

## Competency and Compellability in Criminal Proceedings

COMPETENCY = who **may** lawfully testify as a witness.

COMPELLABILITY = who may be lawfully **obliged** to testify. Refusal to do so may lead to a charge of contempt of court.

Subject to exceptions, all persons are competent – **s53 YJCEA**.

- The bar is set quite low for competence – does not require W to have 100% understanding of all questions.
- **R v Sed**: 81yr old with Alzheimers
  - o Care worker alleged of raping her
  - o Judge concluded she was competent to give evidence
- **DPP v R**: a W who cannot remember facts may still be competent if W can understand questions + give understandable answers.
- **S54(2) YJCEA**: Where a party/court raises the issue of competence, the person who called the W bears the burden of proving on the balance of probabilities that W is competent.

### The compellability of witnesses

- All competent witnesses are compellable. (3 exceptions)
  - o Witnesses are under a legal obligation to give evidence if called upon to do so + may be subject to a legal penalty for failure to carry out that duty.
  - o A competent witness can be compelled to give evidence by the threat of being held in contempt (punishable by imprisonment) for failing to do so.
- In a criminal case, both the prosecution and defence are responsible for the attendance of their witnesses + so require a summons to get the witness to court.
- In Crown Court, a witness can be compelled to attend trial.
  - o A compellable witness who ignores a summons is in contempt of court + can face imprisonment for up to 3 months.
- In Magistrates' Court, attendance of witnesses can be secured by a summons/warrant.
- Refusal to be sworn or give evidence may result in a punishment of up to 1 month imprisonment and/or a maximum fine of £2,500.
- The 3 exceptions:
  - o D's spouse is now a competent witness under **s53(1)**. They are only compellable for the prosecution against the accused, or a co-accused in very limited circumstances.
  - o The accused is a competent witness in their own defence, but is not a competent witness for the prosecution. D is not compellable, but if they choose to give evidence, there is no privilege against self-incrimination.
  - o Diplomats, foreign heads of state + the sovereign are competent, but are not usually compellable witnesses.

### Exceptions to the rule

#### **The spouse of the accused**

- Originally, wife/husband of D was generally considered to be incompetent.

- Criminal Law Revision Committee 1972: it could disrupt marital harmony by placing one partner in the position of having to incriminate the other. But, public policy dictates that wives should be compellable to testify for certain OAPs of the wife/children (< 16) of the same household as D (otherwise these offences may go undetected).

#### NOWADAYS:

→ If spouse/civil partner is also charged: compellability is governed by s53 YJCEA 1999 + s1 CEA 1898.

→ BUT, if not charged....

- **s80(2A) PACE 1984**: a spouse/civil partner is compellable for the prosecution/co-defendant if the offence constitutes a 'specified offence'.
- **s80(3)** – an offence is a specified offence if:
  - o **a)** It involves an assault on, or (threat of) injury to, the wife/husband/a person who was under 16 at the time
  - o **b)** It is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age
  - o **c)** It consists of attempting/conspiring to commit, or of aiding/abetting/counselling/procuring/inciting the commission of, an offence within (a) or (b).
- **s80(4)**: No person who is charged in any proceedings shall be compellable by virtue of subsection (2) or (2A) above to give evidence in the proceedings.
- A spouse is now competent in all cases + can give evidence in any case BUT is only compelled under s80(3) (a) (b) or (c).
- Given that a core function of the CJS ought to be protection of the public, it is questionable that a spouse should effectively hold a form of veto on a conviction.
- Doubtful whether scope of s80(3) includes a sexual offence against the spouse?
  - o This only became a question after **R v R** – where the husband's immunity at common law for marital rape was abolished.
- It is likely that the courts will interpret rape as including an assault for the purposes of (a), given that any touching without consent constitutes an assault – supported by s2 SOA 2003.
- Court focuses on LEGAL nature of the case, rather than the facts.
- **R v AB**: The offence of making a threat to damage property contrary to s2(a) Criminal Damage Act 1971 was not a specified offence as the offence was directed at property, even though D had allegedly threatened to burn down his house whilst his children were in it.
- **R v L** – D was on trial for rapes + indecent assaults on his daughter. Was alleged that the assaults took place for years after she was 10 + she had been raped since 16yrs old. Prosecution sought to introduce a towel into evidence that had been found in V's flat with D's semen on it. D claimed this was used after sex with his wife, but wife said to the police that they had not had sex in their daughter's flat. At trial, wife declined to testify. She was not a compellable witness since this evidence related to rape when V was 19.
- But, the prosecution successfully argued that the statement be introduced under s114(1)(d) CJA to admit out-of-court hearsay statements in the 'interests of justice'.

- D's appeal: (1) the trial judge had circumvented the non-compellability provisions in PACE, (2) his wife ought to have been advised before she was questioned that she could not be compelled to give evidence against her husband.
- CoA rejected this. The legislation reflects that 'the interests of convicting a husband of child abuse take precedence over the demands of marital duty + harmony'.
- Does this case call for a fundamental review of the law governing spousal compellability?
- N.B. Where the spouse of D cannot be compelled to testify for the prosecution but has made a statement to the police, the police statement may be admissible under **s114(1)(d) CJA 2003**.
- Cohabitees are competent and compellable in all cases, as are all children, parents, siblings and other close relatives.
  - **R v Pearce**: Case involved dispute over whether compelling partners + children of the marriage to give evidence constituted a breach of Art 8(1) ECHR. CoA rejected this – such compulsion was necessary in a democratic society to prevent crime.
- Should a more modern approach be enacted that would place on the spouse the same social responsibility to give evidence as non-spouses?

#### Former spouses, future spouses and polygamous 'spouses'

- Under **s80(5) PACE**: former spouses are competent + compellable to give evidence as if they had never been married.
  - **R v Cruttenden**
- Only those who have had the divorce decree made absolute are compellable.
- Future spouses? Considered in *R (CPS) v Registrar-General of Births, Deaths and Marriages*.
  - CoA: there was no power to prevent, on the grounds of public policy, the marriage between a prisoner on remand + his partner, despite the fact that the marriage would make her a non-compellable witness at his trial for murder.
- Polygamous marriage? Considered by CoA in **R v Khan**.
  - K, who was already married under English law, underwent a Muslim marriage taking a 'second' wife. As 2<sup>nd</sup> marriage not recognised in England, this wife was competent + compellable for the prosecution on the charges against Khan.

#### The Accused

- ❖ Prior to 1898, accused persons were incompetent to give evidence in their own defence.
- ❖ **Criminal Evidence Act 1898, s1**: accused persons are competent to give evidence in their own defence – but, they are not COMPELLED to do so.
- ❖ A court may be entitled to draw inferences from the failure of D to testify in his defence (**Criminal Justice and Public Order Act 1994, s35**).
- ❖ Where D decides to give evidence, they can be questioned on any matter of the offence, although no questions may be asked in relation to previous bad character/previous convictions, except in the circumstances provided for in the CJA 2003.
- ❖ Accused is also a competent witness for a co-accused, but is not compellable.

- ❖ **S53(4) YJCEA:** A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution.
- ❖ **S53(5):** A person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings.
- ❖ So, there are 4 ways in which D can be removed from the indictment, making them competent + compellable witness for the prosecution. Where:
  - D is acquitted, with the prosecution offering no evidence (***R v Conti***)
  - D pleads guilty + is subsequently removed from the indictment (***Chan Wai-keung v R***)
  - The A-G enters a nolle prosequi; or
  - D is removed from the indictment + tried separately (***R v Winsor***)
- ❖ Note: Undermined by **CJPOA s35** if D does not testify?

### Vulnerable Witnesses

#### **Child witnesses**

- Goodman et al. study: of those who testified, it brought back traumatic memories, caused sleep disturbance + exacerbated feelings of pain, hurt + helplessness. Also, the more frightened a child was of confronting D, the fewer questions the child would answer.
- Davies + Noon's study: 25% of all questions in child questioning were inappropriate to the witness's age.
- Cordon et al.: advocates frequently try to lure child witnesses into a false sense of security by asking non-substantive questions about the child's interests, before moving on to elicit substantive information that contradicts the child's original testimony.
  - Believe that the goal is to 'keep the child off balance to increase the chance of inconsistencies'.
- NSPCC report on the sort of procedures that ought to be followed:
  - Use simple, common words and phrases
  - Repeat names and places often
  - Avoid negatives
  - Avoid 'Do you remember...' questions
- Plotnikoff + Woolfson survey:
  - 30% of those interviewed had not been offered the opportunity to visit a courtroom/live link facility before giving evidence.
  - Almost 50% interviewed described defence counsel as 'aggressive', 'rude' or 'cross'.
  - 58% of witnesses said the other side's lawyer tried to put words in their mouth.
  - But, half of those interviewed stated that they had gained something positive from the experience of testifying.

### **Complainants in rape and other sexual offences**

(below)

#### **Witnesses with learning disabilities**

- ❖ Sanders et al. study = 3 key areas that are likely to make learning-disabled witnesses at risk of heightened vulnerability in court.

- Impaired in terms of memory – ability to absorb, memorise + recall events is often lessened
- Difficulties in communicating – many possess a restricted vocabulary + so have a limited means of articulating themselves
- These witnesses often respond to aggressive questioning by attempting to pacify the questioners by offering the responses that they think they are looking for

### Witnesses in fear of intimidation

- A particular problem especially where the alleged offenders are part of the community in which the witness lives, or where the community is hostile to the police.
- One incident = Prospective witness was sitting in a crowded pub when he was set upon by 4 masked men. His punishment for testifying was the loss of his hand, which was hacked off with a butcher's knife.
- HO publication envisages that the problem is on the increase.
- Tarling et al.: intimidation occurs in almost 10% of reported crime + 20% of unreported crime.
- Levels of intimidation appear to be greater among poorer socio-economic groups, V's of violent crime, racial and sexual minorities, and women – particularly in cases involving domestic violence, or those involving sexual offences.

### Protecting vulnerable witnesses in criminal cases

Historical difficulties associated with evidence of children...

- ***R v Wallwork***: Girl of 5yrs called as a witness. Lord Goddard CJ: *"The jury could not attach any value to the evidence of a child of five: it is ridiculous..."*
- **CJA 1988**: made provision for children, with the leave of the court, to give all of their evidence by live TV link in cases involving offences of a sexual/violent nature.
- ***R v Hampshire***: Child presumed competent unless it appeared otherwise...
- 1989: Govt. established an advisory group to consider its full implications (examine growing support for a change in the law, so that video-recordings of interviews with V's could be readily used as evidence in child abuse trials).
- Pigot Committee → TV link was only a partial solution + recommended that:
  - No child under the 14 (17 in sexual offences) should have to give evidence in open court when the offence involved is one of violence/sexual nature
  - Children's evidence in chief should be replaced by a video-taped interview
  - Cross-examination should take place at an out-of-court preliminary hearing when the judge + counsel would be present,
  - The videoed evidence + cross-examination being shown to the jury at the appropriate point in the trial when the child would have given evidence
- CJA did not implement these recommendations. The Act made provision for the child's evidence in chief to be recorded in advance of the trial, but made no equivalent provision for cross-examination or re-examination.

- Even when child witnesses were deemed eligible to make use of such measures, the range of measures open to them remained very limited.
- Provisions of the 1988 and 1991 Act were overly complex + poorly drafted.
- Home Office set up a group to examine + make recommendations on the treatment of vulnerable + intimidated witnesses within the criminal justice system.
- Group published its report, 'Speaking up for Justice' in June 1998.
- It identified 2 categories of W who should receive assistance at the discretion of the court.
  - Category A: Witnesses whose vulnerability related to the effects of age/disability /illness would automatically be entitled to some form of special protection
  - Category B: Witnesses who may be vulnerable/intimidated for reasons relating to their particular situation/circumstances of the case the trial judge should retain discretion in determining whether or not it be appropriate to grant such discretion
- Most of these recommendations were implemented in the YJCEA 1999.

## THE CURRENT LAW:

### The Youth Justice and Criminal Evidence Act 1999

- A procedure known as Ground Rules Hearing has been introduced in all cases involving a vulnerable witness/defendant.
- The judge, advocates and intermediary will discuss how a vulnerable person should be questioned.
- In determining whether or not to issue a special measures direction, court must consider:
  - The eligibility of the witness
  - The availability of the range of special measures
  - The desirability of making a special measures direction in the circumstances of the case
- The eligibility of the witness will depend upon the characteristics of an individual witness, rather than hinge on whether or not the witness falls within a list of closed categories.

### Eligibility: child witnesses

→ **S53 YJCEA**: All witnesses are competent **WHATEVER THEIR AGE**.


→ This may be rebutted by **s53(3)**: A witness is deemed not competent to testify if he is not able to:

- Understand questions put to him, and
- Give answers to them which can be understood


→ Where this issue is raised, the party calling the child bears the BoP (**s54(2)**)

→ Children who are competent and also compellable

→ **R v Macpherson**: "A child should not be found incompetent on the basis of age alone".

 **s16(1)(a) YJCEA 1999**: a child witness is eligible for special measures if they are under 18yrs at the time of the hearing.

 Once eligibility is established, court must consider which special measures should be made.

 S16 gave way to a complex framework of presumptions + rules contained in ss21 -22, which were formulated around a 3-tiered hierarchy for child witnesses.

- ✚ This hierarchy was CRITICISED, and... then ABOLISHED by s100 CJA.
- ✚ **NOW**, all child witnesses are now on the same statutory footing.
- ✚ **S21**: primary rule in respect of all child witnesses – their evidence in chief must be pre-recorded under s27 + cross-examination should take place through the live link provision under s24.
  - Subject to s16(4): that the court must take into account the views of the witnesses.
  - No need for court to consider whether measure should improve quality of evidence under s19(2)(a)
- ✚ Rule does not apply if witness wishes to give live evidence, or for if any reason the court is satisfied that compliance with it would minimise the quality of the evidence.
- ✚ In either event, court should take into account range of factors in s21(4C):
  - The witness's age and maturity;
  - The witness's ability to understand the consequences of giving evidence in court rather than via video-recorded statement;
  - Any relationship between the witness and accused;
  - The witness's social, cultural and ethnic background; and
  - The nature + circumstances of the offence being tried.
- ✚ The primary rule continues to operate around 2 age limits.
  - Where a witness has turned 18 before they begin to give evidence, and they are not eligible for special measures for any other reason, **s21(8)**: the direction should cease to have effect.
  - If the witness turns 18 after they have begun to give evidence, the special measures direction continues to apply.
- ✚ Note: other provisions in the Act may apply, where the age factor appears unfair.
- ✚ A child who is eligible under **s16(1)(a)** may also be eligible under **s17** if they are in fear/distress.
  - If the witness is a victim of a sexual offence, **s17(4)** creates a presumption that the witness is eligible for special measures.
  - If the child witness is eligible under both sections, then **s21(8)** will carry most effect, since it solely applies to child witnesses only eligible under s16(1)(a).
  - Section **21(8)** will only apply to a witness to a non-sexual offence who obtains the special measures simply on age + for no other reason.

#### Eligibility: Adult witnesses

- Adult witnesses may be eligible for a special measures direction under **ss16 or 17**, if court considers that the quality of evidence given is likely to be diminished by reason of any circumstances falling within ss16(2) or 17(2).
- **S16(2)** → those suffering from mental/physical disability should automatically be entitled to special measures (mental disorder/impairment of intelligence + social functioning/physical disability/disorder).

- **S17:** witness is eligible for special measures if the quality of their evidence is likely to be diminished by reason of fear/distress. Does not give rise to automatic eligibility.
- **S17(2)** – court should consider a range of factors in arriving at decision:
  - a) The nature and alleged circumstances of the offence to which the proceedings relate;
  - b) The age of W;
  - c) Such of the following matters as appear to the court to be relevant, namely –
    - a. The social + cultural background + ethnic origins of the witness
    - b. The domestic and employment circumstances of the witness
    - c. Any religious beliefs or political opinions of the witness
  - d) Any behaviour towards the witness on the part of –
    - a. The accused
    - b. Members of the family or associates of D, or
    - c. Any other person who is likely to be a D or a W in the proceedings
- **S17(3)** = court must consider any views expressed by the witness
- **S17(4)** → court must presume that a sexual complainant is an 'eligible witness' unless they ask not to be treated as one, although D may rebut the presumption.
- **S17(5)** → creates similar benefit for W's in cases involving violent offences, including homicides + OAPs – in which knives/firearms were used.

#### Special measures

- **S19(2)(a)** Special measures likely to improve quality of evidence +
- **S19(3)(a)** Taking into account any views expressed by W?

#### Types of special measure

A variety of special measures are provided for in **ss23-29** of the Act:

- ❖ Screening the witness from D (s23)
- ❖ Giving evidence by live link (s24)
- ❖ Giving evidence in private (s25)
- ❖ Removing wigs and gowns (s26)
  - Designed to ease the strain of testifying on young children
- ❖ Video-recording the evidence in chief (s27)
- ❖ Video-recording the cross-examination or re-examination (s28)
- ❖ Examining the witness through an intermediary (s29)
  - To facilitate communication between W + the police/Court
  - His/her role is impartial + neutral
  - Not available for W's eligible by way of "fear and distress"
- ❖ Providing aids to communication (s30)
  - E.g. use of sign boards, special computers to enable W to make use of an artificial voice where he/she has lost the power of speech.
  - Not available to W's eligible through fear + distress
- **S31:** Statements not made in court admitted under special measures are admissible as evidence of facts of which direct oral evidence in court would be admissible.



- **S32:** Where evidence is given in accordance with a special measures direction in the Crown Court, the judge should give the jury such warning as is necessary to prevent D being prejudiced.
- **S33A:** Court MAY give a “live link direction” if this is in the interests of justice if...

Thoughts...

- Is it fair that the accused is expressly excluded from being eligible for special measures?
- Have SM's been introduced to protect a 'State' interest in securing more convictions as opposed to any philanthropic desire to protect vulnerable witnesses?
- Do special measures interfere with the accused's right to 'confront' opposing witnesses?
  - *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393

### **SWORN/UNSWORN EVIDENCE**

- **“Sworn”** = W testifies under a solemn + meaningful oath to tell the truth, often based on a religious conviction binding on the conscience of the witness – ***R v Kemble***
- If W has no religious convictions, he/she makes an ‘affirmation’ to tell the truth, which has the same weight as the ‘oath’.
- **“Unsworn”** = considered less desirable + may be afforded less weight.
  - But in practice – under 14s may be asked to ‘promise’ to tell the truth/ be subject to questions to determine whether they know the difference between truth + lies.
- **S55(2) + s56 YJCEA:** A child who is under the age of 14 MUST give unsworn evidence.
- **S53(3):** This evidence will be received providing the child can understand questions + give answers that can be understood.
  - W's over that age must also do so if they lack the appreciation of the solemnity of the occasion + the responsibility to tell the truth involved in taking the oath.

### **EXAMINATION OF WITNESSES**

#### **Three Stages**

1. Examination in chief (by party calling the W)
2. Cross-examination (by other party(ies))
3. Re-examination (by party who called the W)

**Examination in Chief** = examination of a W by/on behalf of the party who called him.

- Usually the questioned will aim to portray the W in a favourable light.
- Principal goal = manipulate W's testimony in such a way that victory is made more likely.
- **Leading question** = one which either suggests the desired answer or suggests the existence of facts of which W has not testified.
  - These should generally not be asked during examination in chief, though there are exceptions + judge does permit the asking of leading questions during examination in chief in the interests of justice – ***Bottomley***
  - Allowed where the evidence being elicited is purely formal + undisputed by either party.

#### **Cross-examination**

- Permits the opposing party to put questions that are designed to extract evidence helpful to its cause from the other side's W.
- Allows the opposing party to ask questions designed to undermine the credit of the other side's W.

-If a party has been prevented from cross-examining a W, that W's testimony may be regarded as inadmissible (or may be afforded little weight).

-**R v Doolin**: W died before cross-examination + the testimony was still deemed to be admissible since the judge had given appropriate warning to the jury.

-**R v Stretton**: V of an alleged rape was epileptic + fell ill while testifying. She was unable to continue + so the judge directed that if they felt D had been deprived of the opportunity properly to test her evidence, they should acquit D. Appeal dismissed as the trial judge had properly exercised his discretion.

-Wigmore: Cross-examination = *"beyond doubt the greatest legal engine ever invented for the discovery of truth"*.

-Ellison: *"It is increasingly acknowledged that the techniques of cross-examination are as well suited to obfuscation, intimidation and coercion as to the effective testing of evidence"*.

-Langbein: *"It is a flawed theory of truth-seeking"*.

Problems:

- **Hobbs v Tinling**: Sankey LJ: a trial judge should exercise discretion to prevent improper cross-examination if questioning relates to matters so remote as to have a negligible impact on the credibility of the W.
- But, judges seem reluctant to intervene during cross-examination for fear of compromising the appearance of judicial impartiality.

Code of Conduct of the Bar of E + W:

- Barrister must not make or ask questions which are merely scandalous or intended to insult or annoy a witness...
- Must not suggest that a V or W is guilty...or make any defamatory aspersion...

-Critics: such provisions are routinely breached.

-Collateral finality rule- Answers on collateral matters are treated as final – cannot be rebutted as further evidence.

(Collateral matter = matter going merely to credit but which is otherwise irrelevant to the issues in the case).

-**R v Burke**: cross-examiner alleged that W, who was testifying through an interpreter in Irish, had been heard talking to people in the court precinct in English. W denied this. Thus, court refused to allow counsel to adduce any evidence in rebuttal, since this was deemed a collateral matter.

-The distinction between facts in issue + collateral issues can be difficult to draw (especially in sexual cases).

-**R v Funderburk**: D alleged that C, who described in graphic detail losing her virginity to him, was lying as she was already sexually experience + wished to adduce evidence that the girl had told him this a number of times.

- CoA: These facts were intimately connected with the facts in issue – could be heard.

-Reason: Trial should remain focused on the principal issues at stake + not be side-tracked.

-There are some exceptions that MAY apply (evidence of previous convictions, evidence of bias or prejudice, evidence of physical or mental disability affecting reliability, evidence of a reputation for untruthfulness and previous inconsistent statements).

## Re-Examination

- Purpose = afford the W's side an opportunity to repair any damage done during cross-examination.
- Questioning must be restricted to matters arising out of cross-examination.
- No new matters can be introduced without the court's permission.
- Leading questions also not normally allowed here.

## SEXUAL HISTORY EVIDENCE

### The Impact of Cross-examination

- It is not uncommon for them to be questioned in relation to intimate details of their private lives + as well as being asked to recount intricate details of an invasive + traumatising attack.
- Grohovsky: the V's body becomes something of a crime scene in itself 'from which evidence must be collected and analysed'.
- Most distressing types of question = complainants being asked details about their underwear, make-up, social lifestyle, menstrual cycle and drug habits.
- Lees: 83% of complainants interviewed said they felt as if they were on trial instead of D.
- Victim Support: 12% of women said their experience in court was worse than the rape itself!
- Temkin (2000): If the complainant could be portrayed as a 'slut', this was highly likely to secure an acquittal.

### Controls on cross-examination

- ❖ Restrictions on self-representation, because of 1990s cases:
  - **Edwards**: D came to court wearing the same clothes it was alleged he had worn while committing the alleged rape + proceeded to subject C to a lengthy + intrusive cross-examination about her private life + their relationship together.
- ❖ **CJA 2003, s10**: Restrictions on attacks on character witnesses.
- ❖ Finality Rule
- ❖ Sexual Offences (Amendment Act) s2: placed restrictions on this.
- ❖ Statutory intervention recommended by Heilbron Committee (1975)
- ❖ Law finally tightened following *Speaking Up for Justice*

### CURRENT LAW (YJCEA)

- **S34**: D CANNOT personally cross-examine a sex offence claimant.
- **S35**: Discretion permits courts to issue directions prohibiting unrepresented D's from cross-examining C's in circumstances other than those in s34 (i.e. assault, injury, threat of injury, kidnapping).
- **S36**: Court can prohibit D from personally cross-examining any W where it appears that the quality of evidence given by the witness on cross-examination is:
  - Likely to be diminished if the cross-examination is conducted by the accused in person, and would be likely to be improved if a direction were given under this section; and
  - That it would not be contrary to the interests of justice to give such a direction.
- Relevant procedural rules are contained in **Part 31 Criminal Procedure Rules 2011**.
- **Ss37-40**: Deals with practical matters, including the power of the court to appoint a representative for an accused in these circumstances where they decline to do so.

Human Rights?

- Potential violation of Art 6 if D is prevented from cross-examining a prosecution W.
- **Croissant v Germany**: There does not appear to be an absolute right to cross-examine in person.
- **Kamansinski v Austria**: There may be a violation if cross-examination by a qualified legal representative is manifestly ineffective.
- Even where D's are represented, questions may be just as distressing – judges are given discretion by common law to take over cross-examination of a particular witness – **R v Cameron**.

#### SEXUAL HISTORY EVIDENCE

- **s41**: Prescribes a blanket rule prohibiting the admissibility of any evidence concerning the previous sexual behaviour of the complainant in any trials involving a sexual offence.
- This is subject to 4 narrow exceptions in subsections (3) and (5).
- **'Sexual behaviour'** = defined in s42(1)(c): 'any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in s41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.'
  - Covers physical + verbal advances of a sexual nature.
- Test as to what constitutes sexual behaviour or experience = objective.
  - **R v E (Dennis Andrew)**: Girls aged 4 & 6 could have had a sexual experience even if too young to be aware it was such.

\*\*\* It appears that evidence of/questions concerning the making of false complaints by C in the past DO NOT amount to evidence of/questions concerning her sexual behaviour – provided that there is an evidential basis for this.

- Evidence of this can prove important where the case effectively rests on the credibility of C.
- **R v T; R v H**:
  - T was charged with rape of his niece + H with indecent assault of his stepdaughter.
  - In both cases, trial judge had refused to allow cross-examination directed by D to one of the C's alleging past fabrication of such an assault + the other's failure to mention the alleged assault when complaining of other such assaults.
    - T's case: submitted that the proposed questions were about the failure to mention the allegations + not about sexual behaviour.
    - H's case: argued that the questions were about lies, albeit about sexual matters.
  - In these circumstances, the questions were clearly relevant to the issues in the trial + did not constitute 'evidence of sexual behaviour' for the purposes of s42(1)(c).
  - 1999 Act was never intended to restrict questions that were not 'about' sexual behaviour. Appeal allowed.
- **R v Stephenson**: CoA stressed if proper basis for suggesting false allegations had been made about others, law allowed it to be explored but basis had to be established for asserting other complaints false.

Exceptions to rule:

### Test for Admitting Complainant Sexual History Evidence

- **S41(2):** a court may give leave if it is satisfied that subsection (3) or (5) applies + that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or the court on any relevant issue in the case.

### GATEWAY 1:

**S41(3)(a):** Evidence relates to a relevant issue at trial + that issue is not one of consent.

- This provision deals primarily with situations in which it is the D's belief in consent that is the issue, rather than whether there was actual consent.
- N.B. The offence of rape provides that the D's belief in consent must be reasonable.
- **R v Y:** D alleged that C had consented to intercourse, or, if not, that he believed that she had consented.
  - o In a preparatory hearing, the judge refused leave for D to cross-examine C about a recent sexual relationship with D.
  - o CoA: such evidence was relevant to any belief in consent that D may have had.
  - o It was admissible pursuant to s41(3)(a).
  - o The previous sexual relationship between C and D was clearly relevant to belief in consent as a matter of common sense, although this was restricted to sexual behaviour in the recent past prior to events giving rise to the charge.
  - o The fact that D had recently had sex with C may give rise to a belief that she will consent to sexual intercourse + may explain why he approached her in the first place, BUT the previous relationship will not by itself provide grounds for a belief that she was consenting in the intercourse that is the subject of the charge.
- **Gjoni:** D was convicted of raping his friend's girlfriend. He argued that a 3<sup>rd</sup> party present in the house at the time had told him that C had intercourse with others on previous occasions with the approval of her boyfriend.
  - o D contended that evidence of this conversation had been improperly excluded under s41 as it triggered his belief in consent.
  - o Held: The fact that she consented in the past to others was not enough.
  - o Moreover, this particular type of evidence was expressly prohibited by s41(4) as the primary purpose of such evidence would be to impugn C's credibility – it would infer that a woman who consented to intercourse with 1 particular stranger would consent to intercourse with another in entirely different circumstances a week later.

### GATEWAY 2:

**S41(3)(b):** sexual behaviour 'at or about' the same time

- This provision permits evidence such as that in **Viola**, in which C was seen to be drinking + flirting with men before the alleged rape + afterwards a man, naked but for his socks was seen sleeping on her couch.
  - o Obvious inference = she was drunk + looking for sex + thus was likely to have consented to the intercourse to that took place sometime later.
- **R v Stephenson:** held: evidence of C kissing other men had no relevance to the issue of consent to intercourse with D.

- **R v A (No 2)**: HL declined to assign a specific temporal limit to it, yet held that a sexual relationship between D and C 3 weeks before the alleged rape fell outside the scope of (b).
- In the years since **A**, there has been a growing consensus that the best interpretation of the phrase refers to a 24hr period either side of the offence.
- **R v Mukadi**: C alleged conversing with A + accompanied him home 'to see if she wanted to be friends with him'.
  - CoA: Judge wrong to exclude evidence- that shortly before she had got into an expensive car driven by a much older stranger, driven to a petrol station + upon returning had exchanged phone numbers.
  - Knowledge of this could have caused the jury to take a different view as to her state of mind + reasons for accompanying A + what she did or did not consent to.

#### GATEWAY 3:

**S41(3)(c)**: previous behaviour that is 'so similar...that the similarity cannot be explained by coincidence'

- It was feared that to confine the relevant evidence to a 24hr period either side of the alleged rape would be unfair to D.
- **R v Tahed**: CoA quashed a conviction where C had claimed she was raped on a climbing frame in a public park.
  - Held: D had been improperly denied the opportunity to cross-examine her about a similar sexual encounter that allegedly took place at the same climbing frame 3 weeks before.
- **R v Harris**: behaviour itself involved the C's alleged habit of engaging in casual + risky sexual encounters. Held: although the act was similar, it was not 'sufficiently similar' that C was more likely to have done it again.
- **R v M(M)**: appellant wished to cross-examine C about previous sexual encounters with D (she had performed oral sex on him in a cinema + had sex with him in her house when home alone). While it was accepted that these instances had 'parallels' with the occasion of the alleged rapes, D 'came nowhere near establishing a degree of similarity'.
- **R v A**: D wanted to cross-examine C on the sexual relationship that he claimed they had been having up until 3 weeks prior to the alleged rape.
  - Contended that the legislation contravened D's right to a fair trial (Art 6).
  - HL: dismissed appeal + concurred with the view that the absence of evidential material relevant to the issue of consent could infringe D's art 6.
  - They construed section 41(3)(c) creatively, through exercising its interpretive obligation under s3 HRA.
  - Held: s41(3)(c) should be read subject to the proviso that the previous sexual history evidence should nonetheless be admitted where it 'is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Art 6' = this constitutes the **further test**.

#### GATEWAY 4:

**S41(5)**: Any evidence called in rebuttal must go no further than directly to contradict or explain claims made by/on behalf of C.

- ***R v Soroya***
- Leave may not be given if the sole/main purpose of the evidence/questions is to attack C's credibility.
- **S41(6):** Leave should only be given (for ss3+5) in relation to evidence concerning specific instances of sexual behaviour.
- Judge must also be satisfied that 'a refusal of leave might have the result of rendering unsafe a conclusion of the jury....on any relevant issue in the case'.
  - HURDLE IS NOT PARTICULARLY HIGH – court must satisfy that a refusal MIGHT have the consequences specified, not that such a consequence is probable/likely.
- ***R v Martin (Durwayne)***: CoA emphasised distinction between the main purpose of adducing evidence + one of the purposes.
  - D alleged that C had pestered him for sex + that it was his rejection of her advances that led to her making a false allegation against him.
  - Trial judge refused cross-examination of C as to the alleged sexual acts on the basis that the main purpose of the cross-examination was to impugn C's credibility.
  - CoA: NO – although one purpose of the proposed questions was to impugn the credibility of C, this was not main purpose. Primary reason D sought to adduce the evidence was to strengthen their case.
  - This suggests that s41(4) may not provide the intended safeguard against attempts by D to blacken C's character?
- ***White***: D made an application to cross-examine V on her previous + contemporaneous activities as a prostitute.
- **Held**: (CoA) The judge had been right to refuse to allow cross examination on the fact that V was a prostitute. A prostitute is as entitled as any other person to refuse to have sex – the fact that she was one did not mean she was more ready than any other to agree to sex.
- NOT relevant to the issue of consent.
- Neither s41(3)(a) nor s41(5) nor *R v A* applied.

#### Post- ***R v A***

- Lord Steyn: "As a matter of common sense, a prior sexual relationship between C and D may, depending on the circumstances, be relevant to the issue of consent".
- Why? – More likely that someone will consent to intercourse with a person whom they know well + have had a previous sexual relationship with, than consent to intercourse with a total stranger.

#### **Criminal Procedure Rules Part 36**

- Process when seeking to introduce evidence of C's sexual history.
- Strict time limits: Defence must make application which should be carefully considered by prosecution and full + proper reply formulated, setting out objections.
- ***R v F***: Once an application is successful, the court cannot limit the extent to which evidence, properly admitted, can be excluded.