FOLEY'S | LIST

SEX APPLICATIONS

- s342 Sexual History

- s32c Confidential Communications

Authors: Richard Edney and Sarah Lenthall

Date: 19 April, 2017

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[THINK FOLEY'S FIRST]

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- s342 Sexual History

- s32c Confidential Communications

RICHARD EDNEY

Richard Edney was admitted to practice in 1997. From 1998 to 2002 he worked as a criminal lawyer for the Victorian Aboriginal Legal Service. He then worked as Senior Lecturer in Law at Deakin University and taught evidence and criminal law. During this time he was also a consultant solicitor advocate for the law firm Doogue & O'Brien and appeared in the Magistrates, County and Supreme Courts in criminal matters.

Richard is the co-author of *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) and has published widely in the areas of sentencing, evidence and criminal procedure.

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SARAH LENTHALL

Since her admission in 2013, Sarah Lenthall has practised exclusively in criminal law.

Immediately prior to coming to the Bar, Sarah worked as a Senior Solicitor Advocate for the Office of Public Prosecutions. In that role, she appeared regularly in the Magistrates' Court and County Court in bail applications, pleas, committals and appeals. This includes appearances in the Magistrates' and County Koori Courts. She has experience in a broad range of indictable matters including sex offences, drug matters and offences against the person.

Sarah comes to the Bar and to Foley's List with an impressive academic record. She is a skilled practitioner in the preparation of written submissions and advice on such issues as sentencing, prospects of conviction, plea negotiation and discontinuance of prosecution. She is a co-author of *Criminal Law Investigation and Procedure Victoria* (Thomson Reuters).

Sarah signs the Bar Roll on 4 May, 2017.

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CPD points

In accordance with the Law Institute of Victoria rules and regulations, each solicitor may be able to claim 1 CPD point.

Foley's List seminars

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Date
Wednesday, 19 April 2017

Time
8.00am - 8.45am

Location
Doogue O'Brien George
5/221 Queen Street, Melbourne

PART I

Section 32C of the *Evidence (Miscellaneous Provisions) Act*: Confidential Communications in Practice

INTRODUCTION

1. The term 'confidential communications' refers to a special category of communication between a sex complainant and their doctor or counsellor. These communications are afforded special protection under s 32C of the *Evidence (Miscellaneous Provisions) Act*. They cannot be accessed or used in a legal proceeding the same way that other information can be accessed or used pursuant to a regular subpoena.

2. The key rationale behind 32C is the protection of therapeutic confidentiality between sex complainants and their treating health professionals, with the broader policy objective of encouraging victims of sexual assaults to report these offences and seek psychological care.

3. A second rationale for 32C is the reliability of the record of the communication. Confidential communications are frequently recorded in clinical notes or files authored by a doctor or counsellor; for example, a counsellor from Centre Against Sexual Assault ('CASA'). A counsellor's notes may take several different forms. For instance, they may be:

    - a verbatim account of what the complainant actually said; or
    - a summary of what the complainant actually said;
    - a summary of what the complainant actually said, with added comments by the counsellor; or
    - 'therapeutic notes' made by the counsellor only and designed to assist with treatment.

4. A person reading the notes will often not know which of these categories is applicable. In many cases, it may be a combination. This presents an

obvious danger that a statement recorded in clinical notes may be unfairly or inaccurately attributed to the complainant. Under cross-examination, the complainant may be asked about what appears to be a prior inconsistent statement, when this may, in fact, not have occurred.

THE STATUTORY FRAMEWORK OF SECTION 32C

5. Section 32C essentially creates a privilege in relation to confidential communications. It also creates a mechanism where a party to a proceeding can seek access to this kind of material.

Is it a Confidential Communication?

6. A confidential communication is defined in s 32B of the Act as:

'a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred.'

7. The definition of medical practitioner is well understood, but a 'counsellor' is defined as a person who is 'treating the complainant for an emotional or psychological condition'. The term 'emotional condition' potentially has a broad application. It has been taken to include psychiatrists, psychologists, social workers, school counsellors and school welfare coordinators. It does not necessarily include staff members of the Department of Health and Human Services (DHHS). The key issue will be whether the worker is treating the complainant for a condition.

8. The definition only captures communications made in confidence. A communication made to a counsellor for the purpose of another legal

proceeding such as an application to the Victims of Crime Assistance Tribunal (VOCAT) arguably is not made in confidence.

9. Importantly, it is the content of the confidential communications which are protected, not the fact of a confidential communication having been made. Communications made between treating professionals do not fall under s 32C – only communications made by the complainant themselves.

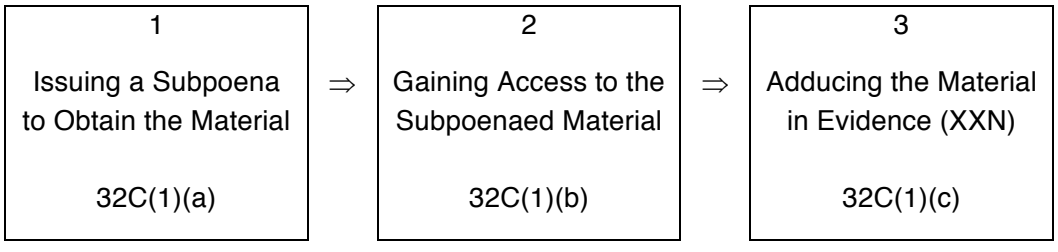
Exceptions to 32C

10. Not all confidential communications within the meaning of the Act are protected by 32C. There are two significant exceptions:

- Information acquired by physical examination including communications made during the examination in relation to the alleged offence (i.e. the history given by the complainant to a Forensic Medical Officer during an examination).
- The complainant consents to the production of the communication.

The Legislative Process

11. The Act creates a three-stage process for accessing or utilising confidential communications. At each stage, the party seeking the information (whether prosecution or defence) must obtain the leave of the court.



Written notice – 14 days

Substantial probative value
+
Availability of other similar evidence
+
Public interest (mandatory considerations)

12. At each step in the process, the court must not grant leave unless it is satisfied on the balance of probabilities that:

- the material will have substantial probative value to a fact in issue;
- other evidence concerning the same matter of similar or greater probative value is not available; and
- the public interest in preserving confidentiality and protecting the complainant from harm is outweighed by the public interest in admitting evidence of substantial probative value taking into account six mandatory considerations.

13. Although the test must be applied at each stage, if it is satisfied at the first stage it should generally be satisfied at later stages unless there has been a change of circumstance.[1]

Substantial Probative Value to a Fact in Issue

14. The complainant's credibility is likely to be treated as a fact in issue for the purpose of s 32C.[2] The types of matters that may be targeted by defence include:

- prior inconsistent statements about the alleged events;
- statements that reveal a motive to lie;
- suggestions that the complainant's memory has been triggered or improved by discussions which occur during the counselling process and is therefore tainted;
- matters that indicate psychological, psychiatric or substance abuse issues that may bear on credibility;
- previous false accusations of sexual assault made by the complainant.

[1] *SLS v R* [2014] VSCA 31, [233].
[2] *Baker v R* [2015] VSCA 323, [50]; *SLS v R* (2014) 42 VR 64, [240]-[242].

15. Demonstrating substantial probative value is a difficult task. The threshold is not only a high one; it is also difficult to meet in practical terms, as the precise content of the material is not known. Defence are unlikely to be able to explore the content of protected material on voir dire, as it appears leave is required even to adduce the evidence on a pre-trial hearing.[3]

16. Under s 32C(6), for the purpose of determining an application for leave the court may order that the document be produced to it for inspection. However, a judge may decline to take this step unless the defence can point to a sound evidentiary basis to justify further exploration.[4]

17. It should be noted that the bare fact that the complainant has previously made allegations of sexual assault against others, even if not substantiated, is unlikely to meet the test. This is the case, even if defence are of the view that the previous complaint was so grave and extraordinary that the very making of the complaint reflects on the complainant's credit.[5] The situation may be different if the accuracy of the earlier complaint can be tested (for example, where the complaint was acknowledged as false).

Availability of Other Evidence

18. The number of people to whom the complainant made a previous representation about the offending may be relevant when considering whether there is other similar evidence available. For instance, a complainant may have told ten people of their abuse, between the date of the offending and before reporting the matter to police. If the first six disclosures were made to friends and family members, and then the seventh disclosure in time was made to a psychologist, the prosecution may argue that there would in fact be other similar evidence available, which might lead a judge to refuse the application.

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[3] *SLS v The Queen* (2014) 42 VR 64, 106–14 [224]–[247].
[4] *Todd (a Pseudonym) v The Queen* [2016] VSCA 29 (3 March 2016).
[5] *Baker v R* [2015] VSCA 323; *LAL v R* [2011] VSCA 111, [81].

19. Defence practitioners should therefore consider how the seventh disclosure is different or more probative than the others. For example, is the complainant more likely to give a different or more complete account to someone who is not a family member? When did the disclosures occur proximate to the alleged offending or other significant events? Was the disclosure to the medical practitioner in fact the first disclosure? Did the disclosure to a counsellor immediately precede a report to the police? By differentiating the confidential communication in question, an applicant is more likely to be successful on the second limb of the test.

The Public Interest

20. The court is bound to consider six factors in considering where the public interest lies, including the likelihood of harm to the complainant and broader public policy objectives such as encouraging victims of sexual violence to seek counselling. In addressing these criteria, it may be helpful to utilise s 32F of the Act, which provides for ancillary orders that can be made to limit harm to a complainant. The available orders include hearings in camera, suppression of evidence and suppression of identifying information.

RECENT CASE LAW ON SECTION 32C

21. The Court of Appeal most recently considered s 32C in *Todd v The Queen* [2016] VSCA 29, which was heard as an interlocutory appeal from the County Court. The case concerned an adult female complainant who met the male accused when he took photographs of her in the course of his out-of-home business as a photographer. The complainant made allegations of rape and indecent assault. The issue was whether the acts occurred.

22. During a committal hearing, the complainant gave evidence under cross-examination that she had fallen into severe depression following the alleged offences and had self-harmed. She had been prescribed anti-depressant medication. Importantly, she gave evidence that prior to the alleged

offences she had never had any mental health problems or taken medication for mental health concerns.

23. In the County Court, defence made application under 32C for various health records. The evidentiary basis of the application was the committal transcript. Defence invited the judge to consider that there may have been psychological issues predating the alleged offending. However, the judge found that defence had failed to establish that there was evidence of substantial probative value in existence and nothing before Her Honour to indicate that she should explore the matter further by receiving the material.

24. It was argued before the Court of Appeal that it was impossible for the judge to determine the question of substantial probative value without viewing the material being sought; therefore it is incumbent upon judges to use their power under s 32C(6) to view the material in all applications. The Court of Appeal rejected that argument. Whether or not the trial judge inspects material before determining the question of substantial probative value is at the discretion of the judge.

25. This decision highlights the importance of presenting evidence, whether it be cross-examination of the complainant at committal or otherwise, to support an application for leave to issue a subpoena under s 32C.

SECTION 32C APPLICATIONS IN PRACTICE

26. Section 32C presents a high hurdle for defence practitioners. Some evidentiary basis for the application must be presented. This may take the form of material disclosed in the brief or answers given in cross-examination at a committal hearing. However, there may be a need to obtain information from other sources to support an application. This may include material obtained via normal disclosure mechanisms or a regular subpoena which is not caught by s 32C, such as:

- LEAP reports and case entries (including, if relevant, entries made in relation to other investigations that list the complainant as a witness or victim, noting possible restrictions as to prior sexual history may apply)
- Interpose notes
- Material listed in the VP Form 30 at the front of the police brief
- Subpoenas with limited scope
- DHHS files or school records (excluding confidential communications)
- Notes from examinations conducted by the Victorian Institute of Forensic Medicine (VIFM) or a Forensic Medical Officer

27. In the Magistrates' Court, Practice Direction 9 of 2016 applies to 32C applications. All Melbourne matters are heard in the Sexual Offences List. In summary matters, defence must:
    - foreshadow any 32C application at the contest mention and note it on the Sex Offence List Contest Mention Information Form A; and
    - list the application at a special mention at least four weeks before the contested hearing.

28. The County Court Criminal Division Practice Note specifies the steps to be taken in listing a 32C application in that jurisdiction. Practitioners should contact the Sexual Offences List associate at least 8 weeks before the trial to obtain a date for the application. Further applications (for example, to inspect) should be heard prior to the final directions hearing.

29. In both jurisdictions, applications must be accompanied by a written outline of submissions and a draft subpoena.

30. Ideally, consideration should be given to 32C applications as early as possible. This is important, not only to allow adequate time to gather additional material (if needed), but also because the material that is

provided can change the course of a case. Material gathered from a 32C application can be used to cross-examine witnesses at committal hearing and trial. They can be used in negotiations with the prosecution. Cases have been discontinued by the prosecution on the basis of what has been revealed from a 32C application.

Sarah Lenthall
Gorman Chambers

PART II

Section 342 of the Criminal Procedure Act 2009: Approaching the Use of Sexual History Evidence in Criminal Proceedings

INTRODUCTION

1. Until the advent of what are termed 'rape shield laws' in Australian jurisdictions in the late 1970's and early 1980's, those appearing on behalf of those charged with sexual offences could question complainants about their prior sexual history.

2. Law reform was underpinned by a basic epistemological premise: that a court system which allowed complainants to be cross-examined routinely about their sexual history would mean that those who had experienced sexual violence would be unlikely to testify against perpetrators. This compounded what was already viewed, based on self-report studies, as the underreporting of sexual offences.

3. But generally, 'rape shield laws' have a 'balancing' aspect to them: that sexual history of a complainant will sometimes be admissible to ensure that the accused has a fair trial and avoid a miscarriage of justice.

4. Those then are the philosophical and empirical premises that inform s 342 of the *Criminal Procedure Act 2009* and must be borne in mind in any attempts to introduce such evidence into a criminal trial because they establish the wider, interpretative framework in which the legislation operates.

THE STATUTORY FRAMEWORK OF SECTION 342 OF THE CRIMINAL PROCEDURE ACT 2009

Application to all 'Sexual Offences'

5. The statutory provisions that govern adducing the sexual history of a complainant are to be found in Division 2 of Part 8.2 of the *Criminal Procedure Act 2009* (hereafter 'CPA').

6. It applies to all criminal proceedings that relate, even in part, to a charge for a 'sexual offence' (s 339 (1) CPA). What is a 'sexual offence' is defined in s 3 of the CPA. It is a broad definition and effectively encompasses all sexual offences under the *Crimes Act 1958.*

Applies to Both the Accused and to Prosecution

7. The prohibition against the eliciting of sexual history evidence – unless falling within the extremely limited strictures provided for by the legislation – has application to both the accused and the prosecution.

What is 'sexual history evidence'?

8. The CPA – pursuant to s 340 (a) & (b) defines 'sexual history evidence' to include '…evidence that relates to or tends to establish the fact that the complainant [in a proceeding for a sexual offence] was accustomed to engaging in sexual activities' or 'had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person'.

9. As a matter of logic this is correct: the fact that a person has agreed to, and engaged in, sexual activity in the past, is not relevant to whether in relation to that particular charge he or she has consented or agreed to participate in sexual activity.

10. In some cases, there may be some evidence that the accused and complainant had engaged in sexual activities that were consensual in the past, or that form part of the 'transaction' that gives rise to the allegation. In most cases, sexual activity – consensual or non-consensual – that is part of the 'transaction' will not fall within the definition of 'sexual history evidence' (for instance, the sexual activity between the accused and the complainant was initially consensual but then consent was withdrawn) because it is indivisible from the allegation itself.

11. But there is not necessarily a 'bright line' which marks out when consensual sexual activity between the accused and the complainant falls within the prohibition; suffice to say the more remote the sexual history the less likely it is to be admissible. The peculiar facts of the allegation and the context of the relationship between the parties will be important.

No Questioning of the General Reputation of the Complainant as to Chastity

12. Section 341 of the CPA creates a blanket prohibition against the eliciting of any evidence that is relevant to the 'general reputation' of the complainant to engage in sexual activity.

13. Again, as a matter of logic it is entirely irrelevant whether a complainant has had a large number, or small number, of sexual partners, or none at all, to the determination of whether in respect of the particular allegation he or she had consented.

14. The fact that the legislation requires a section such as s 341 bespeaks of the historical attitudes towards complainants of sexual assaults.

The Seeking of Leave

15. Section 342 of the CPA allows a court, if certain statutory conditions are satisfied, to permit questioning of the sexual activities, whether consensual

or non-consensual, of the complainant other than those activities to which the charge relates.

Prohibition of Inferences from Questioning the Complainant About Sexual Activities

16. It is essential to remember – in the event that a court grants leave to question a complainant about sexual activity other than sexual activities that give rise to the allegations – that s 343 of the CPA provides that no inference can be drawn that the complainant is the 'type of person which is more likely to have consented to the sexual activity to which the charge relates'.

17. So advancing any argument – not only in respect of a s 342 application but as part of the case in closing submissions - that uses such 'tendency' type reasoning is strictly prohibited. It is also not good advocacy.

Notice Requirements

18. Section 344 of the CPA provides that if an accused person wishes to question the complainant about activities other than to which the charges relate, a notice of application for leave must – in the case of a committal hearing or summary hearing – be filed and served seven days before the date of the hearing. In the case of the County and Supreme Court it must be filed and served on the DPP at least 14 days before the date of the special hearing or trial.

19. The 'notice' requirements can be waived – and a court can grant leave out of time under s 345 – if 'exceptional circumstances' are established.

20. In practice, this can sometimes occur because of late disclosure or some other unforeseen circumstance (for instance, new counsel may have been briefed who has a different forensic strategy).

21. It is hard to envisage – particularly if the questioning would satisfy the criteria for leave under s 349 – that a Magistrate or Judge would refuse to find the existence of exceptional circumstances.

22. It can also arise in the running. Trials are dynamic. Sometimes witnesses disclose material that could not have possibly been foreseen. But that material may raise a serious issue that may require investigation of the sexual history of the complainant. Be prepared to advance arguments under s 349 even if out of time.

What to put in the Notice?

23. Section 346 of the CPA provides that any application under s 342 to cross-examine a complainant must be writing *and* must address the following statutory criteria.

24. First, the initial questions to be asked of the complainant.

25. Second, the scope of the questioning sought to flow from the questioning.

26. Third, how the evidence sought to be elicited from the questioning has substantial relevance to facts in issue or why it is a proper matter for cross-examination as to credit.

27. Note that in practice – if there is a jury – questioning of a complainant may first be determined on a voir dire and is the preferred practice (and I note that the s 342 application itself is to be determined in the absence of the jury under s 348).

28. There is then a further application if – having been granted leave under s 349 – the evidence is sought to be admitted.

Determining the Application – s 349 of the CPA

29. Section 349 provides that in a summary hearing, committal proceeding or trial, the court must not grant leave unless it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence. The court must have regard to four factors, namely:

    a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;
    b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;
    c) the need to respect the complainant's personal dignity and privacy;
    d) the right of the accused to fully answer and defend the charge.

30. When advancing arguments to satisfy s 349 remember – just like confidential communications – that the court is, in effect, engaged in a balancing exercise.

31. The ‘balance’ may be described as requiring a court to consider the right of the accused to a fair trial and ensuring the trier of fact – the jury – has all relevant information against the protection of complainants in sexual allegations from unnecessary intrusions into sexual privacy and the prevention of embarrassment and humiliation.

32. Those ‘values’ are probably, in one sense, incommensurable but it is a judgment that courts are expected to make under the legislative regime.

33. It would be hoped that preventing the possibility of an innocent person being convicted would be a key determinant.

KEY AUTHORITIES ON SEXUAL HISTORY EVIDENCE

34. The key authorities – in terms of factual scenarios and statement of legal principle – in this area of the law are: *R v Sadler* (2008) 20 VR 69; *R v ERJ* [2010] VSCA 61 and *Roberts v The Queen* [2012] VSCA 313.

35. *Roberts* is the most useful decision. Tate JA's judgment deals not only with *ERJ* but also the differences between the cases – see *Roberts* at [57] – [75].

36. In paragraph [67]-[75] of *Roberts,* Tate JA sets out the relevant principle from *ERJ* – as well setting out the relevant factual scenario – and then applies it to the facts of *Roberts:*

> *[67] On appeal, the appellant argued that the judge erred in refusing to allow cross-examination as to whether there was prior 'similar abuse' by another person and whether there had been any prior sexual abuse that prevented the complainant from going home on 9 April 2005. It was submitted that a line of questioning on those issues would have enabled the appellant to call into question the complainant's credibility and would have allowed the appellant to suggest that she had 'transposed' a prior similar assault to the set of events alleged.*
>
> *[68] The appellant relied upon the decision of R v ERJ, applying s 37A of the Evidence Act, in which this Court overruled a decision by the trial judge not to admit evidence or permit cross-examination with respect to the complainant's sexual relationship with her boyfriend. There the applicant had been convicted of two counts of an indecent act with a child under 16 and nine counts of incest. He was acquitted on one count of indecent act with a child under 16 and three counts of incest. The complainant on each count was his daughter. At the trial the complainant said that when she was aged 14 or 15, a time when she was having frequent intercourse with the applicant, she had a 'pregnancy scare'. She purchased 3 tests from the chemist (she being uncertain as to when her period would be due given their irregularity).*

Her father drove her into town and gave her money to buy the tests as well as some lollies. She had previously given evidence at the committal that she had received a love bite from her father. The boyfriend's evidence at the committal was that he slept at the complainant's house most Friday and Saturday nights and had sexual relations with the complainant at this time. He also testified that the complainant had a 'pregnancy scare' as a result of his relationship with her, and that she took a pregnancy test in consequence. He also stated that he had given the complainant a 'hickey' around the time she claimed to receive a love bite from her father.

[69] Before the jury was empanelled, an application was made seeking leave to cross-examine the complainant on these matters:

(1) sexual activities with the boyfriend, and in particular how the complainant came to have a love bite on her neck;

(2) the fact that as a result of her relationship with her boyfriend the complainant became apprehensive about being pregnant and had a pregnancy test;

(3) [withdrawn]

(4) the fact that the complainant alleged she was touched on the breast by a former employer of hers, GM, in August 2004 and (alleged in a statement made at that time) that it was the first time anyone had touched her on the breast and further that she had not been sexually assaulted before.

[70] The judge had granted leave with respect to matters (1) and (4). As Redlich JA observed, the assessment of 'substantial relevance to a fact in issue', with respect to both matters (1) and (4), was based on a direct contradiction or inconsistency of evidence relating to a fact in issue:

With respect to (1), evidence of the love bite was ruled to be of sufficient probative significance to permit it to be put before the jury. The trial judge accepted that the defence submission that as there was a direct contradiction between the boyfriend's claim that he gave her the love bite and the complainant's

account that she received it from her father during intercourse with him, that it was therefore necessary for that part of the boyfriend's evidence to be put before the jury. The judge directed that the defence could suggest some level of intimacy to explain the love bite but could not examine the activity in detail or suggest that it involved sexual intercourse.

In respect of (4), the material before the trial judge indicated that the complainant had sworn a police statement making allegations of sexual assault against the former employer (GM). The statement included the assertion that, as at the time of making the statement, GM was the only person who had ever sexually assaulted her. This was inconsistent with the allegations of sexual assault made against the applicant, which included assaults over an extended period prior to the incident involving GM. The trial judge ruled that this inconsistency justified the admission into evidence of the content of the statement.

[71] The trial judge upheld the view that the fact of a sexual relationship between the boyfriend and the complainant was not relevant to the complainant's claim that she did not think there was anything wrong with having sex with her father. He refused leave for evidence to be adduced about the pregnancy scare with the boyfriend. No evidence was led to the effect that the complainant's relationship with her boyfriend included sexual intercourse and no evidence of the pregnancy test was led. In applying for leave to appeal, the applicant submitted that he was denied the opportunity to suggest to the complainant that she had transposed the pregnancy scare with her boyfriend to a pregnancy scare with her father.

[72] Redlich JA agreed. He considered that the judge had wrongly made an assumption that the complainant, if asked, would have said that she had had a pregnancy test with her boyfriend as well as with her father. But the complainant had never been asked about the fact in issue as it had never been put to her at the committal that she had had a

pregnancy scare with her boyfriend and she had given no evidence on the point. As Redlich JA observed:

> *Were the complainant to have denied that she had a pregnancy test with her boyfriend, contrary to the assumption made by the trial judge, then an inconsistency of the same nature as the 'love bite' would have arisen. The jury's acquittal on the 'love bite' count demonstrates how the issue might have assumed significance on the trial if the complainant had denied that she had a pregnancy scare with her boyfriend.*
>
> *If she had admitted a pregnancy scare with her boyfriend, as well as her father, it would, in my respectful opinion, have had substantial relevance to a fact in issue. The judge's ruling denied the defence the opportunity to cross-examine the complainant, leaving her evidence unchallenged that the pregnancy scare was the consequence of sexual intercourse with her father. That unchallenged evidence added some potentially persuasive detail to her account.*
>
> *...*
>
> *As a consequence of excluding the applicant's assertions in his interview that the pregnancy tests related to her boyfriend and that he did not accompany her on those occasions, no innocent explanation for the pregnancy tests was before the jury. Evidence that at that time of taking a pregnancy test, she was in a sexual relationship with someone other than her father, and evidence of his denial that they related to any relationship with him or that he accompanied her on these occasions, had substantial relevance.*

[73] In ERJ there was clearly a proper and rigorous evidentiary foundation for the application for leave to cross-examine the complainant on the love-bite the boyfriend had given her and on her allegations in relation to GM having been the only man at that time to have sexually assaulted her. That foundation consisted of evidence which directly contradicted, or was inconsistent with, the evidence of the

complainant that it was her father who was responsible for the love bite and that she had been assaulted by her father over a long period of time including the time of the assault by GM. So too the applicant's evidence on whether the pregnancy scare and test was a result of sexual activity with her boyfriend could either have directly contradicted the evidence from the boyfriend (if she denied it) or could have provided an innocent explanation for her having a pregnancy scare and test when she alleged it occurred as a result of intercourse with her father (if she admitted it). It is plain that in the circumstances there was a clash of evidence relating to a fact in issue and the applicant was entitled to cross-examine on those matters.

[74] In my view, such a rigorous application of the test under s 349 as is to be found in ERJ is warranted in accordance with the guiding principles in s 338 and in the light of the legislative history of the section.

[75] There is here no comparable evidentiary foundation, rigorous or otherwise, which could give rise to a grant of leave under s 349 for cross-examination of the prior sexual abuse. There is no tension, let alone an inconsistency or direct contradiction, between the complainant's evidence that she was sexually abused at the age of eight and being raped by the appellant at the age of 16. There was no inconsistency in the complainant's own evidence about the early sexual abuse. She did not claim on one occasion to have been abused as a child and on another occasion deny the claim. Nor was there evidence from any other witness that she had never been abused as a child, nor that she had earlier said that she had never been abused.

37. The Court of Appeal since *Roberts* has heard appeals against conviction where s 342 – and the refusal of the trial judge to permit leave to cross-examine a complainant about his or her sexual history – has been a ground of appeal.

38. None of those appeals has been successful on that ground (See *Green (a pseudonym) v The Queen* [2015] VSCA 279 at [21]-[41]; *Bauer (a*

pseudonym) v The Queen [2015] VSCA at [118]-[126] and *Furness v The Queen* [2017] VSCA 40 at [73]-[76]).

39. So *ERJ* and *Roberts* remain the key authorities.

Richard Edney
Crocket Chambers