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***R v A (No 2)* [2001] UKHL 25; [2001] 3 All ER 1**

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My Lords,

1. It was Lord Chief Justice Sir Matthew Hale who centuries ago proclaimed that rape 'is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent'. This erroneous and unjustified assumption has pervaded the practise of rape law ever since. It led to the distrust of rape complainants, with the corroboration warning against convicting solely on the word of the complainant continuing until 1994. This distrust, in turn, was fuelled by myths about women's lack of credibility as witnesses, especially that of so-called 'promiscuous' or 'unchaste' women; hence the invasive questioning about women's lifestyles, behaviour and sexual activity with which this appeal is concerned.

2. While Hale was writing several hundred years ago, the assumptions underpinning his arguments have continued to be expressed in more recent times. Your Lordships and I were educated and trained during the time of the renowned criminal jurist Professor Glanville Williams. His contribution to the development of the criminal law is undoubted. However, it was also he who opined that women welcome a 'masterly advance' and may 'present a token of resistance' (*Textbook on Criminal Law*, 2nd ed, 1983, at 238). Hale's corroboration warning was necessary, he concluded, due to the fact that 'these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed' (*The Proof of Guilt* 1963, at 238 and 159). Of a similar mind, Professor Elliot opined that 'there must be more chance of objectively false evidence in rape trials than in others' ('Rape Complainant's Sexual Experience with Third Parties' (1984) *Criminal Law Review* 4, at 13).

3. Professors Williams and Elliot were not alone. Professor Wigmore, author of one of the most influential treatises on evidence in the United States and whose work continues to have a discernable impact on both US and English law, stated that the 'mental make-up' of a complainant must be tested by a qualified physician before giving evidence, due to the high risk of women fantasising about rape (*Evidence of Trials at Common Law*, orig 1904, rev ed 1970). Amongst other matters, these sorts of assumptions

* Professor of Law, Durham University. In drafting this judgment, I have drawn on the work of many eminent scholars, particularly that of Jennifer Temkin. I also benefitted greatly from the scholarship and expertise of Louise Ellison, Baroness Hale, Liz Kelly and Aileen McColgan. Thanks must also go to the many colleagues who have taken time to discuss the ideas expressed in this judgment, particularly Neil Cobb, Roger Masterman, Vanessa Munro and Erika Rackley.

led to the introduction of 'special rules' in sexual offence cases, for example permitting evidence showing that a woman was 'of notoriously bad character for want of chastity or common decency' (*R v Greatbanks* [1959] Crim L R 450). It is the continuing legacy of such case law with which this House is now concerned.

4. Myths. Assumptions. Stereotypes. They all continue to contaminate our criminal justice system and adversely impact on the processing and trial of rape complaints. Let us instead deal with some facts. In 1977 one in three women who reported rape to the police saw her attacker convicted. Twenty years later, in 1997, less than one in ten women reporting rape saw a conviction (Liz Kelly and Linda Regan, *Rape: the forgotten issue*, 2001, at 3). In these twenty years, reports of rape to the police increased by over 500 per cent. Responsibility for this low conviction rate lies with every part of the criminal justice system. There is a culture of disbelief of complainants among the police and a distinct lack of determination to seriously investigate sexual offences, while the Crown Prosecution Service evidences timidity in pursuing charges (Gerry Chambers and Ann Millar, *Prosecuting Sexual Assault* 1983: Scottish Executive; Jeanne Gregory and Sue Lees, 'Attrition in Rape and Sexual Assault Cases' (1996) 36 *British Journal of Criminology* 1-17 Nor is the judiciary immune from criticism. Your Lordships will recall the notorious judicial comments and summations in rape cases in which judges demonstrated their own hold on the myths and assumptions to which I have referred.

5. Indeed, it is the practice of the courts which is the focus of this case, specifically, the admission of sexual history evidence in rape trials. This case is important, however, not just for the conduct of rape trials. The treatment of witnesses in court adversely impacts on decisions to report rape to the police. Who would want to put themselves before a voyeuristic court to have their sexual history trawled through and criticised, and often with little direct relevance to the issues at trial? The police and prosecutors often warn witnesses of the harrowing nature of giving evidence at trial, sometimes from the best of motives, with the result that many withdraw their complaint. Accordingly, while this case is about the admission of evidence at trial, its impact will reverberate throughout the criminal justice system in its dealings with rape.

The Facts and Appeal

6. Turning to the specific case before this House, we know very little about the factual basis for this appeal. What we do know is that at the end of May 2000, the complainant met two men, who shared a flat, one of whom became her boyfriend, the second being A, the defendant. A few weeks after first meeting the two men, on 13 June 2000, the complainant and her boyfriend had sexual intercourse at the boyfriend's flat when A was not there. Later, when A returned, all three of them went to the riverbank of the Thames for a picnic and all three were drinking alcohol. When they all returned to the men's flat, the boyfriend collapsed and an ambulance was called, taking him to hospital. This was now the early hours of the morning of 14 June 2000. The complainant and A walked along the riverbank to the hospital. The complainant claims that A chose the route

and at one stage, he fell down. The complainant extended her arm to help him up, at which point A pulled her down and raped her. Later that day, the complainant made a complaint of rape to the police.

7. A's case is that on the riverbank, the complainant initiated sexual intercourse and that this was part of a sexual relationship with A which had been on-going for a few weeks. The most recent incident of sexual intercourse had been approximately one week before 14 June 2000. A's defence was consent or, alternatively, belief in consent.

8. The process leading to this appeal began on 8 December 2000 when, shortly before the defendant was due to stand trial on a charge of rape, a preparatory hearing took place at which counsel for the defendant applied for leave to cross-examine the complainant about the alleged sexual activity with A. The trial judge (who cannot be named due to the Court of Appeal Order not to disclose the names of the parties, the trial judge or the place of trial) ruled that section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) precluded such a line of questioning.

9. The Court of Appeal held that the effect of the YJCEA is that the alleged previous sexual relationship is inadmissible on the issue of consent, though it is admissible regarding belief in consent, and on this latter point the Court allowed the appeal ([2001] EWCA 4). Nonetheless, the Court was of the view that such a ruling may raise a question of compatibility with the right to a fair trial and therefore certified the following question for this House:

> 'May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

10. This case has been fast-tracked through the courts, as we understand from the Director of Public Prosecutions that there are 13 other cases stayed, pending the outcome of this appeal.

Why Restrict the Use of Sexual History Evidence?

11. In order to answer the certified question, it is necessary to review the background to the adoption of the YJCEA and, in particular, the reasons for restricting the use of sexual history evidence. First of all, there is a considerable reluctance on the part of victims to report sexual offences to the police and, once reported, many complaints are withdrawn. One of the many reasons for this is the fear of the court room experience. Victim Support reported in 1996 that over 40% of the rape complainants questioned felt angry, horrified and re-victimised by the experience of their cross-examination (Victim Support*, Women, Rape and the Criminal Justice System*, 1996). Victims interviewed by Lees reported that many of them felt that it was they, rather than the defendant, who had been on trial (*Carnal Knowledge – Rape on Trial*, 1996). It is from such studies that descriptions of a complainant's cross-examination as a 'second rape' or 'judicial rape' have passed into common parlance.

12. In relation to complaint withdrawal, a Home Office report found that one of the reasons for withdrawal is that 'complainants feel that giving evidence in court would be a harrowing ordeal' (Harris and Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s*, Home Office Study 196, 1999, at 48). Further, evidence presented by Rape Crisis and Northumbria Police to the Home Office revealed that the expectation of being questioned, in public, regarding their previous sexual history is the biggest single factor in prompting women to withdraw their complaints (Home Office, *Speaking up for Justice*, 1998, para 9.57-9.58). Accordingly, restrictions on the use of sexual history evidence have been introduced to encourage greater reporting of rapes and in the hope of deterring withdrawals.

13. A second reason for restrictions on sexual history evidence is the promotion of accuracy in fact-finding and rectitude in decision-making, which are fundamental aims of evidence law. As the 1975 Heilbron Report into the use of sexual history evidence acknowledged, the 'exclusion of irrelevant evidence at the trial will make it easier for juries to arrive at a true verdict' (Cmnd 6325, para 133). The integrity of the trial, therefore, means that irrelevant evidence, especially evidence which may mislead the jury, or distract it from the task at hand, must be excluded from the trial, thereby preventing it exercising an undue influence.

14. The protection of the rights set out in the European Convention of Human Rights provides a third justification. Article 8 of the Convention protects the right to respect for private life, subject to those restrictions which are proportionate and necessary in a democratic society. While it will sometimes be necessary to introduce evidence about a complainant's sexual history, thereby constituting a necessary and justified interference with privacy rights, this is not invariably the case. In particular, it has been demonstrated that many unnecessarily intrusive questions have been asked of complainants, often as a matter of routine; potentially, therefore, in breach of the complainant's Article 8 rights.

15. A fourth justification can also be found in Convention rights. Although not argued before us, it seems to me that restrictions on the admission of sexual history evidence may be necessary to ensure compliance with a state's positive obligations, inherent in Article 3 of the European Convention, to bring perpetrators of rape to justice. Article 3 protects the right not to be subject to inhuman or degrading treatment and all state parties are obliged to take appropriate steps to ensure compliance with such rights. Therefore, to the extent that the admission of sexual history evidence impedes proper investigation, prosecution and conviction of perpetrators, restrictions may be justified to ensure compliance with Article 3 positive obligations.

16. Indeed, where evidence or questioning is not necessary and reaches the requisite threshold of harm, eg by inducing significant psychological injury, Article 3 may be directly engaged. Article 3 is a non-derogable

right, meaning that if it is breached, other Convention rights such as the Article 6 right to a fair trial do not take precedence.

17. Sexual history evidence is often of no or little relevance, yet research demonstrates its propensity to adversely impact on complainant credibility, leading to lower conviction rates. For instance, studies from Scotland and New South Wales have found that the introduction of sexual history evidence makes acquittals more likely (Brown et al, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials*, Scottish Office Central Research Unit, 1992; Department for Women, *Heroines of Fortitude: the experiences of women in court as victims of sexual assault* (NSW: Department for Women, 1996). In this country, Adler found a correlation between acquittals and those cases where the sexual reputation of complainants had been discredited (*Rape on Trial*, 1987).

18. We unfortunately know little about how juries actually reach their decisions as the Contempt of Court Act 1981 proscribes jury research. I have been fortunate, however, to be privy to the results of a study into mock jurors' use of sexual history evidence in sexual assault trials. The research by Regina Schuller and Patricia Hastings, due to be published in the *Psychology of Women Quarterly*, finds that evidence of previous sexual history with the accused was deployed by mock jurors in a 'biased and prejudicial' manner, making the mock jurors more negative in their evaluations of complainant credibility. These findings confirm previous US and Canadian studies which are discussed in detail in the judgment of L'Heureux-Dubé J in *R v Seaboyer* ([1991] 2 SCR 577 at 661-665).

Legislative History of Restrictions on Sexual History Evidence

19. For these reasons, in recent years and across many jurisdictions, restrictions on the use of sexual history evidence have been introduced. In England and Wales, there were some limitations on such evidence at common law. A complainant's sexual history was considered relevant both to consent and credit. In relation to the latter, evidence or questioning was permitted as an 'unchaste' woman was thought not to be a trustworthy witness (*R v Greatbanks* [1959] Crim LR 450). On consent, evidence was permitted in relation to sexual activity with the accused, on the basis that this was relevant to consent. However, in relation to third parties, evidence or questioning was only permitted if it went to show that the complainant was a prostitute or a woman of 'notoriously immoral character' (*R v Bashir* [1969] 3 All ER 692). Nonetheless, the common law exclusion of sexual history evidence with third parties was blunted, in effect, by its inclusion in relation to credit (see Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 *Oxford Journal of Legal Studies* 275).

20. The position at common law was altered by legislation adopted following the report of the Advisory Group on the Law of Rape, chaired by Mrs Justice Heilbron. The Heilbron Report made a number of very specific and detailed recommendations regarding sexual history evidence and the conduct of rape trials. It found that in rape trials, while it is the accused who is on trial, there is a risk that the case may 'become, in effect, a trial

of the alleged victim' (para 12). Having heard evidence relating to court practices, the Report concluded:

> 'It appears that procedures have developed in regard to cross-examination and to a much lesser degree the admission of evidence generally which may now be regarded as not only inimical to the fair trial of the essential issues but which may also result in the complainant suffering humiliation and distress.' (para 89)

21. The Report took the view that while 'all relevant and proper' cross-examination must be permitted to ensure a fair trial, unless there were some restrictions on the admission of evidence, questioning will continue to take place 'which does not advance the cause of justice but in effect puts the woman on trial' (para 91). Further, the 'exclusion of irrelevant evidence at the trial will make it easier for juries to arrive at a true verdict' (para 133).

22. The Heilbron Report, like the common law, made a distinction between questioning and evidence relating to sexual history with the accused and that with third parties. This is a distinction which is central to many of the debates regarding the admission of sexual history evidence, though often, I think, the distinction is over-played. The Report concluded that evidence and questioning regarding sexual activity with the accused 'will, in general, be regarded as relevant to the issues involved in a trial for rape' (para 134). However, it recommended restrictions in relation to evidence and questioning involving third parties. It proposed that such evidence or questioning should only be permitted with the leave of the judge and only then if she or he was satisfied that the evidence or questioning related to behaviour which was strikingly similar to events immediately preceding, or following, the alleged offence, and the degree of relevance to issues arising at trial was such that it would be unfair to the accused to exclude it. Provision was also made to allow evidence to rebut prosecution claims (paras 137 and 138). In other words, the Heilbron Report recommended that leave *only* be granted where the behaviour was strikingly similar to that at issue in trial, or was rebuttal evidence; thus there should be no general discretion to admit evidence.

23. The resulting legislation departed from the Heilbron Report in important respects. The Sexual Offences (Amendment) Act 1976, provided in section 2(1) that:

> 'If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than the defendant.'

24. The Act continued, in section 2(2), that the judge should give leave 'if and only if [she or] he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'. The 1976 Act did not require leave regarding evidence of sexual history

with the accused, which was permitted on the basis of the existing common law.

25. Three points are important here. First, the 1976 Act only regulated sexual history evidence with third parties. There remained a general assumption that evidence relating to sexual activity with the accused was relevant. Secondly, there was no real distinction drawn between evidence going to credit and evidence relating to consent. In this way, while the Heilbron Report stated that 'the previous sexual history of the alleged victim with third parties is of no significance as far as credibility is concerned' (para 131), the 1976 Act did not adopt this position.

26. Finally, the most significant aspect of the 1976 Act, for present purposes, was that it granted judges a general discretion to admit what they deemed to be relevant evidence, so long as they considered that to do otherwise would be unfair to the defendant.

27. It did not take long for evidence to emerge that the 1976 Act was doing little to restrict the use of sexual history evidence. Adler's study of rape trials at the Old Bailey in London found that applications under section 2 were made on behalf of 40% of defendants and that these applications were successful three quarters of the time ('Rape – the Intention of Parliament and the Practice of the Courts' (1982) 45 *Modern Law Review* 664). Moreover, she found that sexual history evidence was regularly introduced without seeking leave of the judge and, apparently, with little or no objection from either the judge or the prosecution. The study also revealed quite unjustified instances of the harassment and humiliation of complainants. Lees's study of rape trials confirmed that sexual history evidence was routinely used and was often irrelevant to the issues at trial (*Carnal Knowledge – Rape on Trial*, 1996).

28. The most extensive UK research has been conducted in Scotland where researchers found that applications to introduce sexual history evidence were made less frequently than was found in Adler's study, but that there was a higher success rate (Brown et al, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials*, Scottish Office Central Research Unit, 1992). They also found that sexual history evidence was introduced in many cases without a formal application, with the effect that sexual history evidence was an issue in almost half of the cases examined.

29. Professor Temkin's careful dissection of the case law found that, ironically, following the 1976 Act a broader construction of what constituted relevant sexual history evidence was being taken than had hitherto been the case ('Regulating Sexual History Evidence – the Limits of Discretionary Legislation' (1984) 33 *International and Comparative Law Quarterly* 942; and 'Sexual History Evidence – the ravishment of section 2' (1993) *Criminal Law Review* 3). Professor Temkin's study also demonstrated that far from sexual history evidence only being admitted where probative of issues in the case, such as consent, it was admitted and used in general ways to discredit complainants.

30. The broad approach to the interpretation of the 1976 Act was endorsed by the Court of Appeal in *R v Viola* where it was stated that 'if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent as opposed merely to credit, they are likely to be admitted' ([1982] 3 All ER 73, at 77). *Viola* also endorsed the ruling in *Lawrence* in which May J stated that questions regarding the complainant's sexual relationships with third parties would be permitted if they 'might reasonably lead the jury, properly directed in the summing up, to take a different view of the complainant's evidence from that which they might take if the question or series of questions was or were not allowed' ([1977] Crim LR 492, at 493). As Professor Temkin succinctly pointed out, this is, of course, the whole nub of the problem: it is precisely because juries take a different view of the evidence of a complainant, once they have been told of sexual activity with other men, that steps are needed to limit such questions and evidence ('Sexual History Evidence – the ravishment of section 2', above, at 4).

31. As well as the research investigating trial practices, studies have discovered the distinctly prejudicial assumptions under which some barristers in rape trials operate. Professor Temkin's recent study found many stereotypical and denigratory comments about complainants from barristers who prosecute and defend in rape cases, with one barrister stating that juries will be less likely to convict 'when somebody can be depicted as a slut' ('Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *Journal of Law and Society* 219, at 225). Regarding assumptions about alleged rapes by a partner or former partner, another barrister opined that: 'If somebody has been having a sexual relationship with somebody before, whether it's because juries feel the same way as I do, that it's really not a terrible offence' (at 226). Yet another was strongly critical of cases being brought against ex-partners unless there is 'extreme violence' because: 'I have had to prosecute an awful lot of cases where people have still been sort of seeing each other after having a relationship, where he wants it and she doesn't and it happens. Well she says it was a rape and, probably, yes, it really was. But frankly does it matter?' (at 226).

The 1999 Youth Justice and Criminal Evidence Act (YJCEA)

32. This wealth of research evidence clearly demonstrated that the 1976 Act was doing little to restrict the improper use of sexual history evidence. Moreover, the absence of any regulation of evidence relating to sexual history with the accused was often leading to unnecessary, and sometimes humiliating and distressing, questioning of the complainant.

33. In 1997 the newly elected government moved to implement one of its manifesto pledges, namely that 'greater protection will be provided for victims in rape and sexual assault trials'. The following year it issued a consultation document *Speaking up for Justice* in which it concluded that there was 'overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose' (Home Office, 1998, para 9.64).

34. The result was the YJCEA 1999. The legislature's intention was to establish a more structured approach to decision-making by judges and to ensure that defending counsel gave greater thought to the necessity, extent and potential justifications for questioning. It is without doubt that Parliament was entering onto difficult territory by legislating in the field of evidence and its admissibility. Many judges countenance legislative interference with judicial discretion as of the utmost impertinence. But this was the legitimate choice of a government, in the context of the legislative history set out above. While the HRA makes it clear that rights protection is a matter for both the courts and Parliament, I agree with my noble and learned friend Lord Hope of Craighead that this is an instance in which it is appropriate for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body. See also *R v DPP, ex p Kebilene* ([2000] 2 AC 326, 380-381E per Lord Hope).

Section 41 YJCEA

35. Turning to the legislation at issue, sections 41-43 of the YJCEA are lengthy and complicated. The provisions are set out in full in the speech of my noble and learned friend Lord Steyn and therefore I only provide an outline here. The first thing to note about section 41 is that it prima facie excludes any evidence or cross-examination, by or on behalf of the accused, about any 'sexual behaviour' of the complainant. This blanket ban applies only to the defence, with no similar restrictions on the prosecution; an issue to which I will return below.

36. The section goes on to detail the exceptions to this general rule. For evidence to be admitted, leave of the court must be obtained and the judge may only grant leave if she or he is satisfied that a 'refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case' (section 41(2)(b)). Further, the evidence or questioning must relate to specific instances of sexual behaviour (section 41(6)). Finally, no evidence or question will be regarded as relevant 'if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness' (section 41 (4)).

37. If the evidence or questioning satisfies these conditions, it may be admitted, but only if it falls within one of the four specified 'gateways' of permissible evidence. The first gateway provides for the admission of evidence which does not relate to consent (section 41(3)(a)). This is potentially very broad, as there are no specific limitations in terms of time or connection with the events at issue. This gateway will permit evidence such as that pertaining to the defendant's belief in consent.

38. The second gateway provides for evidence which does relate to consent and to behaviour alleged to have taken place 'at or about the same time as the event which is the subject matter of the charge against the accused' (section 41(3)(b)). Parliament intended to restrict evidence to a 24 hour time-frame and I agree with my noble and learned friend Lord Steyn that this provision cannot be extended to days, weeks or months.

Nonetheless, this gateway is also potentially wide in that it does not demand a connection with the actual events of the charge; that is the sexual behaviour only has to have occurred around the same time, albeit subject to the other requirements of the section.

39. The third gateway relates to evidence of sexual behaviour which is so similar, either to behaviour which is part of the event in question, or to any other sexual behaviour which took place at or about the same time, that the similarity cannot reasonably be explained as a coincidence (section 41(3)(c)). Parliament intended this provision to be a narrow exception and quite rightly. While this provision draws inspiration from the law on similar fact evidence relating to the defendant's conduct, such principles cannot be extrapolated to situations of sexual activity and consent, where consent is given afresh to each person and on each occasion.

40. The final gateway provides for evidence or questioning to be admitted to rebut prosecution evidence (section 41(5)).

41. In enacting section 41, I agree with my noble and learned friend Lord Steyn that there was a serious mischief to be corrected, namely an inclusionary discretion on the part of judges which was too broad and over which there was little regulation. I would also add, here, that Parliament had the choice to grant a general discretionary power to admit evidence which judges deemed relevant and necessary, because such an amendment was placed before it. However, Parliament specifically chose not to adopt such a provision and opted instead for the detailed statutory regime outlined above.

42. It is clear, therefore, that the intention of section 41 is to restrict the use of sexual history evidence and, in doing so, to provide a structured approach to determining the situations in which it may be permitted. In order to consider whether the legislation contravenes the defendant's right to a fair trial under Article 6 of the Convention, it is necessary first to consider the relevance of sexual history evidence to the salient issues in sexual offence trials.

Relevance of sexual history evidence with third parties

43. The general assumption among criminal and evidence law jurists has been that evidence of the complainant's sexual history with third parties is relevant. Professor Elliot trenchantly observed, when responding to the Heilbron Report, that: 'It is impossible to deny that prior sexual activity with third parties has a strong relevance to the issues in rape trials.' ('Rape Complainant's Sexual Experience with Third Parties' (1984) *Criminal Law Review* 4, at 7). Likewise, Professor Smith defended a broad judicial discretion to admit evidence which the judge deemed relevant, even general material about the alleged 'promiscuity' of the complainant ((1992) *Criminal Law Review* 301).

44. Contrary to the views expressed by some of your Lordships, these assumptions continue today. My noble and learned friend Lord Bingham,

speaking in an extra-judicial capacity in the House of Lords during the legislative passage of the YJCEA, spoke in favour of a general judicial discretion to admit sexual history evidence with third parties. He suggested that where counsel wished to ask a complainant whether she had voluntarily had sexual intercourse with men other than the accused on the days before and after an alleged rape, 'no rational person would think that those questions are irrelevant'. He continued that this evidence or questioning was relevant both to the 'truth of the complaint made' and to the defence of consent and that this was only 'good sense' (Hansard, 8 Feb 1999, col. 55).

45. It seems that I must conclude from this that I am not a rational person. I see no reason why evidence relating to a complainant's sexual activity with persons other than the accused, in Lord Bingham's example, is relevant. It should scarcely need stating, but consent is to a person, not to a set of circumstances, and consent must be given afresh on each occasion of sexual activity. This is not to say that there are no circumstances in which sexual history evidence with third parties will be relevant, though they will be few and far between and section 41 makes provisions for these situations. Nonetheless, even where evidence falls within one of the section 41 gateways, assiduous scrutiny will need to be given as to whether the other tests in section 41 have been satisfied.

Relevance of sexual history evidence with the accused

46. Sexual history evidence with the accused has generally been assumed to be relevant to the specific issue of demonstrating consent; in effect by suggesting a propensity to consent. This much was established in 1887 when Coleridge CJ stated that as a matter of 'good sense', evidence of intercourse with the accused is relevant 'because such evidence is in point as making it so much more likely that she consented on the occasion charged in the indictment' (*R v Riley* (1887) 18 QBD 481 at 484). This judgment was handed down, of course, at a time before women were granted real autonomy over their lives and where in sexual matters, in particular, marriage granted irrevocable consent to sexual activity.

47. Indeed, it was not until 1991 that this House took the long overdue decision to remove the husband's immunity from prosecution for rape (*R v R* [1992] 1 AC 599). However, while there have been considerable advances in the status of women since the times of both *R v Riley* and *R v R*, understandings regarding the relevance of sexual history evidence appear to have changed little.

48. The Court of Appeal held in this case that questioning relating to sexual activity with the accused was relevant to an issue at trial, with Rose LJ stating so in the following terms:

> '[It is] common sense that a person, whether male or female, who has previously had consensual intercourse with another, particularly in recent weeks or months may, on the occasion in dispute have been more likely to consent to intercourse with that other than if that other were a stranger or one with whom no previous sexual familiarity had occurred'. (para 31)

49. My noble and learned friends Lord Steyn and Lord Slynn of Hadley are of a similar view that the relevance of such evidence is a matter of 'common sense'. The implication is that this evidence shows a disposition to consent to sexual activity with the accused, hence the related assumption that the evidence is relevant to whether or not the complainant consented. In support of this contention, my noble and learned friend Lord Hutton approvingly quotes Professor Wigmore who claimed that evidence of sexual history was relevant as demonstrating 'an emotion towards the particular defendant tending to allow him to repeat the liberty'.

50. I am afraid that I must disagree with your Lordships on this point. One does not consent to sex in general or even to one person in general. One consents to a particular act of sex, with a particular person, at the particular time and place. Autonomy entails the freedom and capacity to make a choice whether or not to consent on each and every occasion. If legal authority for this proposition is required, it can be found in Article 8 of the Convention. Accordingly, questions or evidence about whether the complainant consented to sexual activity with the accused in the past do not assist in determining whether she consented on the occasion in issue. Furthermore, we should be especially careful about such claims regarding previous sexual activity with the complainant, when this is disputed. This is but one reason why the procedural requirements regarding the introduction of sexual history evidence must be followed.

51. Indeed, while the assumption is made that once a complainant has agreed to sexual activity with the accused on one occasion, she is more likely to agree on subsequent occasions, the contrary could also be the case. We know that a large proportion of rapes are perpetrated by partners or former partners and not by strangers as is often assumed. In this light, we can see that the problem with this assumption is that it assumes that women are less likely to be raped by their partners or ex-partners which demonstrably is not the case. This erroneous approach risks enshrining in law the assumption that once a woman has consented to sexual activity with one man she is more likely to agree to sexual activity with him in the future the impact of which will be to seriously limit the circumstances in which women are able to say no to sexual activity with their partners or ex-partners.

52. On this point, I am in agreement with Professor Tapper (*Cross and Tapper on Evidence*, 8th ed. 1995; helpfully quoted in the written intervention prepared for this House by Rape Crisis and others) who states that:

> 'Acceptance of the common law in relation to activities with the accused himself was recommended by the [Heilbron] advisory group, apparently on the basis that it was relevant to consent. The rationale for this wholesale exemption is quite unclear. It seems to suggest that once a woman has consented to have intercourse with a man she will never again refuse. This is hardly a self evident proposition and it looks very odd beside the rule that no special defence is available to husbands. It is hard to see why special rules should apply to this situation, different from those that apply to third parties. In both the critical consideration should be the

> precise contribution which admission of the evidence will make to the just resolution of the issues between the parties in the circumstances of the case.'

53. It may be instructive, at this point, to turn to the Canadian experience. My noble and learned friend Lord Steyn finds himself in agreement with the majority of the Supreme Court of Canada in *R v Seaboyer* ([1991] 2 SCR 577) which rendered unconstitutional a provision which closely circumscribed the situations in which sexual history evidence with third parties was to be admitted in sexual assault trials. My noble and learned friend Lord Steyn opines that *Seaboyer* demonstrates the problems with non-discretionary regimes regarding sexual history evidence, such as section 41.

54. *Seaboyer*, however, bears closer reading on this point regarding the use of sexual history evidence with the accused. McLachlin J, giving judgment for the majority, stated that:

> 'Evidence 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 not based on facts, but on the 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.' (at 604)

55. McLachlin J continued that evidence of 'consensual sexual conduct on the part of the complainant may be admissible for purposes *other than* an inference relating to the consent or credibility of the complainant' (at 635, my emphasis). Further, where such evidence is introduced, the judge should specifically warn the jury *against* inferring from the evidence of the conduct itself that the complainant may have consented to the act alleged (p 636).

56. Thus, while the majority in *Seaboyer* struck down the restrictive scheme, they also made it very clear that evidence of a complainant's sexual history with either third parties or the accused was not to be permitted to support an inference of consent. This approach was enshrined in the legislation which followed *Seaboyer*, which was upheld as constitutional in *R v Darrach* ([2000] 2 SCR 443). The preamble to the relevant provisions in Canadian law, post-*Seaboyer*, states that: 'The Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence.' In particular, the legislation specifically precludes the admission of sexual history evidence (with the accused or third parties) to support any inference that the complainant 'is more likely to have consented to the sexual activity that forms the subject-matter of the charge' or that the complainant is 'less worthy of belief' (section 276(1)).

57. Finally on this point, I find that I am in complete agreement with L'Heureux-Dubé J who, in *Seaboyer*, noted that the 'concept of relevance

has been imbued with stereotypical notions of female complainants and sexual assault' (at 678-679). She continued that whatever the test for relevancy, 'be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic' (at 679). Her justifiable conclusion was that 'once the mythical bases of relevancy determinations in this area of law are revealed ... the irrelevance of most evidence of prior sexual history is clear' (at 681-682).

Section 41 and the Certified Question

58. Counsel for the accused wishes to bring forth evidence of alleged previous sexual activity between the accused and the complainant, the most recent being approximately one week before the alleged rape. The factual basis of this case is so exiguous that it is extremely difficult to rule on the specific applicability of section 41. With this caveat in mind, section 41 applies as follows.

59. In relation to the issue of consent, the evidence will not be admissible through the second, third or fourth gateways: it is not 'at or about the same time' as the alleged rape; nor is the behaviour so similar to that in question that it can be admitted; nor is it rebuttal evidence. This is fully in accordance with the principles of relevance which I have set out above. Thus, the preclusion of this evidence is justified and section 41 rightly excludes it. In this respect, I am in agreement with my noble and learned friend Lord Hope who states that the appellant's desire to introduce this evidence appears to be based on an evil that section 41 aims to remove from the law, namely the myth that because the complainant consented to intercourse in the past, she was more likely to have consented on this occasion.

60. The evidence or questioning will, however, be admissible under section 41(3)(a) regarding the defendant's alleged belief in consent. I must say that while Rose LJ in the Court of Appeal found the admissibility of this evidence in relation to belief, but not in relation to actual consent, to be within the realms of Alice in Wonderland, I find it perverse for a different reason. I have stated above that evidence of previous sexual activity between the complainant and the accused is not relevant to demonstrating consent, as consent is given afresh on each occasion. However, the law continues to permit such an assumption to be made by the defendant in substantiating his belief in consent.

61. Accordingly, therefore, the evidence or questioning sought to be introduced is admissible under section 41(3)(a) relating to belief in consent, but not in relation to the question of whether the complainant in fact consented. Section 41 rightly, in my view, precludes the admission of such evidence as not being relevant. There is, therefore, no contravention of the defendant's right to a fair trial under Article 6 of the Convention.

The Defendant's Right to a Fair Trial

62. However, your Lordships have reached a different conclusion on this point and I therefore turn to consider submissions that section 41 contravenes the defendant's right to a fair trial. Let me begin by stating that the protection of the right to a fair trial is of importance to society as a whole. We all have an interest in ensuring that trials are conducted fairly, that the innocent are set free and that the guilty are convicted. Similarly, all members of society have an interest in reducing the prevalence of sexual crimes which continue to blight the lives of many people, mostly women. Contrary, therefore, to the opinion of my noble and learned friend Lord Slynn, I do not see this case as one of an 'obvious conflict' between the interests of protecting women and the right to a fair trial. Women and men equally have an interest in a fair trial, as does the whole of society. Neither should the right to a fair trial be seen as solely a conflict between the interests of the state and those of the accused. While this right was developed to protect the accused from an overbearing and authoritarian state, this context no longer defines the right.

63. In recent years, greater emphasis has been given to the role and interests of victims in criminal trials. The international criminal tribunals, most recently the Rome Statute of the International Criminal Court, have been particularly influential in developing better mechanisms by which to ensure victim participation, from special measures to encourage giving evidence, to victim-sensitive rules of evidence, to assistance such as victim representation.

64. Accordingly, when determining the scope of the right to a fair trial, the interests of the accused are part of a balance to be struck between his interests, those of the state, victims, witnesses and society as whole. It is this interplay of factors which led the European Court of Human Rights in *Doorson v the Netherlands* to hold that:

> It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify. ([1996] 22 EHRR 330, para 70)

65. It is therefore important that account be taken of the right to respect for the private life of the complainant. Furthermore, Article 6 does not require that any particular rules of evidence are followed. The European Court stated in *Schenk v Switzerland* that Article 6 'does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law' ([1988] EHRR 242, para 46). Thus, the Article 6(3)D right to call and cross-examine witnesses is not absolute. While the following case has not been argued before us, it shows that the European Commission, though not yet the court, has taken the

approach that regard must be had to a wide range of factors when considering this issue. In *Baegen v the Netherlands* (application no 16696/90, 27 October 1995) it stated:

> 'special features of criminal proceedings concerning rape and other sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings an accused received a fair trial account must be taken of the right to respect for the victim's private life. Therefore, the Commission accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence'. (para 77)

66. Again, it may be instructive to return to the Canadian experience. The Supreme Court in *R v Darrach* made clear that fundamental principles of justice do not permit the accused to have procedures crafted which take only his interests into account; still less is he entitled to procedures that would 'distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial' (per Gonthier J, para 24.) The Supreme Court also ruled, in a sexual assault case regarding the admission of third party records (such as therapeutic records), that the 'scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses' (*R v Mills* [1999] 3 SCR 668, paras 62-66 and 94). Thus, the defendant's rights did not extend to a right to call all relevant evidence.

67. Accordingly, therefore, the right to a fair trial engages the interests of the whole of society and recognises legitimate restrictions on the admission of evidence, especially in sexual assault trials. A defendant's rights do not extend to permitting the admission of any, or even all relevant, evidence. A balance must always be struck between the various interests at play. In the context of sexual history evidence, there is a strong risk of prejudice to the truth-seeking function of the trial in admitting sexual history evidence, as well as a risk of interfering with the complainant's right to private life. In my view, the bare facts presented to us in this appeal do not provide any grounds for holding that section 41 contravenes the defendant's right to a fair trial. The evidence is either irrelevant (as I would hold) or, if deemed relevant, is of such little probative value, outweighed by the significant risk of prejudice, that its admission is rightly circumscribed. For these reasons, the test of proportionality, as detailed by my noble and learned friend Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* ([1999] 1 AC 69) has been met: the legislative objective is sufficiently important to justify limiting a fundamental right, the measures designed to meet that objective are rationally connected to it and the means used are no more than is necessary.

68. There is always the possibility that once the trial has been completed, an appeal determines that, taken as a whole, the defendant has not received a fair trial. While I think such an outcome extremely unlikely, that would

be the most appropriate time to determine the fair trial rights of the accused, rather than on an interlocutory appeal such as this.

Application of Sections 3 and 4 of the Human Rights Act 1998

69. As I have already stated, in my view, section 41 does not contravene the defendant's right to a fair trial under Article 6. If, however, I am wrong on this point, I turn now to consider the applicability of sections 3 and 4 of the Human Rights Act (HRA). The approach to be followed under the HRA is, first, to consider whether the legislation under review is compatible with Convention rights. If it is not, the next stage is to consider, under section 3, whether it is possible, despite appearances, to read and give effect to the legislation in a way which is nonetheless compatible with the Convention. Only if such a re-reading is not possible, may the House issue a declaration of incompatibility under section 4 of the HRA.

70. The majority of your Lordships consider that section 41 YJCEA does contravene Article 6 and have determined that section 41(3)(c) is the vehicle through which Convention rights can be assured by reading into that section an 'implied provision' to permit a judge to admit evidence which is 'so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention'.

71. To me, this use of section 3 goes too far and extends the meaning of the words of section 41 beyond what could ever have been intended by the legislature in enacting either section 41 or section 3 HRA. Section 41(3)(c) permits the admission of evidence which is of a similar nature to either the event in question or to activity at or about the same time as the alleged offence. To read into this provision a more general discretion for judges distorts the wording of the section to such an extent that it veers towards judicial vandalism. A fundamental feature of the YJCEA was the restriction of judicial discretion. I fear that your Lordships' formulation may have the effect of seriously undermining that cardinal aim.

72. Accordingly, I am of the opinion that if it is the case that section 41 does contravene the defendant's right to a fair trial, the only step open to this House is to issue a declaration of incompatibility, in accordance with section 4 of the HRA. This would be the preferable course of action, giving the legislature the chance to reconsider the issue and adopt new legislation which clearly sets out the justifications for restrictions, the scope of admissibility and the balance of interests to be considered.

73. In this regard, I would commend to the legislature the approach taken in Canada. The legislation in Canada does provide for a general discretion to be exercised by judges in relation to the admission of sexual history evidence. However, there are very specific safeguards included in their legislative regime which I highlight here, as they have not yet been considered in this case.

74. I have already noted that the preamble to the Canadian provisions sets out clearly that sexual history evidence is only ever likely to be relevant in exceptional cases and that it cannot be introduced to support an inference

of consent. Furthermore, in seeking to bring forward evidence or questions, the defence must refer to only specific instances of sexual activity which are relevant to an issue at trial and which have 'significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice' (section 276(2)).The demand for 'significant probative value' contrasts sharply with section 41's requirement for evidence to be admitted where it 'might' render unsafe a conclusion of judge or jury.

75. The Canadian legislation also provides a detailed list of criteria which must be taken into account and the judge's reasons for granting or refusing the application must refer to these criteria. The criteria are worth setting out in full, as they demonstrate the many different interests at stake in these cases: (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; and (h) any other factor that the judge, provincial court judge or justice considers relevant. This structured approach would greatly assist any judge in making a determination as to the relevance or otherwise of sexual history evidence.

Conclusion

76. I therefore answer the certified question in the negative. If I am wrong on this, and the evidence is relevant to an issue of consent and therefore is in contravention of the right to a fair trial, I consider that the only appropriate action is to issue a declaration of incompatibility under section 4 of the HRA and to invite Parliament to re-enact legislation along the lines suggested above.