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Domestic Violence and the Sexual History of Rape Victims

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This issue of the LST Review examines two issues:

> The Draft Domestic Violence Law that has been produced by a coalition of women's groups led by the Women & Media Collective.
>
> A recent decision of the House of Lords on the admissibility of the evidence pertaining to the sexual relationship between a rape victim and the accused.

• The Draft Domestic Violence Law

About a year ago the Women and Media Collective initiated an exercise to draft a law on domestic violence. Violence that takes place within a family is one of the worst forms of violence with particularly severe psychological and other consequences. It is also one of the most difficult forms of violence to respond to.

While men also experience violence within a home, most of the victims of domestic violence are women. Physical and psychological abuse, which if it occurred in a public place would be condemned, is tolerated by society merely because it takes within a family or domestic setting. The existence of a family or domestic relationship has given perpetrators the 'right' to abuse others, whether it be a spouse, a partner, elderly relative or child. The term 'domestic violence', used by women activists all over the world, tends to neutralize and hide the harsh impact that this form of abuse has.

Sri Lanka currently has no single law on domestic violence. A victim of domestic abuse would need to make use of the criminal law or make a creative use of the fundamental

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rights provisions to seek relief. So far the fundamental rights provisions have not been used to deal with domestic violence.

For many years women in Sri Lanka have been discussing the possibility of enacting a law on domestic violence. The discussion has looked at two possible models. While some favoured an amendment to the criminal law to include specific provisions on domestic violence, others favoured the enactment of a separate law that would combine both civil and criminal remedies.

The Draft Law put out by the Women & Media Collective favours the second approach. The laws draws inspiration from the model legislation proposed by the Special Rapportuer on Violence against Women, the South African Domestic Violence Act and a draft law on domestic violence put out by some women's groups in India.

Right to be free from all forms of domestic violence

The draft law recognizes that women, men and children have the right to be free from all forms of domestic violence. Domestic violence is defined broadly and takes into account definitions from international law and other jurisdictions. It sees domestic violence as encompassing all forms of physical, sexual, psychological, emotional, verbal and economic abuse perpetrated in a domestic setting.

Emotional abuse has been defined to include degrading or humiliating conduct, including repeated threats to cause pain to a person or a relative. Economic abuse has been defined to include the unreasonable deprivation of economic or financial resources that a person requires, including access to bank accounts and the right to dispose of property.

The law applies to a variety of domestic relationships, which include husband and wife, parent and child and same sex relationships. It also protects members of the extended family from abuse and allows members of the extended family or those sharing a common residential facility to seek legal relief.

Protection Orders

According to the draft law a person who has been subjected to violence in the home can apply to a Magistrate's Court for an Interim Protection Order. The Interim Protection Order is an injunction granted by the court to prevent the respondent (the perpetrator of the abuse) from further violence or going ahead with threatened violence. The Interim Protection Order can be made by the Magistrate ex parte, that is in the absence of the respondent. The Interim Protection Order will be accompanied by a suspended warrant of arrest. In the event the respondent violates the terms of the Interim Protection Order and abuses the victim, he or she is liable to be arrested.

The application for a protection order may be made by the victim or by a third party on his or her behalf. Where an application is made on the victim's behalf, the victim must provide written consent for the application.

In applying for an Interim Protection Order the applicant would need to show that there is prima facie evidence of an act of domestic violence or that such violence is threatened or imminent. Where a prima facie case is established the Magistrate's Court **must** issue an Interim Protection Order even though the perpetrator may not have been heard at this stage. In making a Protection Order the Magistrate may seek the opinion of a counsellor, social worker or medical officer.

The purpose of an Interim Protection Order is to prevent an act of domestic violence taking place or to prevent the victim from being abused further.

It is possible for the respondent to contest the terms of an Interim Protection Order. According to the draft law the matter must be taken up for a full hearing within two weeks. At that point the respondent is given an opportunity to present his or her side of the story and to satisfy the court as to why the Interim Protection Order should not be made permanent.

The draft law stipulates that the court cannot refuse to make a Protection Order on the basis that only a single act of violence has been committed or a single threat issued. Protection Orders may be varied by the court in appropriate circumstances and both the victim and perpetrator may make an application in this regard.

The Court's Power in Respect of a Protection Order

By means of a Protection Order the court may prohibit a person from:

Committing an act of domestic violence either against the victim or against some other person who may be related to the victim.
Enlisting the help of some other person to commit an act of domestic violence.
Entering the shared residence of the victim.
Entering the workplace or school of the victim
Transferring or selling the family home or other jointly owned property.

A full list of the court's powers is contained in section 8 of the draft law. In addition to these prohibitions the court may also make other orders against the respondent to enable the victim to carry on with his or her life with the least possible disruption. This includes the payment of emergency monetary relief and payment of rent or mortgage payments. The quantum of monetary relief may take into account the cost of hospital or dental expenses incurred by the victim. The court may also order that a friend, social worker, counsellor or medical officer monitor the relationship between the victim and the perpetrator.

Rights of Children

Where the victim is a child the draft law requires the court to make an order keeping in mind that the child's interests shall be the paramount consideration. Where the perpetrators of the abuse are the parents or those exercising parental responsibility, it may be possible for the court to prevent contact between the child and the perpetrators, if the court considers this appropriate.

Annual Report on Domestic Violence

The draft law requires the Inspector General of Police to publish every a year a domestic violence report. The report should provide details on the number of complaints of domestic violence reported to the police, the number of breaches of protection orders and the response of the police to those breaches. Any steps taken by the IGP to raise

awareness on the provisions of the law among the police force should also be documented in the report.

Using International and Comparative Law

Since international law has shaped the responses to domestic violence in many countries, the draft law specifically provides that the court may have recourse to international and comparative law in interpreting the Act.

Many countries around the world have begun to combine civil and criminal remedies in developing their laws on domestic violence. Many of these local laws have been influenced by developments at the international level. Against this backdrop, the jurisprudence and pronouncements of the international treaty bodies, the jurisprudence of regional courts and the international ad hoc tribunals, and case law from other countries could have great relevance in developing the Sri Lankan law on this point.

Making the law work

The law itself can have only a limited impact in dealing with the problems thrown up by domestic violence. The setting up of 'shelters' which will provide a safe haven for victims, and the provision of counselling and other support services for victims are of equal, if not greater importance.

Changing public attitudes to this form of abuse is perhaps the biggest challenge and is likely to bring the greatest dividends. Yet the Sri Lankan law cannot continue to ignore this phenomenon. Legal recognition and regulation are part of a broader strategy to deal with abuse that takes place within a family or domestic setting.

The law can work in at least three ways. First, it can provide relief to victims and to those who are willing to use the law despite its lengthy procedures and delays. Secondly, it can be used as an educational tool to create public awareness of the problem and to help in changing attitudes to domestic violence. Thirdly, the law can help develop our understanding of the problem through well reasoned judicial decisions. These decisions in turn can help in mobilizing public awareness and in changing public attitudes.

- **The House of Lords on the 'Sexual History between a Rape Victim and the Accused'**

A recent English case raised the following issue: is the past sexual relationship between an accused and a victim relevant to a charge of rape?

Women lawyers have for long contended that the sexual relationships a woman may have previously had are irrelevant in the case of rape. Two contentions have been advanced. First, that merely because a woman has consented to previous sexual activity it does not mean that she consented to the act in question. Previous sexual activity with other men does not indicate a greater propensity for sexual activity. Secondly, women who have previously engaged in sexual activity are not any less credible as witnesses.

Courts in several parts of the world have accepted these propositions and as a general rule have excluded evidence of prior sexual activity that a rape victim may have had with other men. Courts have accepted that each sexual act must be judged separately and the matter to be considered is whether the woman consented to sexual intercourse on each particular occasion.

In the case of R V A however, the issue pertained to an alleged sexual relationship that the victim had with the accused.[1] The victim alleged that she was raped by the defendant on the morning of the 14th of June 2000 close to the River Thames. The defendant on the other hand alleged that there was consent and alleged that the victim and the defendant had been engaging in sexual activity for the past three weeks. He had sought to bring in evidence of this relationship and had sought to admit evidence of their last sexual act which had taken place a week previously.

We publish in this issue of the LST Review the judgements of Lords Slynn, Steyn and Hope. The opinions of Lords Clyde and Hutton have been omitted because of limited space.

According to the English Law evidence of this nature could be admitted only in tightly defined situations. The relevant statute was the Youth Justice and Criminal Evidence Act. According to this statute, evidence of a sexual relationship between the accused and

[1] *R v A*, Decision of the House of Lords of 17th May 2001.

the victim could have relevance only in a limited number of situations. The statute had tried to limit the discretion the trial judge normally exercises and defined in detailed terms the situations in which such evidence could be admitted.

The matter that had to be decided by the House of Lords was whether the relevant provision of the Youth Justice and Criminal Evidence Act of 1999 infringed the right to a fair trial that the accused had. The right to a fair trial assumed greater importance in England after the passage of the Human Rights Act of 1998 which brought the European Convention on Human Rights into English law.

As is customary, the five law lords gave varying judgements. Four of the judges held that the provisions of the Youth Justice and Criminal Evidence Act of 1999 should be interpreted in a way that is consistent with the European Convention. Thus evidence pertaining to the prior sexual experience between an accused and a victim may be admitted where its exclusion would jeopardize the fairness of the trial. Regard must be had however, to protecting the victim from indignity and humiliating questions. According to this interpretation the trial judge would have a discretion whether to admit such evidence or not. Such evidence could be admitted where it was necessary to ensure a fair trial.

Lord Hope however, disagreed. According to him the thrust of the statutory provision was to exclude the discretion exercised by the trial judge and this was an approach deliberately chosen by the legislature.

The objective of the legislation was to protect what he called were 'vulnerable witnesses' and there was a conscious effort to minimize the discretion exercised by the trial judge in these situations. He conceded though that such evidence would be admissible if it could be brought within the provisions of the statute.

Much of the opinions centred around how the relevant English statutory provisions should be interpreted. Yet the Law Lords go beyond this and discuss some general approaches to the admission of evidence pertaining to sexual offences. The House of Lords also discuss some of the relevant Canadian law.

All five judges were unanimous that rape victims should be protected from humiliating treatment. As Lord Hope notes, the public interest requires that rape victims be protected

to encourage them to make complaints of rape. The public interest would be jeopardized if rape victims feared to come forward because of potential harassment in the witness box. At the same time the judges accepted that the right to a fair trial that the accused had, must also be protected and the accused must be allowed to admit relevant evidence. The judges accepted that the sexual history of a rape victim has limited relevance in proving or negating a charge. The sexual relationships that women may have had with other women are not admissible in all cases. However, the sexual relationship that the victim has with the accused may be relevant in a limited number of situations.

The opinions of the Law Lords have a relevance for the evolving law in this country as Sri Lankan lawyers and judges grapple with some of complexities thrown up sexual violence. It is against the background of the evolving law in Sri Lanka that we publish extracts from the judgement in this issue of the LST Review.

This Draft Law has been produced by a coalition of women's groups headed by the Women & Media Collective

Draft
22nd March 2001

Domestic Violence Act

AN ACT TO PROVIDE PROTECTION TO VICTIMS OF DOMESTIC VIOLENCE; TO EMPOWER COURTS TO GRANT PROTECTION ORDERS; AND TO ENSURE THE LAW COMPLIES WITH SRI LANKA'S INTERNATIONAL OBLIGATIONS

Preamble

Recognising that domestic violence is a serious social evil and is found in all levels of Sri Lankan society; that it is a violation of the human rights of the victim; that it affects the health, safety and welfare of society; that it results in psychological problems, lost productivity and intergenerational violence; that domestic violence takes on many forms and may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence are not effective;

Recognising that while men are also victims of domestic violence, it is women and girls who are among the majority of the victims of domestic violence;

And whereas the Constitution of Sri Lanka guarantees equality and non discrimination, requires the State to foster respect for international law and treaty obligations, and the Government of Sri Lanka has ratified the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, and signed the Declaration on the Elimination of Violence Against Women;

And having regard to the Women's Charter which requires the State to take all measures, including legislative measures, to prevent violence against women, including violence in the family;

Be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

1. Short title and date of operation

This Act may be cited as the Domestic Violence Act No xx of 2000 and shall come into operation on such date as the Minister may appoint by Order published in the Gazette.

2. Right to be free from domestic violence

Every woman, man and child has the right to be free from all forms of domestic violence. This includes all forms of physical, sexual, psychological, emotional, verbal and economic abuse. What constitutes domestic violence is more fully described below.

3. Domestic Violence

Domestic violence includes the following acts of violence which take place in the context of a domestic relationship as defined below:

(a) Physical abuse.
(b) Sexual abuse.
(c) Emotional, verbal and psychological abuse, which would include patterns of degrading or humiliating conduct towards a complainant, such as repeated insults, repeated threats to cause emotional pain, whether to the complainant or to some other person, and the repeated exhibition of obsessive possessiveness or jealousy.
(d) Economic abuse, which includes the unreasonable deprivation of economic, financial or other resources which a complainant requires, and the unreasonable disposal of household effects or other property, in which the complainant has an interest.
(e) Intimidation.
(f) Harassment, which includes repeatedly watching or loitering outside a building where the complainant resides, works, studies or carries out a business, repeatedly making telephone calls, sending faxes, electronic mail, or packages which induce fear in the complainant.
(g) Stalking.

(h) Damage to Property.
(i) Entering a complainant's residence where the respondent and complainant do not share a common residence.
(j) Committing acts of violence against any other person, whether it be a family member, relative, friend, social worker or medical officer, who may be known to the complainant.
(k) Any other controlling or abusive behaviour where such conduct harms or may cause harm to the safety, health or well being of the complainant.

4. Domestic Relationships

A domestic relationship includes a relationship between a complainant and a respondent that arises in any of the following ways:

(a) they are or were married to each other, including marriage according to any law, custom, religion or practice;
(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
(d) they are family members related by consanguinity, affinity or adoption;
(e) they live or lived together as part of a joint or extended family;
(f) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;
(g) they share or recently shared the same residence, residential facility or household;

5. Application for a Protection Order

(1) Any complainant may apply to the court for a protection order.

(2) Notwithstanding the provisions of any other law, an application may be brought on behalf of the complainant by any other person, including a counsellor, social worker,

medical officer, organisation or group, or other person who has an interest in the well being of the complainant.

Provided that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is:

(a) a minor;
(b) mentally retarded;
(c) unconscious; or
(d) a person whom the court is satisfied is unable to provide the required consent.

(3) Notwithstanding the provisions of any other law, any minor, or any person on behalf of a minor, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

(4) The court must as soon as is reasonably possible, consider an application submitted to it in terms of the above section.

(5) The court may consider additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(6) The court may seek the opinion of a social worker, a counsellor, psychologist, psychiatrist, medical officer, friend, or any other person in making an order under this Act.

(7) Ordinarily, an application for a protection order must state:

(a) the facts on which the application is made;
(b) the particulars of the complainant and the respondent;
(c) the police station or stations at which the complainant is most likely to report a breach of the order.

6. Issuing of a Interim Protection

(1) If the court is satisfied that there is *prima facie* evidence that:

(a) the respondent is committing, or has committed an act of domestic violence, or is likely to commit an act of domestic violence; and
(b) hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately;

the court **must**, notwithstanding that the respondent has not been heard, issue an interim protection order against the respondent.

(2) An interim protection order must be served on the respondent and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.

(3) The court must forthwith forward the interim protection order together with a warrant of arrest issued under section 11, to the police station or stations of the complainant's choice and the police officer in charge of such station must ensure that the order is served on the respondent.

(4) If the court does not issue an interim protection order in terms of the above section, then the court must ensure that certified copies of the application and any supporting evidence be served on the respondent, together with a notice calling on the respondent to show cause on the return date specified in the notice, why a protection order should not be issued.

(5) Provided that the return date shall not be more than two weeks from the date of application of the interim protection order.

(6) An interim protection shall have no force until it has been served on the respondent, unless the court is satisfied that the respondent is evading the serving of the order.

(7) An interim protection order shall be in force till such time as a protection order is issued by the court, or till such time as the interim protection order is revoked, modified, or varied by the court under section 13.

7. Issuing of protection order

(1) If the respondent does not appear on a return date and if the court is satisfied that:

(a) the interim protection order or notice of service has been served on the respondent;
(b) and the application contains *prima facie* evidence that the respondent has committed, is committing, or is likely to commit an act of domestic violence;

the court **must** issue a protection order.

(2) Where the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter.

(3) Where the respondent appears on the return date and does not admit the act or acts of violence, but does not oppose the issuing of a protection order, the court must issue a protection order.

(4) In hearing the matter the court may consider any evidence previously received and such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.

(5) Where a respondent is not represented by a legal representative, the court may, on its own accord or on the request of the complainant, if it is of the opinion that it is just or desirable to do so, order that the examination of witnesses, including the complainant, be not conducted by the respondent.

(6) In such a case the respondent shall state the question to court and the court shall repeat the question accurately to the complainant or witness.

(7) The court must, after a hearing is completed, issue a protection order if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

(8) Upon the issuing of a protection order the court must forthwith cause;

(a) the original of such order to be served on the respondent; and
(b) a certified copy of such order, and the original warrant of arrest to be served on the complainant.

(9) The court must forthwith forward certified copies of any protection order, and of the warrant of arrest issued under section 11, to the police station or stations of the complainant's choice.

8. Court's powers in respect of a protection order

(1) The court may, by means of a protection order or interim protection order, prohibit the respondent from:

(a) committing any act of domestic violence;
(b) enlisting the help of another person to commit any such act;
(c) entering a residence shared by the complainant and the respondent: provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
(d) entering a specified part of such a shared residence;
(e) entering the complainant's residence;
(f) entering the complainant's place of employment;
(g) entering the complainant's school;
(h) preventing the complainant who ordinarily lives or lived in a shared residence from entering or remaining in, the shared residence or a specified part of the shared residence;
(i) occupying the shared residence;
(j) committing acts of violence against any other person, whether it be a relative, friend, social worker or medical officer, who may be assisting the victim;
(k) preventing the complainant from using or having access to family or shared resources;
(l) telephoning or in any other way attempting to establish contact with the complainant;
(m) selling, transferring, alienating or encumbering the shared residence in any way;
(n) selling jointly owned family assets or assets which although are in the respondent's name, are assets in which the complainant has an interest;
(o) committing any other act as specified in the protection order.

(2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or well being of the complainant.

(3) The court may issue directions to ensure that the complainant's location is not disclosed, if disclosure may endanger the safety, health or well being of the complainant.

(4) In addition to the above orders, the court may order:

(a) The respondent to pay emergency monetary relief to the complainant within a specified date, taking into account the complainant's and respondent's financial condition. This should also take into account any medical or dental expenses incurred by the complainant, loss of earnings, if any, and relocation or other expenses incurred by the complainant.

(b) The respondent to pay rent or any mortgage payment on a house, keeping in mind the financial resources of the complainant and the respondent.

(c) The respondent to secure alternative accommodation for the complainant, if the complainant so requests.

(d) The payment of punitive damages where the court considers it appropriate. This will take into account the gravity and severity of the abuse and will be in addition to other forms of monetary relief the court may order.

(e) The payment of any remuneration, wages, salary or other dues that may be owed to a household worker.

(f) The police to seize any weapons that the respondent may have in his or her possession.

(g) The police to accompany the complainant to any place to assist with the collection of personal property.

(h) The respondent to attend mandato counselling sessions, psychotherapy or other forms of rehabilitative therapy.

(i) The respondent and the complainant, to attend counselling sessions, psychotherapy or other forms of rehabilitative therapy, if the complainant so requests.

(j) The complainant be placed in a shelter to provide her or him temporary housing where they will be counselled and informed of the alternatives available to them.

(k) That a social worker, counsellor, medical officer, police officer, friend, or other person whom the court deems fit, monitor the relationship between the complainant and respondent. An affidavit by such person that the respondent has breached the terms of a protection order or interim protection order shall be *prima facie* evidence of such fact.

(5) The court may, on the failure of the respondent to:

(a) pay emergency monetary relief; or
(b) the rent or mortgage payment on a house; or
(c) the wages or salary due to a household worker; or
(d) any other financial payment that the court may have imposed;

direct an employer or a debtor of the respondent, to directly pay to the complainant a part or the whole of such financial relief that the court may have ordered.

9. Rights of Children

(1) Where the complainant and the respondent are the parents of any child, or have or had, parental responsibility with regard to any child, the court may by way of an interim protection order, or protection order, if it is in the best interests of the child:

(a) refuse the respondent contact with such child; or
(b) order contact with such child on such conditions it may consider appropriate; or
(c) order the respondent to pay emergency monetary relief or such other financial relief, for the care of the child, taking into account the respondent's financial condition.

(2) In all matters concerning children, the best interests of the child shall be the paramount consideration.

10. The court shall not refuse to grant a protection order

The court shall not refuse to issue a protection order, an interim protection order, or to make any orders which it is competent to make under this Act on the basis that:

(a) only a single act of violence has been committed or a single threat made, or that the acts or threats viewed in isolation appear to be trivial or minor.
(b) the complainant has not previously complained of the acts of violence and had condoned or accepted it.
(c) other legal remedies are available to the complainant.

11. Warrant of arrest upon issuing of a protection order

(1) Whenever a court issues a protection order or an interim protection order, the court must make an order:

(a) authorising the issue of a warrant for the arrest of the respondent; and
(b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed.

(2) The warrant will remain in force unless the protection order is set aside, or it is cancelled after execution.

(3) The court must issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in which it is stated that such warrant is required for her or his protection and that the existing warrant of arrest has been:

(a) executed and cancelled; or
(b) lost or destroyed.

12. Where the protection order is not complied with

(1) A complainant may hand the warrant of arrest together with an affidavit stating that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any police officer.

(2) If it appears to the police officer concerned that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the police officer must forthwith arrest the respondent.

(3) If the police officer is of the opinion that there are insufficient grounds for arresting the respondent, he or she must forthwith issue an original written notice to the respondent calling upon the respondent to appear in court, on a specified date and time, on a charge of committing an offence under this Act.

(4) The police officer shall obtain the respondent's signature on the duplicate of the above notice and forthwith forward such duplicate to the court concerned. The signed duplicate shall be *prima facie* evidence that the original notice was handed to the respondent.

13. Variation and Revocation of a Protection Order

(1) A protection order or interim protection order may be altered, modified, varied or revoked on an application by either the complainant or the respondent, if the court is satisfied that there is a change of circumstances that require such alternation, modification, variation or revocation.

(2) Provided that no such alternation, modification, variation or revocation, shall be made without hearing both the complainant and the respondent. The court may also seek the opinion of a social worker, a counsellor, psychologist or any other person in making an order under this section.

(3) Provided further that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.

14. Duties of Police Officers

(1) Any police officer must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when an incident of domestic violence is reported:

(a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment.
(b) inform the complainant of the right she or he has to apply for a protection order under this Act and the other remedies available under this Act, including the right of access to the shared household, and the rights of custody to the children.
(c) inform the complainant of the right she or he has to initiate criminal proceedings against the respondent.

(d) contact a counselling organisation, a social service organisation, a women's shelter or other group to enable the complainant to access medical, emotional, psychological or other support.

(2) A police officer may without a warrant, arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.

(3) The police should make every attempt that is reasonably possible, to serve an Interim Protection Order or Protection Order on the respondent.

15. Annual Report on Domestic Violence

(1) Every year, before the 31st of March, the Inspector General of Police must publish a report giving details and statistics on:

(a) The number of complaints of domestic violence reported to the police during the previous year and the response of the police to these complaints;
(b) The number of breaches of protection orders or interim protection orders reported to the police during the previous year, and the response of the police to these breaches;
(c) The steps taken within the police force, national and provincial, to spread awareness on the provisions of this Act.
(d) All other measures taken to implement the provisions of this Act.

(2) Such report shall be submitted before the 31st of March each year to:

(a) Parliament;
(b) The Ministries of Women's Affairs and Justice;
(c) The Women's Bureau
(d) The National Committee on Women, or such other body that may replace the National Committee on Women;
(e) The Human Rights Commission;
(f) The National Child Protection Authority; and
(g) Any other national or provincial body that may be created to protect and promote human rights, the rights of women, or the rights of children.

(3) Every person shall be entitled to purchase a copy of such report.

16. Offences

Notwithstanding the provisions of any other law, a person who contravenes any prohibition, condition, obligation or order imposed by the court under this Act, shall be guilty of an offence and on conviction after trial before a Magistrate, be liable to a fine not exceeding one hundred thousand rupees, but not less than five thousand rupees, or imprisonment not exceeding five years, and not less than six months, or to both such fine and imprisonment.

17. Attendance at court proceedings

(1) No person may be present during any proceedings in terms of this Act except:

(a) officers of the court;
(b) the parties to the proceedings;
(c) any person bringing an application on behalf of the complainant;
(d) any legal representative representing any party to the proceedings;
(e) witnesses;
(f) not more than three persons for the purpose of providing support to the complainant;
(g) not more than three persons for the purpose of providing support to the respondent; and
(h) any other person whom the court permits to be present:

(2) Provided that the court may, if it is satisfied that it is in the interests of justice, exclude any person from attending any part of the proceedings.

(3) Nothing in this subsection limits any other power of the court to hear proceedings in camera or to exclude any person from attending such proceedings.

18. Publication of information

(1) No person shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings.

(2) The court, if it is satisfied that it is in the interests of justice, may direct that any further information relating to proceedings held in terms of this Act shall not be published:

(3) Provided that no direction in terms of this subsection applies in respect of the publication of a *bona fide* law report which does not mention the names or reveal the identities of the parties to the proceedings or of any witness at such proceedings.

19. Jurisdiction

(1) Any Magistrate's Court within the area in which:

(a) the complainant permanently or temporarily resides, carries on a business or is employed;
(b) the respondent resides, carries on a business or is employed; or
(c) the cause of action arose;

has jurisdiction to grant a protection or interim protection order as contemplated in this Act.

(2) A protection order or interim protection order is enforceable throughout Sri Lanka.

20. Recourse to international or comparative law

In interpreting a provision of this Act a court may have recourse to international law or comparative law.

21. Availability of other remedies

Nothing in this Act shall prevent a complainant from pursuing any other remedies, whether they be civil, criminal or constitutional remedies, that may be available.

22. Regulations

(1) The Minister may make regulations in respect of any matter concerned with the application of this Act.

(2) Every regulation shall be published in the Gazette as soon as possible and shall be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done.

23. Interpretation

In this Act unless the context otherwise requires:

"Complainant" means

any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant.

"Court" means

any Magistrate's Court.

"Economic abuse" includes:

(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage repayments or payment of rent in respect of the shared residence;

(b) the unreasonable disposal of household effects or other property in which the complainant has an interest.

"Emergency monetary relief" includes

compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including:

(a) loss of earnings;

(b) medical and dental expenses;

(c) relocation and accommodation expenses; or

(d) household necessities.

"Emotional, verbal and psychological abuse" includes

a pattern of degrading or humiliating conduct towards a complainant, including:

(a) repeated insults, ridicule or name calling;

(b) repeated threats to cause emotional pain, whether to the complainant or to some other person;

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security.

"Harassment" includes

engaging in a pattern of conduct that induces the fear of harm to a complainant including:

(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;

(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;

(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;

"Intimidation" includes

uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear.

"Physical abuse" includes

any act or threatened act of physical violence towards a complainant.

"Person" includes

any association, group or organisation, whether, incorporated or unincorporated.

"Respondent" means

any person who is or has been in a domestic relationship with a complainant and who has, committed or allegedly committed an act of domestic violence against the complainant.

"Sexual abuse" includes

any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant and includes sexual intercourse that takes place in coercive circumstances or without the consent of the complainant and the refusal to cooperate in contraception when the complaint may reasonably require it. Where the complainant is below the age of sixteen, sexual intercourse, with or without her consent, would still constitute sexual abuse.

"Shared residence" includes

any residence, household or tenement where the complainant and the respondent live or have lived together and includes property owned jointly or individually by either person.

"Stalking" includes

repeatedly following, pursuing, or accosting the complainant;

"This Act"

includes the regulations.

R v. A

EXTRACTS FROM THE JUDGEMENT OF THE HOUSE OF LORDS

Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead, Lord Clyde, Lord Hutton

Decided on 17th May 2001
[2001] UKHL 25

LORD SLYNN OF HADLEY

My Lords,

1. In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is very unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape.

2. That such questioning about sex with another or other men than the accused should be disallowed without the leave of the court is well established. It was recognised in section 2 of the Sexual Offences (Amendment) Act 1976 which provided that without the leave of the judge there should be no evidence or cross examination by or on behalf of the defendant of a complainant's sexual experience with a person other than the accused. Leave was only to be given by the judge "if and only if 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".

3. Such a course was necessary in order to avoid the assumption too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a promiscuous woman is less credible.

4. Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent.

That is far from being necessarily true and the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances.

5. But the accused is entitled to a fair trial and there is an obvious conflict between the interests of protecting the woman and of ensuring such fair trial. Such conflict is more acute since the Human Rights Act 1998 came into force. The question is whether one of these interests should prevail or whether there must be a balance so that fairness to each must be accommodated and if so whether it has been achieved in current legislation. That is essentially the question which arises in this case. I gratefully adopt the statement of the facts and the relevant statutory provisions set out in the text of the speech prepared by my noble and learned friend Lord Steyn.

6. The question certified by the Court of Appeal which gave leave to appeal to your Lordships' House is

> *"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?"*

7. Section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the giving of evidence and cross examination about any sexual behaviour of the complainant except with leave of the court. Leave may be given where a) consent is an issue and where the sexual behaviour of the complainant is alleged to have taken place "at or about the same time as the event which is the subject matter of the charge against the accused" (section 41(3)(b)) and b) where the sexual behaviour of the complainant to which the question or evidence relates is alleged to have been "in any respect, so similar" to the sexual behaviour which is shown by evidence to have taken place as part of the event which is the subject matter of the charge or to any other sexual behaviour of the complainant which took place at or about the same time as that event "that the similarity cannot reasonably be explained as a coincidence" (section 41(3)(c)).

8. Such questions are not to be allowed if their purpose is to establish material to impugn the credibility of the complainant as a witness. Leave may also be given if the evidence of the complainant's sexual behaviour goes no further than to rebut prosecution evidence.

9. It is apparent that prima facie the restriction placed on the court's power to give leave seriously limits the opportunities for cross examination or the adducing of evidence on behalf of the accused. The limitation in section 41(3)(b) to conduct "at or about the same time" as the event charged would prima facie prohibit questions as to a continuous period

of cohabitation or sexual activity, or as to individual events more than a very limited period before the event, the subject matter of the charge. The requirement that the sexual behaviour relied on must be so similar to the sexual activity which took place as part of the event charged or be so similar to any other sexual behaviour which took place "at or about the same time" as the event charged that the similarity cannot "reasonably be explained as a coincidence" is on the face of it very restrictive.

10. The need to protect women from harassment in the witness box is fundamental. It must not be lost sight of but I suspect that the man or woman in the street would find it strange that evidence that two young people who had lived together or regularly as part of a happy relationship had had sexual acts together, must be wholly excluded on the issue of consent unless it is immediately contemporaneous. The question whether such evidence should be believed and whether it is sufficient to establish consent or even belief in consent are different matters. The man and woman in the street might also find it strange that evidence may be given and cross examination allowed as to belief in consent but not to consent itself when the same evidence was being relied on. That distinction has been recognised in the cases but without in any way resiling from a strong insistence on the need to protect women from humiliating cross examination and prejudicial but valueless evidence, it seems to me clear that these restrictions in section 41 prima facie are capable of preventing an accused person from putting forward relevant evidence which may be evidence critical to his defence, whether it is as to consent or to belief that the woman consented. If thus construed section 41 does prevent the accused from having a fair trial then it must be declared to be incompatible with the Convention.

11. But the prima facie let alone the literal readings are not the end of the inquiry. Section 3 of the Human Rights Act 1998 requires that

> *"So far as it is possible to do so, primary legislation ... must be read and given effect in a way which is compatible with the Convention rights".*

12. I was initially tempted to think that the words "at or about the same time as the event" could be given a wide meaning—certainly a few hours perhaps a few days when a couple were continuously together. But that meaning could not reasonably be extended to cover a few weeks which are relied on in the present case and I consider in the event that even if read with Article 6 they must be given a narrow meaning which would not allow the evidence or cross examination in the present case or in other than cases where the acts relied on were really contemporaneous.

13. Section 41(3)(c) raises a different issue. Although if read literally or even perhaps purposively this provision is very restrictive, I think disproportionately restrictive, it is less precise than section 41 (3)(b). The section must be read and given effect in a way "which is compatible with the Convention rights" in so far as it is possible to do so. It seems to me that your Lordships cannot say that it is not possible to read section 41(3)(c) together with Article 6 of the Convention rights in a way which will result in a fair hearing. In my view section 41(3)(c) is to be read as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one.

14. I do not consider that the provisions of section 41(5) admitting rebuttal evidence are sufficient in themselves to avoid unfairness. They are limited in their effect.

15. I agree with the statement in paragraph 46 of Lord Steyn's speech as to the effect of the decision today.

16. Despite the somewhat unusual procedural route which this case has taken, I think that the right course is to dismiss the appeal. The case should now be referred back to the trial judge for him to continue the case in the light of the present decision.

LORD STEYN

My Lords,

I. The Judge's preliminary rulings

17. In December 2000 the respondent (the defendant) was due to stand trial in the Crown Court on an indictment charging him with an offence of rape, the particulars being that on 14 June 2000 he raped the complainant. The defendant's defence is that sexual intercourse took place with the complainant's consent. It appears that he will alternatively rely on the defence that he believed that she consented.

18. The Crown's case is that the complainant first met the defendant together with a friend on or about 26 May 2000. The complainant and the defendant's friend formed a sexual relationship. The complainant visited the friend at the flat which he was then sharing with the defendant. At about 9 pm on 13 June 2000 the complainant and the friend had sexual intercourse at the flat when the defendant was not there. Later, when the defendant returned, the complainant, the friend and the defendant went for a picnic on the riverbank of the Thames. The friend and the defendant drank whisky and beer. When they got back to the flat the friend collapsed. An ambulance was called and the friend was taken to hospital. Later, in the early hours of 14 June 2000, the defendant and the

complainant left the flat intending to walk to the hospital. The defendant led the way and chose a route which took them close to the river. As they walked along the towpath the defendant fell down. The complainant's account is that she tried to help him to his feet, whereupon he pulled her to the ground and had sexual intercourse with her. Later that day the complainant made a complaint of rape to the police. The police interviewed the defendant. Following the advice of his solicitor he declined to answer questions. He read a prepared statement in which he asserted in very general terms that "she was never against this sexual relationship that we were having".

19. According to the statement of facts and issues it is the defendant's case that:

> *"on the occasion in question, [viz 14 January 2000] the complainant initiated consensual sexual intercourse and that this was part of a continuing sexual relationship. The consensual sexual relationship covered a period of approximately three weeks prior to 14 June 2000; and in particular he had consensual sexual relations with her, including sexual intercourse, at his flat on occasions between 26 May 2000 and 14 June 2000. The last instance was approximately one week before 14 June 2000."*

20. On 8 December 2000 a preparatory hearing took place pursuant to section 29 of the Criminal Procedure and Investigations Act 1996. Counsel for the defendant applied for leave to cross-examine the complainant about the alleged previous sexual relationship between them and to lead evidence about it. Relying on the provisions of section 41 of the Youth Justice and Criminal Evidence Act 1999 the judge ruled: (i) that the act of consensual sexual intercourse with the friend could be put to the complainant in cross-examination; (ii) that the complainant could not be cross-examined, nor could evidence be led, about her alleged sexual relationship with the defendant; (iii) that the prepared statement could not be put in evidence.

21. The judge observed that this ruling would prima facie result in a breach of the right to a fair trial under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998. Pursuant to section 35 of the 1996 Act the judge gave leave to the defendant to appeal to the Court of Appeal. The defendant exercised that right.

II. The decision of the Court of Appeal

22. The defendant appealed against the judge's rulings. In giving the judgment of the Court of Appeal Rose LJ pointed out that the judge's first ruling, viz giving leave to

cross-examine the complainant about sexual intercourse with the friend of the defendant, was made in error. No such leave had been sought.

23. The judgment was, however, principally concerned with the rulings by the judge that the complainant could not be asked whether, nor could the defendant give evidence that, she had sexual intercourse with the defendant on occasions during the previous three weeks: *R v Y,* The Times, 13 February 2001. Rose LJ recorded a concession by the Crown, rightly made in his view, that the questioning and evidence in relation to the complainant's alleged prior sexual activity with the defendant was admissible under section 41(3)(a) of the 1999 Act in relation to the defendant's belief in the complainant's consent: see section 1 of the Sexual Offences (Amendment) Act 1976. It followed that the judge's ruling in entirely excluding such evidence was wrong. On the other hand, Rose LJ concluded that the effect of the Act is that the alleged previous sexual relationship is inadmissible on the issue of consent. On this supposition Rose LJ further stated that the Crown accepted that the trial judge will, in due course, have to direct the jury that the evidence of the complainant's consensual activity with the defendant during the period before the alleged rape is solely relevant to the question of the defendant's belief as to consent and is not relevant to the question of whether the complainant in fact consented. However, Rose LJ was of the view that such a direction might lead to an unfair trial because a previous sexual relationship may be relevant to the issue of consent as well as belief in consent.

24. Allowing the appeal the Court of Appeal observed:

> *"Whether if, following a trial with such a direction, the appellant were to be convicted, it would be possible to argue, by way of appeal, that his trial had not been fair, in the light of article 6, remains for consideration on some future occasion. Clearly, if those events occur, that will be the time, if the point has not previously been resolved following some other trial, for the Home Secretary to be joined as a party with a view to the possibility of a declaration of incompatibility between the provisions of section 41(3)(b) (in so far as they preclude reference, in relation to consent, to the complainant's prior consensual sexual activity with the defendant) and article 6."*

On 31 January 2001 the Court of Appeal certified the following question:

> *"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?"

At the same time the Court of Appeal granted the Crown leave to appeal to the House of Lords.

III. The Secretary of State's intervention

[Omitted]

IV. The context of section 41

27. Following the Second World War the general principle of the equality of men and women in all spheres of life has gradually become established. In the aftermath of the sexual revolution of the sixties the autonomy and independence of women in sexual matters has become an accepted norm. It was this change in thinking about women and sex which made possible the decision of the House of Lords in *R v R* [1992] 1 AC 599 that the offence of rape may be committed by a husband upon his wife. It was a dramatic reversal of old fashioned beliefs. Discriminatory stereotypes which depict women as sexually available have been exposed as an affront to their fundamental rights. Nevertheless, it has to be acknowledged that in the criminal courts of our country, as in others, outmoded beliefs about women and sexual matters lingered on. In recent Canadian jurisprudence they have been described as the discredited twin myths, viz "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief": *R v Seaboyer* (1991) 83 DLR (4th) 193, 258, 278C per McLachlin J. Such generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape cases.

28. In *Director of Public Prosecutions v Morgan* [1976] AC 182 the House of Lords held that in a trial for rape a subjective belief by the defendant that the victim consented to sexual intercourse afforded a defence. Following this decision the Advisory Group on the Law of Rape was established. It produced the so-called Heilbron Report (1975) (Cmnd 6352). It treated previous sexual association between the complainant and the accused as potentially relevant but advised that in general the previous sexual history of the complainant with other men was irrelevant. Parliament enacted legislation which subjected the admission of evidence of the previous sexual experience of a complainant with third parties to a leave requirement. It did not touch on prior sexual contact between

the complainant and the accused: section 2(1) of the Sexual Offences (Amendment) Act 1976. Section 2(2) provides that the judge shall only give leave "if and only if 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 statute did not achieve its object of preventing the illegitimate use of prior sexual experience in rape trials. In retrospect one can now see that the structure of this legislation was flawed. In respect of sexual experience between a complainant and other men, which can only in the rarest cases have any relevance, it created too broad an inclusionary discretion. Moreover, it left wholly unregulated questioning or evidence about previous sexual experience between the complainant and the defendant even if remote in time and context. There was a serious mischief to be corrected.

V. Section 41

29. Sections 41 to 43 of the 1999 Act imposed wide restrictions on evidence and questioning about a complainant's sexual history. These provisions are contained in Chapter III of Part II of the statute and appear under the heading "Protection of Complainants in Proceedings for Sexual Offences". The material part of section 41 reads:

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court -

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied -

(a) that subsection (3) or (5) applies, and

(b) 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.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either -

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar -

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case 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.

(5) This subsection applies if the evidence or question -

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

Section 41 imposes the same exclusionary provisions in respect of a complainant's sexual experience with the accused as with other men. This is the genesis of the problem before the House. There are differences which need to be explored. In this task I have been greatly assisted primarily by the careful and incisive arguments of counsel but also by an as yet unpublished comprehensive review of the literature, comparative jurisprudence, and different legislative models and proposals for reform prepared by Neil Kibble of the Department of Law, University of Wales Aberystwyth "The Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases" (February 2001). My understanding is that in revised form it will be published in the Cambrian Law Review. It amplifies his earlier paper "The Sexual History Provisions, Charting a course between

inflexible legislative rules and wholly untrammelled judicial discretion" [2000] Crim LR 274.

VI. Sexual experience with the accused contrasted with sexual experience with other men.

30. Although not an issue before the House, my view is that the 1999 Act deals sensibly and fairly with questioning and evidence about the complainant's sexual experience with other men. Such matters are almost always irrelevant to the issue whether the complainant consented to sexual intercourse on the occasion alleged in the indictment or to her credibility. To that extent the scope of the reform of the law by the 1999 Act was justified. On the other hand, the blanket exclusion of prior sexual history between the complainant and an accused in section 41(1), subject to narrow categories of exception in the remainder of section 41, poses an acute problem of proportionality.

31. As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question. Relevance and sufficiency of proof are different things. The fact that the accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion.

32. In a balanced review of the voluminous critical literature in the United Kingdom between 1975 and 1999 Mr Kibble has shown that the principal focus throughout has been on the irrelevance and prejudicial impact of sexual experience of the complainant with other men. The target of the literature was the 1976 Act. When the issue of the relevance of sexual experience between a complainant and a defendant was raised there was broad agreement that such evidence is sometimes relevant (e.g. an ongoing relationship) and sometimes irrelevant (e.g. an isolated episode in the past). There was no case made out in the literature for the blanket exclusionary scheme incorporated in section 41 in respect of prior sexual experience between a complainant and accused. Not surprisingly the legislative technique adopted in section 41 has been criticised. Professor

Diane Birch ("A Better Deal for Vulnerable Witnesses?" [2000] Crim LR 223, 248), trenchantly commented:

> *Under section 41, the complainant's sexual behaviour (including behaviour with the accused) has relevance to consent only where it took place at or about the same time as the event of the subject-matter of the charge, or where it is strikingly similar to behaviour of the subject-matter of the charge or to any other sexual behaviour alleged to have taken place at or about that time. All that can be revealed, it would seem, is evidence such as that the complainant was seen in a passionate embrace with the accused just before (or just after) the alleged offence; bizarre and unusual conduct like the much-discussed propensity to re-enact the balcony scene from Romeo and Juliet, and (perhaps) evidence that the complainant was picking up clients as a prostitute (if it is D's defence that he was so picked up). Along with all the complainant's other sexual doings, the remainder of the history of any sexual relationship the complainant has had with the accused will, it seems, have to be concealed from the jury or magistrates. It is not clear how this is to be done in a case where, for example the parties are living together: is the jury simply to be told what happened in the bedroom without any idea of whether D was a trespasser or an invitee? Presumably there will have to be some concept of background evidence that it is necessary for the jury to know in order to make sense of the evidence in the case. "Section 41 is well-intentioned, but the constraints laid on relevance go too far. . . .*

It is difficult to dispute this assessment. After all, good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers or strangers. To exclude such material creates the risk of disembodying the case before the jury. It also increases the danger of miscarriages of justice. These considerations raise the spectre of the possible need for a declaration of incompatibility in respect of section 41 under section 4 of the Human Rights Act 1998.

33. Counsel for the Secretary of State submitted that section 41 was based on the decision of the Supreme Court of Canada in *R v Seaboyer* 83 DLR (4th) 193. In that case a first attempt to introduce "rape-shield" provisions directed against the admissibility of sexual history evidence in rape cases was held to be invalid under section 7 of the Charter of Rights and Freedoms. By a majority the Supreme Court indicated what kind of provisions would be lawful. Following *R v Seaboyer* section 276 of the Criminal Code was amended. Subsequently the Supreme Court held that section 276 as amended was valid.

As amended it was not viewed as a blanket exclusion: *R v Darrach* (2000) 191 DLR (4th) 539. Unfortunately, the Secretary of State's understanding of the Canadian position was flawed. *R v Seaboyer* is largely concerned with the irrelevance of sexual experience between the complainant and third parties. In her leading judgment McLachlin J placed general reliance upon an article of Galvin, who emphasises the probative value of prior sexual conduct between a complainant and an accused to the issue of consent: "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 Minn LRev 763. Moreover, McLachlin J made a telling comment on prior sexual history with the accused. It is to the following effect, at 83 DLR (4th) 193, 280D:

> *I question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none.*

R v Seaboyer does not justify the breadth of the exclusionary provisions of section 41 in respect of previous sexual experience between a complainant and a defendant. The amended section 276 of the Canadian statute is also in more flexible terms than section 41. Section 276 reads:

> *(1) In proceedings in respect of [certain sexual offences] evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant*
>
> *(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or*
>
> *(b) ... ...*
>
> *(c) is less worthy of belief.*
>
> *(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines . . . that the evidence*
>
> *(a) is of specific instances of sexual activity;*
>
> *(b) is relevant to an issue at trial; and*
>
> *(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.*

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence.

It will be observed that subsection (1) is directed at impermissible uses of the evidence. It is not a blanket prohibition. It has an inbuilt flexibility as appears from the balancing provision of subsection (2) and particularly the words of paragraph (c). The Canadian model is therefore in substantially less restrictive terms than section 41. Moreover, it is noteworthy that a law reform proposal in New South Wales explicitly accepts that the fact that the complainant engaged in sexual activity with the accused in the past *may* be relevant to the question whether she consented to sexual activity on the occasion in question: New South Wales Law Reform Commission Report (1998) (No 87) on section 409B of the Crimes Act 1900. A similar flexible approach is reflected in a discussion paper of the New Zealand Law Commission: "Evidence Law: Characters and Credibility" (1997) (Preliminary Paper 27) published in February 1997. Commonwealth developments do not support the breadth of the exclusionary provisions of section 41 in respect of the potential relevance of the sexual experience of a complainant with an accused.

VII. The interpretation of section 41

34. In order to assess whether section 41 is incompatible with the convention right to a fair trial, it is necessary to consider what evidence it excludes. The mere fact that it excludes some relevant evidence would not by itself amount to a breach of the fair trial guarantee. On the other hand, if the impact of section 41 is to deny the right to accused in a significant range of cases from putting forward full and complete defences it may amount to a breach.

35. Counsel for the Secretary of State has argued that unfairness to an accused will rarely arise because evidence of sexual experience between a complainant and an accused will almost always be admissible on the basis of the defence that the accused thought that the complainant consented. His argument has assumed that in practice an accused will almost invariably be able to put forward both defences. Counsel for the defendant has persuaded me that the defence of belief in consent would often have no air of reality and would in practice not be available, eg in cases where there are diametrically opposite accounts of the circumstances of the alleged rape, with the complainant insisting that it was perpetrated with great violence and the accused saying that the complainant took the

initiative in an act of consensual intercourse. In any event, it does not meet the difficulty that the judge's direction to the jury would always have to be to the effect that the past experience between the complainant and the accused is irrelevant to the issue of consent. I would reject the submissions of counsel for the Secretary of State on this point. In these circumstances counsel for the Secretary of State accepts that, despite the interlocutory nature of the proceedings, the House must now grapple with the problem whether, measured against the guarantee of a fair trial, the breadth of the exclusionary provisions of section 41 in respect of sexual experience between a complainant and the defendant are justified and proportionate. The position of counsel for the Secretary of State on this point is realistic. To postpone the decision until after the conclusion of a number of pending trials, which raise the issue, would be unfair to individuals and contrary to the public interest.

36. Counsel for the Secretary of State further relied on the principle that, in certain contexts, the legislature and the executive retain a discretionary area of judgment within which policy choices may legitimately be made: see *Brown v Stott* [2001] 2 WLR 817. Clearly the House must give weight to the decision of Parliament that the mischief encapsulated in the twin myths must be corrected. On the other hand, when the question arises whether in the criminal statute in question Parliament adopted a legislative scheme which makes an excessive inroad into the right to a fair trial the court is qualified to make its own judgment and must do so.

37. The methodology to be adopted is important. In a helpful paper under the title "The Act of the Possible: Interpreting Statutes under the Human Rights Act" [1998] EHRLR 665 Lord Lester of Herne Hill QC has summarised the correct approach, at p 674:

> *The first question the courts must ask is: does the legislation interfere with a Convention right? At that stage, the purpose or intent of the legislation will play a secondary role, for it will be seldom, if ever, that Parliament will have intended to legislate in breach of the Convention. It is at the second stage, when the Government seeks to justify the interference with a Convention right, under one of the exception clauses, that legislative purpose or intent becomes relevant. It is at that stage the principle of proportionality will be applied.*

See also Bertha Wilson J, "The Making of a Constitution: Approaches to Judicial Interpretation" (1988) PL 370, 371-372; and David Feldman, "Proportionality and The Human Rights Act 1998" in *The Principle of Proportionality in the Laws of Europe* (1999), pp117, 122-123.

38. It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. *R v Forbes,* [2001] 2 WLR 1, 13, para 24. The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play. The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the European Court of Justice and the European Court of Human Rights. It is not necessary for us to re-invent the wheel. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 Lord Clyde adopted a precise and concrete analysis of the criteria. In determining whether a limitation is arbitrary or excessive a court should ask itself:

> *whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*

The critical matter is the third criterion. Given the centrality of the right of a fair trial in the scheme of the Convention, and giving due weight to the important legislative goal of countering the twin myths, the question is whether section 41 makes an excessive inroad into the guarantee of a fair trial.

39. Subject to narrow exceptions section 41 is a blanket exclusion of potentially relevant evidence. Section 41 must however be construed in order to determine its precise exclusionary impact on alleged previous sexual experience between the complainant and the accused. Two processes of interpretation must be distinguished. First, ordinary methods of purposive and contextual interpretation may yield ways of minimising the prima facie exorbitant breadth of the section. Secondly, the interpretative obligation in section 3(1) of the 1998 Act may come into play. It provides that "so far as it is *possible* to do so, primary legislation . . . *must* be read and given effect in a way which is compatible with the Convention rights". It is a key feature of the 1998 Act.

40. Three possible ways of minimising the excessive breadth of section 41 must be considered. The first possible gateway is to be found in section 41(3)(b), viz:

> *it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused;*

An example covered by this provision would be where it is alleged that the complainant invited the accused to have sexual intercourse with her earlier in the evening. In my opinion, however, neither ordinary methods of interpretation nor the interpretative obligation under section 3 of the 1998 Act enables one to extend the temporal restriction to days, weeks or months. Section 41(3)(b) acknowledges by its own terms that previous sexual experience between a complainant and an accused may be relevant but then restricts the admission of such evidence by an extraordinarily narrow temporal restriction.

41. The second gateway suggested by counsel for the Director of Public Prosecutions is the provision in section 41(5)(b) enabling evidence adduced by the prosecution to be rebutted or explained by or on behalf of the defence. The suggestion is that the Crown could adduce evidence which will enable the defence to lead evidence of previous sexual experience in rebuttal. This is not a coherent and satisfactory solution. It depends on the goodwill and co-operation of the prosecutor. A defendant has the *right* in a criminal trial to offer a full and complete defence. I would reject this suggested solution.

42. The third gateway is section 41(3)(c). It permits evidence where

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

This gateway is only available where the issue is whether the complainant consented and the evidence or questioning relates to behaviour that is so similar to the defence's version of the complainant's behaviour at the time of the alleged offence that it cannot reasonably be explained as a coincidence. An example would be the case where the complainant says that the accused raped her; the accused says that the complainant consented and then after the act of intercourse tried to blackmail him by alleging rape; and the defence now wishes to ask the complainant whether on a previous occasion she similarly tried to blackmail the accused.

43. Rightly none of the counsel appearing before the House were prepared to argue that on ordinary methods of interpretation section 41(3)(c) can be interpreted to cover, for example, cases similar to the one before the House where it is alleged that there was a previous sexual experience between the complainant and the accused on several

occasions during a three week period before the occasion in question. Let me consider ordinary methods of interpretation in a little more detail. One could say that section 41(3)(c) is a statutory adoption of the striking similarity test enunciated in *R v Boardman* [1975] AC 421. So interpreted section 41(3)(c) is a narrow gateway, which will only be available in rare cases. Alternatively, one could argue that section 41(3)(c) involves the test of high probative force of the evidence, which makes it just to admit it, in accordance with the principle stated in *Director of Public Prosecutions v P* [1991] 2 AC 447. Even if this approach was consistent with the language of section 41, the threshold requirement would be too high: often the evidence will be relevant but not capable of being described as having "high probative value". These ways of interpreting section 41(3)(c) cannot solve the problem of the prima facie excessive inroad on the right to a fair trial. It is important to concentrate in the first place on the language of section 41. Making due allowance for the words "in any respect" in section 41(3)(c), the test "that the similarity cannot reasonably be explained *as a coincidence"* is inapt to allow evidence to be admitted or questioning to take place that, for example, (i) the complainant invited the accused at an office party on a Friday to come to her flat on the Sunday to make love to her or (2) that the complainant and the accused had sexual relations on several occasions in the previous month. While common sense may rebel against the idea that such evidence is never relevant to the issue of consent, that is the effect of the statute. In my view ordinary methods of purposive construction of section 41(3)(c) cannot cure the problem of the excessive breadth of the section 41, read as a whole, so far as it relates to previous sexual experience between a complainant and the accused. Whilst the statute pursued desirable goals, the methods adopted amounted to legislative overkill.

44. On the other hand, the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F; and my judgment, at p 366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see "Rights Brought Home: The Human Rights Bill" (1997) (Cm 3782), para 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of

the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation in compatibility with the Convention": Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of section 3 *against* the executive: "Pepper v Hart: A re-examination" (2001) 21 Oxford Journal of Legal Studies 59. In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise: *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132A-B per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.

45. In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances.

Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in section 3 of the 1998 Act. That is the approach which I would adopt.

VIII. The task of trial judges

46. It is of supreme importance that the effect of the speeches today should be clear to trial judges who have to deal with problems of the admissibility of questioning and evidence on alleged prior sexual experience between an accused and a complainant. The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention. If this test is satisfied the evidence should not be excluded.

IX. Application of the interpretation adopted.

47. The appeal before the House concerns a concrete case. It involves the permissibility of questioning a complainant about an alleged recent sexual relationship between her and the defendant, and the admissibility of evidence on that point. These are matters for the trial judge to rule on at the resumed trial. But in my view he must do so on the broader interpretation of section 41(3)(c) required by section 3 of the 1998 Act.

X. Disposal

48. I would decline to make the rulings sought by the Director of Public Prosecutions and the Secretary of State. Given the terms of this speech it is unnecessary to answer the certified question. I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

49. Rape is the most humiliating, distressing and cynical of crimes. It presents itself in various ways to the prosecutor. Sometimes it is accompanied by acts of extreme violence. In such cases proof that the crime has been perpetrated will be little more than a formality and the more difficult task is likely to be to prove the identity of the perpetrator. But more often than not very little, if any, violence is used, identity is not in issue as the parties were known to each other and the defendant admits that on the occasion in question he had sexual intercourse. The sole issue for the prosecutor in these cases will be whether it can be proved that the complainant did not consent to the sexual intercourse. The crime is constituted by proof of the fact of sexual intercourse with a person who at the time of the intercourse did not consent to it, accompanied by proof that at the time the defendant either knew that the person did not consent to the intercourse or was reckless as to whether that person consented to it: Sexual Offences Act 1956, as substituted by section 142 of the Criminal Justice and Public Order Act 1994. The absence of consent is, in these cases, the crucial issue. This is a question of fact, which must be resolved in the light of the evidence.

50. It is notorious that proof that the complainant did not consent to an admitted act of sexual intercourse raises difficult questions which, in the typical case, resolve themselves into issues of credibility. In its modern form the definition of the crime recognises that every woman has the right, on each and every occasion, to say "no". As Gonthier J put it in *R v Darrach* (2000) 191 DLR (4th) 539, 568, actual consent must be given for each instance of sexual activity. The crime has now been extended to the rape of a man by another man: Sexual Offences Act 1956, section 1(1) as substituted by section 142 of the Criminal Justice and Public Order Act 1994. So every man also has that right. But it is one thing for the law to recognise these essential facts. It is quite another for the law to put its principles into practice. That, in the final analysis, is what this case is about.

Background

51. It is plain a balance must be struck between the right of the defendant to a fair trial and the right of the complainant not to be subjected to unnecessary humiliation and distress when giving evidence. The right of the defendant to a fair trial has now been reinforced by the incorporation into our law of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Human Rights Act 1998. But the principles which are enshrined in that article have for long been part of our

common law. The common law recognises that a defendant has the right to cross-examine the prosecutor's witnesses and to give and lead evidence. The guiding principle as to the extent of that right is that prima facie all evidence which is relevant to the question whether the defendant is guilty or innocent is admissible. As the fact that the act of sexual intercourse was without the consent of the complainant is one of the essential elements in the charge which the prosecutor must establish, the defendant must be given an opportunity to cross-examine the prosecutor's witnesses and to give and lead evidence on that issue. That is an essential element of his right to a fair trial.

52. But the extent to which a defendant may go in the exercise of his right to be given that opportunity is a matter to which the common law has failed to provide a satisfactory answer. The problem is at its most acute in cases where the parties to the alleged rape are known to each other and have had some kind of a relationship in the past. In their joint written intervention the Rape Crisis Federation of England and Wales, the Campaign to End Rape, the Child and Woman Abuse Studies Unit and Justice for Women state that the evidence is that this is the most frequent type of rape, the least likely to be reported to the police and, when proceedings are brought, the least likely to result in a conviction. The statistics to which they refer bear out this statement.

53. K Painter "Wife Rape, Marriage and Law: Survey Report, Key Findings and Recommendations" (Manchester University, 1991), reporting on a sample of 1007 women in 11 cities, stated that 1 in 4 of those interviewed said that they had been the victims of rape or attempted rape, that the most common perpetrators were current and ex partners and that 91 per cent of those interviewed had told no-one. Home Office Statistics quoted in Speaking Up for Justice, Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (Home Office, June 1998) indicated that, while in 1985 35 per cent of reported rapes occurred within an intimate relationship and 30 per cent were by strangers, by 1997 these percentages had altered to 43 per cent and 12 per cent respectively. On the other hand the conviction rate for rape had decreased markedly over the same period. In 1985 24 per cent of rapes reported to the police resulted in a conviction. By 1996 the number of rape complaints to the police had trebled but the conviction rate had fallen to 9 per cent. Unpublished research for the Home Office in 1997 concluded that there was a link between the increased number of complaints involving intimates and former intimates and the decrease in the conviction rate: "The Processing of Rape Cases by the Criminal Justice System" (1997) (Jessica Harris).

54. To a substantial extent these studies may be thought to confirm what is already obvious. In an as yet unpublished paper "The Admissibility of Prior Sexual History with

the Defendant in Sexual Offence Cases" (University of Wales Aberystwyth, February 2001) in which he conducted a review of the critical and reform literature on this subject in the United Kingdom between 1975 and 1999, Neil Kibble observed, at p 23, that the literature was concerned almost exclusively with the problems surrounding the admissibility of prior sexual history with third parties and that little systematic attention had been paid to the question of the relevance and admissibility of prior sexual history with the accused. But it is well known that women in general are deterred from making complaints that they have been raped by a person with whom they have or previously had a relationship. It is distressing enough for women to have to give evidence in these cases. They are unwilling to face the prospect of being further humiliated by questions directed to their previous or subsequent sexual history. The low conviction rate acts as a further deterrent. The humiliation for the woman is much increased if no conviction results after she has been subjected to that kind of questioning.

55. These and studies undertaken in other countries, many of which were referred to by L'Heureux-Dubé and Gonthier JJ in their partial dissent in *R v Seaboyer* [1991] 2 SCR 577, indicate that the balance between the rights of the defendant and those of the complainant is in need of adjustment if women are to be given the protection under the law to which they are entitled against conduct which the law says is criminal conduct. As McLachlin J said, at p 609B-E, in the judgment which she delivered on behalf of the majority in that case, it is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues in the case. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence runs counter to our fundamental conceptions of justice and what constitutes a fair trial. But there is a risk that juries may be diverted from the real issues in the trial by evidence about the complainant's sexual behaviour which is not directly relevant to the offence charged: *R v Seaboyer* [1991] 2 SCR 577, 634A-D; *R v Darrach* 191 DLR (4th) 539, 560-561, Kibble, p 41. A balance must be struck between the probative value of the evidence and its potential prejudice.

56. Section 41 of the Youth Justice and Criminal Evidence Act 1999 has been designed to achieve that adjustment. It is clear from the background against which that section was enacted and from its own terms that this is the mischief which it was intended to address. It is also clear from what has been happening in other jurisdictions where similar provisions have been introduced that there was a choice to be made as to how far the balance should be adjusted in favour of the public interest while preserving the right to a fair trial. A wide variety of measures to which I shall refer later, commonly known as "rape-shield" provisions, have been enacted to restrict the right of a defendant who is on

trial for a sexual offence to cross-examine and lead evidence of the complainant's sexual conduct on other occasions.

57. Section 2 of the Sexual Offences (Amendment) Act 1976 left this matter to the discretion of the trial judge. The original Bill had contained complicated provisions which were designed to restrict the admissibility of such evidence, but these were removed and replaced by a general test of unfairness to the defendant. Section 2(2) of the Act provided that the judge should give leave if, and only if, he was satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked. But the statistics showed that the object of that measure, which was to protect complainants against unnecessary evidence and questions about their previous sexual experience, was not being achieved. They raised doubts as to whether it was satisfactory, in this very difficult and sensitive area, to leave the decision whether leave should be given entirely to the trial judge. The question which has been raised in this case is whether the new legislation, which greatly restricts the discretion given to the trial judge, is compatible with the defendant's Convention right to a fair trial.

58. I would take, as my starting point for examining section 41, the proposition that there are areas of law which lie within the discretionary area of judgment which the court ought to accord to the legislature. As I said in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380-381E, it is appropriate in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society: see also *Brown v Stott* [2001] 2 WLR 817 per Lord Bingham of Cornhill, at p 835A-B, and Lord Steyn at p 842F-G. I would hold that prima facie the circumstances in which section 41 was enacted bring this case into that category. As I shall explain in more detail later (see paragraph 90, post), the right to lead evidence and the right to put questions with which that section deals are not among the rights which are set out in unqualified terms in article 6 of the Convention. They are open to modification or restriction so long as this is not incompatible with the right to a fair trial. The essential question for your Lordships, as I see it, is whether Parliament acted within its discretionary area of judgment when it was choosing the point of balance that is indicated by the ordinary meaning of the words used in section 41. If it did not, questions will arise as to whether the incompatibility that results can be avoided by making use of the rule of interpretation in section 3 of the Human Rights Act 1998, failing which whether a declaration of incompatibility should be made. But I think that the question which I have described as the essential question must be addressed first. As Lord Woolf CJ said in *Poplar Housing and Regeneration Community Association Ltd v Donaghue* [2001]

EWCA Civ 595, para 75, unless the legislation would otherwise be in breach of the Convention section 3 of the 1998 Act can be ignored. So the courts should always ascertain first whether, absent section 3, there would be any breach of the Convention.

The facts

[Omitted]

The ordinary meaning of section 41

70. I propose in this section to examine in detail only those provisions of section 41 that are directly in issue in this case. It is not possible in this case to solve all the problems that may arise. But it may be helpful for me to state what I understand to be its basic structure.

71. Section 41 of the 1999 Act contains the following essential elements:

(a) it applies to any trial at which a person is charged with a sexual offence (see subsection (1) which extends, among other things, to a wide range of sexual offences involving children as well as those involving women who complain that they have been raped);

(b) it contains a general prohibition against the adducing by the accused of evidence or his asking of questions in cross-examination about any sexual behaviour of the complainant except with the leave of the court (see subsection (1), which is to be read with the definition of "sexual behaviour" in section 42(1)(c));

(c) it provides a requirement that leave be given only on an application made by or on behalf of the accused (see subsection (2), as to which section 43 lays down the procedure);

(d) it places a duty on the court to grant leave only if it is satisfied that the evidence or question falls within one or other of the two qualifying subsections (see subsection (2)(a), and subsections (3) and (5)); and

(e) it places an overriding duty on the court to grant leave only if to refuse to do so might have the result of rendering a conclusion on a relevant issue unsafe (see subsection (2)(b), which is to be read with the definition of "relevant issue" in section 42(1)(a)).

72. It is clear that this structure has been designed in such a way as to balance the competing interests of the complainant who seeks protection from the court and the accused's right to a fair trial. The section leans towards the protection of the complainant.

The protection extends to questions and evidence about sexual behaviour after, as well as before, the event giving rise to the charge. It ends the assumption, widely held hitherto, that the complainant's prior sexual behaviour with the defendant is always relevant and admissible. The admissibility of the complainant's sexual behaviour with the defendant is to be determined under the same procedural provisions as those which apply to the admissibility of such behaviour with third parties. But the court is enabled, in the defendant's interest, to give leave in any case which falls within one or other of the two qualifying subsections where to do otherwise might render a conclusion on any issue falling to be proved in the trial by the prosecution or the defence unsafe.

73. Of the two qualifying subsections, the only one that is in play in this case is subsection (3). Subsection (5) applies where the purpose of the evidence or question is to rebut or explain evidence adduced by the prosecution. It was not suggested that the respondent's application was made in reliance upon this subsection. I would prefer not to speculate on the circumstances in which the subsection might be invoked. But it is reasonable to think that it was included with a view to the accused's right to a fair trial. The section places no restrictions on the evidence which may be led by the prosecutor. It would plainly be unfair if the prosecutor were, for example, to lead similar fact evidence to support the Crown's case of the kind described in *Director of Public Prosecutions v P* [1991] 2 AC 447 and the accused were not to be given an opportunity in cross-examination or by adducing evidence to rebut that evidence. Subsection (5) avoids this unfairness.

74. Subsection (3), which is the critical subsection in this case, comprises three qualifying conditions which are stated in the alternative. It requires careful analysis. First there are the opening words of the subsection. They provide that the subsection applies only if the evidence or question relates to a relevant issue in the case - that is, any issue falling to be proved by the prosecution or the defence at the trial: see section 42(1)(a). The wording of this part of the subsection reflects the general tenor of section 41, which is to protect the complainant against evidence or questions about his or her sexual behaviour other than as part of the event which is the subject matter of the charge. Put the other way round, the evidence or question will cross the threshold of subsection (3) if it relates to an issue which falls to be proved by the prosecutor or by the defence. In this respect at least the subsection has been designed to avoid the unfairness which would result if the accused were to be denied the opportunity to lead evidence or put questions directed to issues that were relevant at the trial. Thus far it does not infringe the defendant's right to make a full answer and defence to the charge.

75. But the threshold which is set by the opening words of subsection (3) is further qualified by subsection (4), which provides that for the purposes of subsection (3) - but not, it should be noted, for the purposes of the rebuttal provisions in subsection (5) - no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose or the main purpose for which it would be adduced or asked would be to impugn the credibility of the complainant as a witness. At first sight this is a serious intrusion on the accused's right to a fair trial. In cases where the accused who is on trial for rape admits that he had sexual intercourse with the complainant on the occasion in question but says that it was with her consent the credibility of the two parties is likely to be the critical issue.

76. But the definition of "sexual behaviour" in section 42(1)(c) excludes for this purpose anything alleged to have taken place as part of the event which is the subject matter of the charge. It appears that subsection (4) is designed to address one of the two evils which lie at the heart of the mischief which forms the background to the enactment. These are the leading of evidence of sexual behaviour other than that which took place as part of the event which is the subject matter of the charge for the sole or main purpose of showing that, by reason of such sexual behaviour, the complainant (a) was more likely to have consented to the sexual conduct which is at issue in the trial or (b) was an unreliable or less than credible witness. These were described by McLachlin J in *R v Seaboyer* [1991] 2 SCR 577, 630G-H as the twin myths that may still inform the thinking of many but have no place in a rational and just system of law. As she put it, evidence of such behaviour cannot in itself be regarded as logically probative of either the complainant's credibility or consent. The evil which this subsection addresses in uncompromising terms is the drawing of impermissible inferences as to the complainant's credibility. I shall deal in the next section of this judgment (see paragraph 90 et seq, post) with the question whether by choosing to deal with this issue in this way the section has infringed the accused's Convention right to a fair trial.

77. Section 41 does not distinguish between evidence or questions about the complainant's sexual behaviour with the accused and the complainant's behaviour with persons other than the accused. The extent to which these two situations ought to be approached differently is left to the determination of the trial judge. There are strong reasons for imposing a narrower prohibition on the complainant's sexual behaviour with third parties. Evidence or questions about sexual behaviour with third parties is likely to be much harder to justify on grounds of relevancy than evidence about sexual behaviour with the defendant. Nevertheless I think that the draftsman was right to avoid laying down an absolute rule on this point. To have done so would have been to risk

incompatibility with the accused's right to a fair trial. It is worth noting that the absolute prohibition in the original version of section 276(1) of the Canadian Criminal Code (RSC 1985, c C-46) which was held in *R v Seaboyer* to be incompatible with the defendant's rights under the Charter of Rights and Freedoms was directed solely to evidence about the sexual activity of the complainant with persons other than the accused. The section, in its original version, placed no restriction on the admissibility of evidence about sexual activity with the accused himself. Much of the discussion in that case is about the relevance or otherwise of the complainant's sexual activity with third parties. But McLachlin J, at p 633F, questioned whether evidence about other sexual activity with the accused should be automatically admissible, and in its revised form section 276(1) of the Code treats both kinds of sexual activity in the same way. In this respect, as counsel for the Secretary of State pointed out (in my view correctly), section 41 follows the Canadian example.

78. It was suggested during the hearing that questions about sexual behaviour with the accused would be less distressing and humiliating than questions about such behaviour with third parties. But to assent to that proposition would, I think, risk developing rules by reference to stereotypes. Each case is different, and there are sound reasons for thinking that complainants are likely to find evidence and questions about their sexual history distressing or humiliating whatever their subject matter. The only proper test is whether the evidence and questions relate to a relevant issue in the case.

79. Paragraph (a) of subsection (3) sets out the first qualifying condition. This is that the issue to which the evidence or question relates is not an issue of consent. The justification for enabling leave to be given in such cases was powerfully argued by McLachlin J in *R v Seaboyer*, at pp 613E-615B. The distinction which she drew was between impermissible generalisations about consent and specific inferences pointing to guilt or innocence. Examples of issues which will fall within this paragraph because the evidence of sexual behaviour is proffered for specific reasons are (a) the defence of honest belief, which McLachlin J defined for the purposes of her examination of the Canadian legislation as resting on the concept - which I consider to be consistent with that described in *Director of Public Prosecutions v Morgan* [1976] AC 182 - that the accused may honestly but mistakenly (but not necessarily reasonably) have believed that the complainant was consenting to the sexual act; (b) that the complainant was biased against the accused or had a motive to fabricate the evidence; (c) that there is an alternative explanation for the physical conditions on which the Crown relies to establish that intercourse took place; and (c) especially in the case of young complainants, as in the Scottish case of *Love v H M Advocate* 1999 SCCR 783, that the detail of their account must have come from some

other sexual activity before or after the event which provides an explanation for their knowledge of that activity. The fact that leave may be given for evidence and questions directed to these and similar specific issues under this paragraph is an important protection of the accused's right to a fair trial.

80. Paragraph (b) sets out the second qualifying condition. This is the first of the two qualifying conditions that relate to issues which are issues of consent. To qualify under this condition the evidence or questions must relate to sexual behaviour which is alleged to have taken place "at or about the same time" as the event which is the subject matter of the charge against the accused. The inclusion of the words "or about" give some, but not very much, latitude to the condition imposed by the paragraph. The overall effect is similar to that of the phrase "at or near his own place of work" in section 15(1) of the Trade Union and Labour Relations Act 1974, as substituted by section 16(1) of the Employment Act 1980, which was considered in *Rayware Ltd v Transport and General Workers' Union* [1989] 1 WLR 675. Nourse LJ said, at p 683C-D, that the word "near" is an expanding word, to be extended so far as to give effect to the intention of the legislature. As May LJ said in the same case, at p 682A-B, the question is in the end one of fact and degree.

81. As for the intention of the legislature in the case of section 41 of the 1999 Act, extensive reference was made to statements made by the Home Office ministers as reported in Hansard when the legislation was undergoing examination in Parliament. For the reasons which I explained in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 WLR 15, 48C-E, I consider that the effect of the exception to the rule that resort to Hansard is inadmissible for the purpose of construing an Act which was recognised in *Pepper v Hart* [1993] AC 593 is that, strictly speaking, this exercise is available for the purpose only of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament. In expressing that view I wish to acknowledge the debt which I owe to my noble and learned friend Lord Steyn's valuable discussion of this point in "Pepper v Hart: A re-examination" (2001) 21 Oxford Journal of Legal Studies 59. But that situation does not arise in this case. In answer to a question which was put to him by my noble and learned friend in the course of the hearing counsel for the Secretary of State said in terms that he was not relying on this material as an aid to construction. So the proper course is to construe the words used according to their ordinary meaning without reference to what the ministers said about them in the course of the debates in Parliament.

82. But I think that it is legitimate to refer for the purposes of clarification to the notes to this section in the explanatory notes to the Act prepared by the Home Office. I would use it in the same way as I would use the explanatory note attached to a statutory instrument: see *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [1999] 1 WLR 2093, 2103D-G. The relevant note states that it is expected that the phrase "at or about the same time" will generally be interpreted no more widely that 24 hours before or after the offence. The use of the words "or about" avoids the trap of placing a straightjacket around a matter that has to be determined according to the facts and circumstances of each case. It is sufficient for the purposes of this case to say that the previous sexual behaviour of the complainant, including acts of sexual intercourse, about which the respondent wishes to ask questions and lead evidence falls outwith the scope of the phrase "at or about the same time" according to the ordinary meaning of those words. The last act of consensual sexual intercourse which he alleges took place about one week before the alleged rape.

83. Paragraph (c) sets out the third qualifying condition. It is the second of the two qualifying conditions that relate to issues which are issues of consent. The broad concept to which it is addressed is that of similar fact evidence. As the cases of *R v Boardman* [1975] AC 421 and *Director of Public Prosecutions v P* [1991] 2 AC 447 demonstrate, the principle on which the admissibility of similar fact evidence is based is that evidence which falls into this category may so strongly support the truth of the offence charged that it is fair to admit it notwithstanding its prejudicial effect: per Lord Mackay of Clashfern LC in *Director of Public Prosecutions v P,* at pp 462H-463A. This qualifying condition recognises that the accused may wish to rely on the same principle in order to support his defence of consent. The similarities which it permits are expressed in two alternatives, which are best examined separately. But very precise limits are set on the extent to which the principle may be used in this context. These are indicated by the concluding words of the subsection, which provides that the condition will not be satisfied unless the similarity "cannot reasonably be explained as a coincidence."

84. The first alternative is that on which the respondent seeks to rely in this case. It relates to the complainant's sexual behaviour on some other occasion which is alleged to have been so similar to any sexual behaviour of the complainant which took place as part of the event charged that it cannot reasonably be explained as a coincidence. In two respects the scope which is given by this provision for the giving of leave to put questions or adduce evidence is quite wide. The alternative is widely enough expressed to cover sexual behaviour with third parties as well as with the accused. And it is widely enough expressed to cover sexual behaviour after as well as before the event charged. To this

extent the condition avoids the risk of unfairness to the accused. But the requirement that the similarity cannot reasonably be explained as a coincidence imposes a precisely expressed restriction which is significantly tighter than that which the Crown must satisfy under the rule established in *Director of Public Prosecutions v P.*

85. On the limited version of the facts of this case which has so far been made available, no similarity is alleged as to the complainant's sexual behaviour with the respondent on previous occasions to any behaviour on her part which took place as part of the event charged except for the bare fact that it included occasions when she is alleged to have had consensual sexual intercourse with him. Mr Rook did not seek to suggest to the Court of Appeal that there was such a similarity as would enable evidence to be adduced or questions asked under section 41(3)(c): see para 19 of the Court of Appeal's judgment. No attempt appears to have been made to investigate the facts to the level of detail that section 41(3)(c) demands.

86. For this reason the respondent's allegations seem to me to invite the criticism that they are based on one of the two evils which lie at the heart of the mischief which the section seeks to address: the myth that simply because the complainant consented to sexual intercourse on previous occasions she was more likely to have consented to sexual intercourse on this occasion. The scope of the requirement that the similarity cannot reasonably be explained as a coincidence is therefore not, as matters stand, the critical issue in this case. In my opinion the application fails on the ground that no similarity other than the bare fact of alleged previous consensual intercourse with the respondent has been demonstrated.

87. On the other hand the question whether the requirement that any similarity that may be alleged cannot reasonably be explained as a coincidence may yet arise in this case, if the respondent is given an opportunity to explain the basis for his application in greater detail. So I would add these comments. The test which this phrase lays down appears to have been taken from *R v Boardman* [1975] AC 421 and in particular from Lord Salmon's observations where he said, at p 462C-D:

> *It has, however, never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.*

88. It is not easy to see how that dictum, which is taken from the context of criminal sexual conduct, can be applied to conduct on which the accused wishes to rely as a defence to the charge which has been laid against him. I do not think that it is helpful to speculate as to what kinds of sexual conduct will satisfy this test. Each case will have to be approached on its own facts. But on any view it has been deliberately framed in such a way as to indicate, according to the ordinary meaning of the words used, that it will not be easy to satisfy. It has been modified slightly from the strict test which Lord Salmon described because the phrase "cannot be explained as a coincidence" is qualified by the word "reasonably". Nevertheless it leans strongly in favour of the protection of the complainant. I shall deal in the next section of this judgment (see paragraph 90 et seq, post) with the question whether it leans too far.

89. The second alternative in paragraph (c) relates to the complainant's sexual behaviour on some other occasion which is alleged to be so similar to any other sexual behaviour of the complaint which took place "at or about the same time" as the event charged that it cannot reasonably be explained as a coincidence. The scope to be given to this phrase, according to the ordinary meaning of the words used, is the same as that to be given to the same phrase in paragraph (b). As in the case of the first alternative, the sexual behaviour is not limited to sexual behaviour with the accused before the event charged. It can include within its scope sexual behaviour with third parties as well as sexual behaviour with the accused or with third parties which took place after the event. But, as in the case of the first alternative, the scope to be given to this alternative is qualified by the requirement that the similarity cannot reasonably be explained as a coincidence.

The Convention right to a fair trial

90. The right of an accused under article 6(1) of the Convention is to a fair trial. As I observed in *Brown v Stott* [2001] 2 WLR 817, 851C, this is a fundamental and absolute right, to which the rights listed in articles 6(2) and 6(3) are supplementary. The rights listed in article 6(3) include the accused's right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him: see paragraph (d). There is no doubt that Parliament, by placing restrictions on the questions that may be asked and the evidence that may be adduced by or on behalf of the accused was entering upon a very sensitive area.

91. But article 6 does not give the accused an absolute and unqualified right to put whatever questions he chooses to the witnesses. As this is not one of the rights which are set out in absolute terms in the article it is open, in principle, to modification or restriction

so long as this is not incompatible with the absolute right to a fair trial in article 6(1). The test of compatibility which is to be applied where it is contended that those rights which are not absolute should be restricted or modified will not be satisfied if the modification or limitation "does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved": *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 547, para 57. A fair balance must be struck "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights": *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69. The general principles described in the *Ashingdane* case were restated in *Lithgow v United Kingdom* (1986) 8 EHRR 329, 393, para 194 and again in *Fayed v United Kingdom* (1994) 18 EHRR 393, 429, para 65; see also *Brown v Stott* [2001] 2 WLR 817, 851. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community and the protection of the individual.

92. In my opinion the placing of restrictions on evidence or questions about the sexual behaviour of complainants in proceedings for sexual offences serves a legitimate aim. The prevalence of sexual offences, especially those involving rape, which are not reported to the prosecuting authorities indicates a marked reluctance on the part of complainants to submit to the process of giving evidence at any trial. The rule of law requires that those who commit criminal acts should be brought to justice. Its enforcement is impaired if the system which the law provides for bringing such cases to trial does not protect the essential witnesses from unnecessary humiliation or distress.

93. It seems to me that the critical question, so far as the accused's right to a fair trial is concerned, is that of proportionality. The points of particular concern which I have identified in my analysis of section 41 are (a) the exclusion by section 41(4) of evidence and questions for the purpose of impugning the credibility of the complainant as a witness (see paragraph 76, ante) and (b) the requirement in section 41(3) that any similarity cannot reasonably be explained as a coincidence (see paragraph 83, ante). The impact of these provisions on the right to a fair trial is highlighted by the fact that they are binding on the trial judge. They are mandatory. He has no discretion to admit the evidence or to allow the questioning if he thinks that it is in the interests of justice to do so.

94. The question is whether these provisions have achieved a fair balance. This will be achieved if they do not go beyond what is necessary to accomplish their objective. That is

the essence, in this context, of the principle of proportionality. Furthermore, to ask oneself whether they are fair to the defendant is to address one side of the balance only. On the other side there is the public interest in the rule of law. The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case. The high rate of acquittals in rape cases before section 41 was introduced suggests that juries are not immune from temptation, and that they are quite likely to draw inferences from evidence about a complainant's sexual behaviour on occasions other than that of the alleged rape which the law now recognises they should not draw.

95. A prohibition of evidence and questions about the complainant's sexual behaviour on other occasions whose purpose, or main purpose, is to elicit material to impugn the credibility of the complainant as a witness seems to me to strike the correct balance. If the sole purpose is to impugn credibility, the defendant has no rights in the matter at all. The complainant's sexual behaviour on other occasions is irrelevant. No inferences can properly be drawn about her credibility from the mere fact that she has engaged in sexual behaviour on other occasions. I would hold that the words "or main purpose" which qualify the words "the purpose" in section 41(4) do not widen the prohibition to an extent which, when regard is had to the public interest, is unfair.

96. The effect of the requirement in section 41(3)(c) that any similarity cannot reasonably be explained as a coincidence is more difficult to assess. It seems to me that the assessment might best be approached in stages by asking these questions: (1) does a proportionate response to the legitimate aim entitle the legislature, in principle, to restrict the extent to which evidence may be adduced and questions asked about the complainant's other sexual behaviour where the issue is one of consent? (2) if so, are the restrictions in section 41(3)(c) so unfair that it can be said that no defendant who wishes to adduce such evidence or ask such questions can ever have a fair trial because its effect is to exclude relevant evidence whose probative value is not clearly outweighed by the prejudice which it may cause? (3) if not, has it been shown that it will cause such unfairness in this case?

97. It is not necessary to dwell on the first or on the last of these three questions. Some limit must be placed on the extent to which evidence may be adduced and questions asked if the legitimate aim is to be achieved. That point is not in dispute. As far as this case is concerned, I have already mentioned the fact that no attempt appears yet to have

been made to investigate the facts to the level of detail that section 41(3)(c) demands. It is not yet possible to say that there is any relevant evidence about similar sexual behaviour by the complainant which would be excluded by the restrictions. So I do not think that it can yet be said that, if the restrictions are not caught by the second question, they are so unfair in this case as not to be proportionate.

98. There remains the second question. I agree with Mr Pannick QC for the Home Secretary that if the restrictions are likely to cause unfairness in isolated cases only, of which this is not one, the better course is to deal with them later and one by one as they arise. The point of the second question is that if it is answered in the affirmative the incompatibility which will result will be capable of being invoked by every defendant whose defence is directed to the issue of consent. That, in effect, is the position which the respondent adopts. He says that there is no point in attempting the exercise required by section 41(3)(c) because the restrictions are so tightly drawn that there is no reasonable prospect of overcoming them.

99. It is plain that the question is in the end one of balance. Has the balance between the protection of the complainant and the accused's right to a fair trial been struck in the right place? As I indicated earlier in this judgment (see paragraph 58, ante), I think that, if any doubt remains on this matter, it raises the further question whether Parliament acted within its discretionary area of judgment when it was choosing the point of balance indicated by section 41. The area is one where Parliament was better equipped than the judges are to decide where the balance lay. The judges are well able to assess the extent to which the restrictions will inhibit questioning or the leading of evidence. But it seems to me that in this highly sensitive and carefully researched field an assessment of the prejudice to the wider interests of the community if the restrictions were not to take that form was more appropriate for Parliament. An important factor for Parliament to consider was the extent to which restrictions were needed in order to restore and maintain public confidence.

100. Some assistance in finding an answer to this question may be gained by looking at the solutions that have commended themselves to other jurisdictions. Rape-shield legislation in the United States has been classified into four different models: H Galvin "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 Minn L Rev 763; see also the helpful summary in Neil Kibble's paper, at pp 25-26. The Michigan model is the one followed most widely in the United States. It has been adopted in New South Wales (section 409B(3) of the Crimes Act 1900) and was adopted by Canada until it was held in *R v Seaboyer* [1991] 2 SCR 577 to be unconstitutional. It imposes a general prohibition on the introduction of evidence of prior

sexual behaviour, subject to certain specific exceptions but permits evidence of prior sexual behaviour between the complainant and the defendant. The New Jersey model leaves the matter almost entirely to the discretion of the trial judge, but it provides for the question whether to admit the evidence to be determined at a pre-trial hearing. The Federal model follows the Michigan model to the extent that it imposes a general prohibition on the introduction of prior sexual behaviour with specific exceptions one of which relates to the complainant's behaviour with the accused, but it gives the trial judge a general residual discretion to admit the evidence if it would be contrary to the interests of justice to exclude it or to do so would violate the defendant's constitutional rights. A similar model is in force in Western Australia (sections 36B, 36BA and 36BC of the Evidence Act 1906). The California model prohibits evidence of prior sexual behaviour to prove consent unless the evidence is of prior sexual conduct between the complainant and the defendant, while evidence with respect to credibility is admissible at the discretion of the court.

101. To these four models there now fall to be added two more. The first of these is the revised Canadian model. Section 276 of the Canadian Criminal Code (RSC 1985, c C-46) was redrafted following the decision in *R v Seaboyer* to give statutory effect to the guidelines which the Supreme Court of Canada laid down in that case for the reception and use of sexual conduct evidence. It starts by providing that evidence of other sexual activity, whether with the accused or with any other person is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented or is less worthy of belief. In *R v Darrach* 191 DLR (4th) 539, 560 the Supreme Court of Canada held that this is an evidentiary rule that excludes such evidence because it is irrelevant. There are then three exceptions to that rule which allow the evidence to be admitted if the judge determines that the evidence is of specific instances of sexual activity, that it is relevant to an issue at the trial and that it has significant probative value that is not significantly outweighed by the danger of prejudice to the proper administration of justice. Guidelines are included to assist the judge in determining whether the evidence is admissible. In *R v Darrach* the court held that the procedure created by the revised section 276, taken as a whole, was consistent with the principles of fundamental justice and protected the defendant's constitutional rights.

102. Lastly there is the Scottish model. It was first enacted by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and is now to be found in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. Questioning designed to show that the complainer is not of good character in sexual matters, that she is a prostitute or that she has at any time engaged with any person in sexual behaviour not

forming part of the subject matter of the charge is excluded by section 274. But section 275 provides that such questioning or evidence may be allowed where the court is satisfied that it is designed to explain or rebut other evidence, is questioning or evidence as to sexual behaviour which took place on the same occasion as the sexual behaviour forming the subject matter of the charge or is relevant to the defence of incrimination (that is, that the crime was committed by some other named individual) or that it would be contrary to the interests of justice to exclude it. A study by Dr B Brown "Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials" (University of Edinburgh, 1992) concluded that, while there were a number of positive features in this legislation, it fell short of achieving its aim in practice. It was suggested that, while there were other possibilities, a more certain remedy would be to modify the discretionary character of the exceptions and to identify instead specific types of circumstances in which sexual history or character evidence would be relevant to key issues in the trial.

103. It is reasonably clear from this brief review that there is no one single answer to the problem as to how best to serve the legitimate aim. There are choices to be made. There are indications from the wording and structure of section 41 that close attention was paid to the more recent Canadian and Scottish models. But in significant ways it has departed from both of them. The element of judicial discretion has been reduced to the minimum. There are risks involved in that choice. It has deprived the judge of the opportunity, in the last resort, of preventing unfairness to the defendant in circumstances where to do this would not significantly prejudice the proper administration of justice.

104. But two important factors seem to me to indicate that prima facie the solution that was chosen was a proportionate one. The first is the need to restore and maintain public confidence in the system for the protection of vulnerable witnesses. Systems which relied on the exercise of a discretion by the trial judge have been called into question. Doubts have been raised as to whether they have achieved their object. I think that it was within the discretionary area of judgment for Parliament to decide not to follow these systems. The second is to be found in a detailed reading of the section as a whole. As I have tried to show in my analysis of the various subsections, it contains important provisions which preserve the defendant's right to ask questions about and adduce evidence of other sexual behaviour by the complainant where this is clearly relevant. While section 41(3) imposes very considerable restrictions, it needs to be seen in its context. I would hold that the required level of unfairness to show that in *every case* where previous sexual behaviour between the complainant and the accused is alleged the solution adopted is not proportionate has not been demonstrated.

Conclusions

105. I emphasise the words "every case", because I believe that it would only be if there was a material risk of incompatibility with the article 6 Convention right in *all* such cases that it would be appropriate to lay down a rule of *general* application as to how, applying section 3 of the Human Rights Act 1998, section 41(3) ought to be read in a way that is compatible with the Convention right or, if that were not possible, to make a declaration of general incompatibility. I do not accept that there is such a risk. This is because I do not regard the *mere* fact that the complainant had consensual sexual intercourse with the accused on previous occasions as relevant to the issue whether she consented to intercourse on the occasion of the alleged rape.

106. For these reasons I consider that it has not been shown that, if the ordinary principles of statutory construction are applied to them, the provisions of section 41 which are relevant to the respondent's case are incompatible with his Convention right to a fair trial. I would hold that the question whether they are incompatible cannot be finally determined at this stage, as no attempt has been made to investigate the facts to the required level of detail to show that section 41 has made excessive inroads into the Convention right. It seems to me that it is neither necessary nor appropriate at this stage to resort to the interpretative obligation which is described in section 3 of the Human Rights Act in order to modify, alter or supplement the words used by Parliament. I think that it would only be appropriate to resort to surgery of that kind in this case if the words used by Parliament were unable, when they were given their ordinary meaning, to stand up to the test of compatibility. But that cannot, in my view be said of the allegations which the respondent makes as to the complainant's sexual behaviour with him prior to the incident of the alleged rape. All he appears to be relying upon at present is the mere fact that on various occasions during the previous three weeks she had had consensual sexual intercourse with him in his flat. As I have said, I consider that this fact alone - and nothing else is alleged about it - is irrelevant to his defence of consent. So I would hold that the exclusion of evidence and questions which relate to it in regard to that defence (but not that of honest belief) is not incompatible with his right to a fair trial.

107. This does not mean that the question whether or not the respondent will have a fair trial is at an end. I agree with Mr Perry for the Crown that it will only be in rare and isolated cases, that the question of fairness will be capable of being determined before the trial. It was clearly right that this case should have been brought before your Lordships on appeal in view of the important issues of principle that were raised and the risk of exposing vulnerable witnesses to the risk of having to give evidence at a new trial. But now that these issues have been resolved the case must go back to the Crown Court for

trial. The question whether the respondent did in the event have a fair trial will be open for consideration after the trial is over if he is convicted.

108. I should like to add however that I would find it very difficult to accept that it was permissible under section 3 of the Human Rights Act 1998 to read in to section 41(3)(c) a provision to the effect that evidence or questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators. As Lord Woolf CJ said in *Poplar Housing and Regeneration Community Association Ltd v Donogue* [2001] EWCA Civ 595, section 3 does not entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament: see Lord Hoffmann's observations in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131F-G.

109. In the present case it seems to me that the entire structure of section 41 contradicts the idea that it is possible to read into it a new provision which would entitle the court to give leave whenever it was of the opinion that this was required to ensure a fair trial. The whole point of the section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge. A deliberate decision was taken not to follow the examples which were to be found elsewhere, such as in section 275 of the Criminal Procedure (Scotland) Act 1995, of provisions which give an overriding discretion to the trial judge to allow the evidence or questioning where it would be contrary to the interests of justice to exclude it. Section 41(2) *forbids* the exercise of such a discretion *unless* the court is satisfied as to the matters which that subsection identifies. It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read in a provision which would enable the court to exercise a wider discretion than that permitted by section 41(2).

110. I would not have the same difficulty with a solution which read down the provisions of subsections (3) or (5), as the case may be, in order to render them compatible with the Convention right. But if that were to be done it would be necessary to identify precisely

(a) the words used by the legislature which would otherwise be incompatible with the Convention right and (b) how these words were to be construed, according to the rule which section 3 lays down, to make them compatible. That, it seems to me, is what the rule of construction requires. The court's task is to read and give effect to the legislation which it is asked to construe. The allegations about the complainant's previous sexual behaviour with the respondent are so exiguous that I do not think that it would be possible for your Lordships in this case with any degree of confidence to embark upon that exercise. I would leave that exercise to be undertaken by the trial judge in the light of such further information about the nature and circumstances of his relationship with the complainant that the respondent can make available if and when he renews his application. If he finds it necessary to apply the interpretative obligation under section 3 of the Human Rights Act 1998 to the words used in section 41(3)(c) of the 1999 Act, he should do so by construing those words, so far as it is possible to do so, by applying the test indicated in paragraph 46 of the speech of my noble and learned friend Lord Steyn.

111. The Court of Appeal reversed the decision of the trial judge on the question whether evidence and questions about the complainant's sexual behaviour with third parties would be admissible. I agree with that part of their decision. They also reversed the trial judge on the question whether evidence and questions about the complainant's sexual behaviour with the defendant would be admissible in relation to the defence of honest belief. With that part of their decision I also agree. But I am not satisfied that the respondent and his legal advisers have yet applied their minds sufficiently to the detailed requirements which must be met if his application for leave is to fall within the first alternative of the qualifying condition laid down in section 41(3)(c) in relation to the defence of consent.

112. By its order of 15 January 2001 the Court of Appeal allowed the appeal and reversed the ruling of the trial judge. In the formal petition to the House the appellant asks that that order should be reversed, but in the event at the hearing of the appeal your Lordships were not invited to set aside the order by either party. For those reasons I would dismiss the appeal. But I would hold that the respondent should be given an opportunity, in the light of the decision of this House, to renew his application to the trial judge for leave to be given under section 41(3)(c).

[The opinions of Lord Clyde and Lord Hutton have been omitted.]