R. *v.* Osolin, [1993] 4 S.C.R. 595

Stephen William Osolin *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**The Attorney General of Canada,
the Attorney General for Ontario
and the Attorney General of Quebec** *Interveners*

Indexed as: R. *v.* Osolin

File No.: 22826.

1993: June 17; 1993: December 16.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Presumption of innocence -- Sexual assault -- Defence of honest but mistaken belief in consent -- Section 265(4) of Criminal Code imposing "air of reality" test as threshold to be met before issue of

mistaken belief is left to jury -- Whether s. 265(4) infringes s. 11(d) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 265(4).

Constitutional law -- Charter of Rights -- Trial by jury -- Sexual assault -- Defence of honest but mistaken belief in consent -- Section 265(4) of Criminal Code imposing "air of reality" test as threshold to be met before issue of mistaken belief is left to jury -- Whether s. 265(4) infringes s. 11(f) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 265(4).

Criminal law -- Evidence -- Cross-examination -- Sexual assault -- Medical records -- Complainant's medical records admitted into evidence for limited purpose of determining complainant's competence to testify -- Notation in medical records indicating that complainant was concerned that her attitude and behaviour might have influenced accused -- Trial judge not permitting accused to cross-examine complainant on her medical records to determine "what kind of person the complainant is" -- Whether cross-examination should have been permitted for purpose of determining whether there was evidence to support defence of honest but mistaken belief in consent or allegation of fabrication.

Criminal law -- Defences -- Defence of honest but mistaken belief in consent -- Sexual assault -- Interpretation of s. 265(4) of Criminal Code, R.S.C., 1985, c. C-46.

The accused was charged with sexual assault and kidnapping. On the day of the incident, the complainant, a 17-year-old girl who had been under psychiatric treatment for depression and anxiety, went with two men, D and S, to

B's trailer, where they drank beer. Later in the afternoon, the complainant and D, whom she had dated on a few occasions, had consensual intercourse in a wooded area. After D went home, the accused and his friend M arrived at the trailer and left with B to go to a nearby pub while S and the complainant stayed at the trailer and engaged in sexual intercourse. In the evening, M and the accused came back to the trailer. While the accused drove S some distance away, M attempted to have intercourse with the complainant. She testified that she did not consent to his advances and that he prevented her from getting dressed. She managed to get her underpants on as the accused entered the room. He threw her over his shoulder and carried her out to the car. The complainant testified that she resisted leaving the trailer and asked for her clothes but that the accused put her in the back seat of the car and tore off her underpants. M drove them to a cabin 40 miles away and left. The accused pulled her into a bedroom, tied her up and had sexual intercourse with her. Shortly after 3:30 a.m., an RCMP constable found the complainant on the highway. She was screaming and crying. She was taken to the hospital where her medical examination revealed a number of injuries generally more consistent with sexual assault than consensual intercourse. The police also found a pair of torn women's underpants lying on the ground some 20 feet from the trailer.

At trial, the accused testified that the complainant was an eager although not active participant in all the acts leading up to and including sexual intercourse. She only resisted when he tried to shave her pubic area at the cabin. The accused admitted, however, that he "overrode" her complaints about being forced while naked to leave the trailer. Defence counsel sought to cross-examine the complainant on her medical records, specifically on a notation indicating that she was concerned that her attitude and behaviour may have influenced the accused

to some extent. He indicated that the cross-examination would be directed toward "what kind of person the complainant is". The trial judge refused to permit the cross-examination, ruling that the records had been admitted into evidence for the limited purpose of determining the complainant's competence to testify and that to use them for any other purpose would be a violation of the complainant's privacy. He also declined to charge the jury with respect to the defence of honest but mistaken belief in consent. He ruled that in this case there was no "air of reality" to the defence. The accused was found guilty on both counts and his appeal to the Court of Appeal was dismissed. This appeal raises two issues: (1) whether the trial judge erred in restricting the cross-examination of the complainant on her medical records; and (2) whether the "air of reality" test set out in s. 265(4) of the *Criminal Code* violates the accused's rights under ss. 11(*d*) and 11(*f*) of the *Canadian Charter of Rights and Freedoms*.

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be allowed and a new trial ordered.

(1) *Per* Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The trial judge erred in failing to allow the cross-examination of the complainant on her medical records.

(2) Section 265(4) of the *Code* does not violate s. 11(*d*) or 11(*f*) of the *Charter*.

Per Cory and Major JJ.: The right to cross-examine witnesses, which is now protected by ss. 7 and 11(*d*) of the *Charter*, is fundamental to providing a fair trial to an accused. Despite its importance, the right to cross-examine has never been unlimited and must conform to the basic principle that all evidence must be relevant in order to be admissible. In addition, the probative value of evidence must be weighed against its prejudicial effect. Relevance and probative value must be determined in the context of the purpose for which evidence is tendered. In the context of sexual assaults, this limitation on cross-examination has been recognized to prevent its use for improper purposes. Both *Seaboyer* and the new s. 276 of the *Criminal Code* suggest the factors which should be considered in limiting the scope of cross-examination of a complainant in a sexual assault trial. Sections 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative, should also be taken into account in determining the reasonable limitations. Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from it. Cross-examination for the purpose of showing consent or impugning credibility which relies upon groundless rape myths and fantasized stereotypes is improper and should not be permitted. The trial judge must consider all of the evidence presented at the *voir dire* to determine if there is a legitimate purpose for the proposed cross-examination. In each case he must carefully balance the accused's right to a fair trial against the need for reasonable protection of a complainant. If at the conclusion of the *voir dire* the cross-examination is permitted then the jury must be advised as to the proper use that can be made of the evidence derived from the cross-examination. Here, the privacy of the complainant is an interest that merits protection, as does the need for

a relationship of confidence between a patient and her psychiatrist, but the cross-examination on the complainant's medical records, within the guidelines outlined, should have been permitted to ensure a fair trial and to avoid a miscarriage of justice. While the trial judge was correct in refusing to permit cross-examination for the purpose of determining "what kind of person the complainant is", it was the trial judge's duty to ensure that the accused's rights with regard to cross-examination were protected. It would have been appropriate to permit cross-examination on the medical records, in particular the notation, to determine if they would throw any light either on a possible motive for the complainant's allegation that she was the victim of sexual assault or with regard to her conduct which might have led the accused to believe that she was consenting to sexual advances. There was thus a proper purpose for permitting cross-examination on the medical records. The denial of the opportunity to cross-examine on these records, and the impossibility of ascertaining what might have been the result of the cross-examination, make it necessary to order a new trial.

Section 265(4) of the *Code* simply sets out the basic requirements which are applicable to all defences: a defence should not be put to the jury if a reasonable jury properly instructed would have been unable to acquit on the basis of the evidence tendered in support of that defence. In other words, there must be evidence sufficient to give an air of reality to the defence before it can be left with the jury. It is the trial judge who determines if there is sufficient evidence adduced to give rise to a defence. The defence of honest but mistaken belief in consent in a sexual assault trial must meet the same threshold requirement as that demanded of all defences. There must be evidence that gives an air of reality to the accused's

argument that he believed the complainant was consenting before the issue goes to the jury. There is no requirement that there be evidence independent of the accused. What is required is that the defence be supported by evidence beyond the mere assertion of a mistaken belief. The defence of honest but mistaken belief in consent can realistically only arise when the accused and the complainant tell essentially the same story and then argue that they interpreted it differently. Where the evidence given is directly opposed as to whether there was consent, the defence simply cannot exist. However, even in the absence of the defence, the jury will nonetheless be bound to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue. In this case, the Court of Appeal correctly held that the trial judge erred in finding that the defence of honest but mistaken belief in consent was unavailable on the basis of the accused's evidence alone. However, it erred in finding that there could be no air of reality to the defence on the basis that the complainant had been kidnapped by the accused since there had not been a previous or separate conviction on the kidnapping charge. The *mens rea* for the kidnapping charge and that for the sexual assault were so closely connected as to be inseparable. The kidnapping could therefore not be used as the basis for rejecting the defence. As there must be a new trial to allow for a cross-examination on the medical records, it would be inappropriate to discuss whether there was sufficient evidence to justify putting the defence to the jury in light of the fresh evidence that may be forthcoming.

Section 265(4) of the *Code* does not infringe s. 11(*d*) of the *Charter*. While the air of reality threshold in s. 265(4) creates an evidentiary burden on the accused, in the sense that he must raise sufficient evidence to give the defence an air of reality to justify its presentation to the jury, the burden of proving all the

elements of the offence beyond a reasonable doubt rests squarely with the Crown. All criminal defences must meet a threshold requirement of sufficient evidence before the trial judge should leave them with a jury. This does not violate the presumption of innocence. Nor does s. 265(4) infringe s. 11(*f*) of the *Charter*. The requirement that there be an air of reality to the defence of honest but mistaken belief in consent is reasonable and entirely valid. It is only a reaffirmation of an integral part of the judge's role in supervising a jury trial. Whether there is sufficient evidence to raise a defence is a question of law, and therefore is properly in the domain of the judge. There was consequently no violation of the accused's right to a trial by jury.

Per Iacobucci J.: Cory J.'s reasons were agreed with; however, no comment was expressed on the new s. 276 of the *Criminal Code*.

Per Sopinka J.: Cory J.'s reasons were agreed with, subject to the following reservations. First, no comment was expressed on the new s. 276 of the *Criminal Code*. Second, with respect to the defence of honest but mistaken belief, s. 265(4) of the *Code* sets out the basic requirements applicable to all defences. It requires no more of the accused than the discharge of an evidentiary burden to adduce or point to some evidence on the basis of which a reasonable jury properly instructed could acquit. The addition of the term "air of reality" does not help in understanding the duty of a trial judge with respect to this defence and may only create confusion. Third, the defence of honest but mistaken belief is not excluded when the complainant and the accused relate diametrically opposed versions of what occurred. To exclude the defence in these circumstances would rest on the questionable assumption that either the accused's or the complainant's story is a

complete account of what occurred. In assessing the evidence of a witness, it is not an all-or-nothing proposition. The jury may accept only some of what a witness said, and reject the rest.

Per Lamer C.J.: The trial judge erred in failing to allow the cross-examination of the complainant on her medical records. The cross-examination was appropriate because it had a proper purpose -- namely, to determine whether there was evidence to support a defence of honest but mistaken belief or evidence to support an allegation of fabrication. The denial of the opportunity to cross-examine on the medical records deprived the accused of his right to a fair trial.

With respect to the defence of honest but mistaken belief, Sopinka J.'s reasons were agreed with.

Per La Forest, Gonthier and McLachlin JJ. (dissenting): Before cross-examination can be allowed on a complainant's prior sexual conduct, the trial judge must determine whether the defence has demonstrated a potential relevance to the cross-examination capable of outweighing the damage and invasion of privacy it might cause to the complainant. To be satisfied that the threshold of relevance is met, the trial judge must ensure that the evidence is tendered for a legitimate purpose, and that it logically supports a defence. Here, the only purpose invoked by the defence for cross-examining the complainant on her medical records was the very sort of improper purpose for which evidence cannot be adduced. The defence's failure to raise a valid reason for the cross-examination was fatal. In our criminal trial system, the trial judge does not have a duty to

ensure that all legitimate grounds of cross-examination are explored by counsel. Further, even assuming that a court of appeal confronted by an unexplored avenue of cross-examination which might have led to a reasonable doubt as to guilt should direct a new trial to avoid a miscarriage of justice, the accused is not entitled to a new trial in this case on the ground of denial of cross-examination since no substantial wrong or miscarriage of justice occurred. On the defence theory that the complainant may have fabricated her story to avoid a confrontation with her parents, there was ample evidence before the jury of the difficult relationship between the complainant and her parents and their disapproval of some of her conduct. On the defence of honest but mistaken belief in consent, there was also a great deal of negative evidence before the jury about the complainant's "attitude and behaviour" on the day in question.

Before any defence can be put to the jury, the evidence must provide a basis for that defence. It must have an "air of reality". In order to give an air of reality to the defence of honest but mistaken belief, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting. The bare assertion of the accused that he believed in consent is not enough to raise the defence; the assertion must be supported to some degree by other evidence or circumstances. The supporting evidence may come from the accused or from other sources. The defence of honest but mistaken belief is not precluded where the evidence consists of two diametrically opposed stories, one alleging lack of consent and the other consent. In rare situations, it is possible for a jury to accept parts of the testimonies of both the complainant and the accused, concluding that notwithstanding lack of actual consent, the accused honestly

believed in consent. In this case, there was no evidence, from the accused or from some other source, supporting the accused's assertion of honest belief. Finally, the Court of Appeal did not use the kidnapping charge as a ground for rejecting the defence of honest but mistaken belief. It only said that the evidence of confinement robbed that defence of any foundation.

For the reasons given by Cory J., s. 265(4) of the *Code* does not violate s. 11(*d*) or 11(*f*) of the *Charter*.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): In criminal cases, the defence normally has no access to the medical records of a witness. Medical records evidence is generally completely marginal to the central issue of a trial. Given the fundamental importance placed on the confidentiality of medical records in our society, and the high degree of prejudice to the witness caused by delving into these records, they should only be disclosed in the rare cases when there is cogent evidence to suggest (1) that the competence of the witness to testify is in serious doubt or the witness's testimony with respect to the particular issue to be decided is unreliable because of the witness's medical condition; and (2) that without such disclosure, there would be serious prejudice to the accused's right to make full answer and defence. Mere suggestion, speculation or possibility raised on the part of the defence that such records may be relevant cannot be sufficient. Fishing expeditions should not be permitted. In the event that disclosure is required, the cross-examination on the witness's medical records must be restricted to the purpose for which they were introduced. Even when the records contain information that is relevant to other issues to be decided, cross-examination on such information should, except in extraordinary cases, nonetheless remain

impermissible. Trial judges possess the undoubted discretion to both exclude evidence and limit cross-examination on matters which, although arguably relevant to the issue, are outweighed by their potential to prejudice the trial of the issue. Particularly in the case of complainants in sexual assault trials, there is a serious risk that such information will be used to draw impermissible inferences and encourage the trier of fact to rely on myths about the credibility of sexual assault victims to the prejudice of both the witness and the trial process. Here, the complainant's medical records should not have been disclosed to the accused and admitted into evidence. There was no evidence that the complainant was incapable of giving reliable testimony in general, let alone reliable testimony as to the particular issue to be decided -- the issue of consent -- or that the complainant was in fact suffering from a condition that would affect her capacity to give reliable testimony. However, once the medical records were disclosed, the trial judge was correct in restricting the purposes for which they could be used and in concluding that the privacy of the complainant was an important value which should play a role in determining the scope of the use of the medical records.

The accused was not denied the opportunity to make full answer and defence because he was unable to cross-examine the complainant on her medical records, including the notation. The material in these records was not relevant to the issue of her consent to the sexual assault. On that issue, the jury already had the benefit of the complainant's direct testimony as to the events themselves and the absence of her consent. She was also cross-examined extensively on this point. There was thus no need to resort to the medical records. On the issue of the accused's honest but mistaken belief in consent, the complainant's thoughts about the sexual assault after the fact are completely irrelevant. The defence normally

only arises where the complainant and the accused tell essentially the same story about what occurred but differ in their interpretations as to whether the activity in question amounted to consent. In this case, any mistake of perception or interpretation that might have existed was a matter located solely in the accused's mind. Finally, the material in the medical records concerning the complainant's relationship with her parents was not relevant to the issue of whether she was sexually assaulted. In any event, the jury was already aware of the complainant's difficulties with her parents and the theory of the defence that she invented the story of the assault to avoid repercussions with her parents. It is obvious that the proposed cross-examination to determine "what kind of person the complainant is" would have been highly prejudicial. Its purpose was to attack the complainant's credibility in a general way by putting before the jury every difficulty in her personal life in the hope that they would then draw negative inferences about her character and credibility. Cross-examination for this purpose is clearly impermissible. These are precisely the inferences based upon rape myths which work to the prejudice of complainants in sexual assault cases and which Parliament, in enacting s. 276 of the *Code*, has attempted to prevent. Furthermore, the proposed cross-examination could only have prejudiced the trial by distracting the jury from the narrow issue of consent.

The trial judge was correct in not putting the defence of honest but mistaken belief in consent to the jury. In the circumstances of this case, there was no air of reality to the defence. While it was open to the jury to disbelieve the complainant and either believe or have a reasonable doubt as to the testimony of the accused, the jury was obliged to reach their verdict on the basis of the evidence before them. Had the trial judge left the defence with the jury, he would have been

inviting them to speculate on yet a third version of events wholly unsupported by the evidence of either party. To do so would have been an error on the part of the trial judge.

For the reasons given by Cory J., s. 265(4) of the *Code* does not violate s. 11(*d*) or 11(*f*) of the *Charter*.

The reasons of McLachlin J. were substantially agreed with.

Cases Cited

By Cory J.

Considered: *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Bulmer*, [1987] 1 S.C.R. 782; **referred to:** *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Anderson* (1938), 70 C.C.C. 275; *R. v. Rewniak* (1949), 93 C.C.C. 142; *Abel v. The Queen* (1955), 115 C.C.C. 119; *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47; *Titus v. The Queen*, [1983] 1 S.C.R. 259; *R. v. Anandmalik* (1984), 6 O.A.C. 143; *R. v. Giffin* (1986), 69 A.R. 158; *R. v. Wallick* (1990), 69 Man. R. (2d) 310; *R. v. Potvin*, [1989] 1 S.C.R. 525; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *Parnerkar v. The Queen*, [1974] S.C.R. 449; *R. v. Faid*, [1983] 1 S.C.R. 265; *Kelsey v. The Queen*, [1953] 1 S.C.R. 220; *R. v. Squire*, [1977] 2 S.C.R. 13; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Brisson v. The Queen*, [1982] 2 S.C.R. 227; *R. v. Aalders*, [1993] 2 S.C.R. 482; *R. v. Haughton* (1992), 11 O.R. (3d) 621; *R. v. Guthrie* (1985), 20 C.C.C. (3d) 73; *Director of Public*

Prosecutions v. Morgan, [1976] A.C. 182; *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386; *Perka v. The Queen*, [1984] 2 S.C.R. 232.

By Sopinka J.

Referred to: *Lee Chun-Chuen v. The Queen*, [1963] 1 All E.R. 73.

By McLachlin J. (dissenting)

R. v. Seaboyer, [1991] 2 S.C.R. 577; *Boran v. Wenger*, [1942] O.W.N. 185; *R. v. Ignat* (1965), 53 W.W.R. 248; *Majcenic v. Natale*, [1968] 1 O.R. 189; *Jones v. National Coal Board*, [1957] 2 All E.R. 155; *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *R. v. Turlon* (1989), 49 C.C.C. (3d) 186; *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), leave to appeal refused, [1986] 1 S.C.R. xiii; *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256; *Yuill v. Yuill*, [1945] 1 All E.R. 183; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386.

By L'Heureux-Dubé J. (dissenting)

Toohey v. Metropolitan Police Commissioner, [1965] 1 All E.R. 506; *R. v. Hawke* (1975), 22 C.C.C. (2d) 19; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *R. v. Dersch*, [1993] 3 S.C.R. 768; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Ross* (1993), 121 N.S.R. (2d) 242, leave

to appeal refused, [1993] 3 S.C.R. viii; *R. v. O'Connor* (1992), 18 C.R. (4th) 98; *Director of Public Prosecutions v. Morgan*, [1976] A.C. 182; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120.

Statutes and Regulations Cited

Act to amend the Criminal Code (sexual assault), S.C. 1992, c. 38, s. 2.

Canadian Charter of Rights and Freedoms, ss. 8, 11(*d*), (*f*), 15, 28.

Criminal Code, R.S.C., 1985, c. C-46, ss. 265(4), 276 [am. c. 19 (3rd Supp.), s. 12; rep. & sub. 1992, c. 38, s. 2], 276.1 to 276.4 [en. 1992, c. 38, s. 2], 277 [rep. & sub. c. 19 (3rd Supp.), s. 13].

Privacy Act, R.S.C., 1985, c. P-21.

Authors Cited

Bryant, Alan W. "The Issue of Consent in the Crime of Sexual Assault" (1989), 68 *Can. Bar Rev.* 94.

Calgary Herald, July 16, 1993, p. A12, "Assault Cases: Women's groups seek tighter rein on defence questioning".

Canada. Report of Task Force established jointly by the Department of Communications/Department of Justice. *Privacy and Computers*. Ottawa: Information Canada, 1972.

Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System. *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action*. Ottawa: Department of Justice Canada, 1992.

Ferguson, Gerry A., and John C. Bouck. *Canadian Criminal Jury Instructions*, vol. 1, 2nd ed. Vancouver: The Continuing Legal Education, Society of British Columbia, 1989 (loose-leaf).

Globe and Mail (The), July 15, 1993, p. A7, "B.C. psychiatrist refusing to hand over file: Fears releasing confidential therapy data would hurt patient who alleges sex abuse".

Globe and Mail (The), May 15, 1993, p. D3, "Confidentiality: Balancing justice and medical ethics".

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, 3rd ed. (Supplemented). Scarborough: Carswell, 1992 (loose-leaf).

Holmstrom, Lynda Lytle, and Ann Wolbert Burgess. *The Victim of Rape: Institutional Reactions*. New Brunswick, U.S.A.: Transaction Books, 1983.

MacKinnon, Catharine A. *Toward a Feminist Theory of the State*. Cambridge, Mass.: Harvard University Press, 1989.

McCormick's Handbook of the Law of Evidence, 2nd ed. By Edward W. Cleary, General Editor. St. Paul, Minn.: West Publishing Co., 1972.

McWilliams, Peter K. *Canadian Criminal Evidence*, 3rd ed. Aurora, Ont.: Canada Law Book, 1988 (loose-leaf).

Ontario. Commission of Inquiry into the Confidentiality of Health Information. *Report of the Commission of Inquiry into the Confidentiality of Health Information*, vol. 2. Toronto: The Commission, 1980.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 1A (Tillers rev.). Boston: Little, Brown & Co., 1983.

Wigmore, John Henry. *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. 2, 3rd ed. Boston: Little, Brown & Co., 1940.

Williams, John M. "Mistake of Fact: The Legacy of *Pappajohn v. The Queen*" (1985), 63 *Can. Bar Rev.* 597.

APPEAL from a judgment of the British Columbia Court of Appeal (1991), 7 B.C.A.C. 181, 15 W.A.C. 181, 10 C.R. (4th) 159, dismissing the accused's appeal from his conviction on charges of sexual assault and kidnapping. Appeal allowed and new trial ordered, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting.

John D. McAlpine, Q.C., and *Paul R. Bennett*, for the appellant.

Elizabeth Bennett, for the respondent.

Donna R. Valgardson and *Nancy L. Irving*, for the intervener the Attorney General of Canada.

Susan Chapman, for the intervener the Attorney General for Ontario.

Jacques Gauvin and *Daniel Grégoire*, for the intervener the Attorney General of Quebec.

The following are the reasons delivered by

LAMER C.J. -- I have read the reasons of Justice Cory and concur in his result.

I agree with my colleague that the trial judge erred in refusing to permit cross-examination on the medical records. The cross-examination was appropriate because it had a proper purpose -- to determine whether there was evidence to support a defence of honest but mistaken belief or evidence to support an allegation of fabrication. The denial of the opportunity to cross-examine on the medical records deprived the accused of his right to a fair trial.

With respect to the defence of mistaken belief, I am in agreement with my colleague, Justice Sopinka.

Accordingly, I would allow the appeal and order a new trial on the ground that the trial judge erred in failing to allow the cross-examination of the complainant on her medical records.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- I have had the advantage of the reasons of my colleagues and for the following reasons I do not agree with Cory J.'s reasons nor with his disposition of the appeal. I agree substantially with McLachlin J.'s reasons as well as the result she reaches. However, I wish to deal with additional points as well as different considerations on the points dealt with by my colleagues.

I will discuss the two issues raised in this appeal in the following order. First, does s. 265(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe the rights of the accused as guaranteed by s. 11(*d*) or 11(*f*) of the *Canadian Charter of Rights and Freedoms*? Second, did the trial judge err in restricting the cross-examination of the complainant on her medical records? This second issue raises, in turn, questions concerning the privacy interest in medical records and the particular considerations which surround complainants in sexual assault trials.

Constitutionality of Section 265(4) of the *Criminal Code*

On the issue of the constitutionality of s. 265(4) of the *Criminal Code*, I agree with my colleagues' reasons that the section infringes neither s. 11(*d*) nor s. 11(*f*) of the *Charter*. The general rule is that defences should not be put to the jury which do not arise on the evidence. As with any defence, this section simply requires that, in the case of assault, there be a factual foundation, or, to put it more colloquially, an "air of reality" to a defence before the trial judge is required to leave it with the jury. Thus, the section conforms completely with normal trial

procedure and the interests in ensuring that the jury is not distracted by extraneous matters in the trial of an issue.

As to its relevance in this particular case, in my opinion, the defence of mistaken belief in consent was completely unwarranted given both the evidence and the manner in which the defence was conducted. This case involves, as the trial judge put it, "a straight issue of consent or no consent". The complainant and the appellant each testified as to the events in issue. The evidence of each concerning the events preceding the assault was consistent up to a certain point. Specifically, there is no question that the complainant was taken by the appellant to a cabin 40 miles away in the woods in the winter without her clothes on; nor does the appellant contest that he overrode her objections in doing so.

However, their versions differed completely in respect of consent to sexual relations. The defence proceeded entirely on the basis that the complainant willingly and eagerly consented to sexual relations, not that he may have been mistaken about whether or not she consented. By contrast, the complainant testified that at no time did she consent to the sexual activity in question but had been subject to a series of assaults beginning when the appellant abducted her in a car. This testimony was corroborated by both physical evidence and the testimony of other witnesses.

By way of example, I shall recount but a portion of the evidence. The complainant testified that her panties had been ripped off her when she was taken away by the appellant in the car; ripped panties were found by the police near where the car had been parked. She testified that she was struck on the head while

she was taken into the car and bound by the wrists when she was assaulted; medical evidence confirmed that she had bruises on her wrists and on her head. In addition, the police officer who found her naked by the side of the road at 3:30 a.m. testified that she cried uncontrollably for two hours afterwards and vomited in the police station.

Under these circumstances, there was no air of reality to the defence of mistaken belief in consent. The jury found the appellant guilty of sexual assault. While it was open to the jury to disbelieve the complainant and either believe or have a reasonable doubt as to the testimony of the appellant, the jury was obliged to reach their verdict on the basis of the evidence before them. Had the trial judge left the defence with the jury, he would have been inviting them to speculate on yet a third version of events wholly unsupported by the evidence of either party. To do so would have been an error on the part of the trial judge, subject to review on appeal.

Cross-examination on Medical Records

In this case, there was no challenge to the ability of the complainant to testify at the outset; the trial judge found her "quite capable of testifying" and noted that her competency had never been called into question. Nonetheless, because the appellant was aware that she had a history of hospital admissions for psychiatric problems, he sought an order for the production of the complainant's medical records. The trial judge decided, on the basis of *Toohey v. Metropolitan Police Commissioner*, [1965] 1 All E.R. 506 (H.L.), and *R. v. Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.), that in order to permit the accused the opportunity of

full answer and defence, the medical records of the complainant should be made available to the defence. This was done for the sole purpose of permitting the defence to attempt to establish that the complainant suffered from a medical or psychiatric condition that rendered her testimony unreliable. Despite free use of the information in the records and the testimony of its own psychiatric expert, the defence was unable to succeed in demonstrating that the complainant was, for this reason, an unreliable witness.

However, having failed at this objective, once in possession of the medical records, the defence then argued that because the records were allowed in, it should be permitted unrestricted cross-examination on them to challenge the credibility of the complainant on the issue of consent. The trial judge refused to allow such cross-examination on the grounds that it would be a violation of the complainant's privacy. The Court of Appeal held that the trial judge had erred in refusing the cross-examination because of the complainant's right to privacy, but dismissed this ground of appeal because it was unable to ascertain the questions that the appellant's counsel intended to ask.

Cory J. is of the view that the trial judge should have permitted cross-examination on the July 9th notation in the medical records for the purpose of determining if there was an air of reality to the appellant's defence of mistaken belief in the complainant's consent.

I totally disagree with my colleague Cory J. on the issue of the cross-examination of the complainant on her medical records, as does my colleague McLachlin J. Furthermore, there is a prior issue which must be addressed:

whether the records should have been disclosed to the appellant and admitted into evidence at all in the circumstances. In this case, the Crown has not cross-appealed the order for the production of the complainant's medical records to the appellant, although prior to the disclosure order, counsel argued vigorously before the trial judge that they were totally irrelevant and that their use would be highly prejudicial to the complainant and sidetrack the trial of the issue. However, as many of the concerns which I shall outline below are relevant to both the question of disclosure and the scope of cross-examination in the event that disclosure is ordered, I find it unavoidable to address the matter of disclosure to some degree as well in this case.

It must be recalled at the outset that, as is the case with witnesses in any trial, the defence ordinarily has no access to the medical records of the complainant in a sexual assault case. The reason is clear: such information is, in the vast majority of cases, irrelevant to the issue to be determined. As a matter of policy and procedure we do not permit random fishing expeditions and less so into matters that cannot be expected to have any bearing on the trial. Moreover, such an invasion of the privacy of an individual goes against the policy of privileged communications between doctor and patient which some provinces, Quebec in particular, do protect unless a superior interest is at stake.

Thus the question becomes, whether, upon the release of such records, the right of the accused to make full answer and defence entails the right to cross-examine on information generated from medical records that, except for the extraordinary circumstance of a challenge to the competence of a witness or the reliability of her testimony, would be completely unavailable and even unknown

to the accused. In my opinion it does not. Moreover, in my view, the starting point to the examination of this question is not the wide ability of the accused to cross-examine the complainant, but, rather, the following two considerations which arise much earlier in the trial process: the fundamental entitlement of us all, guaranteed by s. 8 of the *Charter*, to privacy and control over personal information obtained to facilitate medical treatment and the principle that information that is not relevant to an issue is to be excluded.

Hence, the following two interrelated questions must be addressed. First, under what circumstances is disclosure of the psychiatric or medical history of a witness imperative to the interests of justice and the ability of the accused to fully answer the accusations he faces? In other words, when and why are such records relevant? Second, should the use of such information, even if disclosed to the defence, be limited?

In my view, these issues must be examined in light of the general expectation held by society that the privacy interest in information obtained for medical and therapeutic purposes will be respected. First, the existing rules regarding challenges to the competence of witnesses and the reliability of testimony must be examined. Second, one must consider the evidentiary principles governing the admission of evidence and cross-examination. Third, the policy concerns raised by permitting widespread use of medical records must be addressed. Finally, the particular concerns which surround challenges to the credibility of witnesses in sexual assault trials must be confronted.

Analysis

1. *Privacy*

This Court has recognized that the value of privacy is fundamental to the notions of dignity and autonomy of the person (*R. v. Pohoretsky*, [1987] 1 S.C.R. 945, and *R. v. Dyment*, [1988] 2 S.C.R. 417). Equally, privacy in relation to personal information and, in particular, the ability to control the purpose and manner of its disclosure, is necessary to ensure the dignity and integrity of the individual. In the words of La Forest J. in *Dyment, supra*, at pp. 429-30, while

> [w]e may, for one reason or another, wish or be compelled to reveal such information, ... situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

We also recognize that it is often important that privacy interests be respected at the point of disclosure if they are to be protected at all, as they often cannot be vindicated after the intrusion has already occurred (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and *Dyment*, at p. 430).

The importance of privacy as a fundamental value in our society is underscored by the protection afforded to everyone under s. 8 of the *Charter* "to be secure against unreasonable search or seizure". This value finds expression in such legislation as the *Privacy Act*, R.S.C., 1985, c. P-21, which restricts the purposes for which information may be used to those for which it was received.

The question of privacy of medical information was extensively discussed in the reasons of La Forest J. in *Dyment, supra*. In that case, La Forest J. noted that the confidentiality of the doctor-patient relationship has long been respected as an important social value. Protection of information is necessary because persons are especially vulnerable in such circumstances; in order to protect their life or health, they are required to reveal information of an intimate character. La Forest J. also observed in *Dyment*, on the basis of the Department of Communications/Department of Justice Task Force report on *Privacy and Computers* (1972), that hospitals have been identified as a specific area of concern in the protection of privacy. As the *Report of the Commission of Inquiry into the Confidentiality of Health Information* (Ontario 1980) found, in vol. 2, at p. 91, there are concerns that persons in need of medical care might be deterred from seeking valuable and needed treatment if the exchange of information were routine and easily available. Thus, the report concluded that "physicians, hospital employees and other health-care workers ought not to be made part of the law enforcement machinery of the state". Not only would trust in the administration of justice be undermined by such practices, but so would the effective operation of medical care.

The decision in *Dyment* clearly establishes the commitment of this Court to the value of privacy of medical information. In addition, the Court has also recognized the fiduciary nature of the doctor-patient relationship and the special duties that arise from this relationship of trust and confidence in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, and *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.

In light of these general principles, the Court has seen fit to protect privacy interests in relation to specific and limited medical activities such as the taking of a blood sample where the interests of the accused are at stake (see *R. v. Dersch*, [1993] 3 S.C.R. 768). There is no doubt that any attempt by the Crown to conduct a wide-ranging inquiry into the entire medical history of a criminal accused would be met with concerns about prejudice to the accused and irrelevance to the issue at trial.

However, while it was the rights of the accused that were at stake in *Dyment*, as well as in *Dersch*, *supra*, the interest in the privacy of medical records was recognized in the former case as a broad and independent value, separate and distinct from considerations about the fairness of the trial process. Thus, the privacy interest discussed in *Dyment* may be seen as an interest that pertains to all of us which may arise in a number of different circumstances. Indeed, it would be odd if the protection of medical records were to be available only to those accused of criminal offences. Such a finding could hardly inspire confidence in the administration of justice. In my opinion, the inescapable conclusion is that the arguments expressed in *Dyment* in respect of privacy interests are equally applicable, if not more compelling, in the case of witnesses called by the Crown in a criminal matter.

Because the trial judge in this case based the disclosure order on the following jurisprudence, I shall next turn to an examination of the rules governing the challenges to the competence and the reliability of witnesses.

2. *Competence and Challenges to the Reliability of Testimony*

In the present case, the trial judge, relying on the rule in *Toohey, supra*, followed by the Ontario Court of Appeal in *Hawke, supra*, ordered the disclosure of the complainant's records to the appellant in order to permit him to attempt to establish the unreliability of the complainant's testimony.

The basic rule as to challenges to the competency of witnesses is as follows. All witnesses, with the exception of children under a specified age, are presumed competent to testify unless and until found otherwise due to some condition which renders it unsafe for the trier of fact to rely on the testimony. A finding that the witness suffers from a particular mental or psychiatric condition does not necessarily or in itself disqualify a witness; in order to disqualify a witness, the witness's particular condition must be such as to substantially negative the trustworthiness of the evidence on the specific subject.

This issue was canvassed extensively by Dubin J.A. (now C.J.O.) in *Hawke, supra*. As he noted, citing *McCormick's Handbook of the Law of Evidence* (2nd ed. 1972), {SS} 45, at p. 93, "a distinction must be made between attacks on competency and attacks on credibility". Wigmore, for his part, has this to say:

> This broad and rational principle -- that the derangement or defect, in order to disqualify, must be such as substantially negatives trustworthiness upon the *specific subject of the testimony* -- is now practically everywhere accepted.
>
> ...

> *First*, the mere fact of derangement or defect does not *in itself exclude* the witness; the various forms of monomania are no longer treated as equivalent to complete lunacy;
>
> *Secondly*, the inquiry is always as to the relation of the derangement or defect to the *subject to be testified* about. If on this subject no aberration appears, the person is acceptable, however untrustworthy on other subjects; [Emphasis in original.]

(*Wigmore on Evidence* (3rd ed. 1940), vol. 2, {SS} 492, at pp. 585-86.)

From these general principles, it is apparent that, in order to challenge the competency of a witness to testify, it must be established that the witness is unable to give reliable evidence on the specific issue in question. In addition, as an exception to the general rule which provides that an expert may not testify as to the credibility of a witness, expert testimony is permitted to establish that the witness suffers from some "hidden defect" which affects the reliability of the testimony. However, as both the trial judge and the Court of Appeal found in this case, this situation must be distinguished from that of calling an expert to establish that a witness, though capable of testifying reliably, chooses not to do so.

The general principle is set out as follows in *Toohey, supra*. In that case, Lord Pearce, speaking for all the law lords, held at p. 512 that:

> Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show not only the foundation of and reasons for the diagnosis but also the extent to which the credibility of the witness is affected.

In *Hawke*, the Ontario Court of Appeal followed *Toohey* and held that the trial judge had erred in rejecting psychiatric evidence given by the doctors of a crucial witness in a murder trial. At the time of the trial, the witness had been in the care of these doctors for over four years for treatment of serious psychiatric disturbance. The doctors testified in a *voir dire*, on the basis of an examination of her made the preceding evening, that the witness had been actively hallucinating while giving evidence on the stand during the trial. Moreover, they testified that the nature of the hallucination was such that it directly affected the truth of that testimony. As is apparent, such circumstances caused the case to fall squarely within the rule in *Toohey*.

However, such cases are clearly exceptional and this jurisprudence does not permit the exploration of the psychiatric history of a witness simply on the basis that the defence hopes such material may be relevant or useful to impugn the witness's testimony. Nor does it require the trial judge to order the disclosure of the complainant's medical records in order to permit the defence to attempt to establish that a witness's evidence may be unreliable. It is clear that the rule in *Toohey* is intended to ensure that, when there are serious concerns about the reliability of a witness due to mental or psychiatric disturbance, there is a mechanism by which those concerns can be brought to light at trial. Furthermore, it is also clear that expert evidence is permitted only for the limited purpose of establishing that some aspect of the witness's condition may affect the reliability of the witness's testimony on the issue in question; otherwise, such evidence, as both courts below found in the present case, may be inadmissible. Such evidence is not intended to provide easy access to fishing expeditions on the part of the defence where the psychiatric history of a witness may be marginal or totally

irrelevant to the issue to be decided. Nor, in my opinion, can the rule in *Toohey* be used to provide a method of gathering all sorts of other information which, although, no doubt, of interest to the defence in its attempts to undermine the credibility of the witness, would otherwise remain beyond its reach.

Moreover, this jurisprudence does not mandate the disclosure of medical records to the defence in order to allow it to establish the unreliability of a witness's testimony. In the event that the defence has established that, for example, because of the demeanour or behaviour of a witness, such an investigation is crucial to the fairness of the trial, the usual method would be, as was the case in *Hawke*, to call evidence from the witness's own doctor to testify as to whether there is anything in the nature of the witness's psychiatric or mental condition which would bear specifically on her ability to give reliable evidence on the matter in issue.

3. *Limitations on Cross-examination*

In my view, in the event that disclosure is required, the limited purposes for which such evidence is available in the first place indicate that restrictions on the scope of cross-examination are also warranted. However, my colleague Cory J. found that, once a witness's medical records are admitted, cross-examination must then be allowed on any information garnered from the records which may be relevant to an issue in the case. Although my colleague himself finds that defence counsel's submissions as regards the purpose of cross-examination appeared "to be the very sort of improper purpose for which evidence cannot be adduced", (p. 673) he still finds that it was the duty of the trial judge "to permit cross-examination

with regard to the July 9 record, particularly to determine if it would throw any light either upon a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances" (pp. 673-74). For the following reasons, I disagree.

Medical records only become relevant if there is serious reason to believe that the competence to testify, which we normally presume in all adult witnesses, is in question. To the extent that such records are necessary to establish that the witness is incapable of giving reliable testimony in relation to the specific matter in issue, they remain relevant. If the alleged unreliability cannot be established, then, once again, the information in the records becomes tangential and cross-examination on such information will be impermissible simply on the grounds that it is either clearly irrelevant or too remote and of scant probative value.

Given the limitations on the exploration of a witness's particular mental or psychiatric state I have discussed above in regards to *Toohey* and *Hawke*, in my opinion it follows that cross-examination on the medical records that extends beyond the scope of establishing the unreliability of the witness's testimony due to that mental condition should also be curtailed. In other words, cross-examination on medical records must be restricted to the purpose for which they were introduced. The defence may not argue that, because the medical records were relevant to the issue of the witness's competence to testify or reliability as to the issue to be decided, it may then cross-examine on all the information contained therein for whatever use it may be to the rest of the defence's case.

There may be instances, as in the present case, in which the defence argues that the records contain information that is relevant to the issues to be decided. In my opinion, both on basic evidentiary principles and for the policy reasons which I shall discuss below, cross-examination on such information should, except in extraordinary cases, nonetheless remain impermissible.

In the words of McCormick, *supra*, at p. 438, "relevance is not always enough". Trial judges possess the undoubted discretion to both exclude evidence and limit cross-examination on matters which, although arguably relevant to the issue, are outweighed by their potential to prejudice the trial of the issue. Central among these concerns are the following: such facts may unduly arouse sentiments of prejudice, hostility or sympathy; they may distract the trier of fact from the main issue to be decided; and the exploration of the issue may consume an undue amount of time. (See also: *Wigmore on Evidence*, vol. 1A (Tillers rev. 1983), at p. 969.)

In my opinion, the nature of medical records is such that all of these concerns would often be engaged by unlimited cross-examination. Such evidence is, in the vast majority of cases, completely marginal to the central issue of the trial. It may well invite prejudice against the witness by the trier of fact. Furthermore, the process of proof and counterproof to establish the reliability of the evidence entails large amounts of time and may potentially sidetrack the trial of the case. For these reasons, its prejudicial effect on the witness, and also in many cases on the trial process itself, will, even in the event that the medical records are relevant to the trial, outweigh its probative value. More specifically, particularly in the case of complainants in sexual assault trials, there is serious risk

that such information will be used to draw impermissible inferences and encourage the trier of fact to rely on myths about the credibility of sexual assault victims to the prejudice of both the witness and the trial process.

4. *Policy Concerns Regarding the Disclosure of Medical Records*

As I have discussed above, this Court has already acknowledged in *Dyment, supra*, that there are serious dangers in the unrestricted use of information obtained in a doctor-patient or other form of therapeutic relationship. For the purposes of this discussion, it is important to explore the following concerns as they pertain to the initial disclosure of medical records and the limitations on cross-examination subsequent to any disclosure. These are but the most obvious concerns; further research and information may very well disclose other dangers.

First, common sense dictates that if people are aware that medical records can and may very well be obtained to attack the credibility of a witness, they may be reluctant to seek needed and valuable treatment if there is any prospect that they may be required to testify at trial, particularly if there is any connection between the events at trial and the subjects of discussion in the treatment process. Few people are comfortable with the public disclosure of such information, and many people may fear that such disclosure would not be entirely without effect on other areas of their lives.

In addition, routine disclosure of medical records and unrestricted cross-examination upon disclosure threaten to function very unfairly against anyone who has undergone mental or psychiatric therapy, whatever the

precipitating event or nature of the treatment, as compared to other members of the public. Such persons would be subject to an invasion of their privacy not suffered by other witnesses who are required to testify. They may have to answer to details of their personal life reflected in their records and effectively overcome a presumption, most often entirely unfounded, that their medical history is relevant to their credibility and ability to testify on the matter in issue.

Moreover, medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.

Finally, credibility is an issue in many trials but particularly in trials involving sexual assault. In my view, if disclosure is accepted as relevant in such cases, in any such trial, nothing will prevent any accused from requesting in any case the medical and psychiatric records of the complainant and cross-examining her on all matters in the record.

In light of these concerns, courts must weigh carefully the cost of such disclosure, not only in personal terms to the persons subject to disclosure orders or cross-examination on information elicited from such records, but also to the effective prosecution of the very issue at hand. If the net result is to discourage witnesses from reporting and coming forward with evidence, then, in my view, it cannot be said that such practices would advance either the trial process itself or enhance the general goals of the administration of justice.

In addition to these general concerns which may affect all witnesses, in my opinion, it is important to look at the specific position of the complainant in a sexual assault trial.

5. *Sexual Assault*

It is not without significance that this challenge to the credibility of the witness has arisen in the context of a sexual assault trial. It has, since 1983, by reason of the now s. 277 of the *Criminal Code*, been impermissible to challenge the credibility of a complainant by adducing evidence about her sexual reputation. Moreover, Parliament has recently amended the *Criminal Code* (*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2), to replace the former s. 276 of the *Code* which was held unconstitutional by this Court in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. The former s. 276 prevented the accused, subject to a number of exceptions, from adducing evidence of the complainant's sexual activity with anyone other than the accused. The amendments strongly evidence Parliament's desire to instate guidelines to prevent the diversion of sexual assault trials into inquiries into the moral character and past behaviour of the complainant. In my

view, there is a real risk that the use of medical records may become the means by which counsel indirectly bring evidence concerning the complainant before the trier of fact which they are no longer permitted to do directly. Moreover, because of the beliefs which have typically informed notions of relevance and credibility in sexual assault trials, the mere existence of challenges to credibility on mental or psychiatric grounds in a sexual assault trial raises serious questions about the persistence of rape myths.

Historically, a host of factors were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault. In *Seaboyer*, *supra*, I discussed at length the hurdles that complainants faced in sexual assault trials due to these unfounded presumptions. They include myths that deem certain types of women "unrapable" and others, because of their occupations or previous sexual history, unworthy of belief. These myths suggest that women by their behaviour or appearance may be responsible for the occurrence of sexual assault. They suggest that drug use or dependence on social assistance are relevant to the issue of credibility as to consent. They suggest that the presence of certain emotional reactions and immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event. Furthermore, they are built on the suggestion that women, out of spite, fickleness or fantasy and despite the obvious trauma for victims in many, if not most, sexual assault trials, are inclined to lie about sexual assault. The net result has been that sexual assaults are, and continue to be, underreported and underprosecuted; furthermore, the level

of convictions that result in those cases that do reach the courts is significantly lower than for other offences.

It is against this backdrop that challenges to the credibility of sexual assault victims on psychiatric grounds must be examined. There is absolutely no evidence to suggest that false allegations are more common in sexual assaults than in other offences; indeed, given the data indicating the strong disincentives to reporting, it seems much more likely that the opposite is true. Nonetheless, myths about the extraordinary need for caution with respect to the credibility of complainants continue to play a role in the prosecution of sexual assaults. To illustrate their persistence, it is only necessary to point out that, apart from cases of sexual assault, it is rare to encounter a suggestion that the psychiatric history of a witness is at all relevant to the trial of the issue. Moreover, trial judges are normally unlikely to even entertain such submissions unless the defence is able to conclusively establish beforehand that an inquiry into a witness's medical history is crucial to the determination of the issue at bar.

In the face of such practices, the question that must be asked then is, why are medical records deemed, or more likely to be deemed, both relevant and necessary in sexual assault trials?

Relevance is typically described in such terms as "whatever accords with common sense" (P. K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1988), at p. 11-32) or that which is "logically probative" of the matter in issue, the definition adopted by this Court in *Morris v. The Queen*, [1983] 2 S.C.R. 190. While we may, at first blush, think that the question of the relevance of evidence

is a relatively straightforward matter to determine, as I stated in *Seaboyer*, *supra*, at pp. 679-80:

> Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype in determinations of relevance and again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society which, to a large measure, holds these beliefs. It would also appear that recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law. [Emphasis added.]

Despite the fact that there is much wider recognition, both among those involved in the administration of justice and among the public at large, that unfounded beliefs about sexual assault victims prejudicially affect both the victims and the trial of the issue, their force and effect has not been eliminated. Of their very nature, beliefs will inform notions of relevance. However, as they often function unconsciously, their effect can be unacknowledged and identifying them may be a difficult and elusive process. In recognition of this fact, Parliament, in the amendments to the *Criminal Code*, has now expressly directed the judge to take into account, in determining whether evidence should be admissible, the following matters:

> **276.** ...
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

...

> (*b*) society's interest in encouraging the reporting of sexual assault offenses;
>
> ...
>
> (*d*) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (*f*) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;

Because of this, in my view, evidence which normally lies outside the purview of the trial process but is deemed relevant to the credibility of sexual assault complainants must be carefully, and perhaps sceptically, scrutinized. In my opinion, the best way to examine the question of relevance is to place the proposed use of psychiatric evidence in the circumstances of the ordinary trial.

Credibility is a central issue in many criminal cases. Moreover, the entire trial process is structured to provide the trier of fact with opportunities to assess the veracity of witnesses. However, as I have discussed above, the competence of witnesses to testify is normally presumed and challenges to the reliability of evidence on the basis of the mental or psychiatric condition of the witness rarely form part of the trial process. Unless we are to resurrect, consciously or unconsciously, the myth that complainants in sexual assault trials are inherently more untrustworthy than witnesses in any other trial where credibility is an issue, challenges to a witness's testimony on mental or psychiatric

grounds must be measured against the same standard of relevance in sexual assault trials as in the trial of any other offence. Thus, even a request, let alone an order, for the production of a complainant's medical records should be an extraordinary event.

Moreover, the costs to both the witnesses and the trial process of both admitting medical records and permitting cross-examination of the complainant by the defence on the material contained in them must be clearly confronted. In my opinion, for the following reasons, the inescapable conclusion is that such practices would only frustrate further our still inadequate attempts to extend to victims of sexual assault the protection of the justice system to which they are entitled.

One of the most powerful disincentives to reporting sexual assaults is women's fear of further victimization at the hands of the criminal justice system; as I discussed in *Seaboyer, supra*, at p. 650, almost half of unreported incidents may be traced to this perception on the part of sexual assault victims. With good reason, women have come to believe that their reports will not be taken seriously by police and that the trial process itself will be yet another experience of trauma. It must be obvious that if, in addition to the current disincentives, such victims face the revelation of intimate details of their lives via the release of their medical records, the disincentive to reporting could only increase.

Two alternatives seem likely. If victims of sexual assaults feared that their medical records could be deemed relevant to the assault, then they may very well make the decision to forego medical treatment if they intend to report the assault or if charges are already outstanding. Those that did undergo treatment

may be reluctant to fully disclose information out of fear that such information might be used against them, either in the trial or, because of the public nature of the trial process, in other areas of their lives. Such a decision may very well prevent a discussion of matters that are vital to both the course of therapy and their ultimate well-being.

On the other hand, victims who choose to undergo therapy, as well as those for whom therapy is essential for their very survival, would be less likely to come forward with complaints about the assaults. This, of necessity, would lead to lack of prosecution and conviction in such cases and may, in turn, result in both continued victimization and increased risk of assault to other potential victims.

Furthermore, the nature of therapy is such that mere disclosure itself could be prejudicial to the health of the witness.

Indeed, recent reports indicate some support for these very concerns. As a consequence of recent decisions in both Nova Scotia (*R. v. Ross* (1993), 121 N.S.R. (2d) 242 (C.A.), leave to appeal to Supreme Court of Canada refused, [1993] 3 S.C.R. viii) and British Columbia (*R. v. O'Connor* (1992), 18 C.R. (4th) 98 (S.C.)), groups representing, among others, both victims of sexual assault and disabled persons have expressed serious concern about these very outcomes (*The Globe and Mail*, May 15, 1993, at p. D3, and July 15, 1993, at p. A7; and the *Calgary Herald*, July 16, 1993, at p. A12).

Ironically, then, a procedure justified by the accused's right to full answer and defence risks frustrating the object of protecting victims of sexual assault by becoming the means by which offenders escape prosecution.

It must be recalled that experts called by the defence in their attempts to impugn the reliability of the complainant are entitled and expected to discuss the foundations of their opinions. Under such circumstances, it seems impossible to prevent the disclosure of information from the medical records about the witness's behaviour and background which, although irrelevant to the issues, because of the persistence of beliefs about sexual assault victims, may unfairly prejudice the complainant in the eyes of the jury. This, in turn, may prejudice the trial by diverting the focus of the jury to the character of the complainant and away from consideration of the narrow issue before it, the question of the assault.

In my view, to ensure against such consequences, victims of sexual assault must be secure beforehand in knowing that their medical records will be unavailable to the defence.

Conclusion

I would conclude, then, that the compulsion to disclose such records may only occur where there is serious reason to believe that, absent such disclosure, a miscarriage of justice is likely. Given the premium placed on the confidentiality of medical records in our society, and the high degree of prejudice to the witness caused by delving into psychiatric records, in my view, such records should only be disclosed when there is cogent evidence to suggest that: the

competence of the witness to testify is in serious doubt or the witness's testimony with respect to the particular issue to be decided is unreliable because of the witness's medical condition; and furthermore, that without such disclosure, there would be serious prejudice to the accused's right to make full answer and defence. Mere suggestion, speculation or possibility raised on the part of the defence, as is the case here, that such records may be relevant cannot be sufficient.

Because the issue of disclosure was not argued in this case and remains to be fully canvassed by this Court, I refrain from a more specific discussion of what must ordinarily be established to meet this threshold at this time.

However, in the event that medical records are released to the defence, in my view, their use must be limited to the specific purpose for which they were released. In other words, their use is limited to establishing that the witness's testimony is, by reason of a medical condition, unreliable. The defence may not ordinarily make further use of the records to obtain evidence on other issues to be decided. While there may be instances in which, because the evidence revealed is both directly relevant to the matter in issue and carries high probative value and inability to make further use of such information may lead to a miscarriage of justice, such instances will be rare indeed and even then, for the reasons which I have discussed above, defence counsel may not use these records to obtain information with which to impugn the credibility of the witness generally. Medical records, particularly psychiatric records, potentially provide a gold mine of material for defence lawyers in this regard. Therefore, in the extraordinary event that medical records are admitted into evidence, courts must take particular care in the case of sexual assault trials that medical records are not used to confront

complainants about past sexual history or invoke rape mythology by raising issues which might be perceived by the trier of fact as establishing the "bad character" of the complainant, which is precisely what the defence here alleged: "what kind of person the complainant is".

In conclusion, I feel compelled to point out that the defence normally has no access to the medical records of a witness. Unless we are prepared to accept the argument that access to medical records is to be provided in every case in which credibility is an issue (which, for reasons of relevance, we do not), I fail to see how the inability to access this information, or to fully cross-examine the complainant on these records, prevents the accused from making full answer and defence. Such an argument would imply an entitlement on the part of the accused to virtually unrestricted latitude to expand the focus of the trial. The rights of the accused to both adduce evidence and cross-examine are not unlimited but must be first, circumscribed by the question of relevance and second, balanced by countervailing factors such as the privacy interests of the witness and the prejudice to both the witness and the trial process.

Application to the Case

In the present case, counsel to the appellant originally sought disclosure of the complainant's entire medical record and full cross-examination on all of the complainant's psychiatric problems, all her medication and all her counselling. Prior to disclosure, counsel freely admitted that he did not know what he would find and that the records might not supply him with anything of assistance, but he nonetheless claimed that they were necessary to make full answer and defence.

The trial judge was apparently of the view that, because it was possible that the complainant might be suffering from a severe psychiatric illness, her medical records should be disclosed.

In my opinion, there is nothing in the record of this case to suggest that there were sufficient grounds to warrant an order for the disclosure of the records to the defence in the first place. The issue was the narrow one of consent to sexual relations with the appellant on the day in question. There was no evidence that the complainant was incapable of giving reliable testimony in general, let alone reliable testimony as to the particular issue to be decided. Rather, the opposite was true. The complainant was able to, and did give, prior to the order for disclosure, a clear, full and detailed account of the events. Nothing prevented the defence from conducting a full cross-examination of the complainant as to those events.

In addition, there was absolutely no evidence that the complainant was in fact suffering from a condition that would affect her capacity to give reliable testimony; the only evidence was that she had been admitted to the psychiatric ward on several occasions because of difficulties with her family and problems related to low self-esteem. Moreover, the complainant herself had already admitted her psychiatric history prior to the release of her medical records. Thus, there was no evidence of a "hidden defect" in her mental condition that necessitated revelation by psychiatric testimony.

However, given the trial judge's understanding that he was required to order the disclosure of the complainant's medical records, in my opinion, it was not only proper but essential for him to restrict the purposes for which they could be

used. Nor did the trial judge err in concluding that the privacy of the complainant was an important value which should play a role in determining the scope of the use of the medical records. Finally, the trial judge was entirely correct in refusing to allow the defence to cross-examine on the records to attempt to elicit information to establish the defence of mistaken belief in consent. The evidence in the medical records was, of necessity, totally irrelevant and without any probative value as regards this issue.

Despite the production of the medical records, the appellant was unable to establish via the complainant's doctor or its own expert witness that the complainant suffered from some defect of the mind that prevented her from reliably testifying as to consent to sexual relations on that day. The appellant's counsel cross-examined the complainant's own psychiatrist, Dr. MacTavish, in a *voir dire* on the basis of those records. However, Dr. MacTavish rejected the proposition that the complainant suffered from a personality disorder and, when asked directly about it by the trial judge, expressly stated that he thought her evidence was capable of being relied upon at face value.

However, once the appellant was in possession of the medical records, he then argued that, because the records were allowed in, he should be permitted unrestricted cross-examination on them to challenge the credibility of the complainant as to the issue of consent. For the reasons I have discussed, in my view the trial judge's discussion to prevent the cross-examination was correct. Moreover, it is clear that the appellant intended to use these records to establish the very sort of prejudice to the complainant which informs rape myths.

In my opinion, once the appellant was unable to establish that the complainant was unable to give reliable testimony, the trial judge was entirely correct in finding that this was the end of any use of her medical records in the trial.

Contrary to the finding of the Court of Appeal, we do have a record, drawn from the submissions of the appellant's counsel which preceded the disclosure order and those preceding the ruling on the cross-examination, of the questions and line of inquiry that the defence intended to pursue in cross-examining the complainant on her medical records. Counsel to the appellant frankly admitted that he wanted to adduce evidence concerning her parents' reaction to the assault because "that relates directly to what kind of person the complainant is". Moreover, the cross-examination of her psychiatrist, Dr. MacTavish, on those records in the *voir dire* also clearly reveals the manner in which the appellant regarded the material as relevant. Both sources disclose that the defence intended to use the information gained from the record to wage a wide-ranging attack on the credibility of the complainant and establish her "bad character". This is evident in the *voir dire* of Dr. MacTavish, in which the defence raised such issues as her past use of drugs and alcohol, difficulties in social relations, previous history of sexual relations, and fights with her mother. I can only conclude that the defence hoped to use expert testimony on the medical records to invite the jury to draw inferences about the credibility of the complainant based on, among other things, her past sexual history. These are precisely the inferences based upon myths which work to the prejudice of complainants in sexual assault and which Parliament, in its amendments to the law governing sexual assault, has attempted to prevent.

As to the proposed cross-examination of the complainant, in his submissions before this Court, the appellant urged that the July 9th notation in the complainant's medical record, to the effect that she was concerned that her behaviour may have influenced the appellant's behaviour, was relevant to the defences of consent and mistaken belief in consent. He also contended that entries in her medical records indicating that she had a turbulent relationship with her parents were relevant to the defence theory that she made up the allegations of the assault to avoid a confrontation with her parents after she had been out all night.

With regard to the July 9th notation, I am unable to see how this statement, four and a half months after the incident, can be at all relevant to the issues of consent or the appellant's mistaken belief in consent at the time. The complainant's reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent on the part of the appellant. In any event, it is hardly surprising that such statements are to be found in her medical records; in this, as in other traumatic situations such as the death of a loved one, especially by suicide, it is not uncommon for people to blame themselves for the event. It is well-known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack.

Furthermore, as the Court of Appeal noted in its reasons, there is no evidence that the medical record contained any prior inconsistent statements relevant to the complainant's testimony on the issue of consent. The trial judge, who heard all of the evidence and read all of the medical records, was unable to find any relevance to the proposed cross-examination and accordingly refused to

permit the cross-examination. Nor does the appellant allege that the records contain prior inconsistent statements. In my opinion, the appellant clearly has not established that he has been prevented from making full answer and defence by the trial judge's ruling that he may not cross-examine the complainant on her psychiatric records.

On the issue of consent, the jury already had the benefit of the complainant's direct testimony as to the events themselves and the absence of the complainant's consent. She was cross-examined extensively on this issue. In addition, the appellant also testified as to his "expectations" about what would happen. Therefore, there was no need to resort to second hand reports in the medical records and no reason to believe that anything would be gained by questioning her further on this point, particularly as the appellant would have been bound by her answers on this collateral issue.

As to the issue of the accused's honest but mistaken belief in consent, the complainant's thoughts about the assault after the fact are completely irrelevant. The defence of mistaken belief in consent, as opposed to the defence of consent, normally only arises where the complainant and the accused tell essentially the same story about what occurred but differ in their interpretations as to whether the activity in question amounted to consent (see *Director of Public Prosecutions v. Morgan*, [1976] A.C. 182 (H.L.), and *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120). In the present case, any mistake of perception or interpretation that might have existed was a matter located solely in the mind of the appellant; nothing in the subsequent comments of the complainant could add to, detract from, or have any relevance to presence or absence of that belief at the time.

The material in the medical records concerning the complainant's relationship with her parents is also completely irrelevant to the issue of whether she was assaulted. Thus, any cross-examination in this area would be impermissible. But, in any event, the jury was already aware of the complainant's difficulties with her parents and the theory of the defence that she invented the story of the assault to avoid repercussions with her parents. Again, there is no evidence that further cross-examination on this issue would have had any effect on the outcome of the trial.

In summary, important as cross-examination is, and I agree with Cory J. on this, I cannot agree that the appellant was denied the opportunity to make full answer and defence because he was unable to cross-examine the complainant on her medical record. There is nothing to suggest that the material in the records for this proposed cross-examination was anything other than irrelevant to the issue of her consent to the assault. Moreover, it is obvious that it would have been highly prejudicial and that its purpose was to attack the credibility of the complainant in a general way by putting before the jury every difficulty in her personal life in the hope that they would then draw negative inferences about her character and credibility. Cross-examination for this purpose is clearly impermissible; furthermore, it could only have prejudiced the trial by distracting the jury from the narrow issue of consent to the assault on that particular event.

Disposition

In the result, I find that s. 265(4) of the *Criminal Code* is constitutional and, like McLachlin J., I would dismiss the appeal.

The reasons of La Forest, Gonthier and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) -- This appeal raises two issues -- the question of what must be established before the judge may put the defence of honest but mistaken belief to the jury in a case of sexual assault and the question of when cross-examination on sensitive medical records should be allowed in such a case. Both are issues of great importance, not only to the proper development of the criminal law, but also to the proper prosecution of one of the most serious maladies that afflicts our society, sexual assault.

While I agree with much of what my colleagues Cory J. and L'Heureux-Dubé J. say, I take a somewhat different approach to each of the two issues raised on this appeal. In the end, I would dismiss this appeal substantially for the reasons given by the Court of Appeal of British Columbia.

The facts have been detailed by my colleagues. On some things, the evidence is uncontradicted. There is no dispute that the two accused, Osolin and McCallum, went to the complainant's trailer and entered her bedroom after having been told she was "easy". There is no dispute that their intention was to have sexual intercourse with her. There is no dispute that Smith, the man she was with,

was driven away. There is no dispute that Osolin carried the complainant out of the trailer and that she was protesting as he did so. There is no dispute that she was driven 40 miles to a remote cabin, where McCallum, the driver, left Osolin and the complainant. There is no dispute that Osolin tied the complainant up, spread-eagled on the bed, and then had sexual intercourse with her. There is no dispute that the complainant was found crying and hysterical on the highway at 3:30 a.m. in the morning, nor that she told the police that she had been raped. There is no dispute that her hysteria continued, and that she was taken to hospital. Finally, there is no dispute that her physical condition, including a bruised wrist and bruising and discoloration to the pubic area, was more consistent with resistance and rape than with consensual intercourse. Additionally, the complainant's version of the struggle was confirmed by the discovery of her underpants about 20 feet from the trailer, where she said they had been torn off her after she was placed in the back seat of the car that took her to the remote cabin. The appellant admitted that the complainant made some protests over the course of the evening (C.O.A., at p. 471), that he overrode her complaints about her nakedness (C.O.A., at p. 497) and that he tends to adopt the attitude that "no" means "yes" until there is a clear indication of no consent (C.O.A., at p. 509).

On the issue of consent, the complainant's and Osolin's stories diverged entirely. The complainant maintained that she never consented to the abduction, and resisted as best she could throughout the long ordeal. Osolin, on the other hand, maintains that she was a willing participant in the night's events.

Osolin was charged with sexual assault and kidnapping. McCallum was charged with kidnapping. Osolin's defence, as revealed by his evidence,

McCallum's evidence, and the nature of the cross-examination of the complainant, was that the complainant had consented. The theory of the defence was that the complainant had in fact consented to the sexual abduction and acts, and had fabricated the story that she had not consented after the fact to avoid confrontation with her parents. Osolin did not specifically deny that he had forcibly confined the complainant by taking her out of the trailer or having her driven to the cabin. He testified, however, that she seemed to be going along with things, albeit passively, and said in cross-examination that he had no doubt that everything that took place in the cabin took place by consent (C.O.A., at p. 458). The burden of his evidence was that the complainant had in fact consented; he never addressed the question of whether he might merely have had an honest belief in her consent, even though she did not consent.

The trial judge, while leaving it open to the jury to find that the complainant had consented, refused to leave with them the defence that Osolin had an honest but mistaken belief that she had consented, on the ground that the evidence did not give that defence an "air of reality" as required by the law. The jury convicted him of kidnapping and sexual assault and he was sentenced to six years in prison. The British Columbia Court of Appeal sustained the conviction: (1991), 7 B.C.A.C. 181, 15 W.A.C. 181, 10 C.R. (4th) 159. Osolin now appeals to this Court.

Analysis

Restriction of Cross-examination

The complainant spent time in psychiatric care before and after the events at issue on the trial. Osolin's counsel sought and was granted production of her medical records for the purpose of permitting an expert to consider the complainant's competence to testify under oath. The validity of the order for production is not in issue on these proceedings.

Osolin's counsel sought leave to cross-examine the complainant on these records, and in particular on an entry to the effect that the complainant, subsequent to the events in issue, had expressed concern to her doctor "that her attitude and behaviour may have influenced the man to some extent" and that she was "having second thoughts about the entire case". Osolin's counsel told the judge that the purpose of the cross-examination was to show "what kind of person the complainant is".

I agree with my colleague Cory J.'s review of the principles governing the decision of the trial judge whether to permit cross-examination on matters such as this. I also agree with the emphasis my colleague L'Heureux-Dubé J. places both on the discretionary nature of the judge's decision where the evidence relates to the prior sexual conduct of the complainant, and on the caution which a court must exercise in permitting examination on matters like the complainant's background, which may have little or no relevance to the actual issues and at the same time may unduly prejudice her reputation and privacy. Moreover, as pointed out by my colleague L'Heureux-Dubé J., there may be special dangers associated with the use of psychiatric evidence in cross-examination. The rule is clear. Before cross-examination can be allowed on a complainant's prior sexual conduct, the defence must demonstrate that the cross-examination possesses "a degree of

relevance which outweighs the damages and disadvantages presented by the admission of such evidence": *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 634.

This then was the task of the trial judge. Faced with the application for cross-examination, he had to determine whether the defence had demonstrated a potential relevance to the cross-examination capable of outweighing the damage and invasion of privacy it might cause to the complainant. To be satisfied that the threshold of relevance is met, the trial judge, as I said in *Seaboyer* (at p. 634), "must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence". I specifically added: "The fishing expeditions which unfortunately did occur in the past should not be permitted." (Emphasis added.)

In order to meet this test, the accused must demonstrate that the cross-examination is directed at a "legitimate purpose", at a specific defence. Here counsel for the accused failed to do this. The only purpose he gave for wanting to cross-examine on the medical record was to show "what kind of person the complainant is". As Cory J. states, this is the very sort of improper purpose for which evidence cannot be adduced under the principles which this Court adopted in *Seaboyer*, and that without something more, "the trial judge was correct in refusing to permit cross-examination for that purpose" (p. 673).

The question then is whether this "something more" was shown in this case. Counsel for Osolin did not offer anything more; his only purpose on the record was to discredit the complainant's character.

But it is argued that counsel's failure to adduce a relevant reason for the cross-examination does not end the inquiry imposed on the trial judge. It is suggested that the judge has an independent duty to examine the material available for cross-examination and to ensure that any relevant avenues for impeachment of the complainant which counsel for the accused may have overlooked are explored. It is further said that the trial judge failed to discharge this duty. He should, it is suggested, have insisted that cross-examination take place on the notation in question, not with a view to what it might show about the complainant's character, but rather for the purpose of showing that the complainant might have had a motive to falsely allege that she was the victim of a sexual assault, as well as on the question of whether she did anything which might have led Osolin to believe that she was consenting to his sexual advances. Accordingly, it is argued, there must be a new trial.

The Court of Appeal rejected this submission. Southin J.A., for the court, held that the failure of counsel to raise a valid reason for the cross-examination was fatal to this ground of appeal. My colleague Cory J., on the other hand, accepts this submission. Respectfully, I find myself in Southin J.A.'s camp.

My colleague Cory J. (at p. 673) states that "quite apart from the submissions of the defence counsel, it is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected". This statement seems to me to pose two difficulties.

The first difficulty is the implication that, contrary to the rule set out in *Seaboyer*, the onus will no longer lie solely upon the accused to establish a

legitimate purpose for the cross-examination. Instead, where defence counsel fails to demonstrate a legitimate purpose, the onus may now shift to the trial judge to determine independently whether there are any potential grounds for a legitimate cross-examination.

The second difficulty lies in what would follow upon a judicial determination that potential grounds for legitimate cross-examination remain to be explored. Cory J. (at p. 673) says in such circumstances it is "appropriate to permit cross-examination". (Emphasis added.) But it is not a matter of permitting, since counsel has not requested the cross-examination for the legitimate purpose. In a case like this, where counsel has not requested permission to cross-examine on the matters which are legitimate, two options would seem to be open to the judge if he or she is to discharge his or her duty "to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected". First, the judge could direct counsel to cross-examine on the untouched matter for the proper purpose. (It would seem insufficient to merely suggest such cross-examination, since if counsel declined, that would not ensure that the accused's rights are protected.) Second, the trial judge could himself undertake the omitted cross-examination. Both alternatives are fraught with difficulty. On the first, the trial judge usurps the right of counsel (and impliedly the accused) to conduct the case as they see fit. On the second, the trial judge finds himself drawn into the role of counsel.

It is my view that to place a duty on a trial judge to ensure that all legitimate grounds of cross-examination are explored is inconsistent with the nature of our trial process and would confuse and complicate the prosecution of

criminal offences unduly. Our criminal trial system is essentially adversarial. The Crown puts forward evidence directed to showing that the accused is guilty beyond a reasonable doubt. The accused points out weaknesses in the Crown's case and sometimes offers contrary evidence. The court, comprised of judge and jury, sits as neutral arbiter, charged with deciding, whether, at the close of all the evidence, the Crown has proven the accused guilty beyond a reasonable doubt.

The dangers of the judge abandoning the traditional role of neutral adjudicator have often been confirmed. The general rule has emerged that while judges may ask questions of clarification and amplification, they need not, indeed should not, take the case out of the hands of competent counsel and into their own hands: *Boran v. Wenger*, [1942] O.W.N. 185 (C.A.); *R. v. Ignat* (1965), 53 W.W.R. 248 (Man. C.A.); *Majcenic v. Natale*, [1968] 1 O.R. 189 (C.A.); and *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.). Indeed, trial judges have been criticized and verdicts overturned precisely because judges have entered the arena and subjected the accused to their own cross-examination: *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A.); *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), leave to appeal to Supreme Court of Canada refused, [1986] 1 S.C.R. xiii.

A number of considerations support this view of the proper role of the trial judge. First, the judge must not only be impartial; he or she must appear to be impartial; *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. A judge who takes up the role of counsel, whether for the Crown or for the defence, risks giving the appearance of partiality and courts the danger of psychological identification with the successful answers he or she elicits.

A second risk is that judicial intervention may harm the case for the defence. Defence counsel may have good reason for leaving untouched an area of cross-examination which may seem to be a fertile ground for exploration to a trial judge who lacks the opportunities available to counsel of exploring and considering the implications of raising the issue. In *Yuill v. Yuill*, [1945] 1 All E.R. 183 (C.A.), cited with approval in *Brouillard, supra*, Lord Greene M.R. explained, at p. 185 that: "It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination".

Finally, it is questionable whether the efficient conduct of trials supports mandatory judicial intervention on cross-examination where counsel fails to explore potential areas of cross-examination. The trial judge already bears the heavy burden of running the trial in a fair and expeditious manner and listening to and evaluating the evidence. In a jury trial, he or she assumes the additional burden of ensuring that the jury is properly instructed. To add to this the duty to review potential areas of cross-examination which counsel has left untouched would place upon the trial judge yet another task, that of counsel -- counsel, moreover, for both parties. The task might be time-consuming, as the present case illustrates. The medical records filed in the case at bar consisted of approximately 100 pages of reports. If the appellant is correct, the trial judge must examine all of these pages to see whether there may be some entry which might be a ground for cross-examination supportive of the defence. Presumably, in fairness, the judge would be obliged to do the same with respect to the Crown's case. Bearing these implications in mind, it seems to me that the only fair and practical rule is to leave it to counsel to choose the cross-examination upon which they will embark.

The judge may ask questions by way of clarification and amplification. But he or she is not to be faulted for having failed to insist upon the cross-examination of an area which counsel has chosen to leave fallow.

My colleague Cory J. suggests that a court of appeal confronted by an unexplored avenue of cross-examination which might have led to a reasonable doubt as to guilt should direct a new trial to avoid a miscarriage of justice. Accepting for the purposes of this point that a court of appeal is bound to direct a new trial where it appears that counsel has chosen not to canvas a crucial point in cross-examination which might lead to a miscarriage of justice, I do not see this as such a case. It was argued that cross-examination on the notation in question might have led to an admission by the complainant that she fabricated the story of sexual assault to avoid confrontation with her parents. I agree with Southin J.A. in the Court of Appeal that to the extent that the evidence elicited might have had some slight evidentiary value with respect to the defence's theory that she had fabricated the story to avoid confrontation with her parents, no substantial wrong or miscarriage of justice can be said to have occurred. There was ample evidence before the jury of the difficult relationship that existed between the complainant and her parents and their disapproval of some of her conduct.

Before us, it was argued that cross-examination might also have supported the alternative theory that the accused honestly but mistakenly believed the complainant consented. There is a question, as my colleague L'Heureux-Dubé J. points out, as to the importance of any answers that might have been elicited, given the well-documented phenomenon of victim guilt in cases such as these. In any event, it is far from clear that answers favourable to the accused on this point

would have made any difference to the jury's verdict in the context of all the evidence of the case. In this connection, I note that the trial judge permitted one Bragg to be cross-examined as to what he told Osolin about the complainant's engaging in sexual activity with one Dick the day of the events at issue. He also ruled that the complainant could be cross-examined as to her sexual activity on that day. In short, there was already a great deal of negative evidence before the jury about the complainant's "attitude and behaviour" on the day in question. In these circumstances, I find it impossible to conclude that defence counsel's failure to cross-examine on these same matters entitles Osolin to a new trial.

In assessing whether the trial judge should have intervened, it must be borne in mind that this line of questioning would have contradicted the theory of the defence at trial. The defence, as characterized by Osolin's evidence and his counsel's cross-examination of the complainant, was directed to showing that the complainant was a willing participant in the evening's events and had made up the story of abduction and sexual assault after the event to avoid confrontation with her parents. Questioning about whether the complainant, while not consenting, might have acted in a way which could have led Osolin to believe that she was consenting, would have contradicted the theory of the defence. This may explain why counsel may have chosen not to cross-examine on this point. He wanted to cross-examine for the purpose of showing the complainant's bad character, a purpose consistent with the theory that she had consented to Osolin's acts and was lying when she said otherwise. But he apparently did not wish to cross-examine on the contrary thesis that she had not consented, but that Osolin honestly but mistakenly believed that she had. Nor, presumably, would he have wished the trial judge to intervene to conduct an examination on that subject. To pursue this line

of cross-examination would have been to put before the jury a version of events which he was urging the jury to reject.

Having chosen to conduct his case as he saw best at the time, Osolin comes to this Court and asks for a new trial so that he can explore alternative avenues which he thought it best to eschew at the time, pleading that failure to grant him this new trial will amount to a fundamental miscarriage of justice. I cannot agree. An accused is entitled to a trial, in which he may cross-examine on as many defences as he chooses. He is not entitled to a series of trials, exploring one theory on one and another on a second.

For these reasons, I would not order a new trial on the ground of denial of cross-examination.

Honest but Mistaken Belief in Consent and the Air of Reality Test

Different defences may be raised to a charge of sexual assault. One is that the physical acts complained of never occurred. That defence was not raised here. Another is that while the acts occurred, the complainant consented to them. This was the theory of the defence in the case at bar. A third is that while the acts occurred and the complainant did not consent to them, the accused entertained an honest but mistaken belief that she was consenting. As such, he did not possess the necessary subjective *mens rea* or guilty mind to support a conviction.

As my colleagues point out, before any defence can be put to the jury, the evidence must provide a basis for that defence. This requirement is sometimes

described by saying that there must be an "air of reality" to the defence. To put a defence to the jury where this "air of reality" is lacking on the evidence would be to risk confusing the jury and to invite verdicts not supported by the evidence.

While the rule applies generally, it has attracted special attention in the context of trials for sexual assault. This is because one of the most common defences on such trials, the defence of honest but mistaken belief, is frequently asserted in cases where there is no evidentiary foundation for it, requiring the court to advise the jury that there is no air of reality to the defence.

In order to give an "air of reality" to the defence of honest but mistaken belief, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting.

The evidence of lack of consent in most cases is supplied by the complainant's testimony. To prove honest but mistaken belief, on the other hand, the accused typically testifies that he honestly believed that the complainant consented. Theoretically, such a belief could be asserted in every case, even where it is totally at odds with the evidence as to what happened. So it has been held that the bare assertion of the accused that he believed in consent is not enough to raise the defence of honest but mistaken belief; the assertion must be "supported to some degree by other evidence or circumstances": *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 790. The support may come from the accused or from other sources; on this point I agree with Cory J.'s resolution of the confusion which existed in the earlier cases. But the support must exist. As Lord Morris of Borth-y-Gest put it, a "facile

mouthing of some easy phrase of excuse" will not suffice: *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386 (H.L.), at p. 417.

It is suggested that this requirement is at variance with the general rule in criminal law that wherever there is some evidence supporting a defence, however weak, it must be left to the jury to determine the sufficiency of that evidence. Provided there is any evidence, it is suggested, it is for the jury to decide upon its sufficiency, not the judge. To hold otherwise would deprive the accused of his fundamental right to be tried by a jury.

It seems to me that this argument is met by the fact that the accused's mere assertion of his belief is not evidence of its honesty. The requirement that the belief be honestly held is not equivalent to an objective test of what the reasonable person would have believed. But nevertheless it does require some support arising from the circumstances. A belief which is totally unsupported is not an honestly held belief. A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them. Therefore, for a belief to be honest, there must be some support for it in the circumstances. The level of support need not be so great as would permit the belief to be characterized as a reasonable belief. But some support there must be. A person who commits a sexual assault without some support in the circumstances for inferring the consent of the complainant has, at very least, been wilfully blind as to consent. The law draws a distinction between "honest belief" in consent, which arises from an inference, however mistaken, from the circumstances, and "wilful blindness" as to consent, which is belief not grounded on the circumstances, and which does not serve as a defence.

This brings me to the facts of this case. The theory of the defence, as noted, was that the complainant consented, but that she lied about her consent in order to avoid a confrontation with her parents. It was in this context that the accused testified that he believed that the complainant consented. However, when the time came to charge the jury, Osolin asked the trial judge to charge the jury on the additional defence of honest but mistaken belief, which was founded on the theory that the complainant had not consented. The trial judge, after noting that the complainant and the accused told widely different stories, and after reviewing the law on honest but mistaken belief and the need for support in the evidence giving the defence an air of reality, concluded:

> There must be evidence beyond the mere assertion of belief in consent by the accused. That evidence must appear from or be supported by sources other than the accused in order to give it an air of reality.
>
> I find that is lacking here, that there is not that other evidence, and consequently I am not going to charge the jury, and I am not going to permit counsel to refer to the defence of mistake of fact.

The Court of Appeal agreed. Southin J.A. held that the trial judge had erred in suggesting that the evidence needed to give the defence an air of reality must come from persons other than the accused. Nevertheless, she concluded that on the evidence there was no air of reality to the arguments that the accused's belief in consent deprived him of the necessary *mens rea* for the offences of kidnapping or sexual assault (at pp. 183-84 C.R.):

> The appellant never said that he honestly believed the taking of her to Parksville to be not against her will. He did not say he believed that this complainant who was naked was agreeing to go on a 40-mile ride on a cold March night with two comparative strangers both of whom were twice her size. He did not say that he had no intention to confine

> her against her will. If he had so testified, who would have believed him?
>
> ...
>
> There is no more imprisoning state short of actual physical restraint than being without one's clothes. The best that the appellant said for himself was, "I wasn't thinking". That to me is, at the very least, recklessness or wilful blindness.

On the sexual assault charge, Southin J.A. held that had the abduction not occurred, it might have been that the issue of honest but mistaken belief should have been left to the jury. However, she concluded (at p. 184 C.R.):

> To my mind, an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all.

We are left with one question: whether there was evidence, from the accused or from some other source, supporting Osolin's assertion of honest belief. I agree with the courts below that there was none. The undisputed facts reviewed at the outset of these reasons simply do not admit of an honest belief. At the very most they were consistent with wilful blindness. Any man who drags a woman from her home naked and protesting, transports her to a remote place, and there ties her to the bed and has sex with her is at very least put on notice that she may not be consenting. His failure to enquire is consistent only with two states of mind: an intention to have his way without her consent; or wilful blindness as to whether she consented or not. To put it another way, no person, reasonable or otherwise, could honestly infer consent in such circumstances from the mere fact that at certain stages, the complainant may have been passively acquiescent. The

evidence which Osolin put before the jury may have been, as the trial judge concluded, consistent with wilful blindness. It offered no support for the defence of honest but mistaken belief. As Osolin himself told the jury, "I wasn't thinking".

Before leaving this question, I should comment on two points. The first is the argument that the divergent stories of the complainant and the accused on consent, as a matter of law, necessarily preclude a third alternative, the defence of honest but mistaken belief. I am not so convinced as my colleagues that where the evidence consists of two diametrically opposed stories, one alleging lack of consent and the other consent, it is logically impossible to conceive of the defence of honest but mistaken belief arising. While it may rarely occur, it seems to me possible for a jury to accept parts of the testimonies of both the complainant and the accused, concluding that notwithstanding lack of actual consent, the accused honestly believed in consent. As A. W. Bryant states:

> ...the removal of this alternative plea on the basis that the testimony of the complainant and the accused are diametrically opposed, and that there is a lack of common ground for the defence is based, in part, on the premise that the complainant's version is complete -- a questionable assumption in some cases. Moreover, a requirement for corroboration may wrongly encourage an accused to dovetail partially his testimony with that of the complainant in order to supply the necessary common ground for the defence.

("The Issue of Consent in the Crime of Sexual Assault" (1989), 68 *Can. Bar Rev.* 94, at p. 149.)

The second matter is the comment of my colleague Cory J. that the Court of Appeal erred in concluding that the kidnapping could not be used as a

ground for rejecting the defence of mistake of fact. He reasons that this was incorrect since there had been no prior conviction for kidnapping. In other words, he sees the reasoning of the Court of Appeal as circular, in that it makes the inference that there is no defence with respect to the offence of sexual assault because there was none on kidnapping, which itself was in issue. I must say that I do not read the reasons of the Court of Appeal in this manner. It seems to me that Southin J.A. was saying only that the evidence of confinement robbed the defence of honest but mistaken belief of any foundation.

I agree for the reasons given by Cory J. that the section of the *Criminal Code* which requires the accused who raises the defence of honest but mistaken belief in consent to show that the defence has an air of reality, s. 265(4), does not violate the *Canadian Charter of Rights and Freedoms.*

Disposition

I would dismiss the appeal.

The following are the reasons delivered by

SOPINKA J. -- I have read the reasons of Justice Cory and agree with the result he has reached and with his reasons, subject to the following observation.

While I agree with his reasons relating to cross-examination on the medical records, I would prefer not to comment on s. 276 of the *Criminal Code*, R.S.C., 1985, c. C-46 (as amended by *An Act to amend the Criminal Code (sexual*

assault), S.C. 1992, c. 38, s. 2). My colleague's reference to it might be construed as a comment on its constitutionality which is not an issue that is before us.

With respect to the defence of mistaken belief, I agree with Cory J. that s. 265(4) "simply sets out the basic requirements which are applicable to all defences" (p. 676) and that it requires no more of the accused than the discharge of an evidentiary burden to adduce or point to some evidence on the basis of which a reasonable jury properly instructed could acquit. I believe we are all in agreement in this respect. Indeed, this is the basis for our determination that it is constitutional. The term "evidentiary burden" and the definition I have set out are well known to trial judges and well accepted. I cannot understand how the addition of the term "air of reality" helps in understanding the duty of a trial judge with respect to this defence. I am concerned that when an attempt is made to add to the definition of a basic concept in the criminal law, it only creates confusion. Just as attempts to refine the meaning of "reasonable doubt" have frequently resulted in reversible error, so too the use of the "air of reality" test encourages trial judges to weigh the evidence rather than apply the legal definition to which I have referred.

I agree with the reservations expressed by McLachlin J. with respect to Cory J.'s approval of the principle that the defence of mistaken belief is not available if the complainant and the accused relate diametrically opposed versions of what occurred.

Excluding the defence of mistaken belief where the accused and complainant tell opposing versions rests on the assumption that either the accused's

or the complainant's story is a complete account of what occurred. As J. M. Williams ("Mistake of Fact: The Legacy of *Pappajohn v. The Queen*" (1985), 63 *Can. Bar Rev*. 597) points out, this is a questionable assumption. Referring to *Pappajohn* ([1980] 2 S.C.R. 120), Williams, at pp. 611-12, states:

> It is implicit in the majority decision that the jury would either totally accept one story or totally reject it. If this was a correct reading of what the jury would do then one can readily understand why the majority could not see any purpose in putting the alternative defence of mistake to the jury. Assuming, as was suggested, that the two stories were totally incompatible then, if the jury believed the accused's story *in toto*, he would be acquitted on the basis that there was no *actus reus* (i.e., consent was present). If the jury totally believed the complainant, then not only would the *actus reus* have been proven but moreover the jury would have already branded the accused as a liar. Therefore, it becomes unrealistic to suggest that they would nonetheless hold that he had an *honest belief* in consent.
>
> The above reasoning appears logical, given the premise. The question remains, however, whether it is correct to assume that a jury will accept one story in its totality and reject the other completely? It would seem not. Where there are conflicting versions of facts, the trier of fact must "find" what happened. It is well accepted that in doing so, the trier of fact is not bound to deal with one party's evidence as a whole but may accept some of it and reject that which is unacceptable. [Emphasis in original.]

In *Lee Chun-Chuen v. The Queen*, [1963] 1 All E.R. 73 (P.C.), Lord Devlin, in discussing the manner in which an evidentiary burden in respect of provocation may be discharged, stated, at p. 80:

> What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one.

As a matter of standard practice, a jury in criminal cases is instructed that in assessing the evidence of a witness, it is not an all-or-nothing proposition. A typical jury instruction is as follows:

> When you consider the evidence of a witness, please understand that you do not have to accept or reject everything a particular witness said. You may, of course, decide to accept or reject everything a witness said in the witness box. But you may also decide to accept only some of what a witness said, and reject the rest.

(G. A. Ferguson and J. C. Bouck, *Canadian Criminal Jury Instructions* (2nd ed. 1989), vol. 1, at p. 4.12-2.)

I would dispose of the appeal as proposed by Cory J.

The judgment of Cory and Major JJ. was delivered by

CORY J. -- There are two basic issues raised on this appeal. One is whether the "air of reality" test which is set out in s. 265(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, violated the appellant's constitutional rights under ss. 11(*d*) and 11(*f*) of the *Canadian Charter of Rights and Freedoms*. The other is whether the Court of Appeal erred in failing to grant a new trial on the basis of the restrictions imposed by the trial judge on the cross-examination of the complainant.

I. Factual Background

The complainant in this case is a 17-year-old girl. She had been in a psychiatric hospital in January and February of 1987, but by March 26, of that same year she was living with her parents near Ladysmith in British Columbia.

Although she was 17 years of age, she had a limited education. She had completed grade 8 and left school at 14 years of age. She is not physically a big girl, 5 feet 7 inches in height and weighing only 115 pounds.

On the morning of March 26, a friend by the name of Brad Dick, whom she had dated on a few occasions, called her and they arranged to meet at eleven o'clock that morning. Dick, who was in his mid twenties arrived at the meeting place with a friend of his by the name of Ken Smith, who was in his thirties.

The three went to Jim Bragg's trailer, north of Ladysmith. There they drank some beer. From there, they went to Dual Mountain and then went to Boat Harbour. There Brad Dick and the complainant went to a secluded area and had consensual sexual relations.

The three friends eventually returned to the trailer. There Smith gave Dick a ride into town around 5:00 p.m. Smith returned and he, the complainant and Bragg spent time together drinking and playing cards. The complainant stayed with Bragg and Smith because in her words they seemed like "pretty nice guys" and she enjoyed their company. The three went for a drive in Smith's car but it was experiencing mechanical difficulties. It stalled some 100 feet from the trailer and they had to push it. While they were doing so, the appellant, Stephen Osolin, and Russell McCallum came by in another car. All five spent a few minutes in the trailer. Smith and the complainant went out to his car where they were kissing and petting. Bragg, McCallum and Osolin left the trailer to go to a pub. When they did so, Bragg told Smith and the complainant that they could use the trailer. Smith

and the complainant then went into the bedroom of the trailer where they engaged in sexual intercourse.

Meanwhile at the pub, Bragg told McCallum and Osolin that the complainant was promiscuous, or in his words "easy", and they all could have a turn with her. McCallum and Osolin left Bragg at the Pub and drove back to his trailer. There they barged into the bedroom, rousted Smith out of bed, took him outside and drove him some distance away from the trailer. In passing it should be noted that Smith, who was 5 feet 7 inches and weighing 150 pounds, was considerably smaller than the other men.

Back in the bedroom, McCallum grabbed the complainant and threw her onto the bed. She was shocked and scared. McCallum touched and fondled her and would not let her get dressed. He attempted to have sexual intercourse with her but she struggled. He became angry and his threatening words made her fearful. She heard the car returning and tried to put on her blouse, but once again McCallum prevented her. In doing so, he tore her Viking pendant from her neck. She saw it fall onto the bed and clutched it. Later she let the pendant fall in the cabin in Parksville, where it was located by the police. She managed to get her underpants on as Osolin entered the room.

She stated that someone hit her on the side of the head. Osolin threw her over his shoulder and carried her out to the car. When she was being carried out she said that she wanted her clothes. The complainant said that she resisted leaving the trailer, said that she wanted her clothes but that her head was hit on the door jam and Osolin struck her on the face. Neither Osolin nor McCallum got her

clothes for her. The appellant admitted that he "overrode" her complaints about being forced while naked to leave the trailer. The complainant testified that Osolin then put the complainant in the back seat of the car and tore off her underpants. Osolin and McCallum both testified that the complainant was nude at this time and Osolin had not ripped off her underpants. The police later found a pair of torn women's underwear pants lying on the ground some 20 feet from the front of the trailer.

Osolin got into the back seat with the complainant and McCallum then drove away. She was on her left side and Osolin would not let her sit up. She said that she was crying at the time and unable to move. Osolin fondled her breasts and tried to pry her legs apart with his hands. She did not consent to any of the touching and said she was struggling when he forcefully hit her on the side of the face. She specifically denied kissing, petting and drinking beer or having a friendly conversation with him. Osolin testified that the complainant did nothing which indicated she was not consenting.

Eventually the car stopped and Osolin pulled her out. He held her by the right biceps and pulled her through a fence. McCallum drove away. At this time she was wearing only a pair of white socks. She was very cold, upset and crying. In the cabin he pulled her into a bedroom. The complainant testified that he threw her on the bed and tied her hands behind her back with a cord, which he pulled from a lamp. When Osolin left the bedroom for a moment, she ran to a window and tried to escape but he returned with more electrical cords which he had torn from an appliance. He tied her spread eagle to the bed frame. She testified that she was screaming and he said "I could kill you so easily" and would

do so unless she was "good". He returned to the bedroom with soap and a razor and started shaving her pubic hair. She told him to stop but he persisted. She managed to hit him with one knee and he tied that leg tighter. He then raped her. The appellant testified that the complainant was an eager although not active participant in all the acts leading up to and including sexual intercourse.

After the act of intercourse he untied her and she asked if she could take a bath. Although she locked the bathroom door, the appellant pried it open and came in. She testified that while in the bathroom the appellant apologized for all that had happened. The appellant said he apologized only for using the razor, because there was nothing else to apologize for. He gave her an old nightgown and a sweater to wear. When she got out of the bath, the two laid down on the bed and either passed out or fell asleep. The complainant testified that when she awoke the appellant was touching her again. The complainant became hysterical and said she wanted to go home. The appellant testified that he was awoken by the complainant saying she had to go to Ladysmith. The appellant said McCallum would pick them up in the morning, but when she insisted on leaving he put her out of the cabin and pointed her to the highway.

Shortly before 3:30 a.m. an RCMP constable found the complainant on the highway, screaming and crying hysterically. He asked her if she had been raped and she replied that she had. He drove her back to the police detachment where she asked to use the washroom and vomited. She continued to cry hysterically and was taken to the emergency room at the hospital in Nanaimo.

The medical examination revealed the complainant had a number of bruises, abrasions and scratches, including bruising, swelling and discoloration in the genital area. Generally, the injuries noted were more consistent with sexual assault than consensual intercourse.

The jury found the appellant guilty of both sexual assault and kidnapping. He was sentenced to six years on the count for sexual assault and four years for kidnapping, the sentences to be served concurrently.

II. Courts Below

Trial Court

The trial judge directed the jury that with respect to the charge of kidnapping the Crown had to demonstrate that the appellant had intended to confine the complainant against her will. With regard to sexual assault, he told the jury that lack of consent on the part of the complainant had to be proven beyond a reasonable doubt. He did not specifically tell the jury that the accused had to appreciate that the complainant was not consenting in order to commit the offence, and he declined to charge the jury with respect to the defence of honest but mistaken belief in consent. He ruled that there was no "air of reality" to the defence of mistake of fact as was required by the decisions in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, and *Sansregret v. The Queen*, [1985] 1 S.C.R. 570. He stated "[t]here must be evidence beyond the mere assertion of belief in consent by the accused. That evidence must appear from or be supported by sources other than the accused in order to give it an air of reality".

During the course of the trial the complainant's mental health records were admitted. They had been obtained in order to permit an expert to consider them on the issue of the complainant's competence to testify under oath. Counsel sought leave to cross-examine the complainant on those records, specifically on the following note in the records which is dated July 9, 1987:

> The hearing into the sexual assault has been postponed until September. Linda now wishes that it had not been postponed. She is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case.

The trial judge refused to permit counsel to cross examine on this note ruling that the records had been made available for the limited purpose of determining competence of the complainant to testify under oath. Further exploration by means of cross-examination would in his opinion be a violation of the complainant's right to privacy.

The Court of Appeal (1991), 7 B.C.A.C. 181, 15 W.A.C. 181, 10 C.R. (4th) 159

Southin J.A. writing for the court considered first whether the trial judge had erred in failing to charge the jury with respect to the *mens rea* required for the offences of sexual assault and kidnapping. On the basis of *R. v. Robertson*, [1987] 1 S.C.R. 918, and *R. v. Bulmer*, [1987] 1 S.C.R. 782, she held with regard to sexual assault that the trial judge had erred in his appreciation of the air of reality requirement. She expressed the opinion that the testimony of the accused alone might give an air of reality to the defence of mistaken belief that the complainant was consenting.

However, she found that while the trial judge had erred on this issue, the error did not result in any misdirection to the jury, as there was nothing in the appellant's evidence which required the trial judge to charge the jury on the *mens rea* required to commit the offence of kidnapping. The appellant had never testified that he believed that the complainant was consenting to being taken to Parksville without any clothes, nor that it was not his intention to confine her against her will. In any event, she expressed the opinion that he would not have been believed, if he had testified in such a manner. In the absence of the commission of the offence of kidnapping by the appellant, she noted that it might have been preferable that the issue of *mens rea* had been left with the jury on the question of sexual assault. However she wrote (at p. 184 C.R.):

> ...an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all.

Thus it was held that the omission from the charge of any direction as to *mens rea* for sexual assault did not amount to a misdirection.

Southin J.A. then dealt with the appellant's alternative submission that the trial judge's decision not to refer to the defence of honest but mistaken belief in his charge to the jury constituted a violation of the appellant's rights to be presumed innocent until proven guilty and to a trial by jury as guaranteed by ss. 11(*d*) and 11(*f*) of the *Charter*. She rejected this contention holding that the *Charter* does not require the judge in his charge to draw to the attention of the jury all legally possible issues regardless of whether they arise on the evidence.

Lastly on the cross-examination question, it was held that the trial judge erred in basing his refusal to allow cross-examination on the complainant's mental health records on the grounds that it would violate her right to privacy. It was held that if the cross-examination on the records went to the credibility of the complainant then counsel for the appellant should have been permitted to cross-examine. However, since the trial record did not disclose what questions counsel proposed to ask, it was determined that this ground of appeal must also fail.

III. Analysis

A. *The Trial Judge's Restriction of Cross-examination*

(1) Cross-examination as a Fundamental Aspect of a Fair Trial

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence. See *R. v. Anderson* (1938), 70 C.C.C. 275 (Man.

C.A.); *R. v. Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.); *Abel v. The Queen* (1955), 115 C.C.C. 119 (Que. Q.B.); *R. v. Lindlau* (1978), 40 C.C.C. (2d) 47 (Ont. C.A.). The importance of the right to cross-examine was well expressed by the Court in the reasons of Ritchie J. in *Titus v. The Queen*, [1983] 1 S.C.R. 259, at pp. 263-64. There he wrote:

> I think it essential to stress the purpose for which the cross-examination is permitted, namely, in order that the defence may explore to the full all factors which might expose the frailty of the evidence called by the prosecution. That the accused as he stands in the prisoner's box on trial for murder is deemed to be innocent until proven guilty beyond a reasonable doubt is one of the fundamental presumptions inherent in the common law and as such the accused is entitled to employ every legitimate means of testing the evidence called by the Crown to negative that presumption and in my opinion this includes the right to explore all circumstances capable of indicating that any of the prosecution witnesses had a motive for favouring the Crown.

In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, it was once again emphasized that the right to cross-examine constitutes a principle of fundamental justice that is critical to the fairness of the accused's trial. In that case, the right to cross-examine was placed in the context of the right to make full answer and defence (at p. 608, *per* McLachlin J.):

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.
>
> ...
>
> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make

> possible the conviction of persons who the criminal law says are innocent.

Cross-examination is all the more crucial to the accused's ability to make full answer and defence when credibility is the central issue in the trial. Such was the finding made by the Ontario Court of Appeal in *R. v. Anandmalik* (1984), 6 O.A.C. 143, at p. 144:

> In a case where the guilt or innocence of the [accused] largely turned on credibility, it was a serious error to limit the [accused] of his substantial right to fully cross-examine the principal Crown witness. It would not be appropriate in the circumstances to invoke or apply the curative provisions of s. 613(1)(b)(iii).

The same point was made by the Alberta Court of Appeal in *R. v. Giffin* (1986), 69 A.R. 158, at p. 159:

> We agree ...that the events about which counsel sought to cross-examine were relevant on the question of the credibility of the witness .... The accused in this case cannot be said to have had an opportunity for a fair answer and defence when he was not permitted to ask them.

To the same effect is *R. v. Wallick* (1990), 69 Man. R. (2d) 310 (C.A.), where at p. 311 it was said:

> Cross-examination is a most powerful weapon of the defence, particularly when the entire case turns on credibility of the witnesses. An accused in a criminal case has the right of cross-examination in the fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed.

Thus it can be seen that the right to cross-examine has always been held to be of fundamental importance in a criminal trial. That right is now protected by ss. 7 and 11(*d*) of the *Charter*. As a result it should be interpreted in the "broad and generous manner befitting its constitutional status" (see *R. v. Potvin*, [1989] 1 S.C.R. 525, at p. 544).

(2) Limitations on the Right to Cross-examine

Despite its importance the right to cross-examine has never been unlimited. It must conform to the basic principle that all evidence must be relevant in order to be admissible. In addition the probative value of evidence must be weighed against its prejudicial effect. See *Wigmore on Evidence*, vol. 1A (Tillers rev. 1983), at pp. 969 and 975. Lamer J. (as he then was) commented on the need for cross-examination to comply with these two principles in *Morris v. The Queen*, [1983] 2 S.C.R. 190, at p. 201:

> Thayer's statement of the law which is still the law in Canada, was as follows:
>
> > (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.
>
> To this general statement should be added the discretionary power judges exercise to exclude logically relevant evidence
>
> > ... as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public grounds; others, on the bare ground of precedent. It is this sort of thing ... -- the rejection on one or another practical ground, of what is really probative, -- which is the characteristic thing in the law of

> evidence; stamping it as the child of the jury system. [Emphasis added.]

Relevance and probative value must be determined in the context of the purpose for which evidence is tendered. Evidence relevant and probative to one issue may not be relevant and probative to another. In the context of sexual assaults, this limitation on cross-examination has been recognized to prevent its use for improper purposes. For example, it cannot be used to elicit the prior sexual history of a complainant for the purpose of impugning her credibility. It has been recognized that the myth that for some reason the complainant's credibility would be affected by prior sexual experience is completely groundless. In *Seaboyer*, *supra*, s. 277 of the *Criminal Code*'s prohibition of cross-examination on prior sexual history for the purpose of impugning credibility of the complainant was upheld in the following terms (at pp. 612-13, *per* McLachlin J.):

> Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s. 277 can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to a fair trial.

In contrast, s. 276 of the *Criminal Code* was struck down since it provided a blanket prohibition on cross-examination on previous sexual history of the complainant in a sexual assault case regardless of the purpose for which that evidence was being adduced. The Court held that such evidence could not be said

to be of such trifling weight that its prejudicial effect would always outweigh its probative value (*Seaboyer, supra,* at p. 613).

The issue of admissibility of evidence in a sexual assault case requires a careful balancing. On one hand there must be care and sensitivity exhibited to ensure that the complainant's cross-examination is relevant and pertinent and not needlessly extended for improper purposes. On the other hand the accused's right to a fair trial must always be protected. This principle was accepted in *Seaboyer, supra,* and is reflected in Parliament's enactment of new provisions to replace the former s. 276 (*An Act to amend the Criminal Code (sexual assault),* S.C. 1992, c. 38, s. 2, which came into force on August 15, 1992). These provisions aim directly at preventing the use of cross examination and introduction of evidence for improper purposes. The new section provides:

> **276**. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, 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*) 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, in accordance with the procedures set out in sections 276.1 and 276.2, 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;
>
> (*b*) society's interest in encouraging the reporting of sexual assault offences;
>
> (*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (*d*) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (*f*) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (*h*) any other factor that the judge, provincial court judge or justice considers relevant. [Emphasis added.]

Sections 276.1 to 276.3 deal with application for a hearing, exclusion of the jury and public and publication bans. Finally s. 276.4 provides:

> **276.4** Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

These statutory provisions mirror the concern for the appropriate protection of the interest of the complainants in sexual assault cases that were set forth in *Seaboyer*. Both the reasons of McLachlin J. and the new provisions of the

Code suggest the factors which should be considered in limiting the scope of cross-examination of a complainant in a sexual assault trial. It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.

The reality of the situation can be seen from the statistics which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women. See *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (April 1992), at p. 13. We have seen that the accused's rights to a fair trial and to cross-examine are protected by the common law and given constitutional sanctity by ss. 7 and 11(*d*). However in the context of sexual assault the rights of the complainant cannot be completely overlooked. The provisions of ss. 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant. It is only right that reasonable limitations be placed upon such cross-examination. A complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system. Yet a fair balance must be achieved so that the limitations on the cross-examination of complainants in sexual assault cases do not interfere with the right of the accused to a fair trial.

In *Seaboyer* it was stressed that the trial judge must be responsible for ensuring that only probative evidence is admitted and that the purpose for which that evidence is admitted is legitimate. At page 634 the following appears:

> First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence....The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. The fishing expeditions which unfortunately did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither the *in camera* procedure nor the trial become forums for demeaning and abusive conduct by defence counsel.
>
> . . . It is hoped that a sensitive and responsive exercise of discretion by the judiciary will reduce and even eliminate the concerns which provoked legislation such as s. 276, while at the same time preserving the right of an accused to a fair trial.

The reasons in *Seaboyer* make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper. A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented. (See C. A. MacKinnon, *Toward a Feminist Theory of the State* (1989), at p. 175; L. L. Holmstrom and A. W. Burgess, *The Victim of Rape: Institutional Reactions* (1983); and *Gender Equality in the Canadian Justice System, supra,* at p. 18.) In *Seaboyer, supra,* McLachlin J. observed that these myths were now discredited at p. 604:

> Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited.

It might be helpful to summarize the principles that can be taken from *Seaboyer* with regard to the cross-examination of complainants. Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from it. Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility. Cross-examination which has as its aim to elicit such evidence should not be permitted. It will be up to the trial judge to take into consideration all of the evidence presented at the *voir dire* and to then determine if there is a legitimate purpose for the proposed cross-examination.

In each case the trial judge must carefully balance the fundamentally important right of the accused to a fair trial against the need for reasonable protection of a complainant, particularly where the purpose of the cross-examination may be directed to "rape myths". In order to assure the fairness of the trial, where contentious issues arise as to the cross-examination of the complainant a *voir dire* should be held. In the *voir dire* it will be necessary to show either by way of submissions of counsel, affidavit or *viva voce* evidence that the proposed cross-examination is appropriate. If at the conclusion of the *voir dire* the cross-

examination is permitted then the jury must be advised as to the proper use that can be made of the evidence derived from the cross-examination. As a general rule the trial of an accused on a charge of sexual assault need not and should not become an occasion for putting the complainant's lifestyle and reputation on trial. The exception to this rule will arise in those relatively rare cases where the complainant may be fraudulent, cruelly mischievous or maliciously mendacious.

(3) Application to the Facts of this Case

Some 100 pages of medical records were placed before the court in order to determine the complainant's reliability to testify under oath. Counsel for the appellant sought to cross-examine the complainant on them, particularly on the notation made on July 9, 1987, referred to above in the summary of the reasons of the trial court.

Before this Court it was argued that cross-examination on this entry might have elicited evidence which would be relevant to the appellant's belief in the complainant's consent.

It will be remembered that the trial judge refused cross-examination on the ground that it would be a violation of the complainant's privacy to use the medical records for any purpose other than determining her ability to testify under oath. The Court of Appeal held that the trial judge had erred, but concluded that there was nothing in the medical records which would allow it to deduce what questions counsel at trial proposed to ask had he been permitted to make use of

those records. Therefore the Court of Appeal found that it could not properly deal with the ruling on the cross-examination.

There has been no submission made that the medical records were improperly before the court. It was accepted by all parties that they were necessary to determine the issue as to the complainant's ability to testify under oath. Once the medical records were properly admitted, then it was open to the defence to cross-examine upon them in appropriate circumstances. This should not be taken to mean that medical or psychiatric records of complainants in sexual cases will automatically be admissible. There must be a sound basis in relevance for their admission. In most cases there should be a reasonably close temporal connection between the medical reports and the assault.

It is true that the privacy of the complainant is an interest that merits protection as does the need for a relationship of confidence between a patient and her psychiatrist. However, that right to privacy must be balanced against the need to provide a fair trial for the accused and to avoid a miscarriage of justice. Once the medical reports were properly admitted, then in order to ensure a fair trial, cross-examination upon them within the guidelines set out earlier, should have been permitted.

The purpose of the cross-examination must be a significant factor in determining if it is appropriate. Here the defence counsel in submissions to the trial judge indicated that the cross-examination would be directed towards "what kind of person the complainant is". This on its face appears to be the very sort of improper purpose for which evidence cannot be adduced and a jury would have to

have been cautioned to that effect. Without anything further as to the object it would seem that the trial judge was correct in refusing to permit cross-examination for that purpose.

However, quite apart from the submissions of the defence counsel, it is the duty of the trial judge to ensure that the accused's rights with regard to cross-examination, which are so essential to the defence, are protected. The trial judge had before him all the medical records. It would have been appropriate to permit cross-examination with regard to the July 9 record, particularly to determine if it would throw any light either upon a possible motive of the complainant to allege that she was the victim of sexual assault or with regard to her conduct which might have led the appellant to believe that she was consenting to sexual advances.

There was then a sound basis for permitting cross-examination upon the medical reports, particularly the notation of July 9. In the absence of that cross-examination, it is impossible to know what evidence might have been adduced. When the opportunity to cross-examine was denied, the accused was deprived of his right to a fair trial. As Wilson J. stated in *Potvin, supra*, at p. 543:

> ... it is the opportunity to cross-examine and not the fact of cross-examination which is crucial if the accused is to be treated fairly.

I would repeat for purposes of emphasis that the cross-examination of a complainant can only be undertaken for proper purposes and its ambit may well be restricted. Although cross-examination on the medical records ought to have been permitted in this case, that does not mean that it will necessarily bring forth

evidence helpful to the position of the appellant. For example what the complainant said to her counsellor on July 9, could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's consent. However, in the absence of cross-examination it is impossible to know what the result might have been.

In summary then, the opportunity to cross-examine on the medical record was essential to ensure that the accused had the benefit of a fair trial. The denial of that opportunity, and the impossibility of ascertaining what might have been the result of the cross-examination, make it necessary to order a new trial on those grounds.

However, the appellant also challenges the validity of s. 265(4) of the *Criminal Code* and that issue must be resolved.

B. *Section 265(4) of the Criminal Code: the Mistake of Fact and Defence*

Section 265(4) provides as follows:

> **265.** ...
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed

> by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

The appellant's first submission is that the courts below erred in their finding that the evidence was insufficient to justify putting the defence of mistaken belief in the complainant's consent to the jury. In the absence of any evidence which might be held to be admissible arising from a cross-examination on the medical records at a new trial, and considering only the evidence presented at the trial it would be difficult to find any error in that decision. Here the evidence of the complainant was emphatically to the effect there was no consent and that nothing she said or did would give rise to a belief that she was consenting to the actions of the appellant. On the other hand the appellant testified that the complainant was throughout an enthusiastic and willing if not a particularly active participant in all his actions. On that basis there would appear to be no basis for considering the defence of a mistaken belief in the consent of the complainant. However, as there must be a new trial to allow for a cross-examination upon the medical records within the guidelines outlined, it would be inappropriate to discuss this issue in light of the fresh evidence that may be forthcoming.

The second position put forward by the appellant is that s. 265(4) violates the rights of an accused under ss. 11(*d*) (the presumption of innocence) and 11(*f*) (the right to trial by jury).

(1) Interpretation of Section 265(4)

Section 265(4) of the *Criminal Code* is applicable to all assaults, not just sexual assaults. It appears to be no more than the codification of the common law defence of mistake of fact. See *Robertson, supra*, and *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 730. In my view the section simply sets out the basic requirements which are applicable to all defences. Namely, that a defence should not be put to the jury if a reasonable jury properly instructed would have been unable to acquit on the basis of the evidence tendered in support of that defence. On the other hand, if a reasonable jury properly instructed could acquit on the basis of the evidence tendered with regard to that defence, then it must be put to the jury. It is for the trial judge to decide whether the evidence is sufficient to warrant putting a defence to a jury as this is a question of law alone. (See *Parnerkar v. The Queen*, [1974] S.C.R. 449, and *Pappajohn, supra*.) There is thus a two step procedure which must be followed. First, the trial judge must review all the evidence and decide if it is sufficient to warrant putting the defence to the jury. Second, if the evidence meets that threshold, the trial judge must put the defence to the jury, which in turn will weigh it and decide whether it raises a reasonable doubt. See *Wigmore on Evidence, supra*, at pp. 968-69; and *R. v. Faid*, [1983] 1 S.C.R. 265, at p. 276. I take this to be the meaning of the words "sufficient evidence" as they appear in s. 265(4).

It is trite law that a trial judge must instruct the jury only upon those defences for which there is a real factual basis. A defence for which there is no evidentiary foundation should not be put to the jury. This rule extends well beyond the defence of mistaken belief in consent and is of long standing. In *Kelsey v. The Queen*, [1953] 1 S.C.R. 220, at p. 226, Fauteux J., writing for the majority, held:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance. [Emphasis added.]

In *Parnerkar, supra*, it was argued that the defence of provocation must be put to the jury if there was "any evidence" to support it. Fauteux C.J., writing for the majority, rejected this argument. At page 454 he wrote:

> The function assigned to the jury with respect to the particular facts mentioned in s. 203(3) does not in any way differ from the function they have to decide all other questions of fact, whether these facts constitute elements of a crime or elements of an excuse or a justification for a crime charged. Indeed and in all of the cases, the valid exercise of the function of the jury is, according to the very words of the oath of office taken by them, to give a verdict according to evidence. They cannot go beyond the evidence and resort to speculation nor, of course, would it be proper for the trial judge to invite them to do so. If, then, the record is denuded of any evidence potentially enabling a reasonable jury acting judicially to find a wrongful act or insult of the nature and effect set forth in s. 203(3)(*a*) and (*b*), it is then, as a matter of law, within the area exclusively reserved to the trial judge to so decide and his duty to refrain from putting the defence of provocation to the jury.
>
> There is nothing, either expressed or necessarily implied, in the language of s. 203(3) to indicate an intention of Parliament to modify the principle according to which the sufficiency of evidence, which is an issue only where there is some evidence, is a question of fact for the jury and the absence of evidence is a question of law for the trial judge.

In *R. v. Squire*, [1977] 2 S.C.R. 13, the Court again dealt with the defence of provocation and the circumstances in which it should be put to a jury. Spence J. cited *Parnerkar, supra*, and concluded, at p. 21:

> As I have said, it is the duty of this Court to come to a decision whether those circumstances amount to any evidence that a reasonable jury acting judicially could find a wrongful act or insult sufficient to

> deprive an ordinary person of the power of self-control (s. 215(2)), and I am strongly of the view, with great respect to the opinion expressed by Martin J.A., that no jury acting judicially could come to such a conclusion.

Dickson J., as he then was, set out the two-pronged approach to defences in *Faid, supra*, at pp. 276-77:

> Whether the accused was provoked to lose his self-control is a question of fact for the jury. Where an accused testifies that he killed impulsively in hot blood it must be left to the jury to decide whether he is to be believed or not. There is, however, the preliminary question to be decided by the judge as a question of law, namely, whether there was any evidence produced on which a jury could decide that the accused acted in the heat of passion. The question as to whether or not there is any evidence is for the court, but subject to that the following matters are both questions of fact for the jury, namely, (i) the sufficiency of the particular wrongful act or insult to cause an ordinary person to be deprived of self-control, and (ii) whether the accused was actually deprived of his self-control....

Dickson J. went on to state, at p. 278:

> In the present case the question is whether there was any evidence potentially enabling a reasonable jury acting judicially to find that Faid was deprived of the power of self-control by the provocation that he alleged he received.

The question is not whether there is some evidence, but rather, whether there is some evidence capable of supporting the particular defence alleged by the accused. This is made clear by the manner in which the Court examined the evidence in *Faid,* at p. 278:

> There can be no doubt that a reasonable jury acting judicially could find a blow to the head or a knife attack to be a wrongful act or insult

> of the nature and effect set forth in s. 215(3). Provocation no doubt existed here but that is not the end of the inquiry. The critical question to be answered in this case was whether there was any evidence that Faid was provoked. Was there any evidence of passion or that he "acted upon" the provocation on the sudden and before there was time for his passion to cool? We have only his evidence on the point and nowhere in that evidence does one find any suggestion that as a result of the blows or other conduct of Wilson he was enraged, or that his passions were inflamed, or that he killed in heat of blood.

There was evidence before the jury of acts that could amount to provocation. Yet it was not sufficient to support the defence argued since there was no evidence that Faid was provoked by those acts. Thus, the trial judge should not have put that specific defence to the jury.

The same reasoning was applied to the defence of necessity in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616. Laskin C.J. (dissenting on another point) stated (at p. 654):

> The trial Judge in charging the jury on necessity could only have done so on the basis that there was evidence to go to the jury on which they could make a finding that the defence was made out.

Writing for the majority, at p. 659, Pigeon J. stated:

> In *Parnerkar v. The Queen*, (at p. 454) Fauteux C.J., speaking for a majority, said:
>
> > If, then, the record is denuded of any evidence potentially enabling a reasonable jury acting judicially to find a wrongful act or insult of the nature and effect set forth in s. 203(3)(*a*) and (*b*), it is then, as a matter of law, within the area exclusively reserved to the trial judge to so decide and his duty to refrain from putting the defence of provocation to the jury.

> This reasoning is clearly applicable to every defence, seeing that it rests on the fundamental definition of the respective roles of judge and jury.

The same rule has been applied in the context of self-defence. In *Brisson v. The Queen,* [1982] 2 S.C.R. 227, the Court held that there must be an air of reality to the defence before it can be put to the jury. McIntyre J. for the majority on this issue stated (at p. 235):

> A trial judge must put to the jury all defences which arise from the evidence. There must, however, be some evidence sufficient to give an air of reality to a defence before the obligation to put a defence can arise.

This Court again stated the requirement that there must be evidence sufficient to give an air of reality before a defence may be put to a jury in *R. v. Aalders,* [1993] 2 S.C.R. 482. Writing for the majority, I held that the alternative verdict of manslaughter should not have been put to the jury because in light of the evidence presented in that case "[t]here was no air of reality to the defence" (pp. 505-6).

All these cases recognize the wise concept that the jury should only be instructed on defences that arise from the evidence which has been tendered. A juror should not be required to listen to instructions on defences which simply cannot be applicable to the case that they have heard. The comments to this effect made by Doherty J.A. in *R. v. Haughton* (1992), 11 O.R. (3d) 621, at p. 625, are particularly appropriate.

In the realm of sexual assault cases the requirement of sufficient evidence has caused some confusion. Yet in my view these words require no more than the application of the principles that have been set out above. In *Pappajohn, supra,* it was held that the defence of mistaken belief in consent should only be put to the jury if there was an adequate and evidentiary foundation found for it. There McIntyre J. writing for the majority stated that in order for the defence to be put to the jury it must have "an air of reality". He explained that term in these words (at pp. 126-27):

> Before any obligation arises to put defences, there must be in the evidence some basis upon which the defence can rest and it is only where such an evidentiary basis is present that a trial judge must put a defence.

He then went on to state (at p. 133):

> It would seem to me that if it is considered necessary in this case to charge the jury on the defence of mistake of fact, it would be necessary to do so in all cases where the complainant denies consent and an accused asserts it.

In *Bulmer, supra*, McIntyre J. had a further opportunity to explore the defence of mistake and the air of reality requirement. He restated his earlier position (at pp. 789-90):

> It is well settled law that in his charge the trial judge must put to the jury all defences that may arise upon the evidence, whether they have been raised by counsel for the defence or not. In doing so, he is obliged to explain the law respecting the defence and to refer the jury to the evidence which may be relevant on that issue. Before putting the defence, however, the trial judge must decide whether in the facts before him the defence arises on the evidence. It is only when he

> decides this question in favour of the defence that he must leave it to the jury, for a trial judge is not bound to put every defence suggested by counsel in the absence of some evidentiary base. Indeed, he should not do so, for to put a wholly unsupported defence would only cause confusion.

He then continued, at p. 791:

> When the defence of mistake of fact -- or for that matter any other defence -- is raised, two distinct steps are involved. The first step for the trial judge is to decide if the defence should be put to the jury. It is on this question, as I have said, that the "air of reality" test is applied.

In a judgment released concurrently (*Robertson, supra*), Wilson J., writing for the Court, also discussed the air of reality threshold (at p. 933):

> Although there has been some difference of view on the Court as to whether the accused's knowledge of lack of consent is to be described as an element of the offence or as a defence of mistake of fact, the Court has been unanimous in its agreement on one proposition -- there must be evidence that gives an air of reality to the accused's argument that he believed the complainant was consenting before the issue goes to the jury.

And further at p. 938:

> In my view, the inclusion of s. 244(4) [now s. 265(4)] in the *Code* makes it clear that the trial judge should not in every case instruct the jury to consider whether the accused had an honest, though mistaken, belief in consent. The trial judge should only give such an instruction when certain threshold requirements have been met. These requirements are totally consistent with the previous case law.

It can be seen that this Court has consistently held that the defence of mistake of fact in a sexual assault trial will be put to the jury so long as it meets the

same threshold requirement as that demanded of all defences. The term "air of reality" simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury. It is the judge who must determine if evidence sought to be adduced is relevant and admissible. In the same way, it is the judge who determines if there is sufficient evidence adduced to give rise to the defence. If there has been sufficient evidence put forward, then the jury must be given the opportunity to consider that defence along with all the other evidence and other defences left with them in coming to their verdict. See *Morgentaler, supra*, at p. 659, *per* Pigeon J.; and *Wigmore on Evidence, supra,* at p. 976.

The jury system has in general functioned exceptionally well. Its importance has been recognized in s. 11(*f*) of the *Charter*. One of the reasons it has functioned so very well is that trial judges have been able to direct the minds of jurors to the essential elements of the offence and to those defences which are applicable. That process should be maintained. The charge to the jury must be directed to the essential elements of the crime with which the accused is charged and defences to it. Speculative defences that are unfounded should not be presented to the jury. To do so would be wrong, confusing, and unnecessarily lengthen jury trials.

In coming to a conclusion as to the sufficiency of the evidence pertaining to a defence, the trial judge must consider all the evidence and all the circumstances. It is only when the totality of the evidence tendered at the trial has

been taken into account and considered in the light of all the relevant circumstances that the trial judge will be in a position to make a ruling. See *Bulmer, supra,* at pp. 790-91, and *Squire, supra*, at p. 21.

In what circumstances will it be appropriate to consider a defence of mistaken belief in consent? It is the position of the intervener, the Attorney General for Ontario, that the defence cannot arise in situations where the evidence of the complainant and the accused are diametrically opposed. For example, if the accused states that there was willing consent and the complainant denies any consent then the defence simply cannot arise. In such circumstances for a jury to accept the defence of mistaken belief in consent it would have to reject all the evidence given at the trial including that tendered by both the complainant (no consent) and that of the accused (willing consent). Indeed in order to give effect to the defence a jury would have to speculate upon and give effect to a third version of events which was not in evidence. See, for example, *R. v. Guthrie* (1985), 20 C.C.C. (3d) 73 (Ont. C.A.), at pp. 83-84.

McIntyre J. adverted to this issue when he stated in *Pappajohn, supra,* at pp. 133-34:

> Where the complainant says rape and the accused says consent, and where on the whole of the evidence, including that of the complainant, the accused, and the surrounding circumstances, there is a clear issue on this point, and where as here the accused makes no assertion of a belief in consent as opposed to an actual consent, it is unrealistic in the absence of some other circumstance or circumstances ...to consider the judge bound to put the mistake of fact defence.

This point was also made in the House of Lords decision in *Director of Public Prosecutions v. Morgan,* [1976] A.C. 182. Lord Cross explained at p. 204:

> So, as the judge made clear at the outset of his summing up, the only real issue in the case was whether what took place in the Morgan's house that night was a multiple rape or a sexual orgy. The jury obviously considered that the appellants' evidence as to the part played by Mrs. Morgan was a pack of lies and one must assume that any other jury would take the same view as to the relative credibility of the parties. That any jury which thought that the grounds for a belief in consent put forward by the defendants, which if truly held would have been eminently reasonable, were in fact never entertained by them at all, should in the same breath hold that they may have had an honest belief in consent based on different and unreasonable grounds is inconceivable.

Lord Hailsham stated the issue as follows, at p. 207:

> The choice before the jury was thus between two stories each wholly incompatible with the other, and in my opinion it would have been quite sufficient for the judge, after suitable warnings about the burden of proof, corroboration, separate verdicts and the admissibility of the statements only against the makers, to tell the jury that they must really choose between the two versions, the one of a violent and unmistakable rape of a singularly unpleasant kind, and the other of active co-operation in a sexual orgy, always remembering that if in reasonable doubt as to which was true they must give the defendants the benefit of it. In spite of the valiant attempts of counsel to suggest some way in which the stories could be taken apart in sections and give rise in some way to a situation which might conceivably have been acceptable to a reasonable jury in which, while the victim was found not to have consented, the appellants, or any of them could conceivably either reasonably or unreasonably have thought she did consent, I am utterly unable to see any conceivable half-way house. The very material which could have introduced doubt into matter of consent goes equally to belief and vice versa.

See also: *Bratty v. Attorney-General for Northern Ireland,* [1963] A.C. 386 (H.L.).

I agree with this position. The defence of mistake may arise when the accused and the complainant tell essentially the same story and then argue that they interpreted it differently. Realistically it can only arise when the facts described by the complainant and the accused generally correspond but the interpretation of those facts leads to a different state of mind for each of the parties. In a situation where the evidence given is directly opposed as to whether there was consent, the defence of mistake as to consent simply cannot exist. However, even in the absence of that defence, the jury will nonetheless be bound to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue. Lack of consent is an integral element of the offence. In cases where there is conflicting evidence on the issue the trial judge will always direct the jury that they must be satisfied beyond a reasonable doubt that consent was lacking.

It should be emphasized once again that the defence of mistaken belief in consent will be invoked rarely. In the vast majority of cases a sexual assault does not occur as a result of accident or mistake. It is simply not a crime that lends itself to commission by mistake or by accident. As Dickson J. dissenting in *Pappajohn, supra*, stated, at p. 155, it is not a crime that is committed *per incuriam*. Indeed it may well be appropriate for a trial judge to charge a jury that in the usual course of events this is not a crime that can be committed accidentally.

(2) Evidentiary Burden of Section 265(4)

The next question that must be addressed is what evidence must be adduced before the trial judge should put the defence of mistake to the jury. This

issue has caused some confusion. In *Pappajohn, supra*, at p. 133, McIntyre J. stated:

> To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel for the appellant. This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality. [Emphasis added.]

McIntyre J. clarified his position in *Bulmer, supra*, at p. 790:

> There will not be an air of reality about a mere statement that "I thought she was consenting" not supported to some degree by other evidence or circumstances arising in the case. If that mere assertion were sufficient to require a trial judge to put the "mistake of fact" defence, it would be a simple matter in any rape case to make such an assertion and, regardless of all other circumstances, require the defence to be put. [Emphasis added.]

The question that arises is whether this means that in order for the defence to be put to the jury there must be some evidence of mistaken belief in consent emanating from a source other than the accused. In my view, this proposition cannot be correct. There is no requirement that there be evidence independent of the accused in order to have the defence put to the jury. However, the mere assertion by the accused that "I believed she was consenting" will not be sufficient. What is required is that the defence of mistaken belief be supported by evidence beyond the mere assertion of a mistaken belief. In the words of the Lord Morris of Borth-y-Gest, there must be more than a "facile mouthing of some easy phrase of excuse" (*Bratty, supra,* at p. 417).

In order to have the defence put to the jury the same requirement must be satisfied as for all other defences. Just as a defence of provocation will not be put to the jury on the basis of the bare assertion of the accused that "I was provoked", see *Faid, supra,* at p. 278, so too the bare assertion of the accused that "I thought she was consenting" will not warrant putting the defence of mistaken belief in consent to the jury. The requisite evidence may come from the detailed testimony of the accused alone, on this issue or from the testimony of the accused coupled with evidence from other sources. For example, the complainant's testimony may supply the requisite evidence.

In the case at bar, the Court of Appeal correctly held that the trial judge erred in finding that the defence of mistake was unavailable on the basis of the accused's evidence alone. However, it erred in finding that there could be no air of reality to the defence on the basis that the complainant had been kidnapped by the appellant. The basic premise that Southin J.A. elaborated is correct. That is to say the belief by a convicted kidnapper that his victim consented to a sexual assault on the occasion of the kidnapping has no air of reality. However, in this case there had not been a previous or separate conviction on the kidnapping charge. Indeed, the *mens rea* for the kidnapping charge and that for the sexual assault were so closely connected as to be inseparable. The kidnapping could not therefore be used as the grounds for rejecting the defence of mistake.

(3) Constitutionality of Section 265(4)

(i) *The Presumption of Innocence: Section 11(d)*

The fundamental principle protected by s. 11(*d*) is the guarantee of a right to be presumed innocent, that is, that an accused is not to be convicted when there exists a reasonable doubt as to his guilt. Any law which places a persuasive burden on the accused to prove either the existence or non-existence of a fact essential to guilt will infringe upon the right guaranteed by s. 11(*d*). As I have indicated, all criminal defences must meet a threshold requirement of sufficient evidence, or in other words, an air of reality, before the trial judge should leave them with a jury. In my view this does not violate the presumption of innocence.

This Court has earlier had occasion to consider whether such a requirement places an unacceptable reverse onus of proof on the accused. For example, in *Perka v. The Queen*, [1984] 2 S.C.R. 232, Dickson J. discussed this issue in relation to the defence of necessity (at pp. 257-58):

> Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the Court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.

In conclusion he stated at p. 259:

> ... where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

The distinction between a burden of proof with regard to an offence or an element of the offence, and an evidentiary burden is critical. It must be remembered that the accused only bears the evidentiary burden of raising the issue of mistake, and in fact, only bears that burden if sufficient evidence has not already been raised by the prosecution's case. The reasons of Wilson J. in *Robertson, supra,* at p. 933, deal with this issue:

> In addition, I believe that previous case law establishes the proposition that, where there is sufficient evidence for the issue to go to the jury, the Crown bears the burden of persuading the jury beyond a reasonable doubt that the accused knew the complainant was not consenting or was reckless as to whether she was consenting or not. Using the language of Glanville Williams in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 871-910, there are two separate burdens in relation to the issue of honest but mistaken belief -- the evidentiary burden and the burden of persuasion. Evidence must be introduced that satisfies the judge that the issue should be put to the jury. This evidence may be introduced by the Crown or by the defence. The accused bears the evidentiary burden only in the limited sense that, if there is nothing in the Crown's case to indicate that the accused honestly believed in the complainant's consent, then the accused will have to introduce evidence if he wishes the issue to reach the jury. Once the issue is put to the jury the Crown bears the risk of not being able to persuade the jury of the accused's guilt.

McIntyre J. also made this fundamental distinction in *Pappajohn, supra,* at p. 127:

> What is the standard which the judge must apply in considering this question? Ordinarily, when there is any evidence of a matter of fact, the proof of which may be relevant to the guilt or innocence of an accused, the trial judge must leave that evidence to the jury so that they may reach their own conclusion upon it. Where, however, the trial judge is asked to put a specific defence to the jury, he is not concerned only with the existence or non-existence of evidence of fact. He must consider, assuming that the evidence relied upon by the accused to support a defence is true, whether that evidence is sufficient to justify the putting of the defence.

Section 265(4) does not create a statutory presumption. The accused seeking to raise the defence of mistaken belief only bears a tactical evidentiary burden. This point was made by Wilson J. in *Robertson, supra,* at pp. 936:

> There is an evidentiary burden on the accused but (and this, in my opinion, is the important point) if there is sufficient evidence to put the issue before the jury, then the Crown has the burden of proving beyond a reasonable doubt that the accused did not have an honest belief as to consent. The defence of mistake, as Dickson J. pointed out in *Pappajohn,* is simply a denial of *mens rea* which does not involve the accused in a burden of proof.

This position is supported by Professor Hogg:

> ... the presumption of innocence would not be infringed by a provision that imposed on the accused the burden of adducing sufficient evidence to raise a reasonable doubt as to the presence or absence of some fact that is an element of the offence, a collateral factor, an excuse or a defence. An evidentiary burden of this kind does not infringe s. 11(d), because a conviction could be avoided simply by the accused *raising a reasonable doubt* in the mind of the trier of fact. [Emphasis in original.]

(*Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 48-15.)

Section 265(4) leaves the burden on the Crown in regard to all the essential elements of the offence. The prosecution must prove both the *mens rea* and the *actus reus* beyond a reasonable doubt: that the accused engaged in sexual intercourse with a woman who was not consenting, and that he intended to engage in sexual intercourse without the consent of the woman. It is always open to the jury even without the defence of mistake of fact as to consent to find that there was a reasonable doubt as to the accused's *mens rea* and acquit. The mere fact of the air of reality requirement does not displace the presumption of innocence.

In conclusion, then, the air of reality threshold set forth in s. 265(4) does not violate s. 11(*d*). While it creates an evidentiary burden on the accused in the sense that he must raise sufficient evidence to give the defence an air of reality to justify its presentation to the jury, the burden of proving all of the elements of the offence beyond a reasonable doubt rests squarely with the Crown.

(ii) *Right to a Trial by Jury: Section 11(f)*

Section 11(*f*) confers on a person charged with an offence the right to be tried by a jury where the maximum punishment for the offence is imprisonment for five years or more.

It is a basic tenet of the jury system that the jury decides issues of fact while the judge determines questions of law. Whether there is sufficient evidence to determine if an issue has been properly raised is a question of law, and therefore is properly in the domain of the judge (*Bulmer, supra*, at pp. 790-91 and 796).

The requirement that there be an air of reality to the defence of mistaken belief in consent set out in s. 265(4) is reasonable and entirely valid. It is no more than a reaffirmation of an integral part of the judge's role in supervising a jury trial. The trial judge must determine questions of law such as the relevance and admissibility of evidence and the competence and compellability of witnesses. In doing so the trial judge cannot be accused of usurping the role of the jury or violating the accused's rights. Similarly it is appropriate that the judge determine if there is sufficient evidence to raise the defence of mistaken belief in consent. In considering the evidence giving rise to the air of reality, it must be remembered

that the trial judge is not weighing the evidence, but is simply examining it to determine what defences are available. See *Guthrie, supra,* at p. 84.

The appellant was provided with a trial by jury. The only elements of the trial that were decided by the trial judge were those things properly within his realm, namely those issues pertaining to trial process and questions of law. There is consequently no violation of the appellant's right to a trial by jury.

(iii) *Section 1*

As I have concluded that the air of reality threshold contained in s. 265(4) violates neither s. 11(*d*) or s. 11(*f*) there is no need to consider s. 1 of the *Charter*.

IV. Disposition

The appeal should be allowed and a new trial ordered on the ground that the trial judge erred in failing to allow the cross-examination of the complainant on her medical records. That cross-examination should be allowed to the extent that it would comply with these reasons.

The constitutional questions should be answered as follows:

1. If s. 265(4) of the *Criminal Code* imposes an "air of reality test" as a threshold to be met before the issue of mistaken belief is left to the jury, does the subsection limit the right to be presumed innocent as guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* or the right to a trial by jury as guaranteed by s. 11(*f*) of the *Charter*?

No.

2. If s. 265(4) limits the rights guaranteed by ss. 11(*d*) and/or 11(*f*) of the *Charter*, are such limits prescribed by law and demonstrably justified in a free and democratic society?

It is not necessary to answer the second question.

The following are the reasons delivered by

IACOBUCCI J. -- I agree with Cory J. subject to the reservation expressed by Sopinka J. that, in agreeing with the reasons of Cory J., I do not wish to comment on s. 276 of the *Criminal Code*, R.S.C., 1985, c. C-46 (as amended by *An Act to amend the Criminal Code* (*sexual assault*), S.C. 1992, c. 38, s. 2).

Appeal allowed and new trial ordered, LA FOREST, L'HEUREUX-DUBÉ, GONTHIER *and* MCLACHLIN JJ. *dissenting.*

Solicitors for the appellant: McAlpine & Horod, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.