The revival of evidential relevance: Overcoming myths and misconceptions

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Crim. L.R. 458 Abstract

This article explores the definition and operation of "relevance", as a foundational concept within the law of criminal evidence. The review is particularly timely given the Law Commission's latest consultation paper (No.259) which centres an "enhanced relevance" test in its proposal on sexual behaviour evidence. Given the centrality of relevance to criminal evidence and to the Law Commission proposals, it is increasingly important to know what we mean by, and how we apply, relevance currently. This article draws upon interviews with 20 criminal barristers with experience practising in Crown Courts across England and Wales. Interviews showed the existence of a relevance "myth": that evidential relevance is relatively well-settled and straightforward, posing few problems in practice. The interview data give cause to challenge this perceived simplicity, demonstrating inconsistencies in the understanding and application of relevance tests, and raising concerns about its future operation. These findings are, therefore, of importance to the Law Commission which is seeking to employ, and build upon, what is erroneously perceived as a settled concept.

Introduction

A foundational concept in criminal evidence is the requirement that all evidence adduced in a criminal trial must be "relevant"; evidence deemed irrelevant is inadmissible. Despite its universal application and centrality in the law of evidence there has been limited academic and practitioner discussion of evidential relevance. It has traditionally received somewhat cursory treatment in evidence scholarship, where there is a tendency for it to be defined through case examples rather than conceptually.[1] This article interrogates the notion of relevance and draws upon interviews with 20 criminal barristers conducted as part of a research project that focuses on evidential relevance in theory, doctrine, and practice. This article suggests that a prominent relevance myth exists: the myth of relevance as a "well-settled" evidential matter that poses few problems in the criminal courts. Almost all barristers interviewed confidently asserted that the legal test for relevance was settled and dependable. Subsequent questioning as to the details of that test, however, revealed significant differences in understandings of relevance. ***Crim. L.R. 459***

Exploration of relevance is particularly timely given the Law Commission's recently published consultation paper on evidential matters in sexual offence prosecutions,[2] which centres relevance in significant law reform proposals. The consultation paper considers a wide range of issues, including the complex matter of sexual behaviour evidence.[3] Here, the Law Commission proposes a move away from proscriptive exclusionary categories of evidence,[4] preferring a "structured discretion" model as the appropriate evidential filter. The proposed model has two requirements: 1) an enhanced relevance test that requires evidence to have "substantial probative value"[5] and 2) requires that "its admission would not significantly prejudice the proper administration of justice".[6] The Law Commission's evolution of relevance is an important development, which prompts serious consideration and interrogation. This article highlights some of the complexities of relevance and suggests the Law Commission would do well to acknowledge those difficulties and explore measures to control them.

Section 1 of this article explores the theoretical meaning of relevance in an evidential context, examining the Law Commission's proposal and suggested use of relevance for sexual behaviour evidence. Section 2 then draws on interview data to explore how barristers use and understand relevance in practice. Key areas of inconsistency are identified and explained, which raises concerns about the consistent and just application of relevance. The findings presented here are of importance to barristers and courts in their understanding and treatment of relevance. They are also of importance to the Law Commission which is seeking to employ, and build upon, what is erroneously perceived as a settled concept. This research is novel in shedding light on how relevance works in practice, based on perspectives from criminal barristers. After all, it ought not be forgotten that relevance, enhanced or otherwise, permeates the criminal justice system at almost every level.[7] Its practical use and development are, therefore, of the upmost importance and should concern us all.

1. Relevance in theory

Evidence is typically understood to be relevant if it "makes the matter which requires proof more or less probable".[8] Relevance is inherently concerned with the relationship between facts in a criminal case,[9] and if established, evidence is prima facie admissible. Although necessary, relevance alone is not always sufficient for admissibility; relevant evidence may nevertheless be inadmissible by virtue of an exclusionary rule of evidence or the exercise of an exclusionary discretion. This evidential process is usefully expressed in the following tripartite structure which asks three key questions: is the evidence 1) relevant; 2) subject to an exclusionary rule; and 3) is the evidence subject to an inclusionary exception to any applicable ***Crim. L.R. 460** exclusionary rule.[10] This structure is one way of expressing the placement of relevance in the evidential process, and is adopted in this research due to its clarity and emphasis on the distinction between relevance and admissibility. It also ensures consistency in the language used in interviews and the analysis in this article.

Whichever way the evidential process is presented, questions of relevance are foundational to all questions of evidential admissibility. Academic discussion of relevance often focuses on the distinction between two "tests" or approaches to relevance: logical relevance and legal relevance.[11] Logical relevance is regarded as "an affair of logic and not of law"[12] and requires that "to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue".[13] Once a logical connection between the evidence and fact in issue is established, there is no additional threshold in terms of evidential weight (or other) to be met. Legal relevance engages the same initial question as logical relevance—asking whether the evidence is logically relevant—but requires an additional "plus value" is attached to the evidence. The plus value is to be understood as "additional probative value"[14] which is "a vehicle for facilitating consideration of any disadvantages of admitting the evidence".[15] The presentation of relevance in these two forms is almost universal across academic work, yet there has been an absence of practical enquiry into their operation. Even on the most basic question of which of the two tests is, or should, be applied when adducing evidence.[16]

The concept of evidential relevance has come to the fore recently in the Law Commission's consultation paper concerning *Evidence in Sexual Offences Prosecutions*. The consultation paper considers evidential matters in sexual offence prosecutions and proposes a change to the admissibility framework of sexual behaviour evidence.[17] The statutory regime that currently regulates sexual behaviour evidence is the Youth Justice and Criminal Evidence Act (hereafter YJCEA) s.41,[18] which provides that sexual history evidence (equivalent to sexual behaviour evidence) will be inadmissible unless it falls within one of four "gateways" of admissibility, and satisfies a number of other requirements.[19] The Law Commission, however, criticises this regime as both "too broad and too restrictive",[20] and remarks that the issues identified with the regime "call into question the utility of a framework that determines admissibility by categorisation of evidence".[21] This critique chimes with academic critique of s.41;[22] extensive review of the ***Crim. L.R. 461** provisions;[23] and disagreement across the legal profession as to the efficacy of s.41.[24] Several of the barristers interviewed for the research on relevance expressed concern over the difficulty of s.41 and some of the problems is poses:

B10: "I know section 41 fairly well and it still trips me up from time to time."

B5: "… I''s so prohibitive on … what's admissible, and in fact … those of us that have been doing this for 20 years like I have, it's kind of scorched into your consciousness."

B19: "It is so very restrictive now."

Another barrister also noted "the hassle of section 41 and 42" (B17) and regarded it something "to contend with" (B10). These sentiments lend support to one of the Law Commissions' findings that "amongst divergent views, one fairly consistent message is that the current law is too complex".[25] In light of the complexity of the current exclusionary regime, it is understandable that the Law Commission see fit to move away from exclusionary rules of evidence and, instead, rely on other evidential devices. It is also understandable that relevance is a key element of the mechanism the Law Commission suggest may be better suited to regulating the admission of sexual behaviour evidence.

The rejection of proscriptive exclusionary rules of evidence reflects what appears to be the broader diminution of exclusionary rules across the criminal law. Roberts suggests "the power of exclusionary rules is not what it once was and their sphere of influence is constantly being eroded".[26] This erosion of exclusionary regimes can be seen with hearsay evidence where "the trend has been to increase the amount of hearsay evidence available to the trier of fact"[27] since reform of the hearsay regime in the Criminal Justice Act.[28] The bad character provisions have also seen a shift from the prima facie exclusion of a defendant's bad character evidence, with some limited exceptions, to a defendant's bad character being "admissible if, but only if"[29] one of seven gateways are satisfied.[30] It is notable that an erosion of exclusionary rules inevitably places greater emphasis on the role played by relevance in terms of evidential admissibility.

The Law Commission proposes a shift away from the current exclusionary regime and advocate the use of a "structured discretion model", at the centre of which is an enhanced relevance test. The consultation paper proposal is testament to the shift away from exclusionary rules of evidence and, after an analysis of ***Crim. L.R. 462** potential models, the Law Commission proposes that the current exclusionary regime should be replaced with a structured discretion model with an enhanced relevance test at its core. It is the first limb of the proposed discretion test that is the enhanced relevance test, requiring that evidence must have "substantial probative value". The consultation paper does not offer a definition of substantial probative value, as such, but it elaborates that enhanced relevance may require "that evidence has significant weight, often referred to as substantial probative value".[31] It will be recalled from the discussion above that this is similar to legal relevance, though it is enhanced from the generic form of legal relevance as it provides further detail on what the probative threshold includes.[32]

It is of note that the Law Commission did not provide further elaboration on "substantial probative value". This is particularly striking as the wording—substantial probative value—mirrors that in the non-defendant bad character provisions, which is followed by additional detail and addenda. The Criminal Justice Act 2003 s.100(1)(b) provides that evidence is admissible if:

> (b) it has substantial probative value in relation to a matter which—
>
> (i) is a matter in issue in the proceedings, and
>
> (ii) is of substantial importance in the context of the case as a whole …

The Law Commission have chosen not to suggest an additional element of the enhanced relevance test, that would deal with the relational aspect of relevance and the *matter* to which the sexual behaviour evidence pertains. This is a matter returned to in s.2, where it is argued that further detail on substantial probative value would be a valuable addition to the reform proposal. On sexual behaviour evidence, the Law Commission emphasises that "it is … important to ensure that the threshold for admissibility is right, is *clear* and allows for sufficiently *consistent* application".[33] These are laudable aims, and it is understandable that the Law Commission regard relevance a key part of the appropriate mechanism for achieving such aims. As exclusionary rules of evidence erode it is increasingly important to understand the tests for relevance, particularly so when they underpin key law reform proposals. This research is the first of its kind to engage with barristers on the topic of evidential relevance and provides an important insight into views and approaches to evidential relevance in the criminal courts.

2. Relevance in practice

This section draws upon my interview data to explore the operation of evidential relevance in practice.[34] Interviewees shared their views on and approaches to relevance, the test/s they apply, and factors that influence their decision-making ***Crim. L.R. 463** on relevance. I explore the data in detail below. In headline terms, interviews showed that barristers generally had a perception of relevance as a settled and unproblematic evidential matter, and there was a collective suggestion that relevance was dealt with consistently in the criminal courts. Analysis of interview data showed that this veneer of simplicity was something of a myth and, contrary to this perception, barristers understood and used relevance in several different ways. This was particularly the case in relation to the threshold that the barristers attached to relevance, as different relevance thresholds were identified by interviewees. Barrister responses shed light on some factors that influence the way they approach the "threshold question", that being the point at which probative value is sufficient to justify evidential admission.

This section concludes by urging caution to those, including the Law Commission, who wish to employ, and enhance, the supposedly settled concept of relevance. Upon closer examination of relevance, the veneer of simplicity crumbles. This section is organised in three parts: I. considers barristers' views on relevance and its treatment in the criminal courtroom; II. explores inconsistencies in interview responses and the different approaches to relevance as shared by barristers; and III. offers some broader observations on how relevance tests are applied and explores why barristers may understand and use relevance in ways that are, at times, inconsistent with one another.

I. Views on relevance

All interviewees were asked to draw on their experience and offer their view on the consistency with which barristers approach relevance in the criminal courtroom. The responses reflect a collective view amongst interviewees of relevance as a well-understood and straight forward evidential requirement:

B14: "I think [barristers] are all pretty clear on what it means for evidence to be relevant. I think to put it in the most simple way for you, we need to ask 'is the evidence going to assist the jury based on the particulars of the given case?'"

B12: "It's just if something's not relevant, that is normally screaming out … whether or not it is relevant is rarely something that is balanced on a knife edge."

Although some barristers acknowledged the potential for different *outcomes* in the *application* of the relevance test, this was not understood as an inconsistency in the *substance* of the test applied:

B2: "I don't think there is an inconsistency as to the law that is being applied. I do think, undoubtedly, there are inconsistencies of approach between judges and between lawyers, as to whether something genuinely is or isn't relevant."

B9: "I have seen colleagues make decisions and regard something as relevant, where I do not agree and I think they are just plain wrong … when ***Crim. L.R. 464*** something, to me at least, clearly isn't relevant. But I don't think that's because they are applying a different test or understanding relevance differently … I think they have just arrived at a different conclusion to the one that I would have arrived at."

B3: "I always try to remove anything which I think is irrelevant, you know, and it is tricky, not every barrister is the same. Other barristers might say 'oh I think that's really relevant' and you sort of think 'oh I don't know'."

B3 later went on to give an example of a situation where their opposite number was seeking to adduce evidence that B3 did not appear to think was relevant:

B3: "This case I'm doing now is quite interesting because my opponent is quite an old fella and he's trying to adduce all kinds of slightly strange bits of evidence."

Despite these instances where barristers note the potential for different decisions on relevance, the overriding theme from interview data was a collective assumption that barristers understood relevance in the same way and took the same approach to decisions on relevance. It is expected that responses to the Law Commission's consultation paper, particularly those from criminal barristers, will likely concur with the view of relevance projected by interviewees. Respondents may well regard relevance a solid and dependable concept that poses them little difficulty. On this basis, barristers may welcome the use of enhanced relevance as a key mechanism for filtering and restricting sexual behaviour evidence. The next section gives cause to challenge this view and shows how barristers understood and used relevance in different and, at times, inconsistent ways.

II. Selecting a relevance test

All interviewees were given a brief description of logical relevance and legal relevance, and were asked to comment on those two tests and whether they recognised either in practice. A range of responses were given and there was no overall consensus among the sample of 20 barristers, as to the applicability or suitability of either logical relevance or legal relevance. Of the 20 total interviewees, nine said logical relevance was the appropriate test for relevance, five said legal relevance was the test, and the remaining six were categorised within a third category labelled "other" (encompassing those who recognised neither logical nor legal relevance, those who stated it was a mix of both tests, or those who did not specify either way). When barristers were introduced to the academic conception of legal relevance, they provided interesting insights into the prevalence and nature of the test in practice. These insights also shed light on how barristers might understand and approach a further enhanced relevance test. Several barristers considered legal relevance the appropriate test due to its built-in capacity to measure the *strength* of evidence (i.e. through the probative threshold): ***Crim. L.R. 465***

B15: "As I understand it, I would say [legal relevance] because it directs your mind to the strength of the evidence, which is necessary. You might think that some evidence is relevant to something in the case, logically speaking, but that does not necessarily mean it is useful to the case you are advancing."

B3: "I think the [legal relevance] test because you have the added-on issue of probity and I think when you are taught the law, the law of evidence, you kind of remember Section 78 [of the Police and Criminal Evidence Act 1984] … that's one of those things that stick in your mind … it is quite a nice test, it's one most people can get. So I suppose you would look logically first of all, then you do add the second test, in some cases more than others."

Both these responses attach value to legal relevance's ability to measure the probative value—or strength as B15 terms it—of evidence. Interestingly, B3 seems to incorporate the Police and Criminal Evidence Act 1984 (PACE) s.78 into their understanding of relevance. Section 78 provides for prosecution evidence to be excluded in circumstances where "the admission of the evidence would have such an adverse effect on the fairness of the proceedings".[35] The implication of considering s.78 alongside determinations of relevance is that matters not strictly related to probative value may feature in decision-making. For example, matters such as how the evidence was obtained may, on this understanding, form part of the test for relevance. Recalling the tripartite structure of admissibility included above, this approach to decision-making may see relevance and exclusion collapse into one another. Another barrister shared a similar view to B3 and supported the use of a legal relevance test:

B20: "I think that when we discuss relevance we must always establish that there is a logical link between the evidence and a live issue in the case … but thinking of only logic seems far too … it is narrow to me, I think it is correct to proceed to … ask the second question that you identified, legal relevance, and be satisfied that the evidence is sufficiently probative to the live issue in the case."

Interestingly, not all barristers approved of this form legal relevance test. Instead, some barristers took issue with the very notion of *any* additional threshold being applied beyond logical relevance:

B1: "I think there's a real danger in the second one [legal relevance] … I'm thinking more of an investigative aspect, the problem that you have, and this you see it in the most serious cases … you start applying a notional probative test to it [evidence], then that is ultimately subjective, and that's very much in the eye of the person who's applying that probative test … Now the difficulty is if you apply that probative test, that material will be in effect lost, because it won't even appear on the disclosure schedule and that creates a problem. Because then there's material that you didn't even know existed further down the line … So I would reject a probative test, I think. Is it logically, in common sense, relevant … I just think if you, if you start … subverting the second stage of any sort of evidential tests, first being relevance, the second is it evidence or unused material, the third is if it's unused material. ***Crim. L.R. 466*** Is it sensitive, disclosable? But all the rest of it and then probative. It's … far further down the line. I think it's a discrete test."

While referring to wider procedural and practical issues with the justice process, including matters of pre-trial disclosure, B1 expresses discomfort over a relevance test that requires an additional evidential threshold be met, over and above a logical connection between the evidence and a contested fact. On the one hand, this shows how the breadth of relevance can give scope for barristers to take a holistic approach to decision-making on relevance, drawing upon a range of other evidential matters and processes to inform their decisions. Other barristers emphasised the role and importance of discretion in decision-making on relevance; B12 expressed discomfort in a purely logical test of relevance, though nevertheless thought it preferable to the alternative legal relevance:

B12: "Judges use common sense when they can't think of a proper reason to explain something, and they use logic when they apply their own logic, which is very often not rational. So I'm nervous about judicial comment about logic and common sense. But I sort of know what they mean that there has to be a wide discretion that the test has to be in, in my view, is this material? Could it be potentially relevant to a jury's determination of any fact or issue within the case, which is a very wide, very low bar for the Crown to get over, and once that bar is crossed once that threshold is met … then we can look at probative value prejudicial effects… Of the two schools of thought that you've outlined, I would very much, in my experience, would support the former [logical relevance] rather than the latter [legal relevance]."

Some interviewees, rather than falling on one side or the other in relation to legal and logical relevance, suggested that in practice neither legal relevance nor logical relevance answered the fundamental question as to the appropriate test for relevance. Some barristers shared their view that the correct test for relevance was something of a mix between the two tests:

B2: "I think it probably is just a mish mash in practice … I think most people in daily practice just approach it without really thinking whether what they are using to decide that question was strictly speaking a question of logic or by relevance to a legal test … they're only going to start focusing on specific legal definitions of relevance … if they're obliged to assess a statutory gateway."

B10: "In reality, I do not think that we trouble our minds with these sorts of academic questions and theories. I think we look at the case and say … OK what evidence is going to help the jury, what will help paint the picture of the case so to speak. There is logic involved … yes of course, but it isn't only logic. We get on and make a decision based on our professional judgement. I don't think … it can be reduced to definitions or theories of relevance."

The excerpts above show that barristers understood the test for relevance in different and distinct ways, and their views on the appropriate test for relevance varied considerably. It is an important finding that there was no consistent view or approach to relevance across the 20 interviewees. This finding is particularly illuminating given initial comments made by interviewees which suggested ***Crim. L.R. 467*** relevance was generally a straightforward and settled matter. This is not a critique of barristers or a suggestion of bad practice, but a reminder of the importance of understanding how discretionary tests—such as relevance—are used in practice.

These findings have wider import to the Law Commission's proposals on sexual behaviour evidence. The inconsistent approaches to relevance that have been seen here may, on the one hand, lend support to the Law Commission's decision to provide detail on the relevance test through inclusion of the *substantial probative value* threshold. This inclusion has been welcomed by Conaghan and Russell:

"We particularly welcome the suggestion to subject sexual history evidence to a higher threshold of relevance as well as recommendations compelling greater transparency and accountability around decisions to admit sexual history evidence."[36]

It is suggested that the Law Commission proposals would represent only a linguistic change, rather than an impactful and substantive one. The findings presented here show how relevance can be understood and operationalised in different ways by barristers, and key matters such as probative value are at the behest of the subjective interpretation of barristers. Even where a stipulated and seemingly higher threshold is attached to relevance, these issues remain and any proposal predicated on their universal comprehension is unlikely to have the desired effect. Instead, these findings may support the contention that the Law Commission ought to go further and provide additional detail or guidance on salient factors which may assist in the decision-making process. The aforementioned non-defendant bad character provisions[37] discussed above are useful in this respect and may provide a model for which the Law Commission to follow. It is contended that more guidance is needed to assist decision-makers in their determinations of "substantial probative value", beyond that which is currently provided in the Law Commission proposal.

III. Applying a relevance test

Interview data shows there are fundamental disagreements as to which test for relevance is correct. The responses shared indicate that relevance is far more complex than is typically appreciated, and susceptible to being understood and used in distinct ways. Given the open textured nature of relevance we must be cognisant of other factors, aside from the specific test for relevance, that may influence decision-making processes and lead to further inconsistency in decision-making. Interview responses revealed several factors which influenced the barristers' decision-making on relevance. The overarching picture that emerged was of barristers taking a holistic, pragmatic and, at times, transactional approach to relevance decision-making, rather than an academic, theoretically-informed approach.

Some referred to the importance of assisting or communicating a narrative to the jury and, in B10's experience, notions of "professional judgement". Other ***Crim. L.R. 468*** interviewees also referred to the influence of other parties in the courtroom on their decisions on relevance:

B11: "I know if I am … in front of X judge then they might give me some latitude in terms of the evidence I want to include in the case, and give me the time and space to explain its value to the jury. Y judge might have a more brisque approach, so I know when I am before judge Y that I just need to get to the point and that might mean leaving out some bits that I might have otherwise included."

B10: "We do have a sizeable discretion in what we decide … is relevant to our case but it is constrained, considerably so, by judges. They aren't going to sit there and let me prattle on about something which is barely relevant … In reality, I might push my luck a bit with some judges and try have things admitted that I know a stricter judge might not allow. It comes with experience I suppose."

Another barrister reflected on the influence of the judge in their decision-making, and shared how they might make evidential decisions based on a pre-emptive assessment of how the judge may respond to a piece of evidence:

B5: "There is one judge, in particular, that if that trial is listed in front of it wouldn't surprise me if he said they (the jury) shouldn't hear that, that wouldn't be fair, and I'd be expected to run the case without the jury knowing any of those things … If I'm in front of that judge I might water down my bad character application and say to the defence look, if you agree X, Y and I will leave out Z, then we will tell the judge it goes in by agreement."

Where B5 foresees a potential disagreement over relevance, based on their previous experience with the judge, they seek to use agreed facts to ensure the evidence is admitted. This form of party cooperation is reflected in recent research which centres barrister co-operation and the increasing prevalence of evidential admission by agreement between barristers.[38] Other barristers reflected on the role of courtroom personnel but in a different way, considering how their evidential decisions may impact on their professional reputation:

B3: "If you get a reputation for someone who takes crap points and will argue the toss so everything has to go before a judge…then that is not a reputation you really want."

B20: "You definitely don't want to get a reputation among colleagues as someone who will take issue with every piece of evidence the prosecution wishes to adduce. That would be counter-intuitive and, tactically speaking, it isn't great to get on the wrong side of the judge for no good reason."

These excerpts show barristers concern for their reputation amongst judges and fellow barristers. This tallies with much of the literature on courtroom collegiality. The presence of a "courtroom culture" and courtroom "workgroups"[39] have been ***Crim. L.R. 469** well-documented.[40] Court culture is characterised by its "shared norms, routinized work habits, and informal influences (…) arising from continual interactions among the major courtroom actors".[41] The importance of *continual* and repeated interactions between legal actors in the courtroom ought not be overlooked, as barristers often work in the same Crown Court centres and are familiar with one another. Tactics and reputation will go hand in hand in some instances, for example, when barristers associate a particular tactical decision with "winning" their case, which may in turn reinforce their sense of professional standing (and reputation). The association between tactical decision-making and reputational concerns was expressed by other interviewees:

B10: "It does not do your case, and therefore your client, any good if you irritate the judge and question relevance at every opportunity."

These excerpts show how barristers' decision-making on relevance can be influenced by broad considerations far beyond the specific test of relevance. This resonates with legal research that shows the inherent variability with which legal professionals can apply evidential rules in practice.[42] In the context of bad character applications, for instance, Thomason notes the "raft of tactical factors which affect counsels' decisions to make non-defendant BC applications".[43] Equally, in research on judicial discretion Jones considers how the judicial exercise of discretion can be susceptible to ideological fiat and crime control tendencies.[44] Barristers taking a holistic and pragmatic approach to decisions on evidential relevance fits within this broader trend of implementing evidential rules with inherent variability. In the context of relevance, this research has shown how external factors such as the presence of other courtroom actors, concern over professional reputation, and tactical decision-making undoubtedly have significant scope to influence the ways in which barristers make decisions. These are examples of themes that emerged from interviews and are no means exhaustive of the factors that guide and influence legal decision-making on relevance. They indicate, however, the scope for decisions on relevance to be highly-contextual, subjective and their ability to account for a host of extraneous influences that cannot be easily accounted for.

3. Conclusion

This research is the first of its kind to conduct an in-depth examination into evidential relevance, on both a theoretical and practical level. Interview data provide an important, and essential, insight into how barristers use and understand this fundamental evidential matter and the factors that may influence barristers' decision-making on relevance. Interviews showed that a significant relevance "myth" prevails: the myth of relevance as a well-settled, solid, and dependable ***Crim. L.R. 470** evidential matter that poses barristers few problems in practice. Almost all the barristers interviewed confidently asserted that the test for relevance was settled and dependable. This is a sentiment that, it is suggested, will likely be echoed in responses to the Law Commission consultation paper on sexual behaviour evidence. Under empirical scrutiny, the veneer of simplicity around relevance somewhat crumbles and interview data showed significant inconsistencies in barristers' approaches to, and understandings of, relevance. These inconsistencies were seen principally in relation to the precise threshold barristers attached to relevance. The interview data discussed in this article provides an important snapshot that shows the open-textured nature of relevance and its scope to be understood and applied in different ways. These findings will be of particular importance to the Law Commission who are seeking to build upon and use the relevance test in a notoriously complex area of evidence. The Law Commission's proposal is predicated on the existence of a settled and understood concept of relevance. It presumes clarity amongst the legal profession on what it means for evidence to be relevant, and for evidence to be *probative*. Yet the interview data does not support either of those presumptions. Instead, it is contended that relevance is not well-understood, nor well-settled amongst the legal profession, and the interview data shows the breadth of external factors that may influence decision-making on relevance.

Though the addition of an enhanced relevance test goes some way in clarifying how decision-makers should approach matters of evidential relevance, it does little to remedy the inherent lack of consistency and conceptual clarity of relevance. Without those core issues being addressed, the enhanced relevance test may be counter-productive and disguise variability of decision-making, under the guise of a defined higher threshold of relevance. It has, therefore, been suggested that additional guidance on the enhanced relevance test may be a useful addition to the Law Commission proposal to further assist barristers in the decision-making process. This would be at the very least a step towards ensuring the ends of consistency and clarity are best served. Relevance has an increasingly important and central role in criminal proceedings. It is, therefore, of the upmost importance that we understand its use and development across the criminal law. This research is the first to contribute to that important end, and it is hoped the theoretical and practical insights offered are of assistance to the Law Commission in their quest to develop and utilise relevance.

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Footnotes

1 For instance: *N. Monaghan Law of Evidence (Cambridge: Cambridge University Press, 2015), pp.26–29*.

2 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper (23 May 2023), Law Com. CP No.259, p.xvii*.

3 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper, pp.137–205*.

4 Youth Justice and Criminal Evidence Act (YJCEA) 1999 s.41.

5 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper, p.185*.

6 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper, p.185*.

7 Relevance has a key role to play as a universal evidential requirement, but it also operates within specific exclusionary rules of evidence and in relation to disclosure requirements.

8 *Kilbourne [1973] A.C. 729 at 756; [1973] Crim. L.R. 235*, per Lord Simon.

9 *P. Roberts, Roberts and Zuckerman's Criminal Evidence, 3rd edn (Oxford: Oxford University Press, 2022), p.185*.

10 *Roberts, Roberts and Zuckerman's Criminal Evidence (2022), p.185*.

11 *A. Choo, Evidence, 6th edn (Oxford, Oxford University Press, 2021), pp.3–5*.

12 *J. Thayer, A Preliminary Treatise on Evidence at the Common Law (Little Brown, 1898), p.269*.

13 *A (No.2) [2001] UKHL 25; [2001] 2 Cr. App. R. 21* at [31].

14 *Choo, Evidence (2021), p.3*.

15 *Choo, Evidence (2021), p.3*.

16 Some academic commentators suggest this debate is now well settled in favour of logical relevance; it is argued here that this is not the case.

17 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper, pp.183–205*.

18 YJCEA 1999 s.41.

19 YJCEA 1999 ss.41(4) and 41(6).

20 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper, p.158*; Broadly speaking, s.41 is described as too restrictive in its use of a category-based approach to admissibility and simultaneously too broad due to the element of judicial discretion reintroduced by *A [2001] 2 Cr. App. R. 21*.

21 *Law Commission, Evidence in Sexual Offences Prosecutions: A Consultation Paper, p.163*.

22 C. McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third Party Evidence" (2017) 81(5) J. Crim. L. 367.

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34 This article draws on data from semi-structured interviews with 20 criminal barristers who have experience practising in Crown Courts in England and Wales. The interviews were conducted both in person and online, and took place between June and October 2022. Of the 20 barristers, seven were female and 13 male. Most interviewees had experience with both prosecution and defence work (16) and a small number did defence work only (4). Barristers' professional experience ranged from six years in practice to 46 years in practice. All participants gave their informed consent for the interviews, and ethical approval was granted by the University of Birmingham. Any information that may identify the barristers has been removed, and barristers are referred to throughout the article as B1, B2 etc.

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