experience evidence should be used sparingly, available empirical evidence suggests that this attitude has not translated into a reduction in the use of such evidence in Irish sexual offence trials.

Empirical data on the operation of section 3 can be found in the study of thirty-five trial transcripts conducted for the attrition study *Rape & Justice in Ireland* which was published in 2009.⁷ In the cases studied for the purposes of that research, applications for the introduction of sexual experience evidence were made in only seven cases and such evidence was not referred to at all in nineteen cases.⁸ This suggests that the introduction of the section has curbed the use of this evidence to some extent. However, upon closer inspection, some aspects of the research findings indicate that

burglary with intent to commit rape, and incitement to commit rape, and rape under section 4, attempted rape under section 4, aiding, abetting, counselling and procuring rape under section 4 or attempted rape under section 4 and incitement to rape under section 4: *Criminal Law (Rape) Act 1981*, s. 1 (as amended by the *Criminal Law (Rape)(Amendment) Act 1990*, s. 12).

³ It is noteworthy that “sexual experience” in this context refers to sexual experience with the defendant and/or with third parties.

⁴ [2007] 2 I.R. 92.

⁵ *Ibid.* at 103.

⁶ *Ibid.* at 103-104.

⁷ The primary aim of this project was to obtain information about the causes of attrition in rape cases in Ireland by reviewing materials from different points of the criminal justice system. There were three strands to the project which sought to obtain information about the three primary attrition points in the criminal justice system, that is: (1) the decision by victims whether to make a formal report to the gardai; (2) the decision by the Director of Public Prosecutions whether to initiate a prosecution; and (3) the trial process: C. Hanly *et al*, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin: The Liffey Press, 2009).

⁸ *Ibid.* at 355.

section 3 is not as effective as it could be. Six of the seven applications for the introduction of sexual experience evidence were successful.⁹ This indicates that such applications have a high success rate and are granted without much difficulty. Research by Bacik *et al* has also signalled that section 3 might not be acting as an adequate filter for the admission of sexual experience evidence.¹⁰ Bacik *et al* analysed D.P.P. files for 40 rape¹¹ trials which came before the Central Criminal Court in the period from 2003 to 2009. They found that 70% of section 3 applications were granted. This finding, together with the findings from Hanly *et al*, seems to demonstrate that once section 3 applications are made, they are likely to be successful. Indeed, as O'Malley has commented, the dearth of appellate judgments in this area indicates that defence counsel are not experiencing any great difficulty in getting leave for the admission of sexual experience evidence when they seek it.¹² It therefore seems that the section 3 discretionary regime is not the optimum method of restricting the unwarranted introduction of sexual experience evidence.

In seeking to ameliorate the permissive attitude towards the admission of sexual experience evidence which the discretionary model has allowed to develop amongst the Irish judiciary, two options for reform present themselves. The first rule-bound approach is to be found in English law. Under this scheme, sexual experience evidence may only be introduced if it comes within one of a select number of categories of admissibility. The second, more flexible, option can be seen in the Canadian Criminal Code. This structured discretion regime allows trial judges to retain their discretion to admit sexual experience evidence but directs trial judges on how to exercise this discretion. This guidance encourages a careful approach to assessments of relevance, thereby ensuring that sexual experience evidence is only introduced where it is logically

⁹ *Ibid.* at 342.

¹⁰ The results of this research have yet to be published. The findings outlined here are taken from a conference presentation given by Ivana Bacik at the "Rape Law- Victims on Trial?" Conference in Dublin Castle on 16 January 2010: I. Bacik, *et al*, "Separate Legal Representation in Rape Trials" available at: <<http://www.ivanabacik.com/archives/371>> (date accessed: 29 August 2013).

¹¹ For the purposes of the study, "rape" is defined as including rape under section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*, that is, a sexual assault that includes penetration (however slight) of (a) the anus or mouth by the penis or (b) the vagina by any object held or manipulated by another person.

¹² T. O'Malley, *Sexual Offences: Law, Policy & Punishment* (Dublin: Roundhall, 1996) at 242.

relevant to the defence case. The following sections will assess both of these models in order to determine which one represents best practice in this area.

III – The English Rule-Bound Model: An Unduly Restrictive Approach?

In English law, the regulation of the rules regulating the admissibility of sexual experience evidence can be found in section 41 of the *Youth Justice and Criminal Evidence Act 1999* (*Y.J.C.E.A. 1999*). Prior to the introduction of this provision, the English rules on this issue resembled current Irish law, that is, such evidence could only be admitted with the leave of trial judges who retained discretion to admit or exclude sexual experience evidence. Under section 2 of the *Sexual Offences (Amendment) Act 1976* (*1976 Act*), on an application by the defence, the trial judge could admit evidence of sexual experience of the complainant with third parties if s/he was of the view that it would be unfair to exclude it.¹³ Evidence of sexual experience which involved the complainant and defendant was generally admissible, having been left outside the provisions of the *1976 Act*.¹⁴ Due to sustained criticism of the *1976 Act*,¹⁵ the English legislature decided to move away from the discretionary approach which had existed under the old law and to replace it with a rule-bound scheme. As stated above, this approach prohibits the introduction of sexual experience evidence unless it falls within one of the exceptions

¹³ Section 2(1) provides: “[i]f at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at trial, about any sexual experience of a complainant with a person other than the defendant.” The following subsection provides:

[t]he judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked.

¹⁴ N. Kibble, “The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases” (2001) 32 *Cambrian Law Review* 27 at 27 [hereinafter Kibble “Prior Sexual History”].

¹⁵ N. Kibble, “The Sexual History Provisions: Charting a Course Between Inflexible Legislative Rules and Wholly Untrammelled Judicial Discretion” [2000] *Criminal Law Review* 274 at 275 [hereinafter Kibble, “The Sexual History Provisions”]. Readers are directed to the following examples of commentary criticising the *1976 Act*: Z. Adler, “The Relevance of Sexual History in Rape: Problems of Subjective Interpretation” [1985] *Criminal Law Review* 769; J. Temkin, “Regulating Sexual History Evidence- The Limits of Discretionary Legislation” (1984) *The International and Comparative Law Quarterly* 3; J. Temkin, “Sexual History Evidence: The Ravishment of Section 2” [1993] *Criminal Law Review* 3; V. Baird, “Changes to Section 2 of the Sexual Offences Act 1976” (1999) 39 *Med. Sci. Law* 198 [hereinafter Baird]; A. McColgan, “Common Law and the Relevance of Sexual History Evidence” (1996) 16 *Oxford Journal of Legal Studies* 275.

which are enumerated in the legislation. The statutory exceptions are highly specific, reflecting legislative efforts to anticipate precisely those circumstances in which sexual conduct evidence will be critical to the presentation of a defence.¹⁶ The precise admission criteria which are set out in section 41 of the *Y.C.J.E.A. 1999* are detailed below.

A. The Gateways for the Admission of Sexual Behaviour Evidence under Section 41

Section 41 of the *Y.C.J.E.A. 1999* provides that at the trial of a sexual offence,¹⁷ no evidence may be adduced and no question asked in cross-examination by or on behalf of any defendant about any sexual behaviour¹⁸ of the complainant, except with leave of the trial judge. This leave may only be granted if the evidence of sexual behaviour comes within one of the four specific gateways for admissibility that are provided for in sections 41(3) and 41(5), respectively. Section 41(3) sets out three grounds upon which sexual behaviour may be admitted and section 41(5) provides for the admission of sexual behaviour evidence in order to rebut an inference which has been made by the prosecution. In order to contextualise the restrictive approach to sexual experience evidence which is advocated by section 41, it is necessary to briefly outline the limits of each of these admissibility gateways.

Section 41(3)(a) provides that evidence of sexual behaviour may be admitted where the evidence is related to a relevant issue¹⁹ in the case, other than an issue of

¹⁶ H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) *Minnesota Law Review* 763 at 773 [hereinafter Galvin].

¹⁷ "Sexual offence" includes "any offence under Part 1 of the Sexual Offences Act 2003": *Y.C.J.E.A. 1999*, s. 62(1) (as amended by the *Sexual Offences Act 2003*, schedule 6, para. 41). Therefore, it includes rape, assault by penetration, sexual assault, causing a person to engage in sexual activity without consent.

¹⁸ "Sexual behaviour" is not defined in the Act. Section 41(2) does, however, state that it includes sexual experience. The Explanatory Notes on the Act also provide that sexual behaviour would include "secondary evidence of sexual behaviour such as abortions": *Explanatory Notes: The Youth Justice and Criminal Evidence Act 1999* (London: The Stationery Office, 1999) at para. 145. It is also noteworthy that evidence which is sought to be adduced must relate to a *specific instance* (or *specific instances*) of alleged sexual behaviour on the part of the complainant: s. 41(6). Thus, evidence of general sexual reputation is not admissible.

¹⁹ All of the gateways in s. 41(3)(a) contain a common requirement that the evidence of sexual behaviour which is sought to be admitted must be "related to a relevant issue in the case." Evidence of sexual behaviour shall not be regarded as relevant to an issue in the case where the purpose or main purpose for

consent. Thus, it permits evidence of sexual behaviour to be introduced in relation to any matter raised at trial other than the complainant's consent. In *R. v. A. (No. 2)*,²⁰ Lord Hope identified the following situations where sexual behaviour evidence might be admissible under this gateway:²¹

- where the defendant claims to have had an honest belief in consent;²²
- where it is alleged that the complainant was biased against the defendant or had a motive to fabricate evidence;²³
- where there is an alternative explanation for the physical conditions on which the prosecution relies to establish that intercourse took place (*e.g.* bruising or other physical marks);
- especially in the case of young complainants, in order to argue that the details of their account must have come from some other sexual activity before or after the event which provide an explanation for their knowledge of that activity.²⁴

The second gateway (section 41(3)(b)) allows for admissibility of sexual experience evidence where it is related to a relevant issue in the case and: "...it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the defendant." This exception would permit evidence of sexual experience where consent is an issue at trial and the relevant evidence relates to an incidence of sexual activity which occurred at or about the same time as the alleged incident of non-consensual sexual activity.²⁵

which it would be adduced is to establish or elicit material for impugning the credibility of the complainant as a witness: *Y.J.C.E.A. 1999*, s. 41(6).

²⁰ [2002] 1 A.C. 45 [hereinafter *R. v. A. (No. 2)*].

²¹ *Ibid.* at 78.

²² If a belief in consent is to be in issue for the purpose of s. 41(3)(a), the defence must be clearly viable on the facts: *ibid.* at 64. See also: *R. v. Winter* [2008] E.W.C.A. Crim. 3.

²³ The courts have made clear that sexual experience evidence will not be admitted on this ground lightly. There must be a clear connection between the sexual experience evidence in question and the motive to lie: *R. v. Mokrecovas* [2001] E.W.C.A. Crim. 1644.

²⁴ See *R. v. M.F.* [2005] E.W.C.A. Crim. 3376.

²⁵ According to the Explanatory Notes to the *Y.J.C.E.A. 1999* the phrase "at or about the same time" can be interpreted to mean not more than twenty-four hours before or after the alleged event: *Explanatory Notes: The Youth Justice and Criminal Evidence Act 1999* (London: The Stationery Office, 1999) at para. 148.

The third gateway (section 41(3)(c)) permits evidence of sexual behaviour to be admitted where it is related to a relevant issue in the case which is an issue of consent and 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 according to evidence adduced or to be adduced by or on behalf of the defendant) took place as part of the event which is the subject matter of the charge against the defendant, 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 be reasonably explained as a coincidence.

This gateway allows for the admissibility of evidence of sexual behaviour which is apparently similar to the alleged incident of non-consensual sexual activity. The justification for admissibility here would seemingly be that the complainant consented to sex in similar circumstances on a previous occasion and is thus likely to have consented on this occasion.

The final gateway which permits the admission of sexual experience evidence is section 41(5) (the rebuttal gateway). This allows for evidence of sexual behaviour to be admitted in order to allow the defence to rebut prosecution evidence about any sexual behaviour of the complainant. The evidence to be adduced or the question to be asked by or on behalf of the defendant must relate to the prosecution evidence and must go no further than is necessary to rebut or explain it.²⁶ For example, if the prosecution has stated that the complainant was a virgin prior to the alleged incident (and thus unlikely to have consented) and the defence have evidence that this was not the case, the defence may be permitted to adduce this evidence to the extent necessary to rebut the prosecution's assertion of the complainant's virginity.²⁷

The courts have taken a restrictive approach to the interpretation of the phrase: *R. v. A. (No. 2)*, *supra* note 20.

²⁶ I. Dennis, *The Law of Evidence*, 4th ed. (London: Sweet & Maxwell, 2010) at 629.

²⁷ Similarly, the defence might be permitted to adduce rebuttal evidence of sexual behaviour where the prosecution had suggested that the complainant was deeply religious and consequently believed that sex before marriage was wrong.

Once the defence has chosen a suitable gateway upon which to rely, it is necessary to satisfy one additional criterion in order to qualify for admission. As well as fitting within one of the gateways, the evidence must still be excluded unless refusing leave to allow evidence or questioning in relation to it might have the result of rendering unsafe a conclusion of the jury on any relevant issue in the case.²⁸ However, as Keane argues, this hurdle is not particularly high because the court need only be satisfied that a refusal of leave *might* have the consequence specified, not that such a consequence is probable or even likely.²⁹ Consequently, once the defence has demonstrated to the trial judge that the sexual behaviour evidence in question satisfies the criteria for admissibility under one of the four gateways, it should be relatively straightforward to convince him/her that exclusion of the information might render a jury's conclusion on a relevant issue unsafe.

B. Assessing Section 41: Are Strict Rules Preferable to Judicial Discretion?

At first glance, the tightly defined gateways system provided by rule-bound schemes like section 41 appear to offer an attractive and logical alternative to discretionary schemes such as that which formerly prevailed in English law and which currently exists in Ireland. The primary argument in favour of a strict rule-bound approach is that this is the only way of ensuring tighter regulation of the admissibility of sexual experience evidence. As the empirical research on Irish sexual offence trials has shown, unless judicial discretion is curtailed, judges have a propensity to make decisions about sexual experience evidence in the same way in which they always have, thereby stultifying any possibility of a more exclusionary approach to this evidence.³⁰

²⁸ *T.J.C.E.A. 1999*, s. 41(2)(b). N. Kibble, "Judicial Perspectives on the Operation of Section 41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios" [2005] *Criminal Law Review* 190 at 191 [hereinafter Kibble, "Judicial Perspectives"].

²⁹ A. Keane *et al.*, *The Modern Law of Evidence*, 8th ed. (Oxford: Oxford University Press, 2010) at 204.

³⁰ Temkin suggests that it was "odd indeed" that under the discretionary scheme in section 2 of the *1976 Act*, "the judges, the very people who were responsible for the widespread admission of sexual history evidence in the first place, were left with the 'discretion' whether to admit it or not": J. Temkin, "Sexual History Evidence: Beware the Backlash" [2003] *Criminal Law Review* 217 at 218. A similar point is made by Easton who notes that in retrospect, it was unwise for the decision on sexual experience evidence to rest on judicial assessments of unfairness when judge's attitudes in the past were part of the problem: S. Easton, "The Use of Sexual History Evidence in Rape Trials" in M. Childs & L. Ellison, *Feminist Perspectives on Evidence* (London: Cavendish Publishing Ltd, 2000) 187 [hereinafter Easton]. Lees points to her own trial observations in order to observe that, prior to the introduction of the *T.J.C.E.A. 1999*, judges were continuing to routinely allow sexual experience evidence to be adduced at trial: S. Lees,

Since the judges will not make a change themselves, change should be imposed upon them by the legislature. This desire to curb judicial discretion in order to achieve change is evident in the introduction of section 41. The issue of judicial discretion was not overtly discussed in *Speaking Up for Justice* (the Report which considered reform in this area prior to the introduction of section 41) or in the parliamentary debates on the *Y.J.C.E.A. 1999*.³¹ Nevertheless, there is a sense that there was dissatisfaction with the approach to sexual experience evidence which was permitted by the discretionary regime in the *1976 Act*. Drawing on available statistics, it was concluded in *Speaking Up for Justice* that there was “overwhelming evidence” that the prevailing practice in the courts was “unsatisfactory” and that section 2 of the *1976 Act* was not achieving its purpose (*i.e.* curtailing the use of sexual experience evidence).³² Thus, the introduction of a rule-bound scheme was no doubt seen as a viable method of forcing trial judges to change their habits. However, whilst in theory rule-bound schemes seem to hold the prospect of significant improvements, in practice such schemes give rise to a number of difficulties which greatly undermine their effectiveness.

Perhaps one of the most significant problems with rule-bound schemes such as section 41 is the potential to infringe defendants’ rights. Whilst it is certainly true that the admissibility of sexual experience evidence needs to be tightly regulated, it must also be acknowledged that prior sexual experiences of the complainant will often be relevant to the defence case. For example, the defendant may wish to introduce evidence of his own previous consensual sexual activity with the complainant in order to establish a pattern of behaviour which suggests that the complainant might have consented to the sexual activity which forms the basis of the charge. Alternatively, he may want to introduce evidence of previous sexual experience with himself or with others to, for example, establish a mistaken belief in consent or a bias or motive to

Carnal Knowledge: Rape on Trial, 2nd ed. (London: The Women’s Press Ltd, 2002) at xxi [hereinafter Lees]. Lees suggested that there was evidence that judges were not impartial observers and used their discretion in different ways: *ibid.* at 151.

³¹ N. Kibble, “Judicial Discretion and the Admissibility of Prior Sexual History Evidence under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot” [2005] *Criminal Law Review* 263 at 263 [hereinafter Kibble, “Judicial Discretion”].

³² Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*, (London: Home Office, 1998) at para. 9.64.

fabricate evidence.³³ If rule-bound schemes are drafted so restrictively that this potentially relevant evidence is excluded, then there is a clear conflict with the defendant's right to a fair trial. Consequently, such schemes have the potential to fall foul of fair trial guarantees in human rights instruments such as the European Convention on Human Rights (E.C.H.R.).³⁴ Indeed, this is precisely what happened in the wake of the introduction of section 41, which was challenged at the Central Criminal Court the day after it came into force.³⁵ The outcome of this challenge was the decision of the House of Lords (as it then was) in *R. v. A. (No. 2)*.³⁶

The defendant in this case was charged with rape. He sought to have evidence of an alleged sexual relationship with the complainant admitted as evidence.³⁷ It was argued that this evidence supported his contention that the complainant had consented to sex with him. However, section 41 did not permit the admission of sexual behaviour evidence solely on this basis and the defendant could not bring his evidence within any of the gateways in the section. The House of Lords had to consider whether the failure to allow for the admission of the evidence was a breach of the defendant's right to a fair trial in Article 6 of the E.C.H.R., which was incorporated into English law by the *Human Rights Act 1998*.³⁸ It was held that if this type of evidence had to be excluded as a result of section 41, this would generate problems regarding the defendant's right to a fair trial. However, the House of Lords decided not to hold that section 41 was incompatible with the E.C.H.R.³⁹ Instead, Lord Steyn held that it was possible to read

³³ See Kibble, "Prior Sexual History", *supra* note 15 at 31.

³⁴ Article 6(2) of the E.C.H.R. provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Defendants are entitled to similar rights in Ireland. Article 6 is equally applicable in an Irish context, where defendants' rights are also enshrined in Article 38.1 of the Irish Constitution. The Irish constitutional provisions are discussed more fully in Part IV below.

³⁵ The trial judge discharged the jury and gave leave to appeal "with enthusiasm" on the grounds that the defendant was being denied a fair trial contrary to his rights under Article 6 of the European Convention on Human Rights: See Lees, *supra* note 30 at xxvii.

³⁶ *R v. A. (No. 2)*, *supra* note 20.

³⁷ The defendant claimed that he had had consensual sexual intercourse with the complainant a number of times in the three weeks prior to the alleged rape, the last instance of sexual intercourse occurring approximately one week before the alleged rape.

³⁸ Section 3(1) of the *Human Rights Act 1998* provides that English legislation "must be read and given effect in a way which is compatible with the Convention Rights." Thus, when applying a statute, the English courts must interpret it in a manner which is compatible with the E.C.H.R.

³⁹ Section 4(2) of the *Human Rights Act 1998* provides that "if the court is satisfied that the provision is incompatible with a Convention Right it may make a declaration of incompatibility."

section 41, and in particular section 41(3)(c) (the similarity exception⁴⁰), as being subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Article 6 should not be treated as inadmissible.⁴¹ The Law Lords restored an element of discretion to trial judges with regard to the admissibility of sexual experience evidence by providing that under section 41(3)(c):

... construed where necessary by applying the interpretative 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.⁴²

As a result of this decision, where the defence is consent, the trial judge will have discretion whether to admit evidence of previous sexual activity between the defendant and the complainant if a failure to admit such evidence would breach the fair trial rights of the defendant.

The decision in *R. v. A. (No. 2)* demonstrates that any attempt to curtail a defendant's access to relevant sexual experience evidence raises serious implications for fair trial rights. This may result in the whole regime being struck down as a breach of due process guarantees. Admittedly, the House of Lords decided not to declare the entire section incompatible with the E.C.H.R., preferring to interpret it in a manner which complied with defendants' rights. This avoided the creation of a new legislative scheme. However, the need to protect the rights of defendants still resulted in an alteration of the regime which was not intended by the legislature. This reinforces the unassailable nature of defendants' rights. They cannot be legislated out of existence. Since the defendant must be afforded the opportunity to defend himself, he must be permitted to raise any evidence which is relevant to that defence. Any legislative

⁴⁰ That is, the exception which permits sexual experience evidence to be admitted where the complainant's previous sexual behaviour was so similar to her behaviour at the time of the alleged incident that the similarity cannot reasonably be explained as a coincidence.

⁴¹ *R v. A. (No. 2)*, *supra* note 20 at 68. Steyn L. stated that it was "realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material." *Ibid.*

⁴² *Ibid.* at 69.

formula which seeks to circumvent this right is unlikely to withstand human rights challenges.

The second problem with rule-bound schemes is that seeking to suppress judicial discretion is a formidable task and is likely to be resisted by trial judges. This is evident from the decision of *R. v. A. (No. 2)*. In order to maintain their ability to do justice for defendants, the judiciary moved to restore their discretion to admit sexual experience evidence where this was necessary to protect defendants' rights. Indeed, even without formal restoration of discretion such as that which occurred in *R. v. A. (No. 2)*, it is likely that judges will seek to maintain their discretion on an informal basis and exercise it where they believe that this is necessary. Research with judges conducted by Kibble in the wake of the introduction of section 41 demonstrates the potential for this to happen.⁴³ Many of the judges commented that without the decision in *R. v. A. (No. 2)*, section 41 would not be workable. The judges also intimated that in their determination to avoid the injustice which may be caused by the legislative provision, they would feel obliged to respond, presumably by refusing to apply the strict letter of the provision.⁴⁴ Similar research conducted by Temkin and Krahe revealed analogous results. Despite section 41, six of seventeen judges interviewed in Temkin and Krahe's study expressed themselves to be unprepared to forego their discretion in relation to sexual experience evidence.⁴⁵ Consequently, it is clear that a judge faced with a provision of a rule-bound scheme which is likely to cause injustice is liable to circumvent the provision and restore his/her discretion to admit sexual experience evidence in order to provide a more favourable outcome.

⁴³ Kibble conducted interviews with seventy-eight judges in 2003: See Kibble, "Judicial Perspectives", *supra* note 28 at 263.

⁴⁴ This sentiment is well-articulated by the following statement from one judge in Kibble's study:

I don't think it's a question of judges really bending the law. But I'd be prepared to bend one or two things, on timing whether it's contemporaneous, if it's a few days rather than 24 hours and that sort of thing. But it's a question of fairness at the end of the day, You've got to consider the complainant of course. Is it fair to the complainant and is it fair to the defendant? It's a balancing exercise. You do what you think is right.

Ibid. at 264.

⁴⁵ Indeed, the judges listed a number of techniques which they would use in order to neutralise the effects of section 41: J. Temkin, & B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2005) at 148-150 [hereinafter Temkin & Krahe].

Aside from a desire to protect defendants' rights, another reason why trial judges will be jealous to protect their discretion is the fact that "no legislature has the prescience to foresee every eventuality" ⁴⁶ Thus, it is likely that cases will come before the court that the legislation has not accounted for. Given the diverse range of fact scenarios which come before the courts in sexual offence cases, it is highly unlikely that any legislative scheme could be drafted in such a way as to cover every possible fact pattern which could arise in relation to the admission of sexual experience evidence. ⁴⁷ Should an unforeseen circumstance arise, it is likely that the trial judge will have to use his/her discretion and make an *ad hoc* decision regarding the admissibility of sexual experience evidence.

As a result, it is clear that, due to the need to protect defendants' rights and the impossibility of gateway systems catering for every eventuality, judicial discretion is unlikely to be quelled. It is very probable that the judiciary will resurrect its discretion either formally, as *R. v. A. (No. 2)* demonstrates, or on an informal *ad hoc* basis where trial judges feel it is necessary to admit sexual experience evidence in order to do justice in an individual case or where the legislation does not provide for the fact scenario which is before the court.

The final problem with rule-bound schemes such as section 41 is their complex nature. This intricacy is a direct result of attempts to avoid the two problems which have already been outlined. The desire to protect defendants' rights contributes to complexity because legislators must seek to restrict the use of sexual experience evidence as far as possible without contravening due process guarantees. This can result in convoluted compromises such as the gateway system in section 41. Attempts to curb judicial discretion also lead to complication because legislation must seek to provide for every fact pattern which may arise in a sexual offence case in order to avoid trial judges

⁴⁶ See Baird, *supra* note 15 at 204.

⁴⁷ Galvin argues that the underlying flaw in rule-bound schemes is that it is almost impossible to anticipate the myriad of factual contexts in which sexual conduct evidence may be highly relevant to a legitimate defence theory: See Galvin, *supra* note 16 at 774. Similarly, Roberts and Zuckerman comment that probative value is too mercurial to be captured by inflexible evidentiary categories and too unpredictable to be defined in advance by legislation: P. Roberts & A. Zuckerman, *Criminal Evidence*, 2nd ed. (Oxford: Oxford University Press, 2010) at 451.

resurrecting their discretion when unusual fact patterns present themselves.⁴⁸ This effort also contributes to the creation of highly detailed and complicated statutes which may lead to problems of interpretation. The wording of the gateways in section 41 is testament to this. The scheme is difficult to explain, let alone apply in practice. Convoluted provisions such as section 41 create confusion which may result in the statute being misunderstood⁴⁹ and consequently inadvertently ignored by judges and lawyers. This may serve to minimise the practical benefits of the legislation.

From the foregoing it is clear that the notional promise of rule-bound schemes does not always translate into workable legal schemes. Although such systems provide an element of clarity for defendants and complainants, they also have the potential to exclude relevant evidence and thereby encroach upon defendants' rights. If this occurs, the schemes must be altered by the courts. It is also clear that judicial discretion is very difficult to stifle and is likely to resurrect itself in some shape or form. Finally, the complexity surrounding rule-bound schemes may lead to them being inadvertently flouted, again frustrating the intent of the legislature. All of these problems have arisen in England since the enactment of section 41. Thus, it seems that rule-bound schemes are not the most suitable replacement for judicial discretion. It seems that an intermediate approach between these two types of regime may represent the most appropriate model for regulating the admissibility of sexual experience evidence. The Canadian structured discretion model offers one such approach.

IV – The Canadian Structured Discretion Model: A Suitable Intermediate Approach between Rule-Bound and Discretionary Schemes

The Canadian rules relating to the admission of sexual experience evidence in sexual offence trials is to be found in section 276 of the Canadian Criminal Code. The current formulation of section 276 was enacted after a previous rule-bound incarnation was found to contravene defendants' rights under the Canadian Charter of Rights and

⁴⁸ Galvin views this as the fundamental shortcoming with schemes such as this, making reference to “the near impossibility of predicting the myriad of factual contexts in which sexual conduct evidence might be relevant to a legitimate defence theory.” See Galvin, *ibid.* at 865.

⁴⁹ Research with barristers and judges which was conducted by Temkin and Krahe did reveal that there was a certain lack of understanding surrounding s. 41: See Temkin & Krahe, *supra* note 45 at 146.

Freedoms. The original section 276 was introduced in 1982 and provided for a blanket prohibition on the introduction of sexual experience evidence which was subject to just three exceptions. In *R. v. Seaboyer*⁵⁰ it was held that the provision infringed principles of fundamental justice and the right to a fair trial guaranteed by sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms, respectively, because it precluded the court from considering relevant evidence.⁵¹ Thus, care was taken when drafting the current formulation of section 276 in order to ensure that it struck the correct balance between the rights of complainants and defendants. The attention paid to protecting the rights of defendants in light of the Canadian human rights provisions is important in light of the similar mandate imposed in an Irish context by the Constitution. Indeed, one of the primary concerns with the rule-bound scheme in the *Y.J.C.E.A. 1999* from an Irish perspective is its likelihood to fall foul of the due process guarantees in Article 38.1 which provides that “[n]o person shall be tried on any criminal charge save in due course of law.” This Article has been interpreted as providing for the right of a defendant to receive a fair trial which encompasses the right to be presumed innocent until proven to be guilty⁵² and the right to cross-examine witnesses,⁵³ amongst others. The *Human Rights Act 1998* permitted the English Law Lords in *R. v. A. (No. 2)* to interpret section 41 so as to make it compatible with the due process guarantees in the E.C.H.R. The Irish courts would not be similarly capable of “reading down” an equivalent provision with the result that the only option would be to strike the provision down as unconstitutional. Consequently, given the strength of defendants’ rights in this jurisdiction, the structured discretion regime offers a far more viable option than section 41 of the *Y.J.C.E.A. 1999*.

The Canadian scheme is also a better alternative to the rule-bound scheme in an Irish context because of the protection it affords to judicial discretion. The separation of

⁵⁰ [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*].

⁵¹ See Easton, *supra* note 30 at 180. For commentary on *Seaboyer* and discussion on the rape shield rules which that decision struck down see: M.A. Wagner, “Canadian Rape Shield Statutes” (1992-1993) 16 *Hastings International and Comparative Law Review* 637; M.D. Smith, “Language, Law and Social Power: *Seaboyer*, *Gayme v R* and a Critical Theory of Ideology” (1993) 51 *University of Toronto Faculty of Law Review* 118; M. Shaffer, “*Seaboyer v R*: Case Comment” (1992) 5 *Canadian Journal of Women & the Law* 202.

⁵² *O’Leary v. A.G.* [1993] 1 I.R. 102.

⁵³ *State (Healy) v. Donoghue* [1976] I.R. 325.

powers is a sacrosanct principle in Irish law. Article 34.1 of the Constitution provides that justice must be administered in the courts.⁵⁴ One of the consequences of this provision is that “the other organs of government (legislature and executive) may not trespass upon the judicial process”⁵⁵ Casey notes that “*Re Haughey* established that the administration of justice in criminal trials embraced trial conviction and sentence. Save for entry of a *nolle prosequi*, no executive intervention in this process, once begun, is permissible.”⁵⁶ Thus, a rule-bound scheme such as section 41 may be seen as legislative interference with judicial discretion to admit or exclude evidence and therefore be deemed unconstitutional. Unlike the English provisions, however, the prevailing version of section 276 has sought to restore judicial discretion, whilst at the same time guiding it so that sexual experience evidence is only admitted where it is legitimately relevant to the defence case. The section opens with a clear statement of the purposes for which sexual experience evidence must never be admitted. The criteria for admissibility which trial judges must adhere to when exercising their discretion are then outlined. Given the protection afforded to judicial independence and discretion in the Irish constitutional jurisprudence, this deference to judicial discretion is likely to be more acceptable in an Irish context than the rigidity of a rule bound scheme.

A. Forbidden Reasoning and the Section 276 Regime: Countering the “Twin Myths”⁵⁷

Section 276 begins with an absolute prohibition on what are regarded as the illegitimate uses of sexual experience evidence.⁵⁸ Section 276(1) provides that:

...evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person,⁵⁹ is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant:

⁵⁴ Article 34.1 provides that: “[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

⁵⁵ D. Gwynn Morgan, *Constitutional Law of Ireland*, 2nd ed. (Dublin: Round Hall, 1990) at 36.

⁵⁶ J. Casey, *Constitutional Law in Ireland*, 3rd ed. (Dublin: Round Hall, Sweet & Maxwell, 2000) at 249.

⁵⁷ See *infra* note 60.

⁵⁸ See Kibble, “Judicial Discretion”, *supra* note 31 at 267.

⁵⁹ It is notable that s. 276 encompasses sexual experience evidence with both third parties and the defendant. This marked a break with the earlier provision and attracted some critical comment: See A. Gold, “Flawed, Fallacious but Feminist: When One Out of Three is Enough” (1993) 42 *University of New Brunswick Law Journal* 381; R.J. Delisle, “The New Rape Shield Law and the Charter” (1993) 42

- (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.

This opening statement is designed to counter the “twin myths”⁶⁰ which the defence might rely upon when seeking to introduce sexual experience evidence. The first myth which this provision is designed to counter relates to consent and operates at two levels. At a general level, it suggests that a woman who is sexually experienced is more likely to consent to sexual activity. On a more specific (and slightly more realistic) level, it suggests that a complainant who has consented to sexual activity with the defendant on a previous occasion is therefore likely to have consented at the time of the alleged sexual offence. This type of thinking can prove highly prejudicial for complainants, permitting the use of sexual experience evidence where there is no sound evidential basis for it. As a result of this opening provision, sexual experience evidence can no longer be introduced merely on the basis of this type of “she consented before, she must have consented then” reasoning. Of course, this is not to suggest that evidence of sexual experience evidence can never be introduced in order to support the defendant’s assertion that the complainant consented. What is prohibited is using sexual experience evidence to support illegitimate inferences about consent. Where there is a logical and demonstrated nexus between the sexual experience evidence and the impugned sexual encounter, it will be admissible in order to support the defendant’s contention that the complainant consented. For example, where the defendant had consensual sexual activity with the complainant in precisely the same circumstances on a previous occasion, this may be admissible in limited circumstances as a form of “pattern evidence”

University of New Brunswick Law Journal 335; D. Stuart, “The Pendulum Has Been Pushed Too Far” (1993) 42 University of New Brunswick Law Journal 349.

⁶⁰ In *Seaboyer*, the case which preceded the introduction of s. 276, McLachlin J. referred to the traditional inappropriate uses of sexual experience evidence as the “twin myths”:

[e]vidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited.

Seaboyer, *supra* note 50 at 604.

indicating her propensity to consent to sexual activity in these circumstances.⁶¹ However, a strong link between the evidence and the alleged non-consensual encounter would be necessary to justify admission of the evidence.

The second myth which is dealt with in this opening provision is that which suggests that a woman who is sexually experienced is of low moral worth and therefore less credible as a witness. This stereotypical reasoning has no place in a modern sexual offence trial. However, as with the prohibition of the use of prior sexual experience to demonstrate consent, forbidding its use to undermine a complainant's credibility does not mean that a specific instance of sexual activity could never be used in order to challenge a complainant's version of events. For example, a previous sexual experience with the defendant or another individual might be admissible because it suggests a motivation to fabricate on the part of the complainant.⁶² Thus, what is prohibited in the second part of section 276(1) is seeking to suggest that a sexually experienced woman is, as a result of her "unchaste" character, prone to mendacity. The use of genuinely relevant sexual experience evidence which may raise reasonable doubts about the complainant's credibility is still permitted.

The inclusion of the blanket prohibition in section 276(1) sends a strong message about the appropriate use of sexual experience evidence. Paciocco and Stuesser comment that the "twin myths" inferences are pejoratively judgmental and premised on a simplistic and anachronistic world-view.⁶³ Thus, section 276 opens with a necessary and worthwhile statement of intent on the part of the legislature. It makes it clear that sexual experience evidence will only be admitted where it is genuinely relevant to an issue in the trial and that it cannot be used merely to prejudice the complainant's account. In this way it provides a strong introduction to the regime.

⁶¹ Of course, this type of argument would have to be carefully assessed by the trial judge in order to ensure that the evidence is genuinely relevant and that the similarities between the impugned sexual encounter and the evidence which it is proposed to introduce go beyond mere coincidence.

⁶² An example of this would be where the defendant terminated a sexual relationship with the complainant in circumstances where the complainant might be motivated to fabricate an allegation of sexual abuse in a bid to exact revenge on the defendant.

⁶³ D.M. Paciocco & L. Stuesser, *The Law of Evidence: Revised Fifth Edition* (Toronto: Irwin Law Inc., 2008) at 96 [hereinafter Paciocco & Stuesser].

B. The Criteria for Admissibility: Guiding Judicial Discretion

The “twin myths” prohibition is followed by the criteria which must be satisfied if sexual experience evidence is to be properly admitted. Section 276(2) provides that a trial judge may not admit evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the defendant or with any other person, unless the trial judge determines that the evidence:

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.⁶⁴

The effect of section 276(2) is to create a three-stage cumulative test⁶⁵ for the admission of sexual experience evidence. The first stage in the test is that the evidence must relate to a specific instance of sexual activity. Thus, evidence of general sexual reputation is inadmissible.⁶⁶ This ensures that the defence cannot engage in a fishing expedition in order to try to find something in the complainant’s sexual past which might serve to discredit her. It will be necessary to point to a particular experience of the complainant. Presumably this would entail identification of a general time and/or place for this sexual activity. Certainly, it would be necessary to identify the complainant’s partner in this activity.

The second stage in the test is to demonstrate that the instance of sexual activity is relevant to an issue at trial. The sexual activity will be relevant if it “has the capacity to make the determination of any fact in issue more probable than not.”⁶⁷ Thus, in a case where consent is in issue, an instance of sexual activity would be admissible if it would be relevant to determining whether or not consent was present. For example, it may

⁶⁴ The Canadian Criminal Code, s. 276(2).

⁶⁵ This phrase is coined by Duff commenting on the Scottish equivalent of this test: P. Duff, “The Scottish ‘Rape Shield’: As good as it gets?” (2011) *Edinburgh Law Review* 218 at 228.

⁶⁶ See Pacciocco & Stuesser, *supra* note 63 at 95. As will be seen below, s. 277 also provides an express prohibition on the use of evidence of sexual reputation.

⁶⁷ S.M. Chapman, “Section 276 of the Criminal Code and the Admissibility of ‘Sexual Activity’ Evidence” (1999–2000) 25 *Queen’s Law Journal* 121 at 149 [hereinafter Chapman].

demonstrate that the complainant and defendant have always had sex on precisely the same terms and it has always been consensual, thereby making it significantly more probable that consent was present at the time of the impugned encounter.

The final stage in the test requires the trial judge to make sure that the evidence which it is proposed to introduce has “significant probative value” which is not “substantially outweighed by the danger of prejudice to the proper administration of justice.” In order to be “significant”, the evidence must “not be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt.”⁶⁸ Chapman suggests that the requirement of significant probative value requires only evidence which is, together with other evidence, capable of enabling a reasonable jury properly instructed to have a reasonable doubt about guilt.⁶⁹ However, this evidence may still be excluded if its significant probative value is outweighed by its potential to prejudice the proper administration of justice. Paciocco and Stuesser note that on its face, this provision contemplates that evidence capable of raising a reasonable doubt could be denied to a defendant. However, although this is a “troubling proposition”, Paciocco and Stuesser suggest that, “in practice, it is difficult to conceive of cases where a judge could find that prejudice to the administration of justice would substantially outweigh the importance of giving the accused access to evidence having such importance.”⁷⁰

The test for admissibility set out in section 276(2) makes sure that decisions about the admissibility of sexual experience evidence cannot be made lightly. Although this model allows trial judges to retain their discretion, the three-stage test prevents trial judges from making ill-considered or hasty judgments about admissibility. Under this framework, the likelihood of introducing sexual experience evidence unnecessarily so as to prejudice the complainant’s account is significantly curtailed. However, at the same time, there is enough flexibility to allow the defence to admit evidence which can legitimately raise a reasonable doubt about the defendant’s guilt.

⁶⁸ See Paciocco & Stuesser, *supra* note 63 at 97, quoting *R. v. Darrach* [2000] 2 S.C.R. 443 at para. 41 [hereinafter *Darrach*].

⁶⁹ See Chapman, *supra* note 67 at 128.

⁷⁰ See Paciocco & Stuesser, *supra* note 63 at 97.

The three-stage test for admissibility is followed by a list of factors which the trial judge must take into account when deciding whether to admit the evidence of the complainant's sexual experience:

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;
- (h) any other factor that the judge, provincial court or justice considers relevant.⁷¹

This checklist provision attempts to further steer judicial discretion by directing judges to consider the interests of the defendant, the complainant and society more generally. Thus, in considering issues such as "relevance" or "probative value" as set out in the criteria for admissibility, the trial judge is obliged to take a holistic approach and keep all of these considerations in mind. This guarantees that all interested parties are adequately accommodated. Gotell comments that this check-list was "clearly intended to compel judges to engage in a complex balancing exercise that extends beyond the narrow contest between the privacy of the individual complainant and the legal rights claims of individual defendants."⁷² This check-list contemplates "a contextual analysis" of sexual experience, that is, "an analysis in which the individual rights of complainants and defendants are set against a backdrop of sexual violence as a serious social problem and framed by a recognition of the need to curtail the circulation of discriminatory myths within sexual assault trials."⁷³

⁷¹ The Canadian Criminal Code, s. 276(3).

⁷² L. Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2005-2006) 43 *Alberta Law Review* 743 at 755 [hereinafter Gotell].

⁷³ *Ibid.*

The test for admissibility in section 276 is also supported by section 277 which sets out a prohibition on the use of sexual reputation evidence. The provision provides that “evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.” This provision prohibits the introduction of character evidence relating to sexual matters in order to besmirch the complainant. Setting this prohibition outside of section 276 makes it clear that such evidence must never be admitted in a trial and there can be no circumstances in which a trial judge could exercise his/her discretion in order to allow for it to be introduced. Given the highly prejudicial and utterly unnecessary nature of such evidence, this is an important and worthwhile provision.

C. Assessing Section 276: The Benefits of Structured Discretion

Section 276 provides a clear and concise approach to the regulation of the use of sexual experience evidence. The strong blanket prohibition on reliance on the “twin myths” and the use of sexual reputation evidence, together with the strict admissibility criteria ensure that judicial discretion will be sufficiently structured so as to minimise to the greatest degree possible the potential to prejudice complainant’s testimony. However, the fact that discretion is retained has allowed for a far less complex scheme than section 41 of the *Y.J.C.E.A. 1999* because it is not necessary to seek to foresee every instance where sexual experience evidence may need to be admitted. Thus, the need for the creation of complicated gateways is avoided.

In addition, the retention of discretion means that the restriction on the use of sexual experience evidence is achieved without any threat to the rights of defendants. Since trial judges retain their discretion to introduce this evidence, it is possible to do this whenever this is necessary in order to respect the defendant’s right to a fair trial. Indeed, section 276 has proved itself capable of withstanding challenges regarding its compatibility with defendants’ rights. In *Darrach* the Supreme Court of Canada held that section 276 did not contravene the rights of defendants which are enshrined in sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms, that is, the right to make full answer and defence and the right to a fair trial. This outcome of this challenge is

important as it indicates how Irish trial judges might assess a similar provision under the Irish constitutional guarantees of defendants' rights. The defendant in that case had argued that the exclusionary rule in section 276(1) was a blanket exclusion that prevented him from adducing evidence necessary to allow him to defend himself. The Supreme Court held that the defendant was mistaken in his characterisation of the rule and stated that: "... far from being a blanket exclusion, section 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific illegitimate inferences. These are known as the 'twin myths'."⁷⁴

The Supreme Court went on to point out that outside of the twin myths, relevant evidence of sexual activity would still be admissible:

[t]he phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" ... limits the exclusion of evidence to that used to invoke the "twin myths".⁷⁵

Since the defendant was still able to access relevant information, the defendant's right to defend himself was not contravened and thus, section 276 was not a violation of his Charter rights. This assessment of section 276 provides a persuasive precedent for the constitutionality of a structured discretion scheme in an Irish context.

Of course, as with all legislative provisions, there are indications that section 276 is not an infallible solution to the problems posed by the regulation of the admissibility of sexual experience evidence. Gotell has suggested that trial judges' assessments of applications under section 276 are not sufficiently balanced and that trial judges are not paying enough attention to the check-list of factors which they are required to take into account when determining relevance. Drawing on her assessment of available

⁷⁴ *Darrach*, *supra* note 68 at para. 32.

⁷⁵ *Ibid.* at para. 35.

judgments,⁷⁶ Gotell concludes that trial judges have tended to avoid the complex balancing of individual and social concerns that the check-list envisions.⁷⁷ Even though section 276 asks judges to weigh defendants' legal rights against the privacy rights of complainants and to consider such factors as discriminatory beliefs and society's interest in police reporting, it appears that rarely are concerns other than privacy and legal rights acknowledged or analysed.⁷⁸ This suggests that the check-list is not achieving its intended goal of ensuring a thorough contextual analysis of the relevance of sexual experience evidence. As a result of the strength due process guarantees, defendants' fair trial rights will generally be viewed as outweighing complainants' rights to privacy. Consequently, a "zero sum" analysis⁷⁹ of the respective rights of defendants and complainants in relation to the admission of sexual experience evidence will be likely to result in a decision to admit such evidence. In this way, the potential benefits of the structured discretion regime which is offered in section 276 will be negated. Contrarily, if the thorough contextual analysis which is encouraged by the check-list in section 276 were properly undertaken, the trial judge would consider other factors (*e.g.* the need to increase reporting). This would lead to more nuanced assessments and strengthen the case for exclusion of such evidence.

Another criticism which Gotell has made of the current operation of section 276 is that trial judges are not providing reasoned judgments regarding their decisions on admissibility. Rather than setting out how the provisions of section 276 have been applied, judges simply review the facts of the case, summarise defence submissions, recite the provisions themselves and then render a decision without showing their actual reasoning.⁸⁰ This culture of permitting trial judges to not fully articulate their reasoning facilitates the improper application of the check-list of factors alluded to in the previous paragraph. If trial judges do not have to show in their judgments that each factor was given due consideration, then there is little incentive for trial judges to

⁷⁶ Gotell examined twenty-two lower court decisions concerning the admissibility of sexual experience evidence in the three-year period following the Canadian Supreme Court's decision in *Darrach, ibid.*, where it was decided to uphold the constitutionality of the current formulation of s. 276: see Gotell, *supra* note 72 at 757.

⁷⁷ Gotell, *ibid.* at 758.

⁷⁸ *Ibid.* at 766.

⁷⁹ *Ibid.* at 767.

⁸⁰ *Ibid.* at 766.

demonstrate that they have appropriately engaged in the more nuanced assessment of relevance which is required by section 276. Trial judges may thus be inclined to rely on their traditional, and problematic, approach of simply pitting the rights of the complainant against those of the defendant. As stated above, this is a competition where the complainant is likely to lose out and the evidence will be admitted.

The problems identified by Gotell are regrettable. However, they are not insurmountable and could be avoided by the use of extra-legal measures which would support the legislative scheme and ensure that it is correctly implemented in practice. The first initiative which could off-set the problem of incorrect implementation of section 276 by trial judges is the imposition a positive requirement to produce a written reasoned decision regarding admissibility. This would encourage trial judges to engage in a thorough analysis of all the relevant factors because an omission to consider factors such as the need to increase reporting or the societal interest in apprehending sexual offenders would be immediately apparent. The requirement of a written decision would thus force trial judges to make sure that they consider all the relevant factors and apply the legislative provisions carefully. The correct application of the section by trial judges could be further encouraged by the provision of judicial training which shows trial judges how to properly weigh up all of the relevant considerations when making a decision about allowing the introduction of sexual experience evidence. This training could be supplemented by bench book guidance which trial judges could refer to during the trial. Such guidance would remind judges that all of the issues on the check-list must be taken into account when reaching their decision in this area and that it is not enough to simply weigh the complainant's privacy rights against the right of the defendant to defend himself. It could also direct trial judges on the preparation of written decisions about admissibility.

Suitably supported by appropriate extra-legal measures such as these, a structured discretion regime appears to offer a suitable advancement upon wholly discretionary schemes like section 3 of the *Criminal Law (Rape) Act 1981*. Much-needed certainty is injected into this area of the law and complainants are offered far greater protection from the unwarranted introduction of sexual experience evidence.

Importantly all of this is achieved without compromising defendants' rights or introducing undue complexity into the law, two problems which are attendant upon the introduction of a rule-bound scheme such as section 41 of the *Y.J.C.E.A. 1999*. Consequently it would appear that structured discretion represents best practice in the regulation of the admissibility of sexual experience evidence.

V – Conclusion

This article has described three differing approaches to the regulation of the admissibility of sexual experience evidence. The disadvantages of the Irish discretionary approach are palpable. It is clear that this model is not capable of appropriately protecting complainants from the unnecessary introduction of sexual experience evidence. However, the discussion of the English law has shown that the rule-bound approach might be a step too far in the opposite direction and may generate more problems than it solves, leading to undue complexity and raising concerns about defendants' rights. On other hand, the Canadian structured discretion scheme seems to offer a suitable halfway between “between inflexible legislative rules and wholly untrammelled judicial discretion.”⁸¹ Moreover, in an Irish context, the structured discretion approach is far more appropriate, given the constitutional protection of defendants' rights and judicial independence in criminal trials. Consequently, the section 276 regime represents a workable best practice model for regulation of the admissibility of sexual experience evidence.

⁸¹ Kibble, “The Sexual History Provisions”, *supra* note 15 at 282.